God's Revelation: Foundation for the Common Law

HERBERT W. TITUS*

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I. INTRODUCTION

"[W]hile the Roman law was a deathbed convert to Christianity, the common law was a cradle Christian."[1] So wrote John C.H. Wu in his 1955 encomium to the Anglo American legal system known as the common law. Wu, a convert to Christianity in the 1930's and a noted international statesman, jurist and law professor, documented this claim by tracing the history of the English common law from Bracton through Coke to Blackstone. Bracton, named by Wu as the "Father of the Common Law,"[2] was a Churchman, learned in both the canon and Roman law. Remembered for his great thirteenth century treatise, DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE, the first systematic treatment of the English common law, Bracton laid down an unmistakably Christian philosophy of law:

> The king himself . . . ought not to be under man but under God, and under the law, because the law makes the king .... [F]or there is no king where will, and not law, wields dominion. That as a vicar of God he [the king] ought to be under the law is clearly shown by the example of Jesus Christ ... [f]or although there lay open to God, for the salvation of the human race, many ways and means ... He used, not the force of his power, but the counsel of His justice. Thus He was willing to be under the Law, "that he might redeem those who were under the Law." For He was unwilling to use power, but judgment.[3]

Coke, whom Wu praised as "the incarnate common law"[4] or the Savior of the Common Law, showed incomparable courage when he cited Bracton in his momentous encounter with King James I, who claimed that he personified the law as King.[5] Well prepared to defend the common law against tyranny even from the highest place in the kingdom, Coke, like Bracton, understood that God, not man, was the ultimate source of law, even that law which governed the civil realm. Before his confrontation with the King, Coke had confidently proclaimed that "the law of nature is part of the law of England,"[6] that this "law of nature was before any judicial or municipal law,"[7] and that this "law of nature is immutable."[8] What was this "law of nature?" Coke described it eloquently:

> The law of nature is that which God at the time of creation of the nature of man infused into his heart, for his preservation and direction; ... this is *lex aeterna*, the moral law. called also the law of nature. And by this law written with the finger of God in the heart

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1. John C.H. Wu, FOUNTAIN OF JUSTICE: A STUDY IN THE NATURAL LAW 65 (1955).
2. Id. at 71.
3. Henry Bracton, DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE 89 (Sir Travers Twiss ed. 1878).
4. Wu, *supra* note 1, at 93.
5. Id. at 91-93.
6. Id. at 91.
7. Id.
8. Id.

> of man, were the people of God a long time governed, before the law was written by Moses, who was the first reporter or writer of law in the world.[9]

Coke's "law of nature," the "eternal law of God," written on the heart of every man, paralleled John Calvin's "moral law," which the theologian characterized as "nothing else than a testimony of natural law and of that of conscience which God has engraved upon the minds of men."[10] Coke's "law of nature" and Calvin's "moral law," in turn, drew support from the Apostle Paul's letter to the church at Rome: "For when the Gentiles, which have not the [written] law, do by nature the things contained in the law, these, having not the law, are a law unto themselves which shew the work of the law written in their hearts, their conscience also bearing witness ...."[11]

This Christian philosophy of law came to full bloom in England with the work of Sir William Blackstone in his monumental Commentaries on the Law of England. In his seminal chapter on "the Nature of Laws in General," Blackstone stated his Christian thesis with unmistakable clarity:

> Man, considered as a creature, must necessarily be subject to the law of his creator, for he is entirely a dependent being ... [A) state of dependence will inevitably oblige the inferior to take the will of him, on whom he depends, as the rule of his conduct ... And consequently, as man depends absolutely upon his maker for every thing, it is necessary that he should in all points conform to his maker's will.
> This will of his maker is called the law of nature....
> * * *
> This law of nature, being co-eval with mankind and dictated by God himself, is of course superior in obligation to all other. It is binding over all the globe, in all countries, and at all times; no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original.[12]

Published in 1765, Blackstone's Commentaries quickly became the definitive treatise on the common law both in England and in America. Blackstone's statement of the meaning and significance of the law of nature served not only the cause of the common law, but providentially the cause of the American War for Independence. As for the common law, Blackstone provided to Associate United States Justice Joseph Story ample evidence to support the justice's firm opinion that "[t]here never has been a period, in which the Common Law did not recognise Christianity as lying at. its foundations."[13] As for America's claim to independence, Thomas Jefferson unhesitantly

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9. Wu, *supra* note 1, at 91 (quoting *Calvin v. Smith*, Eng. Rep. 377 (K.B. 1610)).

10. John Calvin, INSTITUTES OF THE CHRISTIAN RELIGION 1504 (John T. McNeill ed., Ford L. Battles trans. 1960).

11. Romans 2:14-15 (King James) [hereinafter all citations to the King James Version].

12. 1 William Blackstone, COMMENTARIES *39, 41.

13. Joseph Story, *Discourse Pronounced Upon the Inauguration of the Author, as Dane Professor of Law in Harvard University*, August 25th, 1829, in THE LEGAL MIND IN AMERICA 176, 178 (Perry Miller ed. 1962).

and confidently rested his case upon "the laws of nature and of nature's God."[14]

For over one hundred years, however, this Godly heritage of American law has been neglected. It is no longer generally acknowledged by her lawyers or her judges. The purpose of this article is twofold: (1) To document and to explain how God's revelation provided the basic foundation for the Anglo-American common law system; and (2) To urge its renewal and restoration.

Part II contains a succinct summary of the Biblical philosophy that laid the foundation for the common law at the time of America's founding. It concludes with a brief account of its demise, occasioned by a late nineteenth century Darwinian revolution, and with a forecast of a coming Christian counter-revolution. To illustrate how this Biblical philosophy was applied in the past, and how, if restored, it would make a difference in the future, Parts III and IV address two subjects, private property and civil jurisdiction. Both of these parts document the Biblical roots of the common law of property and of jurisdiction, and urge a return to them to preserve economic stability and to reestablish true liberty in America.

II. GOD'S REVELATION AND THE COMMON LAW

A. The Law of Nature and of Nature's God

The Declaration of Independence's reliance upon the laws of "nature's God"[15] as well as upon "the laws of nature"[16] reflected the faith of America's founders in a "God Who is there and Who is not silent."[17] They believed without reservation that God had created all mankind, that God had endowed them with certain rights, and that God actively judged and superintended the affairs of man, including that of nations.[18] Their faith in God and in His revelation in support of their revolutionary cause mirrored Blackstone's faith in God's will as revealed in nature and in the holy Scriptures. Not surprisingly, America's founders endeavored to preserve and to purify Blackstone's philosophy of the common law even as they were leading the United States of America in a war against the mother country.

Jesse Root, in his "remarkable preface to the first volume of systematic *Reports* on Connecticut cases,"[19] explained the revelational epistemology upon which all Americans understood the common law to rest:

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14. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

15. Id.

16. Id.

17. The phrase has been inspired by Dr. Francis Schaeffer's books, THE GOD WHO IS THERE (1968), and HE IS THERE AND HE IS NOT SILENT (1972).

18. *See generally*, Gary Amos, DEFENDING THE DECLARATION (1989).

19. Jesse Root, *The Origin of Government and Laws in Connecticut*, 1798, in THE LEGAL MIND IN AMERICA, *supra* note 13, at 31.

> What is common law? ... [C]ommon law is the perfection of reason, arising from the nature of God, of man, and of things, and from their relations, dependencies, and connections: It is universal .... It is in itself perfect ... it is immutable, ... it is superior to all other laws and regulations .... It is immemorial ... it is co-existent with the nature of man, ... It is most energetic and coercive ....
> [W]ho will ascend into heaven to bring it down, or descend into the depths to bring it up, or traverse the Atlantic to import it? It is near us, it is within us, written upon the tablet of our hearts, in lively and indelible characters; ... It is visible in the volume of nature, in all the works and ways of God. Its sound is gone forth into all the earth, and there is no people or nation so barbarous, where its language is not understood.
> The dignity of its original, the sublimity of its principles, the purity, excellency and perpetuity of its precepts are most clearly made known and delineated in the book of divine revelations; heaven and earth may pass away and all the systems and works of man sink into oblivion, but not a jot or tittle of this law shall ever fall.[20]

Root's explicit revelational epistemology was presupposed by Blackstone in his Commentaries. Thus, Blackstone unapologetically began his chapter on the Nature of Laws in general with propositional statements derived from the Genesis account of creation:

> Law ... signifies a ... rule of action, which is prescribed by some superior, and which the inferior is bound to obey.
> Thus when the supreme being formed the universe, and created matter out of nothing, he impressed certain principles upon that matter, from which it can never depart, and without which it would cease to be. When he put that matter into motion, he established certain laws of motion, to which all moveable bodies must conform.[21]

Continuing this Genesis theme of creation, Blackstone moved quickly from the laws of the creator governing the inanimate world to the rules of the same creator governing the animate world:

> If we farther advance, from mere inactive matter to vegetable and animal life, we shall find them still governed by laws ... equally fixed and invariable. The whole progress of plants ... the method of animal nutrition, ... and all other branches of vital economy . . . are not left to chance, or the will of the creature itself, but are performed in a wondrous involuntary manner, and guided by unerring rules laid down by the great creator.[22]

Again without hesitation, Blackstone moved from the rules governing the animate world to those applying to human action or conduct. While he acknowledged that man, unlike the animals, is "a creature endowed with both reason and freewill,"[23] Blackstone drew a straight line from the laws

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20. Id. at 34-35.

