

Tennessee's Most Famous Case

by Alfred H. Knight

The familiar figure stood in a rural Tennessee courtroom, hands thrust into his pants pockets, voice rising in genuine passion. "If today you can take a thing like evolution and make it a crime to teach it in the public school," he said, "tomorrow you can make it a crime to teach it in the hustings or in the church ...After awhile, Your Honor, it is the setting of man against man and creed against creed, until with flying banners and beating drums, we are marching backwards to the glorious age of the sixteenth century when bigots lighted faggots to burn the men who dared to bring any intelligence and enlightenment and culture to the human mind."

The orator was actor Spencer Tracy, performing the role of Clarence Darrow in the 1950s movie *Inherit the Wind*. The movie told the story of a brave young schoolteacher named John Scopes, who was prosecuted in 1925 for violating a Tennessee statute making it a crime "to teach the theory that denies the story of Divine creation of man as taught in the Bible, and to teach instead that man has descended from a lower order or animals." Scopes had defied that law by teaching Darwin's theory of evolution to his class and – according to the movie – had been thrown into jail and prosecuted for doing so. The prosecution took place in a tiny Tennessee town (Hillsboro in the movie, Dayton in real life) that the movie depicted as a hotbed of fundamentalist bigotry and hatred.

The movie portrayed Scopes as a fearless hero, but his real-life prosecution was nothing to inspire fear.

Far from being a calculated persecution, it was not even the State's idea. Scopes had volunteered to be prosecuted in order to test the validity of the so-called "Monkey Law." His friend George Rappelya obtained a misdemeanor warrant against him, and the district attorney had no practical choice but to proceed. Scopes was never jailed.

He was defended by Clarence Darrow, who was pitted against William Jennings Bryan, whom the state hired as a special prosecutor. Eloquent as both lawyers were, their performances seemed more directed toward the hordes of spectators and reporters that packed the spacious courtroom than the judge and jury. When the histrionics were over, Darrow agreed to a directed verdict of guilty so that the case could be appealed. The judge assessed a fine of one hundred dollars, the minimum the law allowed.

After the verdict was returned, the lawyers, the judge and a member of the local bar took turns making graceful little speeches to each other and the spectators, referring to the greatness of the event just completed and expressing thanks to all concerned. Except that they were not all winners.

Those who thought it was all a waste of time, however, were expressing an outdated viewpoint. The Scopes trial was one of legal history's first calculated media events, and as such it was a huge success. It attracted journalists from all over the United States and from Canada, England, and France. The proceedings were heard by the entire country on an unprecedented nationwide

radio broadcast. In a post-trial statement, Bryan noted the trial's unique worldwide notoriety: "We are told that more words have been sent across the ocean by cable to Europe and America about this trial than has ever been sent in regard to anything else in the United States."

Despite their technical defeat, Scopes and Darrow had done what they had set out to. The trial had generated a surge of press coverage ridiculing and demeaning the Monkey Law and the "boobs" who attempted to enforce it. Scores of radio broadcasts and press reports had communicated to the world Darrow's scathing anti-fundamentalist oratory, and his humiliating cross-examination of Bryan, who testified as an expert on the authenticity of the Bible. This tide of anti-creationist publicity swamped nationwide efforts to enact statutes similar to the one under which Scopes was prosecuted.

Scopes nonetheless appealed his conviction to the Tennessee Supreme Court, arguing that the "Monkey Law" violated Art. I., Sec. 3 of the Tennessee Constitution, its Religious Establishment Clause. The Supreme Court opinions by Justices Green and Chambliss were among the most skillfully crafted efforts that tribunal ever produced. If the participants and reporters in the court below had often behaved like circus ringmasters, appealing to the passions of the crowd, Green and Chambliss wrote closely reasoned dissertations worthy of the skilled professionals they were. Their opinions upheld the Act through careful, if sometimes fragile,

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logic that refuted the derision that resounded during the trial.

The Court's opinions were greatly aided by a crucial deviation in working between Tennessee's Religious Establishment Clause and the Religious Establishment Clause set forth in the First Amendment to the United States Constitution. The First Amendment broadly prohibits laws "respecting an establishment of religion." The Tennessee Constitution provides that "no preference shall ever be given by a law to any religious establishment or mode of worship." The federal prohibition can, and later would, be invoked to erect a total "wall of separation between church and state."¹ The Tennessee provision merely prohibited government discrimination among various religions.

This constitutional advantage was, however, seemingly obliterated by the statutory language. The challenged Act appeared to create a clear religious preference. As noted, it criminalized teaching the story of Divine creation of man as taught in the Bible, and to teach instead that man has descended from a lower order of animals." (Emphasis added.) Didn't the italicized phrase create a preference in favor of Judaism and Christianity over all other religions, which were not included in the Bible?

It did not, wrote the resourceful Green; the Act's reference to the Bible was a mere matter of rhetorical "iteration." The Legislature "only intended to forbid teaching that man [was] descended from a lower form of animals," and "considered that purpose could be effected by forbidding the teaching of any theory that denied the Bible story..." There was no requirement that the Bible story be taught. The Act "requires the teach-

ing of nothing," it only prohibited teaching evolution.

Having simplified the issue before him by creative verbal engineering, Green proceeded to demolish the defendant's argument with ease. It was self-evident, he wrote, that prohibiting the teaching of evolution did not create a preference for any religion: "So far as we know the denial or affirmance of [evolutionary] theory does not enter into any recognized mode of worship ... Belief or unbelief in the theory of evolution is no more characteristic of any religious establishment or mode of worship than is belief or unbelief in the wisdom of prohibition laws."

Justice Chambliss' concurring opinion was somewhat more exotic than Green's, and probably harder to refute. He claimed there were two types of evolutionary theory; a theistic one, that views evolution as God's instrument for creating man; and a materialist one, that denies Divine creation "and seeks in shadowy uncertainties for the origin of life." The wording of the Act made it plain that only the latter was prohibited. So long as Divine origin was admitted, the "details" of man's creation – whether instantaneous or evolutionary – could be taught. The Act's reference to "the story of Divine creation as taught in the Bible" was "descriptive only of the essence of the matter." (The Justice apparently meant that the quoted phrase should be read to say something like "the story of Divine creation, as taught for example in the Bible"). Since all religions recognize Divine creation, the Act established no unconstitutional preference.

After twenty pages of careful analysis, the Scopes case came to a shuddering anticlimax. Despite the validity of the law, Scopes' convic-

tion must be reversed, the Justices ruled. The minimum one hundred dollar fine had been imposed by the judge, not the jury as the law required. Since no lesser punishment could have been imposed, and since the state had not appealed, the ruling seeming incomprehensible – unless, of course, the Justices were hoping that the case would disappear.

Which, it turned out, was exactly what they hoped for, and in fact, demanded. "We see nothing to be gained by prolonging the life of this bizarre case," the Court admonished the prosecutors. "On the contrary we think the peace and dignity of the State ...will be better conserved by the entry of a nolle prosequi herein. Such a course is suggested to the Attorney General."

Thus did "Tennessee's most famous case die a quiet death, long after it had achieved world-wide renown.

Notes

¹Only the Tennessee provision applied to the case. The federal Religious Establishment Clause was not made applicable to state law through the Fourteenth Amendment Due Process Clause for another sixteen years, in *Cantwell v. Connecticut*, (1940).

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