Moses, Blackstone, and the Law of the Land

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JUDICIAL POWER AND THE LAW OF NATURE

Before God revealed the Ten Commandments and the rest of the written law, Moses judged the people of Israel according to the unwritten law of God. The people brought their disputes to Moses and he resolved those disputes, first, by making known "the statutes of God and his laws" and, second, by validating those rules in his capacity as the living prophet or oracle of God. On these two principles Moses, prompted by his father-in-law, Jethro, established a judicial system for the new nation of Israel (Exodus 18:13-26).

On the identical principles, Sir William Blackstone justified the common law judicial system of England. The common law of England, he wrote in his famous *Commentaries,* is an "unwritten law" made known and validated by judges. For Blackstone, judges' opinions were "monuments" and "evidence" of the common law, but they were not the law (W. Blackstone, *Commentaries on the Law of England* 63). Consequently, Blackstone did not include judges in his list of lawmakers *(Id.* at 46-52), but placed judges in a special category as "the depository of the laws; the living oracles ... who are bound by an oath to decide according to the law of the land." *(Id.* at 68).

Upon Blackstone's *Commentaries,* United States Supreme Court Chief Justice John Marshall and other early American jurists built the American legal system. "Judicial power," wrote Chief Justice John Marshall in *Osborn v. The Bank,* 9 Wheat. 738 (1824):

> *as contradistinguished from the power of the laws, has no existence. Courts are mere instruments of the law, and can will nothing .... Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect ... to the will of the law.* (p.866)

Twenty years earlier Justice Marshall had written *Marbury v. Madison,* 1 Cranch. 137 (1803), in which he established the right of the Court to declare the law of the Constitution. In doing so he drew explicitly upon the common law architecture of Blackstone: *it is emphatically the province and the duty of the judicial department to say what the law is.* (p. 177)

From before Marshall until well into the twentieth century, American legal scholars, judges, lawyers, and statesmen echoed Blackstone's views of law and of the judicial function. Alexander Hamilton provided Marshall with ammunition for his *Marbury* opinion in *The Federalist, No. 78:*

> *The interpretation of laws is the proper and peculiar province of the courts. The Constitution is, in fact, and must be regarded by the judges, as fundamental law.*

Joseph Story defended Marshall's views in his *Commentaries on the Constitution of the United States* (1833). Thirty-five years later, Michigan law professor Thomas M. Cooley assumed those views were still valid in his *Treatise on the Constitutional Limitations* 90-92 (1868).

In 1919, President Calvin Coolidge wrote: *Men do not make laws. They do but discover them. Laws must be justified by something more than the will of the majority. They must rest on the eternal foundation of righteousness. (Have Faith in Massachusetts* 4-5).

In 1936, Justice Owen J. Roberts wrote these words:

> *The Constitution is the supreme law of the land ordained and established by the people. All legislation must conform to the principles it lays down. When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate the judicial branch of the Government has only one duty, - to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. U.S. v. Butler,* 297 U.S. 1, 62-63 (1936).

JUDICIAL POWER AND SOCIAL POLICY

Today, hardly anyone takes former President Coolidge seriously. Justice Roberts has become a familiar object of ridicule in the constitutional law classrooms in law schools throughout the nation. While Chief Justice Marshall is treated with more respect, his views are considered by most legal scholars as no longer sufficient to support the modern legal system of the twentieth century. As for Blackstone, he has been virtually ignored for the past 50 years by law teachers, law students and lawyers, alike.

Why is this so? University of Virginia law professor G. Edward White has, I think, offered the best explanation:

> *Marshall's principal justification for independent judicial review was that judges did not make law, but merely "found" and "declared" it.*
>
> *Marshall's argument assumed that "law" was a universal body of principles, that those principles were "discoverable" by technically skilled persons, such as judges, that in "discovering," judges were merely stating "what the law was." The only power judges had, under Marshall's view, was their professional power: Their technical expertise enabled them to be better "finders" of law than other persons.*
>
> *Marshall thus solved the problem of unchecked lawmaking power in the judiciary by assuming that lawmaking power in the judiciary was a contradiction in terms. But that solution is no longer regarded as acceptable. Law is no longer seen as a finite body of universal principles, and judges are no longer seen as persons who merely find and declare those principles. Twentieth-century perspectives on the Court start with two different assumptions. Law is seen as a fluid mix of established principles and changing social values, and judges, in constitutional law and elsewhere, are seen as persons who make law by creating new principles, often in response to changes in social values.* "Reflections on the Role of the Supreme Court: the Contemporary Debate and the 'Lessons' of History", 63 *Judicature* 162, 163-164 (1979).

