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JUDICIAL ASPERSIONS ON THE NON-RELIGIOUS

FRANK SWANCARA¹

Blackstone wrote:²

"All moral evidence, . . . all confidence in human veracity, must be weakened by apostasy, and overthrown by total infidelity."

Cooley alludes to "the old notion that truth and a sense of duty do not consort with skepticism in religion." This "old notion" was held because the teachings of the clergy were to the effect that (a) if one does not believe in divine punishments he is likely to do ill, and (b) if he does not believe in God he cannot seek help from Him and therefore becomes amenable to the control of a personal Devil. Lord Coke believed "infidels" to be the "subjects" of "the Devil."³ To disbelieve in the Devil was deemed to be as dangerous as to deny the being of a Deity. Accordingly Adam Clarke, the great commentator on the Bible, wrote:⁴

"By leading men to disbelieve and deny his (the Devil's) existence, he throws them off their guard; and is their complete master, and they are led captive by him at his will."

It was usual for common law indictments to incorporate the words: "not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil." The Supreme Court of North Carolina apparently took judicial notice of the existence of a personal Devil when it declared:⁵

"To know the right and still the wrong pursue, proceeds from a perverse will brought about by the seduction of the evil one, but which nevertheless, with the aids that lie within our reach, as we are taught to believe, may be resisted and overcome, . . ."

It was once almost universal that if any one avowed a disbelief in a personal Devil and denied that the Almighty watches each individual so as to reward or punish him according to his deserts, he was denominated an "infidel," and to be so known was to become, as a

¹Member of the Denver, Colo. bar.

²Book IV, p. 44.

³Calvin's Case, 4 Coke's R. 33, cited in *Hairn v. Bridguit*, 37 Miss. 209, 226.

⁴Adam Clarke, LL.D., F.S.A., Commentary on Job 1:6.

⁵*State v. Brandon*, 8 Jones, 463, 467.

Connecticut court solemnly observed,⁶ "odious and detestable." Judges were as willing to denounce the unbeliever when speaking advisedly in their judicial capacity as they were when freely voicing their sentiments as private individuals. It is a curious fact that the opportunity to do so never came by reason of a murderer, a rapist, or some other criminal being suspected of some heterodoxy in his theology, but always the pious judicial invective was directed against some unoffending litigant, witness, or juror. A few cases will be presently cited.

Charles Koppee obtained a judgment in a civil action for damages against S. K. Odell in a justice court. The defendant appealed to the Circuit Court, and being there unsuccessful, he took an appeal to the Supreme Court. That tribunal remanded the cause for new trial upon the ground that the Circuit Court had committed prejudicial error in refusing to permit Odell to show that Koppee "disbelieved in God or a future state of rewards and punishments." In addition to being thus deprived of the results of the time and expense of the two trials, Koppee was compelled to receive the stigmatization contained in the following words of the Supreme Court of Tennessee:⁷

"The man who has the hardihood to avow that he does not believe in a God, shows a recklessness of moral character and utter want of moral sensibility, such as very little entitles him to be *heard or believed* in a court of justice in a country designated as Christian."

The appellate court of New Hampshire used similar language:⁸

"He who openly and deliberately avows that he has no belief in the existence of a God, . . . is *unworthy of any credit* in a court of justice."

The courts were referring to the God of the then orthodox Christians, now commonly called Fundamentalists; they had in mind, according to their beliefs, a personal, punishing and rewarding Deity. So positive and emphatic was the New Hampshire court in making the statement quoted that the opinion was filed as one "*per curiam*," which indicates that every member treated the expression in question as if it was his own, or if axiomatic, and which ought not, therefore, to be credited to the judicial reasoning or to the acumen of any one particular judge. If the court had possessed modern sociological and

⁶*Stow v. Converse*, 3 Conn. 325, 342 (1820). "If believed, it can scarcely fail to deprive him of the esteem of mankind, exclude him from intercourse with men of piety and virtue, and render him odious and detestable."

⁷*Odell v. Koppee*, 5 Heisk. 88.

⁸*Norton v. Ladd*, 4 N. H. 444.

psychological knowledge relevant to the subject, and if it had been affected by a sense of justice and humanity towards those whose minds compelled them to be non-religious, it would have declared that the ancient common law *presumed* that an unbeliever is "unworthy," etc., and that the court must, since such law was adopted in the state, hold likewise. But the judges solemnly and forcefully proclaimed it to be an actual fact, not a mere juristic fiction, that an unbeliever is "unworthy of any credit." Since the court made that statement of what it regarded as a fact, without evidence, it could have added that it took judicial notice of such assumed fact, just as judicial notice has been taken, without proof, of facts of elementary knowledge.

