

# **Biblical Principles of Law**

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## TABLE OF CONTENTS

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Ch. 1 - Law and Justice .....	1
Ch. 2 - Jurisdiction and Authority .....	13
Ch. 3 - Equality and Mankind .....	26
Ch. 4 - Fault and Liability .....	38
Ch. 5 - Vow and Contract .....	57
Ch. 6 - Dominion and Property .....	75
Ch. 7 - Restitution and Punishment .....	97

## CHAPTER 1

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# Law and Justice

At the conclusion of the book of Ecclesiastes, the reader, having been exposed to the vanity of men's philosophies of life, is given one simple message: "Fear God, and keep His commandments: For this is the whole duty of man."<sup>1</sup> Beginning with the latter part of the nineteenth century and continuing at a faster pace in the 1980's, a steady parade of legal scholars, judges, lawyers, and an ever-increasing vanguard of their fellow citizens in the Christian West, have ignored this wise biblical counsel. "Professing themselves to be wise," they have "become fools" by exchanging a heritage of a revealed law-order created by God, and accepted by their Christian forefathers, for an imaginary political power game invented by man.

This deal - a trade of law for politics - has brought the once-Christian West to the brink of destruction. Instead of prosperity and freedom, security and liberty, nation after nation in Europe and in the Americas teeters between totalitarian rule and anarchical chaos. In the United States, for example, the church and other voluntary associations find themselves increasingly forced into homogenous social patterns dictated by the Internal Revenue Service and other federal state agencies. At the same time, repeal of traditional laws protecting society from sexual promiscuity has ushered in a cacophony of movements from the so-called "gay liberationists" to "incest insisters," each of which is committed to its own sexual preference agenda.

In such an age of confusion and conflict, God's call upon His people to teach all nations the commandments of His Son<sup>2</sup> must include the principles necessary to reconstruct God's law-order for the nations. That call, like any rebuilding effort, must begin with the very foundations of law. Not surprisingly, God has revealed those foundations in the very first book of the Holy Scriptures.

In the beginning when God created the heaven and the earth, "the earth was without form, and void; and darkness was upon the face of the deep."<sup>3</sup> Within six days God imposed order upon His creation and established man as His vice-regent over the entire earth and its inhabitants. During this period, God embedded His creation with the rules by which man was to exercise the dominion that God had given him.

God made these rules - this law-order - knowable to man from the beginning, even before He revealed His law to Moses. Thus, Paul wrote to the Christians at Rome:

[T]hat which may be known of God is manifest in . . . [all men]; for God hath shewed it

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1. Ecclesiastes 12:13.
  2. Matthew 28:20.
  3. Genesis 1:1-2.

unto them. For the *invisible things* of him from the creation of the world are clearly seen, being understood by the things that are made, even his eternal power and Godhead . . .<sup>4</sup>

Moreover, God's law order comprehended His entire creation. Not one area, physical or spiritual, was left uncovered as Paul reminded the Christians at Colosse:

For by him [Christ] were all things created, that are in heaven, and that are in earth, *visible and invisible*, whether they be thrones, or dominions, or principalities, or powers: all things were created by him, and for him: And he is before all things, and by him all things consist.<sup>5</sup>

While man has never seen, heard, touched, smelled, nor tasted God's invisible laws, he has observed their effects through the blessings resulting from man's obedience and the curses from disobedience. For example, God so created the land that man has experienced throughout history the blessings of protecting human life, and the curses of taking that life. God's judgment upon Cain for having murdered his brother rested upon the testimony of the earth: "the voice of thy brother's blood crieth unto me from the ground."<sup>6</sup> Moreover, God's punishment of Cain for that murder came through that same earth:

And now art thou cursed from the earth, which hath opened her mouth to receive thy brother's blood from thy hand; when thou tillest the ground it shall not henceforth yield unto thee her strength; a fugitive and a vagabond shalt thou be in the earth.<sup>7</sup>

What happened to Cain has continued to happen throughout history to every murderer: Man killers have become fugitives and wanderers unable to exercise the dominion authority that God has given them. Moreover, that same fate has befallen nations that have failed to obey God's command to and covenant with Noah in Genesis 9:6: "Whoso sheddeth man's blood, by man shall his blood be shed: for in the image of God made he man."

God affirmed this law to Moses with unmistakable clarity:

[Y]e shall take no satisfaction for the life of a murderer, which is guilty of death: but he shall be surely put to death . . . So ye shall not pollute the land wherein ye are: for blood it defileth the land: and the land cannot be cleansed of the blood that is shed therein, but by the blood of him that shed it.<sup>8</sup>

Yet Israel ignored this law and lost its place in the family of nations:

They . . . shed innocent blood, even the blood of their sons and of their daughters, whom

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4. Romans 1:19-20.  
5. Colossians 1:16-17.  
6. Genesis 4:10.  
7. Genesis 4:11-12.  
8. Numbers 35:31,33.

they sacrificed to the idols of Canaan: And the land was polluted with blood . . . Therefore was the wrath of the Lord kindled . . . And He gave them into the hand of the heathen; and they that hated them ruled over them.<sup>9</sup>

Through Israel's failure to honor God's law protecting innocent blood, all nations on earth have been warned that if they refuse to impose capital punishment upon murderers they do so at their peril. As God cursed the earth and expelled the people of Israel from the promised land,<sup>10</sup> He will impose that same judgment on others.

