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A Law above the Law: Christian Roots of the English Common Law

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Abstract

The English common law has an incredibly rich Christian heritage. England's most celebrated jurists – including the likes of Blackstone, Coke and Fortescue – often drew heavily from their Christian faith when expounding and developing what are now well established principles and doctrines of the common law. This article demonstrates how Christian values and principles underpin the English common law, and how they still remain valid to the interpretation of the common law even to the present day. Finally, the article explains why Christianity has always been an important element of the common law, and why the Christian foundations of the common law should not be ignored or neglected.

Bio
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A Law above the Law:
Christian Roots of the English Common Law

Introduction

Common law means a legal system based upon the English legal system; a mixture of customary law, judge-made law and parliamentary law. At least until the early 19th century, the common law was heavily influenced by Christian philosophy. This philosophy argues that there is a divine reason for the existence of fundamental laws, and that such laws are superior to human-made legislation, thus reflecting universal and unchangeable principles by which everyone should live. This assumption was expressed, among other things, in the *Magna Carta* of 1215, a charter which guaranteed the basic rights and privileges to the English barons against the king. Professor Aroney explains Christianity's ideological influence upon the Magna Carta:

> From [the time of Alfred] the kings of England have traditionally recognised their submission to God. At their coronations they take an oath before the Archbishop acknowledging the Law of God as the standard of justice, and the rights of the church. They are also urged to do justice under God and to govern God's people fairly. Magna Carta was a development of these themes.[1]

As can be seen, Christian philosophy has been central to the origins and development of the common law since its conception. In the early stages of its development, and at least until the early nineteenth century, the common law rested almost entirely upon a religious conception that looked to higher or natural laws as the primary basis for judicial decisions. In those days Christianity formed an integral part of the theory of English law and civil government.[2] As the late John Wu pointed out, 'while the Roman law was a deathbed convert to Christianity, the common law was a cradle Christian'.[3] Stephen C. Perks explains that this influence was a necessary result of English society:

> The emergence of the English common law system occurred in an age and in a culture steeped in Christian theology, Christian morals, and a Christian understanding of the meaning and value of life. The influence of the Christian world-view was determinative for social institutions as well as individual lives. [4]

In this sense, Sir William Holdsworth merely explained the traditional view of the close relationship between Christianity and English law, when he declared: 'Christianity is part and parcel of the common law of England, and therefore is to be protected by it; now whatever strikes at the very root of Christianity tends manifestly

[1] N Aroney, 'Society's Salt' (2008) 608 *Australian Presbyterian* 3, p 6.
[2] D Mitchell, 'Religious Tolerance Laws Are Not Only a Challenge to our Freedom of Speech but Also to the Under-Girding of our Historic Legal System'. Paper presented at the seminar 'Religious Tolerance Laws: A Challenge to Our Freedom of Speech?' Christian Legal Society of Victoria, Melbourne, 2 June 2005.
[3] J C H Wu, *Fountain of Justice: A Study in the Natural Law* (New York/NY: Sheed and Ward, 1955), p 65.
[4] Ibid 43. Page 43, Perks text

to dissolution of civil government.'[5] Holdsworth did not make his terminology up out of thin air. In a 1649 case, for instance, an English court had declared that 'the law of England is the law of God' and 'the law of God is the law of England'.[6] In a 1676 case, Sir Matthew Hale stated: 'Christianity is parcel of the laws of England.'[7] Chief Justice Raymond paraphrased Hale with his statement that 'Christianity in general is parcel of the common law of England'.[8] Sir William Blackstone matter-of-factly remarked that 'the Christian religion … is a part of the law of the land'.[9] Lord Hale's statement therefore achieved an almost axiomatic status, and retained this status throughout the 19th century, so that Holdsworth could state that the 'maxim would, from the earliest times, have been accepted as almost self-evident by English lawyers'.[10]

Sir Henry de Bracton (1210–1268)