21. 1 BLACKSTONE, *supra* note 12. at *38.

22. Id. at *38-39.

23. Id. at *39.

governing the inanimate and animate worlds to the laws governing the "image-bearing nature world"[24] peculiar to man:

> For as God, when he created matter, and endued it with a principle of mobility, established certain rules for the perpetual direction of that motion; so, when he created man, and endued him with freewill to conduct himself in all parts of life, he laid down certain immutable laws of human nature, whereby that freewill is in degree regulated and restrained....[25]

By relating God's laws governing mankind to those governing the inanimate physical world, Blackstone-whether advertently or inadvertently I do not know-followed God's revelatory strategy in His dealing with Job. For in response to Job's complaint, God answered by declaring His sovereign power as Creator over inanimate nature and, consequently, His rule of that inanimate world: "Where wast thou when I laid the foundations of the earth?... Who hath laid the measures thereof? ... or who hath stretched the line upon it? ... Knowest thou the ordinances of heaven? Canst thou set the dominion thereof in the earth?"[26]

God repeats this revelatory strategy throughout Scripture both in his relationships with Israel[27] and with individual human beings. In a most telling passage in the Book of James, God likens His physical laws governing water quality to His moral laws governing what man speaks with his mouth:

> [T]he tongue can no man tame; it is an unruly evil, full of deadly poison. Therewith bless we God ... and therewith curse we men, which are made after the similitude of God. Out of the same mouth proceedeth blessing and cursing. My brethren these things ought not so to be. Doth a fountain send forth at the same place sweet water and bitter?[28]

Given these revelations of identity between the laws governing the physical world and those governing man's free will, Blackstone envisioned the job of the lawyer or jurist to be like that of the physical scientist; namely, to use God's gift of "reason to discover the purport of those laws" governing mankind's freewill.[29] Blackstone had faith that God "has enabled human reason to discover" these laws "so far as they are necessary for the conduct of human actions."[30]

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24. This term reflects the realm of nature that was made in the image of God. Genesis 1:27. The term emphasizes the distinction between man and animals. The emphasis is necessary in this modern age so enamored with the Darwinian belief that man is only a "human animal."

25. 1 BLACKSTONE, *supra* note 12, at *39-40.

26. Job 38:4-5, 33.

27. *See. e.g.*, Jeremiah 10:2-15.

28. James 3:8-11.

29. 1 BLACKSTONE, *supra* note 12, at *40.

30. Id.

First, Blackstone contended that God created each individual human being in such a way that he but by his own self-love will discover the rules that lead to happiness.[31] According to Blackstone, one need not be a metaphysician in order to know what is good and what is evil.[32] Likewise, Jesse Root claimed that the law of nature created by God could be known through reason because God had created all human beings with the capacity to know those laws:

> [T]he law exists ... [not as] a matter of speculative reasoning merely; but of knowledge and feeling. We know that we have a property in our persons ... we know that we have a right to think and believe as we choose ... we know the value of a good name ... we know that every man's peace and happiness is his own. Nay, more when our persons are assaulted, our lives attached, our liberties infringed ... our property ... spoiled, we feel the injury that is done to us.... We know also that other men have the same rights. . . . When their rights are violated, this law is therefore evidenced both by the knowledge and the feelings of men.[33]

Notwithstanding the fact that God had revealed His laws clearly in nature and had created each human being with the capacity to discover those laws, both Blackstone and Root agreed that God's revelation of His laws in the natural world was not the only source of man's knowledge of the rules governing his free will. Indeed, both claimed that there was a better source than nature to consult, namely, the Holy Scriptures. Indeed, Root called the "book of divine revelations ... the Magna Charta of all our natural and religious rights and liberties."[34]

Calling the Bible the Magna Charta of justice and liberty did not mean that God had failed to make known His laws through the natural world; nor did it mean that God had failed to give man sufficient reasoning and emotional capacity to discover those laws in nature. To the contrary, God's ways in nature were still discoverable by man through his reason. Nevertheless, God, in His mercy, provided man with a more sure guide. Blackstone captured best the reason why God took these laws already sufficiently revealed in nature and revealed them also in writing:

> [I]f our reason were always, as in our first ancestor before his transgression, clear and perfect, unruffled by passions, unclouded by prejudice, unimpaired by disease or intemperance, the talk would be pleasant and easy; we should need no other guide but this [*i.e.*, the law of nature]. But every man now finds the contrary in his own experience; that his reason is corrupt, and his understanding full of ignorance and error.
>
> This has given manifold occasion for the benign interposition of divine providence; which, in compassion to the frailty, the imperfection, and the blindness of human reason, hath been pleased ... to discover and enforce its laws by an immediate and direct revelation. The doctrines thus delivered we call the revealed or divine law, and they are

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31. Id.

32. Id. at *40-41.

33. Root, *supra* note 19, at 36.

34. Id. at 35-36.

> to be found only in the holy scriptures.[35]

For Blackstone and Root, then, the Biblical revelation did not displace the natural revelation, but confirmed it and made it possible for man, even though his reason had been corrupted by sin, to continue to discover the special rules that the Creator had imposed upon him as a human being created in the image of God. Again, Blackstone is most explicit:

> These precepts [the ones written in the holy scriptures] ... , when revealed, are found upon comparison to be really a part of the original law of nature, as they tend in all their consequences to man's felicity. But we are not from thence to conclude that the knowledge of these truths was attainable by reason, in its present corrupted state; since we find that, until they were revealed [in writing], they were hid from the wisdom of ages. As then the moral precepts of this law are indeed of the same original with those of the law of nature, so their intrinsic obligation is of equal strength and perpetuity.[36]

In other words, God's putting in written form "Thou shalt not murder"[37] did not make murder wrong, but His putting the rule in writing revealed more effectively to fallen man the original law protecting the sanctity of human life that God had placed and revealed in the created order from the beginning. Murder was wrong, therefore, because it was contrary to the nature of man and to the very nature of God's creation.

B. The Municipal or Civil Law

By presupposing God's revelation in both nature and in the Holy Scriptures, Blackstone and Root established the common law heritage as rooted in an objective legal order that pre-existed civil society and the writings of men. That objective legal order Blackstone identified as ..the law of nature and the law of revelation."[38] As for the laws of civil order, Blackstone claimed that such laws were wholly dependent upon the law of nature and the law of revelation and that "no human laws should be suffered to contradict these."[39] As for the writings of men, these were only "what, by the assistance of human reason, we imagine to be" the law of nature.[40] Blackstone called these writings the "natural law"[41] and distinguished them from the law of nature, which he stated is "expressly declared ... to be [Law] by God himself."[42]

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35. 1 BLACKSTONE, *supra* note 12, at *41-42.

36. Id. at *42.

37. Exodus 20:13.

38. 1 BLACKSTONE, *supra* note 12, at *42.

39. Id.

40. Id.

41. Id.

42. Id.

Having begun with God's revelation in nature and in the Holy Scriptures to define law generally, Blackstone turned to the subject of "municipal or civil law; that is, the rule by which particular . . . nations are governed."[43] Before proposing a definition of "municipal law," however, Blackstone laid one final building block from God's revelation. While no human law could be law if it contradicted the law of nature and the law of revelation, there were, Blackstone claimed, "a great number of indifferent points, in which both the divine and the natural leave a man at his own liberty; but which are found necessary for the benefit of society."[44] In other words, God's revelation does not command every single human law, jot and tittle; rather, God, having created man in His own image, bas allowed man freedom to adopt some rules that man finds efficacious about which God is indifferent.

