

Supplementary Material

Chapter 5: The Jacksonian Era – Individual Rights/Religion/Establishment/Blasphemy

Commonwealth v. Kneeland, 20 Pick. 206 (MA 1838)

Abner Kneeland published an article which claimed, "The whole story concerning [Jesus Christ] is as much a fable and a fiction as that of the god Prometheus." He was immediately indicted for blasphemy. Under Massachusetts law, blasphemy consisted of "the denial of God, his creation government, or final judging of the world, made . . . with the intent and purpose to calumniate and disparage him and impair and destroy the reverence due to him." After several trials ended with hung juries, Kneeland was convicted and sentenced to three months in prison. Kneeland appealed his conviction to the Supreme Judicial Court of Massachusetts. His appeal claimed that the Massachusetts law prohibiting blasphemy violated the free speech and free exercise clauses of the Massachusetts Constitution.

The Supreme Judicial Court of Massachusetts sustained the conviction for blasphemy. Chief Justice Lemuel Shaw's majority opinion claimed that the existence of blasphemy statutes when the constitution of Massachusetts was adopted demonstrated that the persons responsible for the state constitution did not intend to give persons the right to disparage the deity. Why did Shaw reach that conclusion? On what basis did he think statutes prohibiting blasphemy were consistent with the freedom of speech and the freedom of religion? Why did Judge Morton disagree?

Kneeland did not argue that the blasphemy statute violated the separation of church and state because the Massachusetts Constitution in 1838 did not include an establishment clause.

CHIEF JUSTICE SHAW delivered the opinion of a majority of the Court.

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In general, blasphemy may be described, as consisting in speaking evil of the Deity with an impious purpose to derogate from the divine majesty, and to alienate the minds of others from the love and reverence of God. It is purposely using words concerning God, calculated and designed to impair and destroy the reverence, respect, and confidence due to him, as the intelligent creator, governor and judge of the world. . . . It is a willful and malicious attempt to lessen men's reverence of God, by denying his existence, or his attributes as an intelligent creator, governor and judge of men, and to prevent their having confidence in him, as such. . . .

...
It seems now to be somewhat late to call in question the constitutionality of a law, which has been enacted more than half a century, which has been repeatedly enforced, and the validity of which, it is believed, until this prosecution, has never been doubted, though there have been many prosecutions and convictions under it. It was itself a revision of the colonial and provincial laws, to the same effect, already cited. It was passed very soon after the adoption of the constitution, and no doubt, many members of the convention which framed the constitution, were members of the legislature which passed this law. In 1820 another convention was called to revise the constitution, the subjects of religious freedom and of universal toleration were long and earnestly discussed, but no suggestion was made, that the statute of 1782, against blasphemy, was in violation of the Declaration of Rights.

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It is contended that it is opposed to the 16th article, which provides that "the liberty of the press is essential to the security of freedom in a state; it ought not therefore to be restrained in this

Commonwealth." The obvious intent of this provision was to prevent the enactment of license laws, or other direct restraints upon publication, leaving individuals at liberty to print, without the previous permission of any officer of government, subject to responsibility for the matter printed. According to the argument attempted to be drawn from this article, every act, however injurious or criminal, which can be committed by the use of language, may be committed with impunity, if such language is printed. Not only therefore would the article in question become a general license for scandal, calumny and falsehood against individuals, institutions and governments, in the form of publication, a form in which it would be the most injurious, and most speedily, certainly and extensively diffused; but all incitation to treason, assassination, and all other crimes however atrocious, if conveyed in printed language, would be dispensable. A mere statement of the direct and obvious consequences of the doctrine contended for, shows that it cannot be sound. . . . The intention of the article in question was, to insure the general right of publication, at the same time leaving every citizen responsible for any offence capable of being committed by the use of language, as well when printed, as when oral, or in manuscript. Any other construction of the article would be absurd and impracticable, and inconsistent with the peace and safety of the State, and with the existence of free government.

The other article supposed to be violated by this law, is the second, and is as follows;

"It is the right, as well as the duty, of all men in society, publicly, and at stated seasons, to worship the Supreme Being, the great creator and preserver of the universe. And no subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping God in the manner and season most agreeable to the dictates of his own conscience; or for his religious profession or sentiments; provided he doth not disturb the public peace, or obstruct others in their religious worship." [The blasphemy statute] does not prohibit the fullest inquiry, and the freest discussion, for all honest and fair purposes, one of which is, the discovery of truth. It admits the freest inquiry, when the real purpose is the discovery of truth, to whatever result such inquiries may lead. It does not prevent the simple and sincere avowal of a disbelief in the existence and attributes of a supreme, intelligent being, upon suitable and proper occasions. And many such occasions may exist; as where a man is called as a witness, in a court of justice, and questioned upon his belief, he is not only permitted, but bound, by every consideration of moral honesty, to avow his unbelief, if it exist. He may do it inadvertently in the heat of debate, or he may avow it confidentially to a friend, in the hope of gaining new light on the subject, even perhaps whilst he regrets his unbelief; or he may announce his doubts publicly, with the honest purpose of eliciting a more general and thorough inquiry, by public discussion, the true and honest purpose being the discovery and diffusion of truth. None of these constitute the willful blasphemy prohibited by this statute.