Among the English jurists who were instrumental in the development and refinement of the common law was Sir Henry de Bracton. His exceptional contributions even earned him the deserving title of 'Father of the Common Law'.[11] In Bracton's *De Legibus et Consuetudinibus Angliae* one finds the very first systematic treatment of the common law. Nowadays the term jurisprudence is commonly defined as 'the science of law'. However, initially the actual meaning of the term is far richer and more encompassing that such a vague generalisation. Thus, in Bracton's book, jurisprudence is rather described as 'the science of the just and unjust', whilst the proper application of the law is declared to comprise 'a just sanction ordering virtue and prohibiting its opposite'. His most celebrated statement, of course, is that the English monarch ought to be 'under God and the law'. 'The king himself', Bracton famously declared:

> … 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 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.[12]

These are probably the most famous and important words ever pronounced in the whole history of the common law. As Plucknett put it, 'here was an antidote to that

[5] W S Holdsworth, *History of English Law*, vol 8 (3rd ed, London/UK: Methuen, 1932) pp 410–16.
[6] Quoted in S Banner, *When Christianity was Part of the Common Law* (1998) 16 *Law and History Review* 16, pp 27 & 29.
[7] Ibid; see also S B Epstein, 'Rethinking the Constitutionality of Ceremonial Deism' (1996) 96 *Columbia Law Review* 2083, pp 2102–3.
[8] *Rex v Woolston*, 94 Eng Rep 655 (KB 1729).
[9] W Blackstone, *Commentaries on the Laws of England* [1765], Ch 2.
[10] Quoted in Banner, above note 7, pp 29–30.
[11] H W Titus, 'God's Revelation: Foundation for the Common Law' in H W House (ed), *The Christian and American Law: Christianity's Impact on America's Founding Documents and Future Directions* (Grand Rapids/MI: Kregel Publications, 1998) p 13.
[12] H De Bracton, *On the Laws and Customs of England — Vol 2* (c 1235), Harvard University Press, Cambridge/MA, 1968, p 25.

State absolutism which the later Tudors and the Stuarts attempted'.[13] Such words of Bracton were famously evoked by Sir Edward Coke during his celebrated dispute with King James over the superiority of the common law, in the seventeenth century. King James asserted that, as the sovereign monarch, he personified the law. Coke dared to disagree, thus reminding the king that, as Bracton had once observed, 'the king shall be under God and the law, for the law makes him king'. In reflecting upon this remarkable fact in English legal history, Lord Denning, the most celebrated English judge of the 20th century, commented:

> Those words of Bracton quoted by Coke, 'The King is under no man, save under God and the law' epitomise in one sentence the great contribution made by the common lawyers to the Constitution of England. They *(the common lawyers)* insisted that the executive power in the law was under the law. In insisting upon this they were really insisting on the Christian principles *(of the common law).* If we forget these principles, where shall we finish? You have only to look at the totalitarian systems of government to see what happens. The society is primary, not the person. The citizen exists for the State, not the State for the citizen. The rulers are not under God and the law. They are a law unto themselves. All law, all courts are simply part of the State machine. The freedom of the individual, as we know it, no longer exists. It is against that terrible despotism, that overwhelming domination of human life that Christianity has protested with all the energy at its command.[14]

Sir John Fortescue (1394–1476)

The sentiments of Bracton concerning the nature of laws were embraced in the following century by Sir John Fortescue, who was the Chancellor to King Henry VI and Chief Justice of the King's Bench. Deeply recommended for his great wisdom, gravity and uprightness, in his book *De Laudibus Legum Angliae*, Fortescue declares that 'the Law of Nature sprang from God alone, is subject to his Law alone, and under Him and with Him governs the whole world, whence it comes that all other laws are its servants'.[15] Considered to be a masterly vindication of the laws of England, Fortescue also argues in *De Laudibus* that England is a constitutional monarchy in which the king is under the law and never above the law. The king would have no power to change the basic laws of the realm at pleasure. What is more, Fortescue further explains how God would have instilled in every human being a natural sense of liberty, so that tyranny is described by him as any attempt on the part of civil authorities to replace natural freedom by a condition of servitude that only satisfies the interests of oppressive rulers. 'For law', Fortescue concluded:

> … is necessarily adjudged cruel if it increases servitude and diminishes freedom, for which human nature always craves. For servitude was introduced by men for vicious purposes. But freedom was instilled into

[13] T F T Plucknett, *A Concise History of the Common Law* (5th ed., Boston/MA: Little, Brown and Co., 1956) p 263.
[14] The Rt Hon Sir Alfred (later Lord) Denning, *The Changing Law* (London/UK: Stevens & Sons, 1953) pp 117-8.
[15] D W Hanson, *From Kingdom to Commonwealth: The Development of Civic Consciousness in English Political Thought* (Cambridge/MA: Harvard University Press, 1970) p 220.

