

A Biblical View of the Common Law



In the beginning God created the heavens and the earth. The earth was without form and void; and darkness was on the face of the deep. And the Spirit of God was hovering (vibrating) over the face of the waters. – Genesis 1:1-2

God is the creator of all Law



God's Nature is in the Common Law

- God created physical motion in creation
- God put His law in the conscience – Ro. 2:15
- God's unwritten law is common to all – Ge. 4:10
 - The ground “cried out” for Abel's justice
 - Cain was subject to God Himself as Common Law
 - Numbers 35:33 – *no atonement but justice*
 - Ro. 5:13 – *sin is not imputed without written law* so not all sins are to be civil crimes; or *under common grace not every sin is necessarily illegal*
- The Common Law pre-dates and is above all legislatures, executives and judges

God puts His law in the Conscience

Ro. 2:15 – *show the work of the law written in their hearts*

Westminster Confession of Faith, chp. 20 (1643) *God alone is Lord of the conscience, and has left it free from the doctrines and commandments of men, which are, in any thing, contrary to His Word.*

Blackstone (1755) *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... Upon these two foundations, the law of nature and the law of revelation, depend all human laws; that is to say, no human laws should be suffered to contradict these.*

R. J. Rushdoony on the Nature of Law

Law is in every culture religious in origin. Because law governs man and society, because it establishes and declares the meaning of justice and righteousness, law is inescapably religious, in that it establishes in practical fashion the ultimate concerns of a culture. Accordingly, a fundamental and necessary premise in any and every study of law must be, first, a recognition of this religious nature of law. Second, it must be recognized that in any culture the source of law is the god of that society. If law has its source in man's reason, then reason is the god of that society. If the source is an oligarchy, or in a court, senate, or ruler, then that source is the god of that system.

Civil law punishes actions; *for not every sin is necessarily illegal*

- God created civil government to punish actions *for only God can judge the heart* – Genesis 9:6
- Cain was not punished with banishment for anger, but for murder (Ge. 4:9-15)
- Common Law is jurisdictional – *Criminal intent, unaccompanied by a criminal act (actus reus), is not punishable.* (A Treatise on the Law of Crimes, Clark and Marshall)
- *Common Law respects jurisdictions of the heart, separation of powers and self-government*

Biblical Foundations of Common Law

- (1) Individuals have authority directly from God to govern themselves – Ge. 1-2:7
- (2) Law has always been in the mind of God from eternity past – Ge. 2:15-25
- (3) People and public officials are under the same common law – Ge. 9:6
- (4) Ultimate accountability of all civil magistrates are to God and the people (Ro. 13:1-7)
- (5) Common law demands an independent, appellate jurisdiction of justice (Ex. 18)

Biblical Foundations of Common Law

- (6) Common law requires public officials to be subject to removal (2nd Sam. 23:2-3)
- (7) Everyone entitled to due process of law with clear jurisdictions (Deut. 17:7; 19:21; Ex. 21:24-25)
- (8) Trial by jury is the “foremost defining quality of the common law.” (Deut. 17:6-7)
- (9) Scriptures undergird and preserve the practice of the common law. (Ge. 1-4, 1st Tim. 3:15)
- (10) The common law’s precepts and habits of mind are revealed in its practice. (Exodus 21...)

The Practice of the Common Law

- Romans 13:1-4 – Civil magistrates are *ministers*
 - The word “minister” is the word for “deacon”
 - Justice is to be administered according to God’s law
 - The goal is *constitutional liberty* – (Lev. 19:15)
- Ro. 13:5 – God alone is Lord of the conscience
 - Civil government is to protect the conscience
 - Freedom of conscience is the source of liberty
- Ro. 13:3; Acts 5:29 – Positive commands contrary to God’s Word should be resisted
- When Israel chose a King (1st Samuel 8), she slowly switched from common law to civil law

Common Law vs. Civil Law

Traditional Practices

Excellence of the Common Law, Brent Winters, 2008, page 23

Common Law tradition

- *Conformity (oath) to the Law – to God*
- *Focus on due process for justice in each case*
- *Basic principles bring a proper application*
- *Steady and consistent application of principle*

Civil Law tradition

- *Conformity (oath) to the State – to men*
- *Focus on arriving at a desired outcome*
- *Legal precedent brings universal application*
- *Legislators blown by political winds*

Herb Titus on the Common Law

'While the Roman Law was a deathbed convert to Christianity, the common law was a cradle Christian.' 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,' is remembered for... the first systematic treatment of the English common law, Bracton laid down an unmistakably Christian philosophy of law.

Herb Titus on Common Law...

