

## INTRODUCTION

The preceding volume reviewed a variety of situations in which efforts to practice religious faith in the secular world encountered legal restrictions. What follows will examine various legal provisions designed to protect religious faith and its practice, such as prohibitions against interference with religious activities or organizations, exemptions of religion from laws of general application, and governmental provisions for religious practice in special environments such as military installations, prisons, hospitals and legislatures. These are termed “shelters” in this work as a more or less neutral term that encompasses various kinds of buffers, immunities, protectorates and proprietaries, some of which have been held to be violations of the Establishment Clause, but others upheld as permissible accommodations of Free Exercise. Determining what organizations or activities qualify for these protections poses in itself an interesting array of boundary problems that have their own implications for religious liberty.

### A. PROTECTING RELIGION: SOME RECOLLECTIONS FROM BLACKSTONE

The United States inherited from England a number of statutory and common law protections of religion that were natural incidents of establishment. An instructive retrospective on the background from which American law emerged can be found in the monumental tomes of Blackstone's *Commentaries on the Laws of England*, published between 1765 and 1769. In his treatment of “Public Wrongs” (Vol. IV), the leading category was “Wrongs against God and Religion.”

I shall next proceed to distribute the several offences, which are either directly or by consequence injurious to civil society, and therefore punishable by the laws of England, under the following general heads:...

First then, of such crimes and misdemeanors, as more immediately offend Almighty God, by openly transgressing the precepts of religion either natural or revealed; and mediately, by their bad example and consequence, the law of society also....

I. Of this species the first is that of apostacy, or a total renunciation of christianity, by embracing either a false religion, or no religion at all....

II. A second offence is that of heresy; which consists not in a total denial of christianity, but of some of it's essential doctrines, publicly and obstinately avowed....

III. Another species of offences against religion are those which affect the established church. And these are either positive, or negative. Positive, as by reviling it's ordinances: or negative, by non-conformity to its worship....

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Thus much for offences, which strike at our national religion, or the doctrine and discipline of the church of England in particular. I proceed now to consider some gross impieties and general immoralities, which are taken notice of and punished by our municipal law....

IV. The fourth species of offences therefore, more immediately against God and religion, is that of blasphemy against the Almighty, by denying his being or providence; or by contumelious reproaches of our Saviour Christ. Whither also may be referred all profane scoffing at the holy scripture, or exposing it to contempt and ridicule....

V. Somewhat allied to this, though in an inferior degree, is the offence of profane and common swearing and cursing....

VI. A sixth species of offences against God and religion, of which our antient books are full, is a crime of which one knows not well what account to give. I mean the offence of witchcraft, conjuration, enchantment, or sorcery.... Wherefore it seems to be the most eligible way to conclude...that in general there has been such a thing as witchcraft; though one cannot give credit to any particular modern instance of it....

VII. A seventh species of offenders in this class are all religious impostors: such as falsely pretend an extraordinary commission from heaven; or terrify and abuse the people with false denunciations of judgments. These, as tending to subvert all religion, by bringing it into ridicule and contempt, are punishable by the temporal courts with fine, imprisonment, and infamous corporal punishment.

VIII. Simony, or the corrupt presentation of anyone to an ecclesiastical benefice for gift or reward, is also to be considered as an offence against religion....

IX. Profanation of the lord's day, or sabbath-breaking, is a ninth offence against God and religion, punished by the municipal laws of England....

X. Drunkenness is also punished by statute...with the forfeiture of 5s.; or the sitting six hours in the stocks: by which time the statute presumes the offender will have regained his senses, and not be liable to do mischief to his neighbours....

XI. The last offence I shall mention...is that of open and notorious lewdness: either by frequenting houses of ill fame, which is an indictable offence; or by some grossly scandalous and public indecency, for which the punishment is by fine and imprisonment....

But, before we quit this subject, we must take notice of the temporal punishment for having bastard children, considered in a criminal light.<sup>1</sup>

This outline from the first systematic university lectures on English law, delivered in the early 1760's by a redoubtable Anglican Tory, sketched a picture of the “modern,” “enlightened” views of that time on the subject of this volume: legal protections for religion. American law was the stepchild of English law, and its practitioners were steeped in Blackstone. Where American legislatures did not explicitly depart from English precedent, the law described by Blackstone tended to prevail, and where it did depart, it was usually in conscious reaction to the English pattern.

So the pragmatic and practical outlook often typical of Blackstone, even in this rather pious subject matter, offered a point of departure for American practitioners of bar and bench—and legislature. Blackstone made various efforts in this section to buttress (or to rebut) the received statutes with practical civil considerations as well as rueful reflections on the vestiges of earlier rigor excused as not being latterly enforced with their former zeal. While welcoming recent relaxations of the law in this area, Blackstone was in no doubt that there needed to be laws to protect religion (by which he meant the established church) from sundry harms, scandals and affronts that might otherwise befall it, to the derogation of God and his proper worship.

Some protections for religion remain in the law of the United States today, but by and large not under the headings Blackstone advanced for “Wrongs Against God.” To recapitulate his “distribution”:

- I. Apostasy (no such criminal category in U.S.);
- II. Heresy (no such criminal category);
- III. A. Reviling the Ordinances of the Church (no such criminal category);  
B. Nonconformity
  - 1. Nonattendance at church (no such criminal category)
  - 2. Deliberate dissent
    - a. Papists (no such criminal category)
    - b. Protestant dissenters (no such criminal category)
    - c. Religious tests (outlawed by Art. VI of U.S. Constitution)
- IV. Blasphemy (no such criminal category in U.S., but see *Burstyn v. Wilson* on “sacrilege,” at § B1 below);

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1. Blackstone, William, *Commentaries on the Laws of England*, Book the Fourth (Birmingham: Legal Classics Library special edition, 1983, prepared from an original first edition of 1769), ch. 4, *passim*.

V. Swearing and Cursing (no such criminal category);

VI. Witchcraft (no such criminal category);

VII. Religious Imposters (no such criminal category);

VIII. Simony (no such criminal category);

IX. Sabbath-breaking (see A.7. Sabbath Observance in Volume IV);

X. Drunkenness (various criminal penalties, but not because of offending God or religion);

XI. Lewdness (various criminal penalties against obscenity, child pornography, and some other sexually related offenses, but not as protections of religion);

Having Bastard Children (no criminal penalties, and civil disabilities of illegitimate children are suspect, see *Levy v. Louisiana*.<sup>2</sup>)

(Blackstone saw the offenses under “Lewdness” as religious offenses, whereas contemporary American society does not.)

So the law has changed greatly in crossing the Atlantic and maturing through two centuries. But religion is still the subject of various protective statutes, of which some may be justified from a civil standpoint and some may not. It is to that array of questions that this volume is devoted. First it is important to examine some devices for the protection of religion that have not survived an encounter with the religion clauses of the First Amendment.

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2. 391 U.S. 68 (1968) (illegitimate child cannot be disqualified from wrongful death recovery for death of mother). For further development of this area of law, see Tribe, L., *American Constitutional Law*, 2d ed. (Mineola, NY: Foundation Press, 1988), § 16-24.