> human nature by God. Hence freedom taken away from men always desires to return, as is always the case when natural liberty is denied. So he who does not favour liberty is to be deemed impious and cruel.[16]

Christopher St Germain (1460–1541)

Following the Reformation tradition in England, the jurist Christopher St Germain played a substantial role in the development of equity practice by the English lawyers. St Germain conceived the first systematic attempt to establish a doctrine of precedent that would define how the Chancellor ought to decide a given suit.[17] In his seminal treatise *Doctor and Student* (1523), St Germain undertakes a rather detailed analysis of the relationship between law and conscience, which 'makes no appeal to a secular conscience: the whole dialogue is premised on true religion as the foundation of understanding law and equity'.[18] Conscience is hereby understood in terms of the natural ability of individuals 'to be open to the call of truth that is objective, universal, and the same for all who can and must seek it … It is in this relationship with common and objective truth that conscience finds its dignity'.[19]

There are three types of law according to St Germain: the will of the creator as made known by the law of nature or reason; the written law of God; and the 'law of man'. The law of reason is that portion of the eternal law which is known by all humans through natural understanding.[20] The written law of God, by contrast, St Germain defines as the revealed law derived from the Bible and ordaining the human soul to salvation. Like Aristotle, he contended that the 'law of man' is based on the necessity of peace as well as on the need of coordination in society. And yet, he informed that any law which is contrary to the law of God is 'not righteous or obligatory.'[21] Curiously, St Germain believed it to be rather 'inconceivable' that the English Parliament would ever dare to legislate against the laws of God.[22] As he explained: 'It is not to presume that so many noble principles and their counsel, nor the lords and the nobles of the realm, nor yet the Commons gathered in the said Parliament, would from time to time run into so great offence of conscience as is the breaking of the law of God'.[23] In sum, St Germain believed in the wisdom and ability of the Parliament, which represented 'the collective wisdom of the entire realm and Church of England', to both accept and recognise the supremacy of God's laws above any human law, including laws enacted by the English Parliament.[24]

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[16] J Fortescue, *De Laudibus Legum Anglie (c 1470),* Cambridge University Press, Cambridge, 1949, p 105.
[17] T A O Endicott, 'The Conscience of the King: Christopher St German and Thomas More and the Development of English Equity' (1989) 47(2) *University of Toronto Faculty of Law Review* 549, p 558.
[18] ibid, p 561.
[19] C E Rice, *50 Questions on the Natural Law: What It Is and Why We Need It*, Ignatius Press, San Francisco/CA, 1999, p 343.
[20] C St Germain, *Doctor and Student* (1528), p 17 quoted in Endicott, above note 20, p 549.
[21] St Germain, p 29 quoted in Endicott, above note 20, p 560.
[22] St Germain, *Doctor and Student* (1528) quoted in J Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (Oxford/UK: Clarendon Press, 1999) p 71.
[23] St Germain, *Treatise Concerning the Power of the Clergy and the Laws of the Realm* (1534/5) quoted in Goldsworthy, above n.25, p 71.
[24] ibid.

Richard Hooker (1554–1600)

Another key figure in the development of the common law, the Anglican theologian Richard Hooker set the stage for the debates that raged in the seventeenth century about the nature, sources, and purposes of the English law.[25] John Locke drew heavily on Hooker's jurisprudence when he developed his arguments in *Second Treatise*, in the 1680s.[26] According to Hooker, true law invariably rests on three basic ideas: reason, morality and the natural sociability of human beings. Although he believed that crimes such as murder, rape and theft were eternal violations of the natural law, Hooker notwithstanding reminded that that the particular type of punishment to be applied for each of these crimes of an universal nature, must be left to the positive law of each individual state. Implicit in Hooker's legal reasoning is the understanding that society is always bound by certain principles of natural law that are both eternal and inviolable, although 'its subsidiary laws may vary according to the needs of particular times and places'.[27]