In the past two or three decades, nation after nation has deliberately chosen to defy God's law protecting innocent blood by encouraging and practicing abortion and, on an ever increasing scale, infanticide and euthanasia. But as Paul wrote to the Christians at Galatia: "Be not deceived; God is not mocked: For whatsoever a man soweth, that shall he also reap."<sup>11</sup> The law of the land that cursed Cain and spewed out Israel has not changed. To the contrary, as Jesus Christ has reminded us: "Till heaven and earth pass, one jot or one tittle shall in no wise pass from the law, till all be fulfilled."<sup>12</sup>

## GOD'S LAW FOR ALL NATIONS

In the book of Deuteronomy, God revealed to Moses that Israel's future lay in its choice of law-orders. Israel and her people were promised life and happiness if they obeyed the law of God but death and curses if they disobeyed. And God recorded this revelation in "heaven and earth" not only for the benefit of Israel, herself, but for all nations.<sup>13</sup> Yet men and nations have ignored this record almost without exception.

One outstanding exception was the United States of America during its first 200 years, from the early part of the 17th century to the early part of the 19th century. When the first Europeans came to America, they justified their settlements under Christ's Great Commission. Every colonial charter gave as the primary reason for coming to the new world the "propagating of Christian Religion to . . . People, [who] as yet live in Darkness and miserable Ignorance of the true Knowledge and Worship of God, and may in time bring . . . [such People] to human Civility, and to a settled and quiet Government."<sup>14</sup>

This claim not only established the legitimacy of their religious purpose under the law of God, but the legitimacy of their colonial purpose under God's law for the nations. As Israel laid claim to the land of Canaan under God's Old Testament decree,<sup>15</sup> so Christians laid claim to America under God's New Testament command:

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9. Psalm 106:38,40-41.

10. 2 Chronicles 34:24-25.

11. Galatians 6:7.

12. Matthew 5:18.

13. Deuteronomy 30:15-29; Psalm 147:19-20.

14. The First Charter of Virginia, in R. Perry, ed., *SOURCES OF OUR LIBERTIES* (1962), 39, also H.W. Titus, "The Colonial Charters: Seedbed for a Christian Nation" (unpublished manuscript).

15. Joshua 1:3-4.

All power [authority] is given unto me [Christ] in heaven and in earth. Go ye therefore, and teach all nations . . . teaching them to observe all things whatsoever that I have commanded you . . .<sup>16</sup>

Having established the legitimacy of the colonial enterprise upon this law of God, America's revolutionary leaders, a century later, relied upon that same law to justify their decision to separate from the mother country and to become an independent nation:

When, in the course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume, among the powers of the earth, the separate and equal station to which the laws of nature and of nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes that impel them to separation.

The "laws of nature and of nature's God" were familiar 18th century terms that referred to the "will of the Creator" as revealed in nature and in the Holy Scriptures.<sup>17</sup>

Not only did the United States justify its becoming a legitimate member of the family of nations upon the law of God, as had Israel, each state and the federal union justified their legal and political structures upon the covenant law that God revealed through Israel in her choice to be ruled by a king. While the people of Israel demanded a king "like all the other nations,"<sup>18</sup> God in His mercy gave her a covenant king under God's law:

Then Samuel told the people the manner of the kingdom, and wrote it in a book, and laid it up before the Lord.<sup>19</sup>

Beginning with the Mayflower Compact in 1620 and, continuing through the revolutionary war, the American statesmen adopted the covenant form of government by written charters and constitutions containing the God-given framework and limits for the exercise of civil authority. While America's Old Testament roots have been widely ignored in recent years, they were gratefully acknowledged in her early history as the following quote from David Hoffman's 1846 *COURSE ON LAW STUDY* attests:

The Bible . . . affords the only authentic history of the origin and multiplication of mankind; and by exhibiting the actual manner in which society was generated, and communities formed, offers the best theory of the social compact. These remarks apply of course chiefly to those portions of the Bible connected with the origin and polity of the Jews.

Not only did America's constitutional commitments link her to Israel and to God's law, but each

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16. Matthew 28:18-20.

17. H.W. Titus, "The Christian Legacy of America's Declaration of Independence" (unpublished manuscript).

18. 1 Samuel 8:5.