Professor White has not considered whether the twentieth century assumptions about law are correct. To him it would be unthinkable to return to Marshall's view that law is "a finite body of universal principles;" therefore, it would be equally unthinkable to return to Blackstone's view that a judge does not "make" law, but only "finds" it.

Have we no choice but to agree with Professor White? Must we abandon the assumptions of Marshall and Blackstone? Not only do I not think so, but I believe that we dare not do so.

Sir William Blackstone was a godly man. He believed that the fear of the Lord was the beginning of wisdom. Thus, he opened his *Commentaries* with a careful analysis of the law of God as revealed in the Holy Bible. First, he defined law "in its most general and comprehensive sense" as "a rule of action which is prescribed by some superior, and which the inferior is bound to obey." To illustrate this definition Blackstone examined the physical laws of the universe:

> *... 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.* (*Commentaries* 38).

From this example of the law governing "inactive matter," Blackstone turned his attention to vegetable and animal life:

> *We shall find them still governed by laws; more numerous, indeed, but equally fixed and invariable. The whole progress of plants, from the seed to the root, and from thence to seed again; the method of animal nutrition, digestion, secretion, 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. (Ibid).*

For Blackstone, the next and final step was inevitable:

> *Man, considered as a creature, must necessarily be subject to the laws of his Creator, for he is entirely a dependent being.... And, consequently, as man depends absolutely upon his Maker for everything, 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. 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 free-will to conduct himself in all parts of life, he laid down certain immutable laws of human nature.... These are the eternal, immutable laws of good and evil. (Id.* at 39).

From this conclusion Blackstone drew a straight line to law in every human society:

> *This law of nature being coeval with mankind, and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe, in all countries, and at all time: 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*. (*Id.* at 40).

Blackstone, as had Moses before him, knew that there could be no law in England without God. In addition, he agreed with Moses that the judge had a single task: to make known the laws of the realm. He reinforced this limited role by analogizing the task of the judge with that of the scientist. As the scientist has probed the universe to discover and to state the physical laws of the universe so

the judge must probe man and his society to discover and to state the laws of the realm. A judge could no more invent the laws governing murder, for example, than could the scientist invent or make up the law of gravity. Both types of law existed independently of man's mind and could be discovered only by the grace of God.

Blackstone applied this analytical pattern to statutes, customs, and maxims that were not required by God. As God's law governed the universe (whatever man might believe or say), so a statute or immemorial custom governed conduct (whatever a judge might believe or say). Both the statute and the custom were law; the judge had authority only to state the rule and apply it.

Nevertheless, God's law provided for Blackstone and for the 18th century English judge inerrant guidelines to distinguish between those rules commanded by God for all societies and those rules that were a matter of indifference to Him. As to the latter, the judge had no authority but to accept the rules laid down by the lawmaking authorities; but as to the former the judge could refuse to recognize any human rule contrary to God's law as not law at all. If he worked within this biblical framework, a judge could confidently assert that he did not make law, nor did he determine cases according to his private judgment. Rather, he was, in fact, the "depository" or "oracle" of the law. (*Id.* at 53-54, 68-69).

JUDICIAL POWER AND EVOLUTIONARY PRECEPTS

Modern legal scholars have rejected these views of Blackstone because they have rejected his faith in God and his reliance upon the Genesis account of the creation and origin of man and the universe. In 1952 Fred Cahill, professor of political science at Yale University, uncovered the soil in which these modem views have been planted:

> *The appearance in the mid-nineteenth century of the concept of evolution was an event of transcending importance to the development of American jurisprudence ....*
>
> *The alteration in outlook as applied to the law ultimately contributed heavily to the attacks on the accepted theory of the judicial function ....*
>
> *What this involved might be summarized as a shift ... from the rationalistic, deductive pattern, characteristic of the pre-Darwinian period, to the empirical, evolutionary approach that is followed in many areas of social studies today. The substitution of the method of biology for what was essentially that of eighteenth-century physics reflected a change in the attitude of the social observer.* (*Judical Legislation,* 22-23).

In science, evolution remains an unproved theory. But in law it has become an incontestable presupposition. According to Professor Cahill, evolutionary thinking about law and about the role of the judiciary has come because of a change of "attitude," not because of scientific proof. For example, Professor White in the quote above has not stated that law is, in fact, "a fluid mix of established principles and changing social values." Rather, he has concluded that law is now "seen" or "conceived of as a repository of shifting social values rather than as a set of permanent universal principles." Nor has he claimed that judges are, in fact, "persons who make law by creating new principles, often in response to changes in social values." Rather, he has concluded that the "art of

judging" is "seen" or "linked not so much to a persuasive articulation of 'first principles' as to a persuasive articulation of deeply felt and widely shared values."