To illustrate this point, Blackstone contrasted those human laws prohibiting murder and those laws governing the export of wool into foreign countries. As for murder Blackstone noted:

> [T]his is expressly forbidden by the divine, and demonstrably by the natural law; and from these prohibitions arises the true unlawfulness of this crime. Those human laws, that annex a punishment to it, do not at all increase its moral guilt, or superadd any fresh obligation *in foro conscientiae* to abstain from its perpetuation. Nay, if any human law should allow or enjoin us to commit it, we are bound to transgress that human law, or else we must offend both the natural and the divine.[45]

In two later chapters Blackstone returned to the subject of murder with explicit reliance upon God's revelation in the Holy Scriptures. On the question of civil authority to impose the death penalty, Blackstone rested his case squarely upon Genesis 9:6: "[C]apital punishments are in some instances inflicted by the immediate command of God himself to all mankind; as, in the ease of murder, by the precept delivered to Noah, their common ancestor and representative, 'whoso sheddeth man's blood, by man shall his blood be shed.'"[46]

On the question of authority to pardon a convicted murderer, Blackstone claimed that it was prohibited, citing Numbers 35:31: "Moreover ye shall take no satisfaction for the life of a murderer, who is guilty of death, but he shall surely be put to death; for the land cannot be cleansed of the blood that is shed therein but by the blood of him that shed it."[47]

With these two revelations Blackstone supported his observation that murder was a "crime at which human nature starts, and which is . . . punished almost universally throughout the world with

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43. Id. at *44.

44. Id. at *42.

45. Id. at *42-43.

46. 4 William Blackstone, COMMENTARIES *9 (quoting Genesis 9:6).

47. Id. at *194 (quoting Numbers 35:31).

death,"[48] and his critique of the "Polish monarch ... who thought it proper to remit penalties of murder to all the nobility, in an edict with this arrogant preamble, "*nos divini juris rigorum moderantes*, etc."[49]

In contrast to the authority of civil rulers to impose the death penalty upon convicted murderers, Blackstone claimed that no civil ruler had authority to impose such a penalty for "offenses against the municipal law only, and not against the law of nature; since no individual has, naturally, a power of inflicting death upon himself or others for actions in themselves indifferent."[50] Whether or not an offense is "indifferent," *i.e.*, within the discretion of man to prohibit, was, however, determined by God's revelation: "[W]ith regard to matters that are in themselves indifferent, and are not commanded or forbidden by those superior laws [the law of nature and the law of revelation] ... here the inferior legislature has scope and opportunity to interpose, and to make that action unlawful which before was not so."[51]

Armed with this foundational distinction from God's revelation, Blackstone proceeded to define municipal or civil law as "a rule of civil conduct prescribed by the supreme power in a state, commanding what is right, and prohibiting what is wrong."[52] This definition tracked that of law generally: "Law ... is that rule of action, which is prescribed by some superior, and which the inferior is bound to obey,"[53] but it specified the criteria by which one determined if he was bound to obey.

With God all of His rules of action are binding on all of His creatures because His authority is universal and because His rules are inherently good: "As therefore the Creator is a being, not only of infinite power, and wisdom, but also of infinite goodness, . . . he has . . . inseparably interwoven the laws of eternal justice with the happiness of each individual, that the latter cannot be attained but by observing the former...."[54]

In contrast, the civil ruler, being both finite and limited in authority, could prescribe rules extending only to matters of civil conduct which, according to Blackstone, distinguished "municipal law from the law of nature, or revealed; the former of which is the rule of moral conduct, and the latter not only the rule of moral conduct, but also the rule of faith."[55] Such rules of morality and faith

48. Id.

49. Id. *Nos divini juris rigorum moderantes* is translated as "We are those who moderate the rigor of divine law."

50. Id. at *9.

51. 1 BLACKSTONE, *supra* note 12, at *43.

52. Id. at *44.

53. Id. at *38.

54. Id. at *40.

55. Id. at *45.

> regard man as a creature, and point out his duty to God, to himself, and to his neighbour, considered in light of an individual. But municipal or civil law regards him also as a citizen, and bound to other duties towards his neighbour, than those of mere nature and religion: duties ... which amount to no more, than ... to the subsistence and peace of the society.[56]

Whether a duty was moral only or faith only, as contrasted with civil, was in Blackstone's view determined by God's revelation, just as the distinction between duties commanded by God and those commanded solely by the civil ruler was determined by God's revelation.

Blackstone reiterated this latter point in his discussion of the criteria governing what is right and what is wrong for the purpose of determining whether one was bound to obey a rule prescribed by municipal or civil law. On this point, Blackstone was clearly not a positivist; that is, he did not claim that a human law was binding solely because a lawful civil ruler had properly prescribed it. To the contrary, Blackstone expressly noted that "no human legislature has power to abridge or destroy ... [t]hose rights which God and nature has established."[57]

On the other hand, "with regard to things in themselves indifferent ... [t]hese become either right or wrong, just or unjust . . . according as the municipal legislator sees proper, for promoting the welfare of the society, and more effectually carrying on the purposes of civil life."[58] Again Blackstone provided an example to illustrate this crucial distinction and once again the example rested upon God's revelation: "[I]n civil duties; obedience to superiors is the doctrine of revealed as well as natural religion: but who those superiors shall be, and in what circumstances, or to what degrees they shall be obeyed, is in the province of human laws to determine."[59]

C. The Common Law of England and America

Having drawn upon God's revelation to define both the jurisdiction and the substance of municipal or civil law generally, Blackstone turned in the next section of Chapter 2 of Volume 1 of his Commentaries to the municipal law of England, which he claimed could be divided into "the unwritten, or common law" and "the written, or statute law."[60] In this section, Blackstone devoted over two-thirds of his discussion to the common law as "contained in the records of the several courts of justice, in books of reports and judicial decisions, and in the treatises of learned sages of the profession."[61]

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56. Id.
57. Id. at *54.
58. Id. at *55.
59. Id.
60. Id. at *63.
61. Id. at *63-64.

Blackstone noted first that the common law was considered to be unwritten because that law had become law not because it had been put into writing by judges in their opinions or by legislators as statutes, but rather, the common law had become law "by long and immemorial usage" or by custom.[62] Thus, Blackstone claimed that common law judges in England did not make law, but only discovered and stated it.[63] A court opinion, therefore, was only evidence of law, but not law itself. As "living oracles," judges were "bound by oath to decide according to the law of the land."[64] Should a judge's opinion be found not in conformity with that law, then that opinion was considered not to be "bad law" but "not law" at all.[65]

The common law contained two kinds of rules. First, there were the rules commanded by God and required of all nations and at all times. Second, there were the rules adopted by the community because felicitous to the societal order. These were known as customs, indifferent to God. As for the former, such rules were clearly subject to the "rule of reason." If a court opinion setting forth such a rule was found "contrary to reason" or "much more ... contrary to the divine law," then it was incumbent on a "subsequent" judge to disregard that ruling as "not law, that is, that it is not the established custom of the realm, as bas been erroneously determined."[66] As for customs "indifferent to God," a judge could never justify a departure from rules that were "fixed and established ... without a breach of his oath and the law ... [f]or herein there is nothing repugnant to natural justice ... ."[67]

The common law of England, then, was but one form of the municipal or civil law of the nation and subject to the same limitations as to jurisdiction and as to substance. The customs of the realm could extend only to civil conduct, not to exclusively moral or exclusively religious conduct. And the customs could not proscribe what God has commanded or command or permit what God has prohibited.

Blackstone's view of the common law and the role of the judge was accepted without debate in America at the time of her founding. Jesse Root, in answering the questions "What is the common law of America? Have we any common law in Connecticut?,"[68] began first to describe those rules found "in the book of divine revelations"[69] that are common to all mankind:

> By this we are taught the dignity, the character, the rights and duties of man. . . . This

62. Id. at *64.

63. Id. at *69-70.

64. Id. at *69.

65. Id. at *69-71.

66. Id. at *70.

67. Id. at *70-71.

68. Root, *supra* note 19, at 34.

69. Id. at 35.

> teaches us, so to use our own as not to injure the rights of others. This enables us, to . . . construe contracts and agreements. . . . This designates crimes. . . . This defines the obligations and duties between husbands and wives, parents and children . . . between the rulers and the people, and the people or citizens towards each other. This is the Magna Charta of all our natural and religious rights and liberties-and the only solid basis of our civil constitution and privileges ... the usages and customs of men and the decisions of the courts of justice serve to declare and illustrate the principles of this law.[70]

Root, like Blackstone, found that the common law also included customs not reflected in Holy Writ, but binding nonetheless. Customs were rules "adopted in practice by the citizens at large, or by particular classes of men, as the farmers, the merchants ... which are reasonable and beneficial."[71] Root explained that

> the courts of justice take notice of [these customs] as rules of right, and as having the force of laws formed and adopted under the authority of the people, [for] as statutes are positive laws enacted by authority oi the legislature ... [as] representatives of the people, ... [s]o these unwritten customs ... have the force of law under the authority of the people.[72]

This view of the Anglo-American common law prevailed in both England and America into the early period of the 20th Century.[73] At the end of the 19th Century, however, God's revelation as the foundation and framework of the common law came under relentless attack from the pens of Oliver Wendell Holmes, Jr., and his Harvard colleague, John Chipman Gray, and from the new "case method" of teaching law installed by Dean Christopher Columbus Langdell at Harvard.