19. 1 Samuel 10:25.

new state sought to submit her citizens' daily lives to God's law through the English common law. Jesse Root, the first reporter of court decisions in Connecticut, heralded the new nation's Common law as having been "derived from the law of nature and of revelation - those rules and maxims of immutable truth and justice, which arise from the eternal fitness of things. . . ."20 Even Joseph Story, while a Unitarian at heart, was a Trinitarian at law: "There never has been a period, in which the Common Law did not recognize Christianity as lying at its foundation."21

With such a Biblical heritage, Christians have been given a foundation for reconstruction not only of America's legal system, but of the legal systems of all nations. The task then is to rediscover God's common law for the nations and to proclaim it to a dying world:

See, I have set before thee this day life and good, and death and evil; In that I command thee this day to love the Lord thy God, to walk in his ways, and to keep his commandments and his statutes and his judgments, that thou mayest live and multiply: and the Lord thy God shall bless thee in the land whither thou goest to possess it.<sup>22</sup>

### **LAW: GOD CREATED, NOT MAN INVENTED**

At the heart of the common law was a Biblical definition of law. One of its great expositors, Sir William Blackstone, discovered the meaning of law in the book of Genesis. In chapter II of his *COMMENTARIES ON THE LAW OF ENGLAND*, he noted that God, as the Creator of the heavens and the earth and of all living creatures, created the rules of action that all creation was bound to obey.

First, God created the physical world and subjected that world to rules that governed its action. For example, on the fourth day God created the sun "to rule the day" and the moon and stars "to rule the night."<sup>23</sup> Moreover, God revealed to Job that He had created all such rules before man ever existed:

"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 earth?"<sup>24</sup>

Yet, through the ages, God has allowed man to discover His physical laws as He did when Sir Isaac Newton discovered in 1684 the law of gravitation. That law, in turn, reflected the truth revealed by God in Genesis 1 that the movement of physical objects on earth was regulated in relation to other physical objects in the universe.

Second, God created plant and animal life. And, as was true of the physical inanimate creation, God subjected this life to rules of action that it was bound to obey. For example, on the third day

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20. P. Miller, ed., *LEGAL MIND IN AMERICA* (1962), 33.

21. J. Story, "1829 Inaugural Discourse as Dane Professor of Law in Harvard University," *Id.*, at 178.

22. Deuteronomy 30:15-16.

23. Genesis 1:16; Psalm 136:8,9.

24. Job 38:4-5, 33.

God created each plant and each tree bearing seed after his kind and on the fifth and sixth days God created each animal bearing forth "after his kind."<sup>25</sup> Once again God revealed to Job that the laws governing life, such as the law of gestation, were created before man existed:

"Knowest thou the time when the wild goats of the rock bring forth? Or canst thou mark when the hinds do calve? Canst thou number the months that they fulfill? Or knowest thou the time when they bring forth?"<sup>26</sup>

Yet, as has been the case with the inanimate physical world, God has opened to man opportunities to discover his law of gestation, nutrition, growth, and other biological activities. Indeed, man's discoveries have affirmed God's law that each plant, each tree, and each animal reproduces after his kind.

Finally, God created man. While God did create man to reproduce after "his kind," He, also, created man specially in His own image. Thus, God subjected man not only to the laws governing His animate and inanimate creation, God also subjected man - as the bearer of His image - to laws which reflected God's will and intellect. Because God created man along with everything else to be entirely dependent upon Him, God required man to conform to His will.<sup>27</sup> Blackstone and his contemporaries called this "will of the maker . . . the law of nature."

From the beginning God made it clear that He had created a law-order especially addressed to man's unique nature. For example, in Genesis 1, God commanded man to do good: to multiply and to subdue the earth and its creatures.<sup>28</sup> In Genesis 2, God commanded man not to do evil: "[O]f the tree of the knowledge of good and evil, thou shalt not eat of it: for in the day that thou eatest thereof thou shalt surely die."<sup>29</sup> He commanded no other creature concerning good and evil, because He had created no other creature like man.

The book of Genesis, then, has established the first essential element of a Biblical definition of law, namely, that it is a rule of action created by God by which God's creation is governed. Man did not invent law as modern day legal positivists have contended. To the contrary, man has by God's grace discovered the laws of gravitation, the laws of gestation, and the laws of human society. Moreover, man has not found law inherent in an eternal universe as modern day natural law theorists have assumed. Instead, God created the law governing His creation at the same time that He created all things; and, like that created world, that law-order has both a beginning and an end.<sup>30</sup> Without the sun to govern the day and the moon to govern the night, there will be no law of gravitation governing the new physical universe. With Christ as the light to all of that universe's human

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25. Genesis 1:11-13 and 20-25.

26. Job 39:1-2.

27. Colossians 1:16-17; *Cf.* John 1:1-4.

28. Genesis 1:26-28.

29. Genesis 2:17.

30. Chapter 21 of the book of Revelation records: "And I saw a new heaven and a new earth, for the first heaven and the first earth were passed away . . . And I John saw the holy city, saw Jerusalem, coming down from God out of heaven . . . And the city had no need of the sun, neither of the moon, to shine in it, and the Lamb is the light thereof. And the nations of them which are saved shall walk in the light of it . . ." Rev. 21:1-2, 23-24.

inhabitants, there will be no "law of nature" governing the new man. Rather, God's new creation will walk in the light as He is in the light in which there is no darkness at all.<sup>31</sup>