Sir Edward Coke (1552–1643)

Sir Edward Coke is the renowned author of the 12-volume *History of English Law.* His contributions to the development of the common law are said to be incalculable. Indeed, Coke has been called 'Shakespeare of the Common Law', and Sir William Holdsworth once wrote the following about him: 'What Shakespeare has been to literature, what Bacon has been to philosophy, what the translators of the Authorised Version of the Bible have been to religion, Coke has been to the public and private laws of England'.[28] According to his biographer Allen Boyer:

> Wherever the common law has been applied, Coke's influence has been monumental … He is the earliest judge whose decisions are still routinely cited by practicing lawyers, the jurisprudence to whose writings one turns for a statement of what the common law held on any given topic. His discussion of a phrase from Magna Carta, *nisi legem terrae*, is one of the earliest commentaries to give a deeply constitutional resonance to the phrase 'due process of law'. For his defense of liberties and property rights, for his assertion of judicial independence, for his active, careful role in adjusting law to the demands of litigants and the interests of society, few figures have deserved more honor.[29]

On jurisprudential matters Coke relied quite heavily on Christian philosophy to both defend and explain the common law. Coke believed that the true nature of law is to be always fair and reasonable. The basic test of reasonableness, he contended, lies in the ability of each and particular law to withstand the test of time. Indeed, his own description of the common law as the product of 'artificial reason' implies that laws should be endowed with internal logic, coherence, structure and proper functioning.

[25] H J Berman, *Law and Revolution II: The Impact of the Protestant Reformations on the Western Legal Tradition* (Cambridge/MA: Harvard University Press, 2003), p 234.
[26] ibid.
[27] ibid.
[28] W Holdsworth, *Some Makers of English Law*, Cambridge University Press, Cambridge, 1938, p 132.
[29] A D Boyer, 'Introduction' in A D Boyer, *Law, Liberty and Parliament: The Selected Essays on the Writings of Sir Edward Coke*, Liberty Fund, Indianapolis/In, 2004, pp xiii–xiv.

What Coke meant by 'artificial reason' is therefore the delicate combination of natural reason, which is inherent in the realisation of the law, combined with the specific type of legal reasoning which has been developed across time by all learned lawyers.[30]

History informs that Coke famously angered King James I by declaring that even the king himself ought to be 'under God and the law'. The argument was viewed as treasonable by a monarch who claimed that he, as the king, personified the law. But Coke remained resolute and he cited Lord Bracton to remind James that 'the King shall not be under man, but under God and the Law'. In sum, the same Christian principle expressed in 13th century was evoked by Coke in order to govern the common law over 300 years later.[31] This momentous encounter of Lord Coke with King James left an unprecedented mark on the development of the common law, and, more largely, on the development of the rule of law in the West.

Although revering the antiquity of the common law, as well as the 'immemorial character' of its principles, Coke did not deny either the existence or the applicability of God's eternal laws. On the contrary, Coke saw the divine law as incorporated into the English legal system through the acknowledgement of biblical principles, so that the basic rights and freedoms of the English subject (the right of self-defence, the right to impartial judgment, etc.) were regarded by him as being inviolable and never to be repealed by positive law. That Coke relied on this particular understanding to both defend and legitimise the common law is made evident in numerous of his judicial rulings. In *Calvin's Case* (1608), for example, he argued that God's law to be inherent in human nature and so as superior to the positive law.[32] And as Chief Justice of the Court of Common Pleas, Coke declared:

> 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; and this is Lex Aeterna, the moral law, called also the Law of Nature … and written with the finger of God in the heart of man.[33]

The strong reliance of Coke on natural law principles was particularly manifested in *Dr Bonham's Case* (1608), another of his most celebrated court rulings. There Coke appears to appeal to God's law even as a justification for the invalidation of parliamentary legislation.[34] To elucidate why the London College of Physicians should not be entitled under an Act of Parliament to punish Mr Bonham, for having practised medicine without a professional licence, Coke stated:

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[30] Berman, above note 28, p 260.