Langdell led the way in 1870 by recasting the science of law in evolutionary terms, thereby discarding the revelation of God as the source of laws governing the universe. Langdell wrote in 1879 in the Preface to his CASES ON CONTRACTS, the first law casebook ever published: "Law, considered as a science, consists of certain principles or doctrines .... Each of these doctrines has arrived at its present state by slow degrees; in other words, it is a growth, extending in many cases through centuries."[74]

Two years later Holmes published his book on THE COMMON LAW. He tracked Langdell's evolutionary scientific view of law with neither explanation nor justification:

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70. Id. at 35-36.

71. Id. at 37.

72. Id. at 37-38.

73. *See, e.g.*, James C. Carter, LAW; ITS ORIGIN, GROWTH, AND FUNCTION, (DaCapo Press 1974)(1907).

74. Christopher Columbus Langdell, A SELECTION OF CASES ON THE LAW OF CONTRACTS vi (The Legal Classics Library ed. 1983) (Little, Brown, and Company, Boston 1871).

> The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy ... even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become.[75]

With God's revelation cast aside as "a brooding omnipresence in the sky" not an "articulate voice of some sovereign ... that can be identified,"[76] Gray put on the finishing touches by disposing of Blackstone's view that judges discover, but do not create law. He contended that there is no mysterious entity "the Law" apart from the rules of conduct which the courts apply, and that judges are the creators rather than the discoverers of the Law.[77]

This shift from a common law system founded and framed by God's revelation to a common law system determined by judge's opinions was not accidental. Indeed, Christopher Columbus Langdell had been chosen by Harvard President Charles William Eliot for the specific purpose of establishing a new method of teaching law based upon the Darwinian revolution that had taken hold of American higher education in the late 19th Century. As Eliot put it in his address celebrating the inauguration of the first president of Johns Hopkins University:

> They [the new schools of which Johns Hopkins was one] can show how ... biology with its principle of evolution through natural selection, [has] brought about within thirty years a wonderful change in men's conception of the universe. If the universe, as science teaches, be an organism which has by slow degrees grown to its form of today on its way to its form of tomorrow, with slowly formed habits which we call laws, ... then, as science also teaches, the life-principle or soul of that organism, for which science has no better name than God, pervades and informs it so absolutely that there is no separating God from nature ....[78]

Nearly 100 years later American historian, Henry Steele Commager, would write:

> Fundamental changes in culture . . . were affected ... decisively by the intellectual and philosophical revolution we associate with Darwin's Origin of Species (1859)....
> This shift, both inspired and dramatized by the speedy acceptance of the hypothesis of Darwin, was fundamental. It was a shift from the old teleologically-oriented moral and natural philosophy to the scientific ....

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75. Oliver Wendell Holmes, Jr., THE COMMON LAW 1 (1887).

76. *South Pacific Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

77. John Chipman Gray, THE NATURE AND SOURCES OF LAW 99 (2d ed. 1921).

78. Hugh Hawkins, BETWEEN HARVARD AND AMERICA 129-30 (1972).

> "My generation," wrote the philosopher James Hayden Tufts, who had been born in the midst of the Civil War, "has seen the passing of systems of thought which reigned since Augustus. The conception of a world ruled by God and subject to his laws ... has dissolved...." What shattered that traditional world was science, which in almost every arena-including ... the law... - substituted the operations of the law of evolution for the laws of God.[79]

As the 20th Century closes, man's faith in evolutionary science is itself being challenged. Not only is the Darwinian hypothesis under siege,[80] but the common law system that evolutionary science transformed is breaking down. At the same time there is a resurgence of Christian scholarship in law that is taking a second look at the Blackstonian legacy of the common law based upon a revelatory epistemology centered upon the Genesis account of creation in the Holy Scriptures. To illustrate the significance of this coming counter-revolution, I turn now to two major subjects that have long captured the minds of legal scholars; the law of private property and the law of freedom of religion.

III. THE COMMON LAW OF PRIVATE PROPERTY

A. A Biblical Heritage

In his introduction to Book I of the University of Chicago's facsimile of Blackstone's COMMENTARIES ON THE LAWS OF ENGLAND, the late Stanley N. Katz, professor of law at Chicago, dismissed Blackstone's chapter "On the Nature of Laws in General" as "a brief and unconvincing essay on the natural law background of the English legal system ... [and as] an obligatory eighteenth-century exercise, in which Blackstone accords to natural and revealed law about the same importance as Newton accorded God in the operation of the physical universe."[81]

Calling Blackstone's view of law a "modern positivist one,"[82] in which God's revelation played no real part, Katz simply ignored large chunks of the Commentaries which were laced with references to God's revelation. Nowhere was this oversight more significant than in Blackstone's section on the common law of property.

In the opening chapter of his second book, addressing "the Rights of Things," Blackstone devoted fifteen full pages to exploring the origin and foundation of the right of property, namely "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe."[83] Without hesitation or apology, Blackstone began his search by quoting Genesis 1:28: "In the beginning of the world, we

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79. Henry Steele Commager, *1978: The World of the Mind*, 64 A.B.A.J. 1003, 1005-06 (1978).

80. *See, e.g.*, Phillip E. Johnson, DARWIN ON TRIAL (1991).

81. Stanley Nider Katz, *Introduction* to 1 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND at vi (Facsimile ed., Univ. of Chicago Press 1979).

82. Id.

83. 2 William Blackstone, COMMENTARIES *2.

are informed by holy writ, the all-bountiful creator gave to man 'dominion over all the earth; and over the fish of the sea, and over the fowl of the air, and over every living thing that moveth upon the earth.'"[84]

Blackstone chose to begin with the Biblical mandate to exercise dominion, not because he had no other possible source, but rather, he began with Genesis because he believed that book to be "the only true and solid foundation of man's dominion over external things, whatever airy metaphysical notion may have been started by fanciful writers upon this subject."[85] While Blackstone did not identify these "fanciful writers" by name, America's Blackstone, Chancellor James Kent of New York, did in the introduction to the common law of property in his Commentaries on American Law:

> To suppose a state of man prior to the existence of any notions of separate property ... when men throughout the world lived without law or government, in innocence and simplicity, is a mere dream of the imagination. It is the golden age of the poets which forms such a delightful picture in the fictions, adorned by the muse of Hesiod, Lucretius, Ovid, and Virgil.[86]

And what were these "dreams" of a "golden age" in which man lived in "innocence and simplicity?" Hesiod, the Greek poet mentioned first by Kent, lived in the Eighth Century before Christ. In his epic poem, Works and Days, he imagined a golden age of history in which all human beings lived happily upon a fruitful earth that spontaneously satisfied all men's needs. Hesiod bemoaned the loss of this age of innocence. He blamed this loss on the gods who had failed to create mankind in such a way as to prevent man from falling into evil. Because evil had entered into the world, Hesiod claimed, men were condemned to hard work to exercise dominion.[87]

As for Lucretius, this Roman poet who lived in the First Century before Christ claimed that the earth, not gods, had given birth to mankind through a process of natural selection of species. He hypothesized a time when men lived communally

> after the roving fashion of wild beasts. No one then was a sturdy guider of the bent plough or knew how to labour the fields with iron or plant in the ground young saplings or lop with pruning-hooks old boughs from the high trees. What the sun and rains had given, what the earth had produced spontaneously, was guerdon sufficient to content their hearts.[88]

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84. Id. at *2-3 (quoting Genesis 1:28 (King James)).

85. Id. at *3.

86. 2 James Kent, COMMENTARIES ON AMERICAN LAW *317.

87. *See*, Will Durant, THE LIFE OF GREECE 102 (1939).

88. Lucretius, ON THE NATURE OF THINGS, reprinted in MAN AND THE UNIVERSE: THE PHILOSOPHERS OF SCIENCE, at 27 (Sax Commins & Robert N. Linscott eds., Random House 1947).

Only later did man invent laws and government as he evolved from a state of nature to a civilized creature with a spoken language. According to Lucretius, "mankind, tired out with a life of brute force, lay exhausted from its feuds; and therefore the more readily it submitted of its own freewill to laws and stringent codes."[89]

Ovid, like Lucretius, staked man's origin in "Mother Nature," personified by the goddess "Venus ... the spirit of desire, mating, fertility."[90] In his *Metamorphoses*, Ovid "recounted in engaging hexameters the renounced transformations of inanimate objects, animals, mortals, and gods . . . and range[d] through the whole realm of classical mythology from the creation of the world to the deification of Caesar."[91]

Virgil, in the AENIAD, also wrote a "sacred scripture for Rome." Although "he oscillates between Jove and an impersonal Fate as the ruler of all things," he repeated the same "mythological background" as the Greek poets before him. In earlier works he predicted the coming of a utopia that, in reality, was simply a wishful forecast of a return to a mythological golden age.[92]

Kent dismissed all of these poetic musings with a brief, but telling, reference to the Genesis account of Cain's murder of Abel following the fall of man in the Garden of Eden: "It has been truly observed, that the first man who was born into the world killed the second; and when did the times of simplicity begin?"[93] The significance of this citation cannot be overestimated. With it Kent not only dismissed the possibility of some utopian past, but he rejected the poet's anthropological speculations and evolutionary hypotheses as well. No wonder Kent, after citing Genesis 4, proceeded to endorse that entire book as the only authentic account of the origin of the world and of mankind. This endorsement came as he turned from his critique of the Roman and Greek poets to a similar critique of their historians and philosophers.