### **LAW: GOD REVEALED, NOT MAN REASONED**

God has not only created Law, He has revealed that law to man. In Matthew 16:6, Jesus Christ warned His disciples to "beware of the leaven of the Pharisees and of the Sadducees." Matthew devoted this entire chapter to Christ's exposure of the limitations of human reason. The Lord Christ taught that the empirical observations of man, unaided by God's revelation, could never uncover the truths of God. To demonstrate this proposition, Christ conducted a "Gallup poll:" "Whom do men say that I the Son of Man am?" And they said, "Some say thou art John the Baptist: some Elias; and others, Jeremias, or one of the prophets."<sup>32</sup> Not until Peter suddenly exclaimed: "Thou art the Christ, the Son of the living God," was the truth known. Christ, then, identified the unmistakable source of that truth: "Blessed art thou, Simon Barjona; for flesh and blood hath not revealed it unto thee, but my Father which is in heaven."<sup>33</sup>

The early scholars and practitioners of the common law accepted Christ's teaching in Matthew 16 and sought God's revelation in nature and in His Holy Scriptures to discover God's precepts for man. Indeed, the phrase "law of nature" meant simply the will of God as it has been revealed by God in His creation.<sup>34</sup> The Psalmist David linked the Laws of God to God's revelation through nature with these words:

The heavens declare the glory of God; and the firmament sheweth his handiwork. Day unto day uttereth speech, and night unto night sheweth knowledge. There is no speech nor language, where their voice is not heard. Their line is gone out through all the earth, and their words to the end of the world . . . The law of the Lord is perfect.<sup>35</sup>

Moreover, Moses, before God revealed His written law in the Ten Commandments, applied the law of God to the disputes brought before him as judge:

"[T]he people come unto me to enquire of God: When they have a matter, they come unto me; and I judge between one and another, and I do make them know the statutes of God, and his laws."<sup>36</sup>

Not only did God's leaders know God's law by revelation through nature, but all men by faith in the Creator may know God's law as did Abel when he "offered unto God a more excellent sacrifice than Cain, by which he obtained witness that he was righteous . . ."<sup>37</sup> As Paul wrote to the Christians

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31. Cf. 1 John 1:5.

32. Matthew 16:13-14.

33. Matthew 16:16-17.

34. See, e.g., W. Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND (1765), 34.

35. Psalm 19:1-4,7.

36. Exodus 18:15-16.

37. Hebrews 11:4.

at Rome, all men have always known God's law, they have simply suppressed that knowledge in unrighteousness. That knowledge has always been revealed by God through His creation:

[T]hat which may be known of God is manifest in them; for God hath shewed it to them. For the invisible things of him from the creation of the world are clearly seen, being understood by the things that are made . . .<sup>38</sup>

Even though God revealed His laws through nature; nevertheless, because of His mercy He also revealed those laws in writing in the Holy Scriptures. Blackstone has captured well why God chose to speak His law to man through His Word:

[I]n order to apply . . . [the law of nature], it is still necessary to have recourse to reason, whose office it is to discover . . . what the law of nature directs . . . And if our reason were always, as in our first ancestor before his transgression, clear and perfect . . . we should need no other guide . . . But . . . [man's] reason is corrupt, and his understanding full of ignorance and error.<sup>39</sup>

The law that God has revealed in His Word has not contradicted His Law revealed through His creation. Rather, it has confirmed that law. For example, the law prohibiting murder that has been revealed through the land that cried out upon the spilling of innocent blood was revealed by God in the sixth commandment: "Thou shalt not kill."<sup>40</sup> Moreover, the blessings of obedience to God's law and the curses of disobedience have been specified in God's revelation to Israel through Moses in Deuteronomy, Chapter 28.

Because of his corrupt nature, the natural man has chosen throughout the ages to reject God's revealed Law. For example, the modern age has yielded two schools of legal philosophy: the legal positivists who have sought to explain law as the invention of wise men, and the natural law theorists who have labored to explain law as reflections of eternal truth reasoned by wise men. Both schools have become victims of a self-created dilemma, As Roscoe Pound, dean of the Harvard Law School in the early 1900's, acknowledged:

From the time when lawgivers gave over the attempt to maintain the general security by belief that particular bodies of human law had been divinely dictated or divinely revealed or divinely sanctioned, they have had to wrestle with the problem of proving to mankind that the law was something fixed and settled, whose authority was beyond question, while at the same time enabling it to make constant readjustments and occasional radical changes under the pressure of infinite and variable human desires.<sup>41</sup>

Having experienced no better than a draw in this wrestling match between stability and change, the legal positivists bankrupted the German legal system by justifying the near extermination of the

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38. Romans 1:19-20.

39. W. Blackstone, COMMENTARIES ON THE LAW OF ENGLAND (1765), 41.

40. Exodus 21:13.

41. R. Pound, INTRODUCTION TO THE PHILOSOPHY OF LAW (1922), 3.

Jews in the name of social order. And the natural law theorists are today seeking to erode the American legal system by justifying sexual anarchy in the name of liberty. Both are guilty of the same error: "Professing themselves to be wise, they became fools, And changed the glory of the uncorruptible God into an image made like to corruptible man, and to birds, and four footed beasts, and creeping things."<sup>42</sup>

God's people have by God's grace been positioned to receive God's true Law of justice and liberty for mankind: As Paul wrote to the Corinthians:

Now we have received, not the spirit of the world, but the spirit which is of God; that we might know the things that are freely given to us of God.<sup>43</sup>

Christ, Himself, promised His disciples that if they continued in His word then they would know the truth of God. Included in that truth is the Law of God as revealed by Him in nature and in the Holy Scriptures.