Bracton wrote, *The king himself... ought not to be under man but under God, and under the law, because the law makes the king... For 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... for 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.*

The Common Law Jury

- Scriptural origins of the Common Law Jury
 - God's Law – fundamental law and statute equity
 - Dt. 17:6-7 – two or three witnesses – innocence
 - Mt. 18:15-17 – two or three witnesses settle disputes
 - 1st Cor. 6:1-8 – set the “least esteemed” to judge
- Christianity begins with the Individual
 - John 16:7-10 – Christ's Kingdom – rule from within
 - Common Law the essence of interposition (Winters)
 - Dt. 17:6-7 – *Writ of Habeas Corpus* – body present
 - Mt. 5:33-34; Dt. 19:15 – the *oath* to God is critical...
 - Ro. 13:1-7 – *enumerated power* – from God by consent

Winters on essence of Common Law being *Interposition*

The Jury's simple and unexplained veto of the law and its judge-instructed application, case by case, is the steady and sure-footed defense against the tyranny of over-zealous prosecutors, the domination of dictators, the malignancy of political correctness, the mania of majorities, and the arrogation, ignorance, and misapplied knowledge of priests, scholars, legislators, and judges. - (Excellence of the Common Law: Compared and Contrasted with Civil Law, Armstrong and Winters Foundation, 2008, page 480)

Jury Trials Model Interposition

GOD



INDIVIDUAL

conscience

Horizontal Interposition

Church and State



Legislative, Judicial and
Executive



Treaties

Trying the FACTS

*Is the Defendant
guilty or
innocent?*

Trying the LAW

*Is the law
legitimate and
was it
constitutionally
applied?*

Vertical Interposition

Local



State



Federal



International

Steps of Biblical Interposition

- Matthew 5:38-41 – avoid personal offenses
- Matthew 18:15-18 - Appeal for resolution
- Matthew 10:14 - Boycott – economic resistance
- Acts 25:11 - Civil interposition – by lower magistrate, resistance must be *under authority*
- Matthew 10:23 - Flee – avoid greater conflict
- Acts 5:29 - Disobey – commanded to disobey God's Word; could result in martyrdom
- Luke 22:36 - Forceful resistance – *under authority*

St. Patrick and the *Liber* (450 AD)

- Patrick was sold as a slave at 16, returned as a missionary to Ireland decades later...
- Started 300 churches, baptized 120,000 converts
- But he didn't just evangelize, he *discipled*
- *Wherever Patrick established a church he was believed to have left a copy of "the books of the Law an the Books of the Gospel." The Liber ex Lege Moisi is the only work surviving from Celtic sources which answers to the description, "books of the law."*
- The Law and the Gospel – from Galatia?
- First known leader to condemn slavery as evil!

Common Law changes Culture (Winters)

God's Word never threatened the Anglo-Saxons' folk-law tradition because political unity was not the direct message of the gospel, but its indirect outcome. God's Word aims foremost at direct and individual overthrow of false personal desires, not direct and collective overthrow of false social and political institutions. Then as now, the Christian message stressed personal humility and obedience to the Scriptures, not open threats to Anglo-Saxon political structures. Unity then resulted as individuals devoted themselves to the same written Word of Christ.

King Alfred's England (893 AD) acknowledges the Common Law

The judgments (doms, later spelt dooms) of the ancient Anglo-Saxon folk assembly called the moot were never imperial decrees, as from a great to a lesser, but were findings, as that of the Jury of one's neighbors... divine affirmations of an ancient custom discerned afresh and applied anew; an expression of law's application that had existed from eternity past... (Winters)

Sam Adams on Magna Charta

Our writer... tells us that formerly the right of taxation was in the King only. I should have been glad if he had pointed us to that time. We know that kings – even English kings – have lost their crowns and their heads for assuming such a right. 'Tis true this strange claim has occasioned much contention, and it always will as long as the people understand the great charter of nature upon which Magna Charta itself is founded, - No man can take another's property from him without his consent. This is the law of nature; and a violation of it is the same thing, whether it be done by one man who is called a king, or by five hundred of another denomination – Boston Gazette – January 9, 1769

The Legacy of Magna Charta

- Framers' view of Magna Charta
 - Restoring ancient English liberties – colonial era
 - The fountain of English liberty – revolution era
 - Resting on higher (natural) Law – constitution era
- American Liberty the child of English Liberty
 - “English colonies more English than England”
 - Framers went further back than Magna Charta
 - Declaration rested on natural/divine law
 - Constitution repeated due process found in MC
 - Over 100 Supreme Court decisions reference it

Why doesn't the U.S. Constitution “mandate” Common Law?

- It is an enumerated or express powers document
- The Constitutional covenant was a dual one...
 - Neither confederated nor consolidated
 - The “way in” to a covenant is the “way out”
- The Dilemma of 1811 and 1860 – secession...
- From about 1880 onward, the common law has been covered over with “incorporation of U.S.”, “civil rights and civil law tradition”, all without reference to the common (or higher) law

James Madison to Edward Everett – August 28, 1830

...in the event of a failure of every constitutional resort (avoiding congressional consolidation or state confederation; as well as an amendment), and an accumulation of usurpations and abuses rendering passive obedience and non-resistance a greater evil, than resistance and revolution, there can remain but one resort, the last of all, an appeal from the canceled obligations of the constitutional compact, to original rights and the law of self-preservation

In Summary...

- Common law is the unwritten laws of God in both creation and the conscience
- All law is religious – the question is which one?
- Common law is in the heart of the individual
- Scripture defines the scope of the law – justice
- Common law is distinct from “civil” law (state)
- The Common Law Jury tries both “law and fact”
- Common Law is the essence of interposition
- It was recognized in Ireland, Britain and America
- God in Christ is hope – *His law will not change!*