Claiming that the works of Homer, Herodotus, and Livy rivalled that of their poetic compatriots in "their descriptions of some imaginary state of nature," Kent found these men attempting to know the impossible and, therefore, to have spent their energies in conjecture.[94] Kent's appraisal of these three men's work have proved remarkably prescient. In his monumental work on THE STORY OF CIVILIZATION, Will Durant came to similar conclusions. On Homer, Durant wrote that no one can be sure that he even existed and that Homer's work contained but "legends of an Heroic Age" in which gods and men interacted with each other, even in acts of sexual intercourse to sire those who were destined to rule on the earth.[95] As for the Greek historian, Herodotus, Durant found "much

89. Id. at 33.

90. Will Durant, CAESAR AND CHRIST 61 (1944); see also Lucretius, *supra* note 88, at 28-29.

91. DURANT, *supra* note 90, at 256.

92. Id. at 236-42.

93. KENT, *supra* note 86, at *317-18.

94. Id. at *318.

95. DURANT, *supra* note 90, at 38-39.

nonsense" in his work, including the claim that "Nebuchadnezzar was a woman."[96] Durant also observed that the Roman historian, Livy "accepts almost any superstition," and "litters his pages with omens, portents, and oracles ... .[so that] as in Virgil the real actors are the gods."[97] So zealous to establish the absolute righteousness of Rome, Durant finally noted that Livy "ceases to distinguish legend from history."[98]

Having dismissed this Roman and Greek heritage, Kent proceeded to endorse God's revelation in the Book of Genesis as the only true account of the origin of the universe, and. consequently. of the origin of private property. "No such state [of man prior to the existence of any notions of separate property] was intended for man in the benevolent dispensation of Providence; and in following the migrations of nations, apart from the book of Genesis, human curiosity is unable to penetrate beyond the pages of genuine history ...."[99]

Having identified Genesis as his starting point, Kent, for reasons unknown. shifted his focus from God's revelation in the Holy Scriptures to God's revelation in every man's heart: "The sense of property is inherent in the human breast .... Man was fitted and intended by the [A]uthor of his being ... for the acquisitions and enjoyment of property. It is, to speak correctly, the law of his nature."[100] Perhaps Kent believed that this "sense of property" was so self-evident it needed no support from Scripture. Perhaps he believed that Scripture's endorsement of private property was so clear that it needed no exegesis. After all, had not Cain owned the land that he tilled and the crops that he grew?[101] And had not Abel owned the land upon which he grazed his sheep and the sheep as well?[102] And were not Cain and Abel the first generation after Adam and Eve, so there was no room for any wandering nomads or communal property in between?[103]

Blackstone, however, was not so sure. First, he was uncertain that Cain and Abel owned the land because there was so much of it and so few to claim it. It was not until the population of the world increased that conflicts over land arose. Even so, Blackstone stuck with Genesis as he cited the controversies between Abraham and Abimilech and Abraham and Lot as the earliest examples of how such conflicts were resolved. For he, like Kent, considered the Book of Genesis "the most venerable monument of antiquity, considered merely with a view of history."[104]

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96. DURANT, *supra* note 87, at 431-32.

97. DURANT, *supra* note 90, at 251.

98. Id.

99. KENT, *supra* note 86, at *318.

100. Id.

101. Genesis 4:2-3.

102. Genesis 4:2-4.

103. Genesis 4:1.

104. 2 BLACKSTONE, *supra* note 83, at *5-6.

Even before Blackstone, other apologists for the institution of private property, most notably John Locke, also found Genesis to be the beginning of any effort to justify any man's right to exercise exclusive dominion over things. Locke began his discussion of the subject by referring not only to God's revelation in nature but also to His revelation in the Scriptures:

> Whether we consider natural reason, which tells us, that men, being once born, have a right to their preservation, and consequently to meat and drink, and such other things as nature affords for their subsistence: or revelation, which gives us an account of those grants God made of the world to Adam, and to Noah and his sons.[105]

Locke, unlike Kent, did not believe, however, that the right of private property was self-evident. So he, like Blackstone, sought to explain how, and to justify why, an individual human being could claim exclusive right to a piece of land or to a thing. And Locke, like Blackstone, relied upon the Genesis creation story and utilized the Genesis accounts of Cain and Abel, Abraham and Lot, and Esau and Jacob to support his theory of private property.[106]

Other common law scholars followed suit. But their common starting point in Genesis and their affirmation of Genesis as the authoritative account of the early history of mankind did not result in agreement in the foundational principles of the common law of property.

B. Private Property: Unalienable Right or Societal Convention

Blackstone and Locke inferred from the Holy Scriptures that in the beginning God had given the earth and all it contains to all mankind in common. While Blackstone rested his case upon Genesis 1:28,[107] Locke based this first principle upon Psalm 115:16: "[I]t is very clear, that God, as [K]ing David says, 'has given the earth to the children of men;' given it to mankind in common."[108] From this foundational principle Blackstone and Locke sought to demonstrate how the institution of private property came about. Both claimed that it had arisen out of necessity, in that as people multiplied upon the earth there was not enough land and things to meet every person's need. To illustrate this historical process, both cited passages from the book of Genesis dealing with conflicts over property.[109]

While Blackstone and Locke agreed that "necessity begat property,"[110] they did not agree upon the justification for an individual human being to claim exclusive right to a plot of land or a thing to the

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105. John Locke, SECOND TREATISE OF GOVERNMENT 18 (C.B. Macpherson ed. 1980)(1690).

106. Id. at 24-25.

107. "The earth ... and all things therein, are the general property of mankind, exclusive of other beings, from the immediate gift of the Creator." 2 BLACKSTONE, *supra* note 83, at *3.

108. LOCKE, *supra* note 105, at 18 (quoting Psalm 115:16).

109. 2 BLACKSTONE, *supra* note 83, at *5-6; LOCKE, *supra* note 105, at *23-24.

110. 2 BLACKSTONE, *supra* note 83, at *8; LOCKE, *supra*. note 105, at *27-30.

exclusion of all others. Drawing on the Genesis history, Blackstone determined that exclusive ownership began with first possession and that the system of laws protecting private property were designed to keep the peace by preserving possessory interest from claims of those who came later. In effect, Blackstone simply accepted as fact that the "first taker" had a superior right to the property possessed and that anyone with a contrary claim had the burden of proving that his claim was better. Because Blackstone found nothing inherently right in the first taker's claim, he concluded that the common law of property was a matter of societal convention, not a matter of natural right. He favored a system of private property partly because it best met men's needs and partly because it was clearly practiced in the book of Genesis. But he did not believe that the system of private property portrayed in Genesis had been specifically prescribed by God; it was one of those areas of "indifference" where man had freedom to choose a variety of rules depending upon his assessment of their efficacy.[111]

Locke thought otherwise. While God gave "the world to men in common," He also gave each man "reason to make use of it to the best advantage of life and convenience."[112] This ability to reason and, thereby, to exercise dominion was each individual man's property in which "nobody has any right to but himself. The labor of his body and the work of his hands, we may say, are properly his."[113] From this God-given right, Locke reasoned that whatever a man, by his labor, "removes out of the state that nature has provided" he has, by mixing his labor with the thing removed, made the thing "his property."[114] To ensure that all men would have opportunity to mix his labor with some external thing, Locke claimed that a man's claim of ownership could not exceed the bounds of reason; *i.e.*, could not go beyond what he could use to the advantage of life. To be sure, no one could claim ownership to anything if he did not work for it, but no one could claim so much that it kept others from having opportunity to own things for his use and enjoyment.[115]

While Blackstone's view allowed that man could adopt any system of property ownership so long as it proved efficacious, Locke's view required a system of private property governed by rules that protected claims based upon one's work tempered by rules that limited those claims to reasonable use and enjoyment. Both came to their positions because of their first proposition that God had given to all mankind in common the earth and all that it contains.

Kent disagreed with this first postulate. He emphatically denied that there ever was time when man owned all things in common. To the contrary. he claimed that God fitted and intended each individual man from the beginning to acquire and to enjoy separate property. Kent did not bother to support this proposition with a careful Scriptural account; he was content to state it as self-evident: "There is no person. even in his rudest state, who does not feel and acknowledge ... the

111. 2 BLACKSTONE, *supra* note 83, at *3-15.