It is impossible to say what remedy, if any, a wronged litigant would have had against a verbose judge who had published against him such an aspersion as that made in the Tennessee opinion. If any prosecuting attorney, willing to imperil his political prestige, should file a criminal information against the judicial culprit, the defendant might adopt the cowardly course of hiding behind the technical skirt of "privilege." To escape a just verdict, assuming such verdict possible, he would invoke the rule that an official is not civilly or criminally liable for words published in the course of a judicial proceeding, regardless of his malice or the falsity of his utterances.⁹

It is reasonable to suppose that a juror, who is not responsible for the litigation in which he serves and has not solicited his position, will not be assailed by any court on account of any opinion not pertaining to the issues at the trial. Yet one of the Judges of the Supreme Court of Tennessee attacked an unoffending juror, who had agreed with his associates, by aspersing him and his class. It was in a case where the evidence showed "clear and aggravated murder" on the part of the defendant, and this juror voted to convict. The judge in question desired that the appellate court grant the murderer a new trial because a clergyman, at the request of the murderer, was willing to testify that this faithful juror was an "atheist." The jurist in question invoked the law that the juror could not "hold any office . . . because he cannot take an oath—he cannot be trusted." The dutiful citizen was referred to as "an evil genius, in a sacred place."¹⁰

On two different occasions the Supreme Court of Pennsylvania declared that a hall devoted to the "free discussion of religion" . . .

⁹*Mundy v. McDonald* (Mich. 1921) 185 N. W. 877.

¹⁰*McClure v. State*, 1 Yerger (9 Tenn.) 207.

"would prove a nursery of vice, a school of preparation to qualify young men for the gallows and young women for the brothel."¹¹

Thus there has existed, if it does not still exist, a situation wherein a judge may calumniate with impunity, under the pretext of rendering an official and an advised judicial opinion, a party, witness, or juror whose opinions in matters of religion are different from those he himself professes to hold. Once a judicial libel is promulgated, it is allowed to travel on, and be quoted by laymen, without retraction by the court in which it originated, and without criticism by any other tribunal.

At the present time, due to the widespread unbelief among the educated classes, the courts are not disposed to cast aspersions upon the non-religious, except mildly. For example, an Alabama court declares that to say "there is no God, . . . proves one a fool."¹² It has always been the practice of the courts not to offend any sect of Christians, and to prevent counsel from so doing. It seems that finally the non-religious are also protected, at least to some extent. Accordingly an appellate court in California reversed a judgment because counsel for the prevailing party used this language of and concerning one of the adverse counsel:¹³

"In all my experience in life I am yet to find one single person who openly and avowedly does not believe in God and that man didn't have a frozen, poisoned, shriveled lump where his heart ought to be."

If an unoffending class of our citizens have been judicially and otherwise libeled, it is the duty of the bar and of legal periodicals to refute the libels, in justice to the class stigmatized wrongfully.

An examination of unbiased works on criminology, sociology, psychology and ethics, in so far as they discuss the question whether morality is dependent on the belief in divine punishments, would tend to show that the Tennessee court was proceeding upon a false premise, and would support the conclusion that Koppee's supposed opinions in matters of religion were not calculated to make him become such a liar or demon as the court's opinion suggests. Moreover, there are criminal statistics extant which tend to show that such a brand of irreligion as was attributed to Koppee by his adversary is less likely to produce crime or encourage deceit than is religion, in its doctrinal aspects, which the judge speaking for the appellate court probably professed.

¹¹*Updegraph v. Com.*, 11 S. & R. 394; *Zeisweiss v. James*, 63 Pa. St. 465.

¹²*Wright v. State*, 135 So. 636.

¹³*Peacock v. Levy*, 299 Pac. 790.

When belief in divine punishments was almost universal, no writer undertook to show that there could be either public or private morality without such a belief. There was a general acquiescence in the teachings of the clergy to the effect that morality was dependent on religion and that true religion requires a belief in divine rewards and punishments. However, when such a belief became weakened, unbelieving writers were tempted to assail the old theory. It is only in recent years that the subject has been given consideration. Thus in a late book by Prof. Harry Elmer Barnes the author refers to an investigation "directed by Prof. Hugh Hartshorne of Columbia and Prof. Mark A. May of Yale University," and states that their *Studies in Deceit* "indicated that orthodox religious training, either Christian or Jewish, *did not promote honesty and reliability.*"¹⁴

Mr. Franklin Steiner has in recent years conducted investigations in this country and produces statistics to show that the minimum of criminality exists among the non-religious people, and that nearly all the convicts in the penal institutions profess to believe according to some Christian sect.¹⁵

Prof. Havelock Ellis observed that "in all countries religion, or superstition, is closely related with crime," and that "among 200 Italian murderers, Ferri did not find one who was irreligious."¹⁶ In one of the latest works on *Medical Jurisprudence*, Prof. Herzog says:¹⁷

"In a survey of 100,000 each of Protestants, Catholics, Jews, and persons not adherents of any religion the ratio of crimes committed was as follows: Protestants, 308.6; Catholics, 416.5; Jews, 212.7; nonreligious persons, 84.2."