[31] J A Brauch, *Is Higher Law Common Law? Readings on the Influence of Christian Thought in Anglo-American Law*, William S Hein, Buffalo/NY, 1999, p 34. Lord Denning, one of the most celebrated English judges of the 20th century, commented: 'Those words of Bracton quoted by Coke, 'The King is under no man, save under God and the law' epitomise in one sentence the great contribution made by the common lawyers to the Constitution of England. They (the common lawyers) insisted that the executive power in the law was under the law. In insisting upon this they were really insisting on the Christian principles (of the common law). If we forget these principles, where shall we finish? You have only to look at the totalitarian systems of government to see what happens. The society is primary, not the person. The citizen exists for the State, not the State for the citizen. The rulers are not under God and the law. They are a law unto themselves. All law, all courts are simply part of the State machine. The freedom of the individual, as we know it, no longer exists' (A Denning, *The Changing Law*, Stevens, London, 1953, pp 117–18).

[32] Eng Re. 377 [KB 1610].

[33] ibid.

[34] 8 Co Rep 114.

> And it appears in our books, that in many cases the common law will controul acts of Parliament, and sometimes adjudge them to be utterly void; for when an act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it and adjudge such act to be void.[35]

The view expressed by Coke regarding the judicial function is derived from his general impression about the institution's antiquity, its integrity in the civil polity, and its responsibility for the protection and supremacy of the rule of law.[36] Being a judge himself, Coke thought that judges like him ought not to create laws, but rather to declare or enunciate the existing ones insofar as these laws are hidden and waiting to be discovered; so that the judicial function is essentially for him a matter of legal discovery, not making of the law. According to Coke, 'legal change' by the judiciary should serve no other end but that of revealing (and clarifying) the law.[37] 'New adjudication', he added, 'does not make new law, but makes plain the old; adjudication is the dictum of law, and by adjudication law which was before hidden is newly revealed'.[38]

The idea that the world is governed by invariable laws that dictate how societies ought to be governed and structured, was an accepted principle in Coke's time. Indeed, all the leading English jurists of the time shared with Coke the common belief in eternal laws that operate in as fixed a manner as the physical laws of nature. Their jurisprudential approach, as Professor Berman explained, 'must be understood as an integral part of their total philosophy, including their religious philosophy and their philosophy of the natural sciences'.[39] Hence, in *Third Reports* Coke argued that the rule of law ultimately resides in God's wisdom as displayed through his creative handwork in nature:

> For as in nature we see the infinite distinction of things proceed from some unity, as many flowers from one root, many rivers from one fountain, many arteries in the body of man from one heart, many veins from one liver, and many sinews from the brain: so without question *Lex orta est cum mente divina*, and this admirable unity and consent in such diversity of things, proceeds only from God the fountain and founder of all good laws and constitutions.[40]

John Selden (1584–1640)

John Selden worked very closely with Coke in the draft of the 1628 Petition of Right. For such participation they were both put into prison in the Tower of London.[41] The Petition of Right, a declaration by Parliament in the run-up to the English Civil War, set out the basic liberties of the English subject that even the king himself as monarch was prohibited from legally infringing. Selden was a legal scholar of ancient laws. And yet, he did not deny, but rather affirmed, the existence of the natural law

[35] ibid.
[36] See T G Barnes, 'Introduction to Coke's "Commentary on Littleton"' in Boyer, above note 32, p 12.
[37] ibid, p 23.
[38] 10 Co Rep 42.
[39] Berman, above note 28, p 263.
[40] E Coke, *Third Reports*, 3, cii.
[41] Berman, above note 28, p 246.

and its condition as the main source of legality.[42] On the more practical side, however, Selden was particularly interested in stressing the contractual nature of legal obligations, and the role of conscience in fulfilling such obligations. His most distinctive contribution to the common law was the interpretation of the contractual character of moral obligations generally: 'It is not only breach of a prohibition that is offensive to God, and punishable by him, but also breach of a covenant. Indeed, for Selden the most important rule of natural law appears to have been the rule that contracts are to be kept, *pacta sunt servanda*, which he applied not only to divine contracts but also to human contracts generally'.[43]