112. LOCKE, *supra* note 105, at *18.

113. Id. at *19.

114. Id.

115. Id.

justice of this title" of the one who occupies something first.[116] It was occupancy, not labor, which gave rise to a claim of title, Kent claimed, because God "graciously bestowed [the sense of property] on mankind for the purpose of rousing them from sloth, and stimulating them to action."[117] He further asserted that private property rights "ought to be sacredly protected," not subordinated to claims of injustice whether they are based upon inequalities of wealth or upon unreasonable use and enjoyment:

> A state of equality as to property is impossible to be maintained, for it is against the laws of our nature; and if it could be reduced to practice, it would place the human race in a state of tasteless enjoyment and stupid inactivity, which would degrade the mind, and destroy the happiness of social life.[118]

Who was right, Blackstone, Locke, or Kent? Or were any of them right? Had Kent bothered to examine the Holy Scriptures carefully, he would have found ample evidence to refute both Blackstone and Locke. As for their first postulate, that God had given the earth and all it contains to mankind in common, neither Genesis 1:28 nor Psalm 116:16 or any other verse in Scripture supports that proposition. Rightfully understood, Genesis 1:28 along with Genesis 1:26, is a grant of authority, not a conveyance of title. True, the language of each verse is in the form of a command-man must "rule"-but the operative word, "rule," is not one that connotes an "immediate gift" as Blackstone contended. Rather, "rule", literally "rule ye" (the command to man as male and female), is not a possession word or an ownership word, but an authority word, meaning to "have dominion, rule, dominate."[119]

As for Psalm 115:16, it must be read in context of the whole of Scripture. It cannot be read in isolation from Genesis 1:26-28, nor from the Genesis account of property ownership as evidenced in the lives of real people.

C. Family Free Enterprise

The grant of authority contained in Genesis 1:28 is not to mankind in general, but to mankind through the family unit. The command to exercise dominion is linked directly to the command for man, male and female, to multiply and replenish the earth. By conferring authority upon the family, God chose the one human institution uniquely suited to meet the terms of the dominion mandate. Given the vastness of the earth and its contents, the mandate could not possibly be fulfilled without the multiplication of human beings through the natural reproductive method prescribed by God. Thus, God placed Adam and Eve in the Garden of Eden, thereby conveying title and ownership to the "first family farm" with the expectation that from this humble beginning with one family the

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116. KENT, *supra* note 86, at 319.

117. Id.

118. Id. at 328.

119. William Gesenius, A HEBREW AND ENGLISH LEXICON OF THE OLD TESTAMENT 921-22 (Francis Brown, et al. ed. & Edward Robinson trans., 1907).

earth and all its contents would be "kept and tilled."[120]

This grant of family authority sets the norm as chronicled by Moses in the book of Genesis. Family ownership begins with Adam and Eve, continues with their offspring and begins again with Noah and his sons, interrupted only by Pharaoh, who obtained all the land and property of his Egyptian subjects, thereby placing them in slavery.[121] Significantly, Jacob and his progeny escaped this enslavement only to be enslaved later by a "Pharaoh who knew not Joseph."[122] By the opening of Exodus we are introduced to this Pharaoh's "final solution" to the Jewish problem - a systematic extermination of all new-born sons.[123] The enslavement of the Israelites began with the taking of their labor and their property but it could only be completed by abolition of the Jewish family units. Providentially, God led the people of Israel out of slavery and into the promised land where property ownership was restored family by family.[124]

This Old Testament normative view of family free enterprise is affirmed propositionally by the writer of Proverbs: "Houses and riches are the inheritance of fathers ...."[125] It is also confirmed by one of the teaching parables wherein Jesus drew upon the family free enterprise system to illustrate a certain basic principle in the kingdom of God. In the parable of the vineyard owner who leased out his vineyard, the right of the son to inherit his father's property is utilized to demonstrate the right of Jesus as the Father's Son to inherit the whole of creation.[126]

This right of a son or other child to inherit the property of the father or parent was considered by Locke, Kent, and other common law authorities to be God-given.[127] This follows from the foundational proposition that God authorized the family through the generations to exercise dominion. But with the right of inheritance comes also the duty to meet the needs of one's parents. Jesus confirmed this by condemning the pharisaical practice of "Corban," *i.e.*, of dedicating property to God but neglecting to honor one's father and mother by meeting their needs in their old age.[128] Paul followed this teaching with one of the most severe rebukes that one can find in his many letters to believers: "But if any provide not for his own, and especially for those of his own house, be bath

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120. *See generally*, Genesis 1:26-28; 2:7-10, 15.

121. *See generally*, Genesis 4; 9:18-20; 13:1-6; 26:12-32; 31: 47:11, 27.

122. Genesis 47:11, 27.

123. Exodus 1:8-16.

124. Numbers 26:1-56; 27:1-11: 33:53-54; *See, e.g.*, Joshua 15:1, 20.

125. Proverbs 19:14.

126. Luke 20:9-16.

127. LOCKE, *supra* note 105, at 98; KENT, *supra* note 86, at "'326. St. George Tucker, Virginia lawyer and professor of law at The College of William and Mary, wrote in a footnote in his edition of Blackstone's COMMENTARIES that he disagreed with Blackstone's view that family inheritance was a matter of societal convention. 3 William Blackstone, COMMENTARIES 10 n* (Philadelphia, William Birch Young & Abraham Small, St. George Tucker ed. 1803).

128. Mark 7:10-13.

denied the faith, and is worse than an infidel."[129] Of course, this passage applies not only to the duty of sons and daughters to aged parents but also to fathers and mothers to their children. Paul illustrates this point with his reminder to the church at Corinth that as their spiritual father, it was his responsibility to meet their needs, not vice versa: "[F]or the children ought not to lay up for the parents, but the parents for the children."[130]

In short, God selected the family as the primary economic unit of society, not the individual, not the state, not the corporation, and not the church. The common law was designed to foster and protect the family, not only through rules protecting private property ownership and facilitating its voluntary transfer, but also through criminal sanctions prohibiting adultery, fornication, sodomy, and bigamy.

Since the Darwinian revolution, however, this understanding of the common law bas deteriorated. In the late 19th century the system of family free enterprise was first eroded by the selfish, individualist capitalist who, invoking Darwin's theory of the survival of the fittest, disclaimed any responsibility for the welfare of the poor and claimed immunity from all state regulation.[131] In reaction to this perverted view of free enterprise and private property came the cry for socialism, or short of that, for redistribution of wealth by the state for the benefit of the less fortunate.[132]

The most extreme reaction to individualistic capitalism came from Karl Marx in his *Communist Manifesto*: "Aboli[sh] ... Private Property .... Aboli[sh] ... the family!"[133] While these communist ideals have never triumphed, these ideas still claim the imaginations of scholars, fuel the visionary schemes of utopian reformers, and undergird various government entitlement programs that have dominated American national polities since the New Deal. With the advent of social security in the 1930's, the God-ordained responsibility of children for the care of their aged and infirm parents has slowly eroded to the point where parents claim with pride that they are not a burden to their children in their old age. This erosion of family responsibility has also created a generational conflict of significant proportion as younger workers pay the bill for an ever escalating social security benefit system that is being exhausted by a retired generation whose life span continues to lengthen.

No longer the cornerstone of economic prosperity, the family has become increasingly viewed as a place for retreat and pleasure away from the work place. With the sexual revolution of the 1960's and 1970's, the family has become even more irrelevant because young people are lured into sexual activity outside of the marriage commitment, which is seen by many experts as the antithesis of

129. 1 Timothy 5:8.

130. 2 Corinthians 12:14.

131. *See*, Richard Hofstadter, SOCIAL DARWINISM IN AMERICAN THOUGHT 3-66 (rev. ed. 1959).

132. *See, e.g.*, Upton Sinclair, THE GOOSE STEP 15-18, 486-40 (rev. ed. 1922).

133. Karl Marx, COMMUNIST MANIFESTO (1848), *reprinted* in THE PORTABLE KARL MARX, at 219, 223 (Eugene Kamenka trans., Viking Press 1983).

pleasure.[134] This change of sexual mores has been accompanied by the systematic failure of the state to enforce the criminal sanctions against adultery, fornication, sodomy, and bigamy. Such laws are considered to be relics of an outmoded "Victorian morality"[135] rather than essential to protect the primary economic unit of society, the family.