In short, Professor White has rejected Blackstone's views not because they have been proved false, but because he prefers a new view of law and of the role of judges whether it has been proved or not. He desires to "see" the law independent from God and from His law. But he and those like him do so at their peril and at the peril of the nation.

Blackstone, in a footnote, warned his readers of the dangers of departing from the law of Nature or from the will of God:

> *The 'Law of Nature' is a supreme, invariable, and uncontrollable rule of conduct to all men; ... because its violation is avenged by natural punishments, which necessarily flow from the constitution of things and are as fixed and inevitable as the order of nature ....* (*Commentaries* p. 39).

As the scientist is bound by the law of gravity or the laws of thermodynamics, so is the judge bound by the law of the land: God's laws of crimes, property, contract, and tort. God's law even serves as the benchmark for determining whether man has freedom to adopt the rule of conduct of his choice.

JUDICIAL POWER AND MERE POLITICS

Having rejected the Judeo-Christian heritage of Blackstone, modern legal scholars have replaced law with politics. It is no wonder that two journalists have done a Watergate-type expose of the United States Supreme Court when that Court continues to impose its own value judgments in the name of constitutional law, as it did in the case of *Roe v. Wade*, 410 U.S. 113 (1973), where it struck down the state's historic anti-abortion laws:

> *The clerks in most chambers were surprised to see the Justices, particularly Blackmun, so openly brokering their decision like a group of legislators. There was a certain reasonableness to the draft, some of them thought, but it derived more from medical and social policy than from constitutional law. There was something embarrassing and dishonest about this whole process. It left the Court claiming that the Constitution drew certain lines at trimesters and viability. The Court was going to make medical policy and force it on the states. As a practical matter, it was not a bad solution. As a constitutional matter, it was absurd. The draft was referred to by some clerks as Harry's abortion* (B. Woodward and S. Armstrong, *The Brethren,* 233).

After *Roe v. Wade,* we can no longer speak with confidence, as Chief Justice Marshall did, that we are a government of laws and not of men.

But even more is at stake as Blackstone's footnote warns. A nation faces serious consequences when its lawyers turn away from God and act as if they may make into law any rule that they desire. Many legal scholars, lawyers, and judges assert that adults have a legal, even constitutional, right to engage in any consensual sexual activity so long as it is done in private. They claim, for example, that criminal laws prohibiting homosexuality are "victimless crimes."

The Bible teaches quite the opposite. In Leviticus Chapter 18:22, 24-25, Moses included among the itemized prohibitions considered essential to the survival of the new nation of Israel, the one prohibiting homosexual conduct:

> *thou shalt not lie with mankind, as with womankind .... Defile not ye yourselves in any of these things: for in all these the nations are defiled which I cast out before you. And the land is defiled: therefore I do visit the iniquity thereof upon it, and the land itself vomiteth out her inhabitants*.

This is the "law of the land" endorsed by the Magna Carta and incorporated into America's constitutions by various words, including "law of the land" and "due process of law." It is the "law of the land" of Blackstone's *Commentaries*. It is the "law of the land" of our founding fathers and of Blackstone because they took seriously Bible passages such as the account of the first murder in the history of mankind:

> *And the Lord said unto Cain, Where is Abel thy brother? And he said, I know not: Am I my brother's keeper? And he said, What hast thou done? The voice of thy brother's blood crieth unto me from the ground.* (Genesis 4:9-10).

Human opinion, no matter how well-reasoned, could not be in the 18th Century legal world, "the law of the land." That place was reserved for God's eternal decrees because God was honored as the Sovereign Creator of heaven and earth.

Today, however, most of America's leading legal scholars, judges, and lawyers live by novel legal theories that rest upon human assumptions that will be disproved only when it is too late. Would an aircraft builder dare construct an airplane upon the principles of time and chance that have become the hallmarks of scientific evolutionary speculations? No. He knows that if he disregards the fixed laws of gravity and other physical laws of the universe he would build a plane that could not fly or, if it could fly, that would bring certain destruction to its crew and passengers. How dare we build a legal system in disregard of the laws of God for such efforts will as certainly lead to the destruction of this nation and this people!

CONCLUSION

The Holy Bible and Blackstone's *Commentaries* stand as witnesses against the legal experimentation that is taking place across America. No matter how these works may be ridiculed or ignored in the law school classroom and the courtrooms in this nation, Christian lawyers, judges, law teachers, and law students ought to heed these words of the great prophet, Isaiah:

> *The Lord God hath given me a tongue of the learned, that I should know how to speak a word in season to him that is weary .... The Lord God hath opened mine ear and I was not rebellious, neither turned away back. I gave my back to the smiters and my cheeks to them that plucked off the hair. I hid not my face from shame and spitting. For the Lord God will help me; therefore, I have set my face like a flint, and I know that I shall not be ashamed.* (Isaiah 50:4-7).

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