### **LAW: GOD IMPOSED, NOT MAN ADOPTED**

What God has revealed to man is a world sovereignly governed by God. Blackstone summarized this fact in one short paragraph as follows:

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 times: No human laws are of any validity if contrary to this; and such of these as are valid derive all their force and all their authority, mediately or immediately, from this original.<sup>44</sup>

In other words, Law to be called Law must be unchanging, that is, fixed, uniform, and universal, not relative as to time, person or situation, or place.

In Psalm 148, God revealed that His laws governing the physical universe - the sun, the moon, the stars, and the heavens have been forever fixed. In like manner God revealed to Job that His laws that govern the animate world have not changed from the time that He created them:

"Where was thou when I laid the foundations of the earth? . . . Who hath laid the measures thereof . . . ? or who hath stretched the line upon it? . . . Who hath sent out the wild ass free? or who hath loosed the bands of the wild ass? Whose house I have made the wilderness, and the barren land his dwellings."<sup>45</sup>

As the laws governing God's inanimate and animate creation have been fixed from the

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42. Romans 1:22-23.

43. 1 Corinthians 2:12.

44. W. Blackstone, *supra* note 39.

45. Job 38:3-5; 39:5-6.

beginning, so have been the laws of good and evil. As Jesus Christ, Himself, has declared:

"Think not that I am come to destroy the law . . . I am not come to destroy, but to fulfill. For verily I say unto you, Till heaven and earth pass, one jot or one tittle shall in no wise pass from the law, til all be fulfilled."<sup>46</sup>

Jesus, therefore, warned the people not to be misled by the Scribes and the Pharisees who taught, for example, that God's command concerning marriage could be broken because it had not remained as it has been at the beginning:

"Have ye not read, that he which made them at the beginning made them male and female and said, For this cause shall a man leave father and mother, and shall cleave to his wife and they twain shall be one flesh? Wherefore they are no more twain, but one flesh. What therefore God hath joined together, let not man put asunder . . . Moses because of the hardness of your hearts suffered you to put away your wives: but from the beginning it was not so."<sup>47</sup>

Not only is God's law fixed over time, it is uniform; that is, not relative to person or to situation. This characteristic of law has been confirmed by God for the inanimate world by His response to Joshua's prayer for victory over the Amorites:

Then spake Joshua to the Lord in the day when the Lord delivered up the Amorites before the children of Israel. And he said in the sight of Israel, "Sun stand thou still upon Gibeon and thou, moon, in the valley of Ajalon."<sup>48</sup>

Only by God's sovereign intervention into the physical laws of the universe did the sun, the moon, and the earth stand still. The uniqueness of this event has been recorded:

And there was no day like that before it or after it, that the Lord harkened unto the voice of a man: for the Lord fought for Israel.<sup>49</sup>

This event, by its uniqueness, has established that law must be uniform - absolutely binding in all circumstances and on all men; otherwise, it cannot correctly be called law.

What is true for law in the inanimate physical world, that it is both fixed and uniform, is true for the animate world. Thus, God revealed to Job these observations about the ostrich:

"Gavest thou the . . . wings and feathers unto the ostrich? Which leaveth her eggs in the earth, and warmth them in the dust, and forgetteth that the foot may crush them, or that the wild beast may break them. She is hardened against her young ones, as though they were

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46. Matthew 5:17-18.

47. Matthew 19:4-6,8.

48. Joshua 10:12.

49. Joshua 10:14.

not hers: her labor is in vain without fear; Because God hath deprived her of wisdom, neither hath he imparted to her understanding."<sup>50</sup>

The ostrich, like all of God's living creatures, cannot deviate from the fixed and uniform rules governing its life. Indeed, God has protected her from doing so by depriving her of "wisdom" and "understanding." In short, she has been programmed to behave after her kind.

But man has not been programmed in the same way; rather, he has been created in God's image. Although he has the capacity to conduct himself contrary to God's rules and to justify that conduct in his mind, man is bound by God's uniform rules of right and wrong. That has been so from the beginning. God forbade Adam and Eve to eat of the tree of the knowledge of good and evil. Nevertheless, they partook of the forbidden fruit because they believed it to be good. Then, they justified their conduct before God:

"Hast thou eaten of the tree whereof I commanded thee that thou shouldest not eat?" And the man said, "The woman whom thou gavest to be with me, she gave me of the tree, and I did eat . . ." And the woman said, "the serpent beguiled me, and I did eat."<sup>51</sup>

Neither Adam's and Eve's behavior nor their justifications altered God's command that they not eat of this one tree in the Garden of Eden. God's law concerning the tree did not change because of Satan's deceitful act nor because of Eve's gullibility. The very nature of Law does not allow man to relativize it to fit his personal desires or to accommodate his situation.