Having divorced the family from the economy, America's leaders, both Republican and Democrat, have placed the social issues on the back burner to concentrate on the economic issues. But the issues of abortion and homosexual behavior, to name just two, are keys to the economic future of the nation. Activities designed to destroy America's posterity by ridding her of her so-called "unwanted children," and by protecting the unproductive lifestyle of homosexual couples, are already devastating America's work force, so essential to America's continuing economic prosperity. By elevating a woman's selfishness to choose death for her baby to the level of a constitutional right, America has endorsed the unnatural use of the woman over that ordained by nature.[136] If America elevates the homosexual's right to similar heights, and many of America's leaders are doing everything they can to do just that, then we will see the enactment into law of policies that encourage men to elevate the unnatural use of their bodies over the natural. The Apostle Paul warned the readers in his letter to the church at Rome that this exchange the unnatural for the natural-would introduce an avalanche of ungodly behavior, including covetousness and covenant-breaking.[137]

Respect for the property of others and the keeping of one's promises are foundational moral principles essential to the economic health and prosperity of a nation. The common law protection of the monogamous family reflected a Biblical understanding that family free enterprise protected by the law of private property was the only economic system sanctioned by God. Given this Biblical endorsement of private property ownership through the family, America's founders included "the pursuit of happiness" or "property" along with life and liberty as one of the three major God-given rights to be "secured" by civil government.[138] To secure a right granted by God does not mean that the civil ruler may define what that right is. A God-given right is defined by revelation in nature and in the Holy Scriptures; the duty of the civil ruler is to discover that right and to enact rules that facilitate its exercise and protect it from wrongful acts of others.[139]

Thus, James Kent denied to the civil ruler any authority to enact "sumptuary laws," that is, rules dictating to property owners how they should use and dispose of that property. He also objected to

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134. *See* Melvin Maddocks, *Brave New Marriage*, 230 ATLANTIC MONTHLY 66-69 (1972); see also Harry D. Krause, FAMILY LAW, CASES, COMMENTS, AND QUESTIONS 123-72 (3d ed. 1990).

135. *See* AMERICAN LAW INSTITUTE, MODEL PENAL CODE AND COMMENTARIES Part 2, Vol. 1 at 430 (1980).

136. Romans 1:26; 1 Timothy 2:15.

137. Romans 1:27-32.

138. AMOS, *supra* note 18, at 128-29.

139. *See* 1 BLACKSTONE, *supra* note 12, at *39-43.

any legislative enactment limiting "the extent of the acquisition of property."[140] Such laws, along with policies designed to redistribute the wealth, did not belong to the civil realm, but to "Providence."[141] In drawing this jurisdictional line, Kent endorsed another common law principle, the law that limited civil authority to, duties that are by nature and by Scripture enforceable by civil sanction. It was that law of jurisdiction, well-developed in the common law, that ultimately led to the constitutional protection of freedom of religion in America.

IV. THE COMMON LAW OF CIVIL JURISDICTION

A. Civil Conduct, Not Moral or Faith Conduct

As noted in Section II above, Blackstone, in his COMMENTARIES, defined municipal or civil law as those rules governing "civil" conduct, as contrasted with "moral" and "faith" conduct.[142] In drawing this distinction between different kinds of conduct, Blackstone was simply following a well established common law rule that not all of man's duties were enforceable by the civil ruler. That principle was well-established in those areas of life exclusively governed by the Biblical admonition to love one's neighbor as oneself.[143] Love, rightly understood, must be both unconditional and voluntary. This is clearly what Jesus taught in the parable of the Good Samaritan. The man who came to the aid of the man in need did so without condition, and the man in need had no power or authority to require the other to help him.[144] Likewise, the common law did not sanction any human being for failing to rescue another nor authorize a person in need to sue another for having failed to rescue him.[145]

But this jurisdictional principle was not well-established in the common law when it came to matters of faith, *i.e.*, in those duties owed to God. Thus, Blackstone devoted an entire chapter of his Commentaries to "offenses against God and religion." In this chapter, Blackstone affirmed the common law crimes of apostasy, heresy, reviling the ordinances of the church, blasphemy, witchcraft, Sabbath breaking, and so forth.[146] Blackstone's endorsement of these duties as subject to civil sanction caused him some uneasiness as he acknowledged that certain acts of nonconformity with the rules of the established church of England could very well be matters of "private conscience." Nevertheless, Blackstone allowed only that such non-conforming acts could be "tolerated" so long as they did not disturb the good order of the established church and of society.[147]

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140. KENT, *supra* note 86, at 328-29.

141. Id. at 330.

142. *See supra* notes 50-56 and accompanying text.

143. Matthew 22:39.

144. Luke 10:25-37.

145. *See, e.g.*, *Buch v. Amory Mfg. Co.*, 44 A. 809, 811 (N.H. 1898).

146. 4 BLACKSTONE, *supra* note 46, at *41-65.

147. Id. at *51-53.

In short, Blackstone endorsed the principle of freedom of "faith conduct," but he could not bring himself to the point of endorsing its practice.

B. The Advent of Freedom of Religion

It was not until the eve of the American Revolution that this common law principle of limited civil jurisdiction was applied to matters of religion by any political state. Adopted in 1776, the Virginia Declaration of Rights captured the essence of the principle with the following language:

> That religion, or the duty which we owe to our CREATOR, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men are entitled to free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practice Christian forbearance, love and charity towards each other.[148]

An earlier draft, written by George Mason, had contained the typical language of religious toleration: "that all men should enjoy the fullest Toleration in the Exercise of Religion . . . unpunished and unrestrained . . . unless . . . any Man disturb the Peace, the Happiness or Safety of Society or of Individuals."[149] But this language was rejected and the absolute jurisdictional guarantee of free exercise of religion was inserted. Freedom of religion was to be determined by the nature of the duty, *i.e.*, whether or not it was enforceable only by "reason and conviction" as dictated by the law of the Creator.[150] It could not be balanced away or modified by any societal considerations.

It was James Madison who led his fellow Virginia statesmen to make this significant break with the past. Had he been more successful he would also have included language of disestablishment. That battle would have to be won on another day as it was on January 19, 1786, when the Virginia Assembly passed Thomas Jefferson's *Act for Establishing Religious Freedom*.[151] The operative section of this Act specifically prohibited the civil ruler from levying a tax to support Christian teachers. But Jefferson's preamble to that section, also adopted by the Virginia Assembly, embraced a principle that went beyond that specific prohibition.

Beginning with the observation that Almighty God had created the mind free from all coercive sanctions, even in man's relationship with Him, Jefferson concluded that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and

148. VA. CONST. art. I, §16.

149. George Mason's Proposal for the VIRGINIA DECLARATION OF RIGHTS (June 12, 1776), in JAMES MADISON ON RELIGIOUS LIBERTY, at 51 (Robert S. Alley ed, 1985).

150. James Madison, *Memorial and Remonstrance Against Religious Assessments* (circa June 20, 1785), in JAMES MADISON ON RELIGIOUS LIBERTY, *supra* note 149, at 56.

151. Thomas Jefferson, *An Act for Establishing Religious Freedom* in 12 Hening 84 (1786).

tyrannical."[152] It is sinful because it violates the law of God limiting the authority of the civil ruler: "Render unto Caesar what belongs to Caesar and to God what belongs to God."[153] And it is tyrannical because true liberty is found only when man's law conforms to the law of God. This latter proposition was clearly derived from the teachings of Bracton, the Father of the Common Law, who claimed that there was no king "where will, not law, wields dominion."[154] The former proposition, likewise, stemmed from Bracton's use of Christ as the supreme example of a man with all power and dominion but who nevertheless was committed to obey the law so that He might redeem those who were under the law.[155]

These common law antecedents found in Jefferson's preamble are also evident in James Madison's famous *Memorial and Remonstrance*, written in support of the Act which, in effect, disestablished religion in Virginia. If a man failed to pay his tithe, as he ought, Madison claimed that "it is an offence against God, not against man" for the payment of the tithe was a duty "precedent, both in order of time and in degree of obligation, to the claims of Civil Society."[156] Here, Madison's reliance upon Blackstone's view of the law of nature, *i.e.*, God's will revealed in nature, limits the authority of the human law maker who cannot enact any rule into law contrary to natural revelation. To do so would not create "bad law," but would create a rule that was not law at all.[157]

This philosophical premise enabled Madison to learn from his predecessors, but not to be bound by their practices. For example, John Locke provided a fertile seedbed for true freedom of religion with his arguments in *A Letter Concerning Toleration*. In that letter Locke defined civil authority as extending to the protection of life, health, liberty, and the possession of outward things, property. These interests were protectible by the use of force and coercion because the civil magistrate had been created by the consent of the governed for the very purpose of securing such rights. But the civil jurisdiction was not without limits:

> Now that the whole jurisdiction of the magistrate reaches only to these civil concernments; and that all civil power, right, and dominion, is bounded and confined to the only care of promoting these things; and that it neither can nor ought in any manner to be extended to the salvation of souls ....[158]

Locke did not limit the civil religious immunity to only inward beliefs, but extended it to some acts as well. However, he never broke from the English practice of toleration.

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152. Id.

153. Luke 20:25.

154. BRACTON, *supra* note 3, at 39.

155. *See supra* text accompanying note 3.

156. Madison, *supra* note 150, at 56-57.

157. 1 BLACKSTONE, *supra* note 12, at *70.