Taking this to be the true meaning, intent and construction of this statute, the Court are of opinion that it is not repugnant to the second article of the Declaration of Rights. . . . [I]t is impossible to believe that the authors of this article intended to prohibit the legislature from reënacting a law, which had been in force from the first settlement of the country, a law thought essential to preserve the sanction of oaths, prescribed and required in every clause almost of the constitution, and which had hitherto been deemed essential to the peace and safety of society. . . .

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JUSTICE MORTON dissenting.

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The legislature have the general power to define and prescribe the punishment for crimes. They may determine what *acts* shall be deemed crimes. And may they not determine what words shall be deemed criminal? Is liberty of action less important than liberty of speech? Is personal freedom less sacred than the freedom of the press? With a single exception, there is no restraint upon the legislature in relation to the punishment of speech. They can punish for *acts* and for *words*, but it is argued that they cannot punish for any thing *printed*. Verbal slander, profanity, obscenity and blasphemy, may be interdicted, but the moment it is put in print it becomes privileged and is above legislative control. Will *printed* falsehood circulate less extensively, or do less injury to individuals or the public, than *oral*? What

good reason can be found in the constitution or in sound principle, why a man should not be answerable for the truth of what he publishes, as well as of what he speaks?

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In this State, from the formation of our government to the present day, libels have ever been deemed crimes, and punished as such, by virtue of a constitutional adoption of the common law. If the [state constitution] prohibits the punishment of them, this long and uniform course of judicial decisions has been founded in error and a violation of the constitution. But we rest not only upon judicial, but legislative authority. . . . The law has been enforced for more than half a century; and whenever the people become dissatisfied with its operation, they have only to will its abrogation or modification and let their voice be heard through the legitimate channel, and it will be done. But until they wish it, let no branch of the government, and least of all the judiciary, undertake to interfere with it.

On the whole, the true intent and meaning of the [free speech clause] seems to me very plain and obvious. While it scrupulously protects the publication of truth, the unrestricted discussion of all subjects sacred or profane, and the dissemination and inculcation of all honest opinions, it contains no restraint upon the legislative power in relation to the punishment of the violations of the rights of others, or of the disturbance of the peace, by malicious falsehoods or obscene or profane publications or exhibitions.

The defendant relies with more confidence and more plausibility upon the last clause of the second article of the Bill of Rights. It is in these words. "No subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping God, in the manner and season most agreeable to the dictates of his own conscience; or for his religious professions or sentiments; provided he doth not disturb the public peace, or obstruct others in their religious worship." The first member of the sentence contains a complete proposition, and secures to every citizen of the Commonwealth perfect liberty of worship, not only as to time and mode, but the more essential parts, the principles and doctrines which he may adopt, profess and inculcate. It embraces all who believe in the existence of God, as well Jews, Mahometans and Deists, as Christians of every denomination. But clearly does not include atheists.

The second proposition contained in this clause may fairly be stated in this connected form. "No subject shall be hurt, molested or restrained in his person, liberty or estate, for his religious professions or sentiments." This clearly protects every citizen, not only in *adopting*, but in *professing*, whatever tenets he may think right; and necessarily includes the right of *advocating* and *disseminating* them. No restraint, in this respect, is imposed. But every one, in the adoption of his moral principles and the formation of his religious creed, has an unlimited scope, and is left to the free exercise of his own reason and the unbiased dictates of his own conscience.

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It has been suggested that this provision does not extend to atheists, because they do not believe in God or religion; and therefore that their sentiments and professions, whatever they may be, cannot be called *religious* sentiments and professions. But this in my opinion is too narrow a construction. It is true that the term *religious* is very often used in a limited sense, frequently as synonymous with *pious*, and sometimes as denoting devotion to a particular creed or mode of worship. Christians, Jews and Mahometans, Protestants and Catholics, and even different sects of Protestants, reciprocally accuse each other of want of religion. And individuals of every denomination are commonly called *religious* or *irreligious*, according to their characters for piety. If this limited use of the word were to be applied to this important provision, there would be danger that its construction might vary with the varying creeds of its interpreters.