This truth about God's law learned through the fall of Adam and Eve has been repeated again and again in the Holy Scriptures. For example, God has revealed that if a male makes a vow to God, then he is obligated without exception to perform it.<sup>52</sup> Thus, Joshua was obligated to save the Gibeonites from destruction because of his vow even though it had been secured through fraud.<sup>53</sup> And Jephthah, the ninth judge of Israel, was obligated to kill his daughter because he had vowed to sacrifice the first one who came out of his house upon his return from war if God granted him victory.<sup>54</sup> God's law of vow was not modified by either a fraudulent circumstance or a special person. It was uniform.

To be law according to Scripture, a rule must not only be fixed and uniform, but, also, universal, that is, not relative to place. This principle may be easily demonstrated in the physical world: the law of gravitation and the law of gestation govern the entire universe; they are the same in Africa and in America. That is why an airplane may fly around the world without having to undergo structural change; that is, also, why it takes as long to produce a panda bear baby in the San Diego zoo as in China. Likewise, God's laws governing man's choices of right and wrong behavior do not vary by cultures or nations. As Paul told the "men of Athens" in his sermon on Mars Hill:

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50. Job 39:13-18.

51. Genesis 3:11-13.

52. Deuteronomy 23:21, Numbers 30:2, Ecclesiastes 5:4, Matthew 5:33.

53. Joshua 9:3-9,15,18-20.

54. Judges 11:30-35.

"God . . . hath made of one blood all nations of men to dwell on all the face of the earth, and hath determined the times before appointed, and the bounds of their habitation; that they should seek the Lord . . . and find him."<sup>55</sup>

God's "law of the Spirit of life in Christ Jesus" applies to all peoples, to all nations. Indeed, God created the nations out of one people in order to save man from destruction through salvation by works.<sup>56</sup> In turn, He created Israel to point all people to His mercy to a salvation by Faith through Jesus Christ.<sup>57</sup>

Man has denied that God created the nations. Through the ages men have claimed credit for kingdoms and their law-orders.<sup>58</sup> Modern legal anthropologists have continued this heresy by asserting that law depends upon the choice of a nation's people. The common law assumed otherwise. It followed the Bible's teaching that God, the Sovereign Ruler of all nations, determined not only all nations' lifespans and boundaries, but all nations' law-orders.

## CONCLUSION

From this brief analysis have emerged the three essential ingredients of law: 1) It is created by God; 2) It is revealed by God; and 3) It is imposed by God without regard to time, situation or person, or place. In order then for any command or order or rule or other act to be called law, it must conform to these Biblical principles. As Blackstone has put it, no human law is law at all if it contradicts "the law of nature or the law of revelation." Ignoring this maxim, man, especially twentieth-century man, has ushered in totalitarian reigns of lawless rule. Indeed, the lawlessness practiced by today's United States Supreme Court in such cases as *Roe v. Wade* (the pro-abortion decision) has been made possible by contemporary legal scholarship that has denied that man discovers the law, but has claimed that man makes law. Blackstone's view of the role of the judge followed that of Moses: a judge's opinion was evidence of the law, not law itself. Therefore, if a court order was "clearly contrary to the divine law" then it should not be followed, not because such an order was "bad law, but that it was not law" at all. Such biblical thinking about law is an absolute necessity to restore the rule of law not only in America, but throughout the world.

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55. Acts 17:26-27.

56. See, Genesis 10:25 and 11:6-8.

57. Romans 9.

58. Psalm 2.

## CHAPTER 2

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# Jurisdiction and Authority

Many have objected to the Bible as the foundation of a nation's legal system on the ground that it would usher in tyranny, not liberty. For example, both Christians and non Christians have expressed their fears that a Biblical system of law would authorize the civil government to eliminate any belief and any activity inconsistent with that government's leaders' personal religious views of righteousness. Such objections, although widely held, are totally erroneous. In fact, only a Biblical foundation for law guarantees true freedom of thought and action; all other foundations lead either to anarchy or to totalitarianism.

"Render unto Caesar the things which be Caesar's, and unto God the things which be God's."<sup>1</sup> These words of Jesus Christ, while addressed to a question about paying one's taxes, answer two of the most significant political and legal questions of the ages: What authority may rightfully be exercised by a civil government? Who decides what that lawful authority is?

Jesus emphatically denied that any human civil government could legitimately exercise total power over its citizens: Not all things belong to Caesar. This principle of limited authority had already been revealed by God through Moses in the book of Deuteronomy:

"When thou art come unto the land which the Lord thy God giveth thee . . . and shalt say, I will set a king over me, like as all the nations that are about me; Thou shalt in any wise set him king over thee, whom the Lord thy God shall choose . . . But he shall not multiply horses to himself . . . Neither shall he multiply wives to himself . . . Neither shall he greatly multiply to himself silver and gold. And it shall be . . . that he shall write him a copy of this law in a book . . . And it shall be with him . . . that he may learn to fear the Lord His God, to keep all the words of this law and these statutes, to do them."<sup>2</sup>

Israel's first king, Saul, on two occasions violated the law that governed his kingdom, first, by exercising authority that was not his<sup>3</sup> and, second, by failing to obey God's commands.<sup>4</sup> Therefore, he forfeited his right to rule.<sup>5</sup>