Sir Matthew Hale (1609–1676)

Lord Coke also exercised a great influence on the jurisprudential work of Sir Matthew Hale. His *History of the Common Law* provided the first comprehensive portrayal of the historical origins and growth of the common law. And Hale's book remained 'the standard book on early English legal history until the late nineteenth century'.[44] It is a book said to epitomise 'the philosophy which dominated English legal thought in the late seventeenth, eighteenth, and early nineteenth centuries', and, as such, 'it still plays an important part in the intellectual outlook of many English (and American) practicing lawyers and judges'.[45]

Hale was not just a legal historian, but the writer of numerous tracts in the fields of mathematics, natural science, philosophy and theology. Pioneered by him and consummated a century later by Blackstone, the modern methodological method of the common law bears a remarkable resemblance to scientific methodology. 'He was greatly influenced by his knowledge of the exact and natural sciences, on which he wrote several long tracts. He was well acquainted with Boyle and Newton and with some of the founders of the Royal Society of London'.[46] Such devotion to the systematic study of the natural sciences and theology led him to accept not only universal values but also a distinct body of natural laws universally binding on every society. Accordingly, criminal offences such as homicide, rape and theft were deemed by him eternal violations of the natural law, even if no positive law was prescribed against them.[47]

Naturally, Hale fully acknowledged that the level and degree of punishment to be applied for any such crimes had to be determined by positive laws. These must be left for the most part, if not altogether, to the positive law of each particular state.[48] And yet, Hale also comments that, so far as possible, these positive laws pertaining to criminal sanction must be studied and analysed according to their historical evolution.[49] Berman summarises Hale's jurisprudence:

[42] ibid, p 247.
[43] ibid.
[44] ibid, p 250.
[45] ibid, p 251.
[46] Berman, above note 28, p 467, fn 60.
[47] ibid, p 254.
[48] ibid.
[49] ibid, p 254.

> The divine law is found in those biblical precepts that are intended to have universal application, such as the Ten Commandments. Natural law includes such divine law as well as other legal principles and institutions that are in fact common to all nations. Divine law and natural law are binding on all rulers. Positive law is distinct from natural law in that it is subject to the discretion of the lawgiver, although the wise lawgiver will act according to reason and will do what is socially useful under the historical circumstances.[50]

Sir William Blackstone (1723–1780)

The natural law foundation of the common law is said to have received its full exposition through the influential work of Sir William Blackstone. Blackstone delivered the first series of lectures on the common law ever presented at an English university, at Oxford in 1753. His *Commentaries on the Laws of England (1765–1768)* is broadly perceived as 'the most celebrated law book in the English language', and praised by many as 'the first accessible, authoritative, and comprehensive guide to the complexities of the common law'.[51] Thomas Jefferson described it as 'lucid in arrangement, correct in its manner, classical in style, and rightfully taking its place by the side of Justinian's Institutes'.

Blackstone was 'a committed advocate of material and moral improvement'.[52] He saw himself as a sort of common law's Newton, 'transforming darkness into light'.[53] Hence Blackstone employed the language of Newtonian physics to describe the functioning of England's legal and political institutions. For Blackstone, the King, the Lords, spiritual and temporal, and the House of Commons formed 'a mutual check upon each other … Like three distinct powers in mechanics, they jointly impel the machine of government in a direction different from what either acting by itself would have done but at the same time in a direction partaking of each and formed out of all'. Newtonian science also inspired Blackstone to formulate his famous definition of the nature of laws in general:

> Law, in its most general and comprehensive sense signifies a rule of action; and is applied indiscriminately to all kinds of action, whether animate or inanimate, rational or irrational. Thus we say, the laws of motion, of gravitation, of optics, or mechanics, as well as the laws of nature and of nations. And it is that 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. And, to descend from the greatest operations to the smallest, when a workman forms a clock, or other piece of mechanism, he

[50] ibid.
[51] See A W Alschuler, 'Rediscovering Blackstone' (1996) 145 *University of Pennsylvania Law Review* 1, p 8.
[52] W Prest, *William Blackstone: Law and Letters in the Eighteenth Century*, Oxford University Press, Oxford, 2008, p 308.
[53] ibid., p 60.