William Adrian Bongers, cited by Prof. Herzog, made calculations, based upon the criminal statistics, of more than 126,000 individuals sentenced during the period from 1901 to 1909 in the Netherlands, with the result that the *minimum* of criminality in all crimes without exception is shown by the *irreligious*.¹⁸ Prof. Maurice Parmelee incorporates the results of Bongers's investigations into his own book.¹⁹ He also says that "so far as reliable statistics are available they *disprove* this assertion on the part of the religionists" that "irreligion is a potent force for crime."

¹⁴*Twilight of Christianity*, p. 100.

¹⁵*Religion and Roguery* (The Truth Seeker Co., N. Y. 1924).

¹⁶*The Criminal*.

¹⁷Published in 1931 by Bobbs-Merrill Co., Indianapolis. See section 843.

¹⁸*Criminality and Economic Conditions* (Boston, 1916), p. 209.

¹⁹*Criminology*, p. 108.

If it is claimed, as it may justly be, that criminal statistics showing a greater prevalence of crime among believers than among atheists do not constitute evidence either for or against one class or the other, because criminality is produced by various factors, then it may be observed that such statistics have been eagerly invoked by religious sects who happen to be favored by them. "In the quarrels among the denominations, the kind and number of convictions are quoted to show the inferiority of the opposing sect."²⁰ As a matter of fact criminal statistics do show that religion, apart from the influence of its teachers, does not weaken the factors which cause deceit or crime. The Jew has less hell and fewer doctrines in his theology than has the Fundamentalist Christian, and yet when Prof. Herzog explains "why the Jew is much less apt to steal" than is the Christian says that it is because of "the greater frugality of the Jew."²¹

Prof. Hans Gross in *Criminal Psychology* seeks to minimize the importance of the statistics by claiming that many of the criminals are only *nominal* adherents of religious bodies. Be that as it may, these "nominal" adherents are still believers in some form of Divine surveillance and punishments. The avowed unbeliever against whose character judicial and non-judicial aspersions have been made is not even a "nominal" member of any religious denomination. The statistics are still in his favor.

Dr. Lombroso, the eminent criminologist, says:²²

"If we rely upon the somewhat limited statistics available in this matter, we shall find that there are fewer criminals where atheists abound, than where, under equal conditions, either Catholics or Protestants dominate."

Prof. Leuba declares, in effect, that his investigations disclosed the unbelievers to be morally better persons, as a general rule, than the believers in a God.²³

It is needless to multiply the authorities. Any professional man knows that the atheist is discovered, not by his conduct, but by his expressions of opinion. Lawyers know that the average perjurer is not one who is suspected of some heterodoxy in religion. A Federal court referred to Mrs. Rosika Schwimmer as one who "stated she was an absolute atheist."²⁴ Mr. Justice Holmes referred to her as

²⁰Dr. Gustav Aschaffenburg, *Crime, and Its Repression* (Little, Brown & Co., Boston, 1913).

²¹*Medical Jurisprudence*, sec. 834.

²²*Crime, Its Causes and Remedies* (Little, Brown & Co., Boston, 1918), p. 292.

²³*Belief in God and Immortality* (Wm. Morrow & Co., N. Y. 1916), p. 322.

²⁴*Macintosh v. U. S.*, 42 Fed. 2d., 845, 849.

"a woman of superior character and intelligence, obviously more than ordinarily desirable as a citizen of the United States."²⁵ Whatever the situation once may have been, there is not now any ground for assuming that one's conduct is made either better or worse by reason of what he believes as to supernatural rewards and punishments. This is a matter of common knowledge to most educated people, but there may be Fundamentalists who cling to the ancient theory and prejudice, and a discussion of this kind is still timely.

Words imputing a lack of moral character or want of veracity to a class are just as libelous as they would be if directed against particular individuals. It is just as much a criminal libel if a non-religious person is the victim as it is when aspersions are made against one on account of his belief in, for example, the doctrine of transubstantiation. Moreover, it is more cowardly to assail a supposedly inarticulate minority than it is to slander an orthodox and respectable group, for the libeler knows that the latter has both the power and the inclination to punish its defamers. Atheists are just as much entitled to have their calumniators criminally prosecuted, or at least publicly refuted, as are members of religious organizations. The latter have, and successfully, invoked the criminal law of libel against talebearers with stories of alleged escaped nuns,²⁶ and against writers who claimed to be exposing treasonable oaths at the risk of their own lives.²⁷

²⁵*U. S. v. Schwimmer*, 279 U. S. 644, 653.

²⁶*State v. Hosmer*, 72 Or. 57, 142 Pac. 581.

²⁷*Crane v. State*, 14 Okla. Crim. Rep. 30, 166 Pac. 1110, 19 A. L. R. 1455.