These jurisdictional limits to civil authority were invoked by the early church when its leaders refused to obey the Jewish Council's order to stop teaching in the name of Jesus. That Council,

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1. Luke 20:25.
  2. Deuteronomy 17:14-19.
  3. 1 Samuel 13.
  4. 1 Samuel 15.
  5. 1 Samuel 15:26,28.

while acting within the authority that had been granted it by the Roman Empire,<sup>6</sup> had exceeded Caesar's lawful authority as defined by God. As Peter and the other apostles said: "We ought to obey God rather than men."<sup>7</sup>

Three times in Romans 13, Paul labeled civil rulers "ministers or servants of God."<sup>8</sup> In doing so, he had merely restated a truth that had been taught by the Master, Jesus Christ. Jesus, by simply making the statement as God's Son, affirmed that God, Himself, has the exclusive authority to decide what power may rightfully be exercised by all human civil governments. Jesus as the Word of God<sup>9</sup> and, therefore, as Creator of all governing authorities<sup>10</sup> has by definition that incontestable right.

When God created man and woman, He gave them dominion over "the earth," "the fish," "the fowl" and "over every living thing that moveth upon the earth."<sup>11</sup> God kept for Himself the jurisdiction to rule man. Thus, when Eve ate the forbidden fruit and Adam followed, God adjudged them guilty and pronounced their sentences.<sup>12</sup> Not until after the Fall did God grant any authority to man over a fellow human being:

Unto the woman he said, "I will greatly multiply thy sorrow and thy conception; in sorrow thou shalt bring forth children; and thy desire shall be to thy husband, and he shall rule over thee."<sup>13</sup>

Even so, God placed severe limits on the husband's authority over his family. For example, God denied to the father and husband any right to impose the death penalty upon a family member even for murder.<sup>14</sup>

After the flood, God granted authority to men to enforce the law of murder when he entered into a new covenant with Noah and his sons:

"Who so sheddeth man's blood, by man shall his blood be shed; for in the image of God made he man."<sup>15</sup>

From Noah's sons came the gentile nations.<sup>16</sup> Through the Noahic covenant, God granted limited authority to those nations to impose the death penalty. Later, God granted to Israel an extended jurisdiction to inflict capital punishment on those who committed adultery, sexual perversion, and various other offenses.

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6. See, John 11:48.

7. Acts 5:29.

8. Romans 13:4,6.

9. John 1:1,14.

10. Romans 13:1.

11. Genesis 1:27-28.

12. See, Genesis 3.

13. Genesis 3:16.

14. Genesis 4:9-15.

15. Genesis 9:6.

16. See, Genesis 10.

The point of this review has not been to determine the legitimacy of capital punishment. Rather, it has documented that man has no authority to rule over a fellow human being except as conferred by God.

In the early history of America, this proposition was not only well known but widely accepted. Indeed, the political and legal doctrine of the "divine rights of kings" was based upon erroneous Biblical interpretations that extended the God-given right of the husband and father over his family to the king over his subjects. John Locke, a 17th century political thinker and defender of England's 1688 Glorious Revolution, devoted his entire *FIRST TREATISE ON CIVIL GOVERNMENT* to a refutation of the claim of the English Stuart Kings to a "divine right to rule."

Locke's *TREATISE* reflected the common assumption of his day. The legitimacy of any claim of right to rule rested upon an examination of God's word and God's will. As Samuel Rutherford had written about 50 years before:

That power of government in general must be from God, I make good, 1st, Because (Rom XIII. 1) "there is no power but of God; the powers that be are ordained of God."<sup>17</sup>

If civil government derived its legitimacy from God, then one could well expect that such government authority would also be limited by God. Indeed, Locke wrote that the legislative authority in any civil government was bound by "the law of nature:"

The rules that they [the legislators] make for other men's actions must . . . be conformable to the law of nature - *i.e.*, the will of God, of which that is a declaration - and the fundamental law of nature being the preservation of mankind, no human sanction can be good or valid against it.<sup>18</sup>

Rutherford preceded Locke with a more explicit Biblical statement on the limited authority of the king, by relying upon the Deuteronomy passage quoted above.

Locke's and Rutherford's views followed those of earlier Reformation thinkers, especially John Calvin. Having experienced both the error of total authority in civil government and of total authority in the church, Calvin found neither approach consistent with the Bible.<sup>19</sup> Dr. R.J. Rushdoony has captured Calvin's position well:

Calvin's conception of the kingdom eliminated the church as the manifest kingdom and made the individual Christian, in his activity, the citizen of that eternal order by virtue of divine grace. The individual was thus the primary area of responsibility. If the conscience of the individual made justice impossible, the state could not supply what the individual lacked. The state has its jurisdiction, the church its realm, art, economics, the university, the family, all have their respective jurisdictions, and the key to the life of each is the

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17. S. Rutherford, *LEX REX* (1644), 1.

18. J. Locke, *2D TREATISE ON GOVERNMENT*, 77.

19. *See*, J. Calvin, *INSTITUTES OF THE CHRISTIAN RELIGION*, Book IV, Ch. 20.