> establishes at his own pleasure certain arbitrary laws for its direction; as that the hand shall describe a given space in a given time; to which law as long as the work conforms, so long as it continues in perfection, and answers the end of its formation.[54]

In *Commentaries* Blackstone contends that the common law is founded on the basis of both the natural and the revealed law: 'On these two foundations, the law of nature and the law of revelation depends all human laws; that is to say, no human law should be suffered to contradict these.'[55] In this context, Blackstone, the great advocate of parliamentary sovereignty, writes favourably about the natural law being always superior to the positive law:

> Natural law, being coeval 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.[56]

Blackstone's statement that the natural law is 'dictated by God Himself'[57] echoed the sentiments of his predecessors. His definition of the natural law as conveyed in his *Commentaries* (the most revered and influential legal text in America during the 18th and 19th centuries) was heavily relied upon when adapting the English common law example to the American situation. Blackstone's portrayal of the natural law as connected to God and derived from the nature of all things created by God, basically reveals the philosophical foundations of American constitutionalism. Indeed, the whole understanding of natural law by the American founding fathers virtually echoes Blackstone's own understanding of the subject. As Wilfred Prest points out:

> Blackstone's clearly-stated emphasis on the authority of the law of nature and the absolute rights of individuals was of particular importance in formulating and defending the case for armed resistance to King George and his parliament … The Commentaries thus became and remained the basis of US legal education, moulding American legal thought and practice throughout the nineteenth century and beyond.[58]

According to Albert Alschuler:

> Blackstone taught American Revolutionaries their rights, helped inspire the Declaration of Independence, influenced the deliberations of the Constitutional Convention, articulated a sense of providence like the one that touched Abraham Lincoln, and instructed the children, grandchildren, and great-great grandchildren of his initial American readers on the virtues of the English common law.[59]

The acceptance of natural law was then mirrored in the American judiciary, with many judges placing reliance on Blackstone's definition when adjudicating legal

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[54] Blackstone, above note 8, Ch 2.
[55] J Eidsmoe, 'Rediscovering the Biblical Roots of the American Constitutional Republic' in H W House (ed), *The Christian and American Law: Christianity's Impact on America's Founding Documents and Future Directions* (Grand Rapids/MI: Kregel Publications, 1998) p 90.
[56] Blackstone, above note 8, p 39.
[57] ibid, p 41.
[58] Prest, above note 51, p 292.
[59] Alschuler, above note 50, p 2.

matters during the 19th century.[60] Within this historical context, the concept of natural law was openly acknowledged and advocated by Joseph Story, the first Dane Professor of Law at Harvard University and Associate Justice of the United States Supreme Court, who linked natural law to the rights of conscience, which 'are given by God, and cannot be encroached upon by human authority, without a criminal disobedience of the precepts of natural, as well as revealed religion'.[61]

Why does it Matter?

As can be seen, the English common law was largely inspired by Christian ideals, with the moral convictions of judges and legislators resulting in enduring legal principles. The English common law was the basis of the legal and political structures in both Australia and the United States. Above all, Christianity was viewed as a fundamental part of English law at the times the English settled first the U.S. and then Australia. As such, the leading early settlers and founders of these younger nations embraced this religious heritage, as we shall see. And while the Australian legal system cannot lay claim to the historical depth of America and England, it too was built on solid foundations derived from Christian philosophy. These foundations were largely inherited through the country's reception of the English common law, in addition to the adoption of the American system of federalism.

The fundamental values of the English legal tradition were exemplified and formulated by Christianity, not only as a theory but as a way of life and feeling: as a religion, in short. This religious identity resulted in an enviable political environment whereby the citizens could take their legal rights seriously, for instance, by considering these rights God-given and not government-created. They would also find in the law-abiding nature of Christianity a justification for respecting principles and institutions of the rule of law, and primarily as a matter of high moral obligation.