158. John Locke, *A Letter Concerning Toleration* (1689), in John W. Yolton, THE LOCKE READER, at 246 (1977).

C. Freedom of Religion and the Law of Revelation

While neither Jefferson nor Madison cited God's revelation in the Holy Scripture, both clearly embraced the Genesis account of creation as the foundation for their views on freedom of religion. While they knew they were departing from the English practice of "toleration" and "establishment" of religion, they believed that by doing so they would be more true to the Common Law jurisdictional principle than those who had gone before them. But their reliance on God's revelation in nature, unaccompanied by explicit justification based upon the Scriptures, meant that the full implications of this new experiment in church and state would not be realized either in their lifetimes or in the next 200 years.

As the great Lord Acton has so clearly stated it, the key to understanding true freedom of religion is found in the teachings and life of Jesus Christ.[159] It was Christ who taught the basic principle: "Render therefore unto Caesar the things which be Caesar's, and unto God the things which be God's."[160] It was also Christ who embraced this principle at his own trial before Pilate when Pilate asked him if He was the King of the Jews. Pilate's question was obviously directed to Jesus to determine if he was guilty of treason, for the Roman Emperor was the King of everyone in the Roman Empire, including the Jews. Jesus replied that He is the King of the Jews, but that His Kingdom "is not of this world;" rather His Kingdom is "truth."[161] In light of this response, Pilate could not and did not find Jesus guilty of treason: "I find in him no fault at all."[162] In effect, Pilate acknowledged that neither he nor the Roman Emperor as civil ruler had any authority over what is truth.

The significance of this jurisdictional limitation on the power of the civil ruler was soon revealed in the life of the early church. In Acts 4 and 5, it is recorded that the church was twice ordered by the ruling religious council of the Jews "not to speak at all nor teach in the name of Jesus."[163] The religious council backed their order with the exercise of civil power first by threatening to imprison the church leaders, Peter and John, and then by beating them.[164] But led by the Holy Spirit to Psalm 2, Peter and John claimed that their authority to teach came from God, not Caesar, so that they could not help but teach what they had heard, for they must obey God, not men, in this matter.[165]

This Biblical heritage affirming the exclusive sovereignty of God over the work of the church is clearly the foundation of America's early formative embracement of a constitutional guarantee of

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159. John Emerich Edward Dalberg Acton, ESSAYS ON FREEDOM AND POWER 81 (1956); see also Herbert W. Titus, *Education, Caesar's or God's: A Constitutional Question of Jurisdiction*, 3 J. CHRISTIAN JURISPRUDENCE 101 (1982).

160. Luke 20:25.

161. John 18:36-37.

162. John 18:33-38.

163. Acts 4:17; 5:28.

164. Acts 4:3, 21; 4:40.

165. Acts 4:19-31; 5:29.

the free exercise of religion. At the heart of that guarantee is the right to choose one's religious faith without fear of civil sanction. Madison put it this way in his Remonstrance: To use civil power as a "means of salvation .... is a contradiction to the Christian [r]eligion itself, for every page of it disavows a dependence upon the powers of this world."[166] Not only did Madison rest his case for freedom of religion on this explicitly Biblical base, he further observed that the Christian religion, not having been invented by men, was not in need of enforcement by men. Indeed, Madison reminded the reader

> that this religion [Christianity] both existed and flourished, not only without the support of human laws, but in spite of every opposition from them, and not only during the period of miraculous aid, but long after it had been left to its own evidence and the ordinary care of Providence.[167]

Finally, Madison returned to the creation theme struck by the text of Virginia's constitutional guarantee, that religion is a duty owed to the Creator, enforceable only by reason and conviction: "[I]t is a contradiction in terms; for a [r]eligion not invented by human policy, must have pre-existed and been supported, before it was established by human policy."[168]

But was Madison's view of freedom of religion limited to religious matters, such as the "means of salvation?" Almost all legal and political scholars have assumed that Madison and Jefferson claimed protection only for man's "religious opinions" under the constitutional guarantee of free exercise of religion. That assumption is clearly false and has given rise to one of the most pernicious infringements upon the rights of conscience in the history of mankind: the system of tax-supported public schools in America.

For nearly one hundred years American education has been dominated by a tax-supported and civilly supervised program. This system has been assumed to be consistent with constitutional guarantees of freedom of religion so long as religious activities are not conducted and religious opinions are n:ot inculcated in the public schools. Because citizens are taxed to support the system, they are inevitably forced to support the teaching of some ideas with which they disagree. As for Bible-believing Christians, they are forced to support a system of education that "constitutionally requires," according to the U.S. Supreme Court, that their ideas be excluded from the classroom dialogue.[169] No one in America would require an atheist or agnostic to pay taxes to support the church or the church school. Yet millions of American Christians are required to pay for an educational program that assumes that there is no God, or that, if He exists, He is irrelevant to history, science, and language. American school children study subjects as if the Author of these subjects does not even exist.

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166. Madison, *supra* note 150, at 57.

167. Id.

168. Id.

169. *See Edwards v. Aguillard*, 482 U.S. 578, 584, 597 (1987).

This was not what Jefferson and Madison had in mind when they endorsed freedom of religion. Jefferson put it most succinctly when he stated "[t]hat to compel a man to furnish contributions of money for the propagation of opinions with which he disbelieves, is sinful and tyrannical."[170] Religion, for Jefferson, embraced all opinions, not just religious ones. Madison agreed. He wrote that the civil magistrate could not be "a competent [j]udge of [r]eligious [truth" and that, therefore, he could not use religion as an engine of civil policy.[171] What is tax-supported education but an "engine" of "civil policy" whereby the public school teacher "inculcates" the "fundamental values necessary to the maintenance of a democratic political system."[172] In fact, this is the very description that has been consistently attached to the role of the public school system by even the most liberal justices of the United States Supreme Court.

Madison's and Jefferson's view of civil immunity for all of the opinions of mankind rests squarely upon Christ's claim that He is the King of truth and that His Kingdom encompasses all of truth, not just matters of salvation. The apostle Paul summarized this foundational principle in his letter to the Colossians: In Christ "are hid all the treasures of wisdom and knowledge."[173] And Paul practiced what he preached as is evidenced by his sermon on Mars Hill in Athens, the intellectual capitol of the Roman Empire. In that brief message Paul spoke of history, philosophy, and the natural sciences, of politics, anthropology, and psychology, and of gerontology, futurology, and theology.[174] All disciplines, all truth, are subject to God's Holy Spirit, immune from the sanctions of human tyrants pretending to exercise civil power.

Jefferson's preamble to his Statute on Religious Freedom echoes Paul's comprehensive understanding of the nature of religion as embodying all of truth. He wrote that the opinions of men are not the "object" of civil government because "our civil rights have no dependence on our religious opinions, anymore than our opinions in physics or geometry."[175] Jefferson claimed that truth would prevail only in an arena free from civil regulation or subsidy. He, therefore, concluded that the civil magistrate could exercise power only after the breaking out of "overt acts against peace and good order."[176] All of this followed from Jefferson's having embraced the same principle of liberty as had Jesus Christ and the early Church, and in words that are unmistakably Biblical:

> Well aware that Almighty God hath created the mind free; that all attempts to influence it by temporal punishments or burdens, or by civil incapacitations, tend only to beget

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170. Jefferson, *supra* note 151, at 84 (emphasis added).

171. *See* Madison, *supra* note 150, at 57.

172. The words are from *Ambach v. Norwick*, 441 U.S. 68, 77 (1979), an opinion written by moderately conservative Justice Lewis Powell, Jr., and they were quoted with approval and without reservation by former Justice William J. Brennan, Jr., in *Board of Education v. Pico*, 457 U.S. 853, 864 (1982).

173. Colossians 2:3.

174. Acts 17:22-31.

175. Jefferson, *supra* note 151, at 84.

176. Id.

> habits of hypocrisy and meanness, and are a departure from the plan of the Holy Author of our religion, who, being Lord both of body and mind, yet chose not to propagate it by coercions on either, as was in His Almighty power to do.[177]

V. CONCLUSION

As evidenced by this opening statement in Jefferson's preamble to his 1786 Statute for Religious Freedom, America's founding fathers embraced a philosophy of law and government explicitly based upon God's revelation in nature and in the Holy Scriptures. This philosophy was deeply rooted in the English common law heritage to which America's founders clung even as they sought independence from the Mother Country. It is a philosophy that served America well in the beginning by establishing both economic liberty upon the common law of private property and political liberty upon a constitutional guarantee of freedom of religion.

These liberties have been put in jeopardy in America in the last 100 years because the nation's leaders and her people have drifted from a Godly heritage of a created order with fixed, uniform and universal rules to a scientific future of a changing technological order with an evolving set of values. This shift in philosophy has ushered America into an age of uncertainty and of escalating costs as legal, political, and economic norms break down. God's revelation offers to the nation a set of "self-evident truths" that, if embraced, will insure to all mankind God-given rights of life, liberty, and the pursuit of happiness.

177. Id.

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