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Any attempt, by legislation, to control or dictate the belief of individuals, is so impracticable, so perfectly futile, as to show at once, how entirely above all civil authority are the operations of the human mind, especially in the adoption of its religious faith.

The greatest extent to which any government could carry its power would be to compel its subjects to *profess* certain tenets and to prohibit the *profession* of others. But this would be as impolitic as it is unjust; it would encourage imposture and hypocrisy, but would never promote sincere piety or religion.

...

To allow and encourage discourses and arguments in proof of the existence of the Deity and in support of the Christian religion, and to prohibit arguments on the other side, would appear to imply a want of confidence in the truth, power and efficacy of those great doctrines, which would give advantage to their opponents, and, instead of aiding and supporting them, would lead to skepticism and infidelity. These essential and all important truths are too deeply rooted and have too strong a foundation, to need or admit of the fallacious and dangerous aid of human legislation.

Upon the fullest examination which I have been able to give the two articles under consideration, I can entertain no doubt of their true import and meaning. They perfectly harmonize with each other. And taken together, they guaranty to every citizen the right to form, enjoy and promulgate such opinions, upon any subject, as his own judgment shall dictate. They inhibit the legislature from making any law which shall infringe this right. It is their duty to protect it, to secure the enjoyment of it, and to guard it from abuse. And for this purpose they may pass laws to punish those who, under the pretence of exercising it, shall wantonly and wickedly invade the enjoyment of it by others. It cannot be necessary to the fullest enjoyment of this right by any one, that he should wound the feelings or shock the sense of decency of others, by obscene or profane language or publications, or endanger the peace of society by malicious falsehoods.

The legal axiom so often applied to property, is equally applicable to these more important personal rights. *Sic utere tuo ut alienum non lædas*. Let each man so use his own freedom, so enjoy his own faith, and so advocate his own doctrines, as not to interrupt the full enjoyment of the same rights by others. It cannot be necessary or expedient that any man, in the inculcation of his own notions, should abuse or insult others. And I have no doubt that a law punishing malicious falsehoods or obscene, profane or blasphemous language, used with the malicious intent to injure others, is constitutional.

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The statute enacts, that “ *if any person shall wilfully blaspheme the holy name of God, by denying, cursing, or contumeliously reproaching God,*” &c. The Attorney General contends that one mode of committing the offence is, by denying the existence of God. And that a *denial* is of itself blasphemy. The language certainly will admit of this construction. And his argument in favor of it, derived from the omission of the word “*denying*” in the next clause, as applicable to Jesus Christ and the Holy Ghost, is certainly entitled to consideration. Indeed I feel bound to admit that this seems to me to be the most natural and obvious construction.

But if this be the true meaning of the statute, I am by the course of my former reasoning brought to the conclusion, that it is irreconcilable with the constitution. What one man may assert, another may deny. No one may advocate an opinion which another may not controvert. The Provincial statutes made it blasphemy to deny the divinity of Jesus Christ, or the doctrine of the Trinity. And I cannot perceive why the legislature have not the same constitutional power to punish such a denial, that they have a denial of God. We all, I presume, should resist such an exercise of power, not only on the ground of expediency, but of constitutionality.

...
[Blasphemy] does not consist in the discussion of any subject, in the propagation of any sentiments, or in the denial of any position, but in the wicked and injurious intent with which it is done. And, in my opinion, this intent must have reference to other men and consist in a malicious purpose to infringe their rights, to destroy their peace of mind, or to disturb the good order of society. . . . Anger towards God, indignity to him, to our Saviour, or the Holy Ghost, a disposition to scoff at religion, do not seem to me to be the subjects of human punishment. These sins may be committed when no one is present, and be known to God alone; and cannot be reached by a human tribunal. But if made known, they would not be the subject of punishment, because they inflicted no injury upon any human being, and so did not violate the rights of society. It is only the injury to civil society which can give civil government jurisdiction of them.

For a man’s private opinions, for his communion with his creator, for his devotional feelings and exercises, he is answerable to his God alone. When he engages in the discussion of any subject in the honest pursuit of truth, and endeavours to propagate any notions and opinions which he sincerely

entertains, he is covered by the ægis of the constitution; but when he wantonly or maliciously assails the rights and privileges of others, or disturbs the public peace, he is the proper subject of punishment.

Applying these doctrines to the statute under consideration, and construing it with reference to the constitution, I have come to the conclusion, that it was not intended to punish a denial of the existence of God; but only such denial when made in a manner calculated to give just offence to others, and with a bad intent. With this interpretation the statute is in harmony with the constitution. . . .



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