Although the most significant common law principles are drawn from the principles of Christianity, during the second half of the nineteenth century a considerable shift occurred. Judges and lawyers came to regard the Christian foundations of the common law as no longer relevant. As the judicial elite began to accept the belief that humans have evolved through a natural process of adaptation and change, they then automatically assumed that society's moral standards and codes of behavior might undergo an evolutionary process as well. Of course, when the tenets of evolutionary theory are applied to matters of justice and legality, then the biblical foundations of the common law are eroded and undermined, meaning therefore that the moral basis of the common law as a system of judicial precedents ceases to rely on objective standards that are objective and universal, so as to embrace instead the subjectivity and contingency of personal opinions of judges and lawmakers. Charles Colson and Nancy Pearcey explain:

> The idea that human (or positive) law must reflect a higher law was seriously challenged in the latter part of the nineteenth century – especially after the work of Charles Darwin. His theory of evolution implied

[60] ibid.

[61] J Story, *Commentaries on the Constitution of the United States* (Boston/MA: Little, Brown and Co, 1833) p 1399.

> that there is no created moral order that functions as the basis for law; rather, life is the result of a process of trial and error, with new structures being preserved if they help the organism get what it needs to survive. This new view, appearing to help the imprimatur of science, seemed to suggest that truth itself is found by a process of trial and error – the "true" idea being the one that works best at getting the results desired.[62]

Naturally, if no appeal to objective truth is permitted, then truth becomes relative and the judicial elite is elevated to the position of being the supreme authority on matters of law and morality, of right and wrong. But it is not safe, however, to assume that the rule of law will necessarily subsist in such post-Christian legal environment, one in which the faith and doctrine that gave birth to the common-law system has been abandoned. The evidence of history and the testimony of current events oppose such assumptions. This sentiment is reflected by Lord Devlin, who served on England's High Court of Justice during the 1950s and 1960s. Lord Devlin proposed that 'no society has yet solved the problem of how to teach morality without religion'[63]. What can be taken away is that, according to Devlin, there is an inextricable link between religion, morality and the law.

In this sense, when life is subject to no order or personal restraint, freedom becomes a mere licence to do as one pleases. Such distinction was commonly made by the American Founding Fathers as well as classical liberal theorists such as John Locke. By "liberty" they meant those freedoms which people ought to possess. "License", by contrast, refers to those freedoms which people ought not to have, and thus those freedoms which are lawfully constrained.[64] Ultimately, wrote John H. Hallowell, 'freedom conceived as license leads to anarchy, and anarchy manifests itself in political tyranny'. [65] Indeed, as Plato put it five centuries before Christ, the citizens will become so insensitive 'that they resent the slightest application of control as intolerable tyranny, and in their resolve to have no master they end by disregarding even the law, written or unwritten'.[66]

[62] C Colson and N Pearcey, *How Now Shall We Live?* (Wheaton; Ill: Tyndale House, 1999) pp 403-4.
[63] Lord Devlin, 'Morals and the Criminal Law', available at http://faculty.mc3.edu/barmstro/devlin.html
[64] R E Barnett, *The Structure of Liberty: Justice and The Rule of Law* (Oxford/UK: Oxford University Press, 1998), p 2.
[65] J H Hallowell, *The Moral Foundation of Democracy* (Indianapolis/IN: Liberty Fund, 2007), p 102.
[66] Plato, *Republic* (London/UK: Oxford University Press, 1945), p 289.

Conclusion

The English common law owes much to the influence of Christian natural law theory. This legal system was originated and largely influenced by the moral convictions of lawyers, philosophers and politicians who believed in the existence of a higher law reflecting enduring principles of freedom, justice and morality. It is impossible therefore to underestimate the extent to which the common law developed and assumed new forms as a result of the use of such concepts as 'natural law', 'natural right' and 'natural justice'.[67] Above all, the common law tradition is inextricably connected to this particular way of thinking about law and justice. To ignore this fact results in a diminished understanding of the common law and the principles that underpin it. Accordingly, the ongoing divorce of the common law from its own Christian foundations will only bring disaster to the legal system. It will bring further confusion and lack of objectivity regarding to the interpretation and application of the law, and simply because our 'secular' courts have now basically lost the only objective basis they once had for effectively upholding the rule of law, even against the government if necessary.

[67] J H Abraham, *Origins and Growth of Sociology* (London/UK: Penguin Books, 1973), p 26.