Word of God in the heart of man.<sup>20</sup>

Even before Calvin wrote his study that called for limited authority both in the church and in the state, the English common law had been developed in such a way to recognize such limits. In the 13th century Bracton claimed that the common law courts had jurisdiction over "temporal" matters and the ecclesiastical courts had authority over "spiritual" matters. For several centuries, English judges battled over whether cases involving marriage, tithes, inheritance of property, and the like were "temporal" or "spiritual." Whatever the merits of these claims and counterclaims, this common law principle was established: Some "wrongs" were not within the jurisdiction of the civil government courts that enforced the Common Law, but were within the jurisdiction of the ecclesiastical courts and vice versa; more importantly, some wrongs were not within the jurisdiction of any human court.

### HEARTS, MINDS AND DEEDS

Throughout the entire period of English Common Law, scholars and judges have assumed that an act of wrongdoing was necessary to enable the civil courts to assume jurisdiction. This assumption was consistent with the scriptural mandate to the civil government servant "to execute wrath upon him that doeth evil."<sup>21</sup> Thus, a man could be convicted of an act of murder or an act of theft under the common law, but he could not be convicted of being a murderer or being a thief. The common law courts have always had jurisdiction over what men do, not over what men are.

Likewise, under the law of Moses, the people of Israel did not incur any penalty at the hand of the duly constituted human authorities for having hate or lust in their hearts. While they were commanded in Leviticus 19:17 not to hate their brothers, no human-administered punishment for hate was provided. Whereas proof of an act of murder upon the testimony of two or more witnesses not only authorized, but required the imposition of the death penalty upon the offender.<sup>22</sup> So it was with adultery, the act was subject to a man-administered penalty,<sup>23</sup> but the desire was not.

God's limit upon the jurisdiction of Israel's rulers led the scribes and Pharisees to assume that if they conformed their conduct to meet the standards of their human authorities, then they met the standards of God. That was a mistake, and according to Christ's teachings in the Sermon on the Mount, it was a mistake of jurisdiction:

"For I say to you, that except your righteousness shall exceed the righteousness of the scribes and Pharisees, ye shall in no case enter into the kingdom of heaven."<sup>24</sup>

As Christ pointed out in His great sermon, the Scriptures taught that it was wrong not only to

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20. R. Rushdoony, *POLITICS OF GUILT AND PITY*, (1970), 279.

21. Romans 13:4.

22. Numbers 35:30-31.

23. Leviticus 20:10.

24. Matthew 5:20.

kill, but to hate<sup>25</sup> and not only to have sexual intercourse with another's spouse, but to lust.<sup>26</sup> Because God looked upon man's heart,<sup>27</sup> Christ taught that man's citizenship in God's kingdom depended upon matters outside the jurisdiction that God had granted to man. To illustrate this point Christ chose a simple example:

"Whoever shall say to his brother, Raca, shall be in danger of the council. But whoever shall say, Thou fool, shall be in danger of hell fire."<sup>28</sup>

Raca, a term of contempt and ridicule, triggered the jurisdiction of the Jewish ruling council, but the term "fool" did not. Yet, acquittal by that council for having merely called another a "fool" did not save the guilty speaker from God's judgment. Likewise, acquittal by that same council for not having committed an act of murder did not spare the accused if he hated the victim in his heart.

Having made this jurisdictional point concerning man's limited authority to adjudge wrongdoing, Jesus made the same argument concerning man's limited authority to assess another man's righteousness. Under the law of Moses, a man was entitled to restitution from another man if that man wrongfully harmed him. Such restitution was directly proportionate to the blame of the wrongdoer and to the harm caused.<sup>29</sup> Entitlement to the remedy did not require any examination of the injured person's heart.

In His Sermon, however, Jesus admonished His listeners that vindication of a man in a human court did not qualify that man for vindication in God's court. Therefore, Christ instructed even the "righteous man" to forego worldly entitlements in order to walk in blamelessness before God:

"Ye have heard that it hath been said, An eye for an eye, and a tooth for a tooth. But I say to you, that ye resist not evil, But whosoever shall smite thee on thy right cheek, turn to him the other also."<sup>30</sup>

By this statement, Jesus did not mean that the *lex talionis* principle of the Old Testament was no longer valid, as some have contended. To the contrary, Jesus used this simple illustration to teach that, while an injured man may be entitled to obtain a remedy proportioned to the blame and harm attributed to a wrongdoer in a human court, he could not insist upon being found "righteous" in the kingdom of God unless he also had a pure heart. In God's eyes, man's righteousness was determined by a higher standard not administered by any human authority:

"But I say unto you, love your enemies, bless them that curse you, do good to them that hate you . . . That ye may be the children of your Father which is in heaven. For he maketh His sun to rise on the evil and on the good, and sendeth rain on the just and on the

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25. Matthew 5:22.

26. Matthew 5:28.

27. 1 Samuel 16:17.

28. Matthew 5:22.

29. See, e.g. Exodus 22:1-7.

30. Matthew 5:38-39.

unjust."<sup>31</sup>

If God Himself did good to those who hated Him, man could do no less. Man could not, therefore, insist upon his rights to restitution and thereby qualify as a good citizen in God's kingdom.

Both of these points of jurisdiction - that unrighteousness before God was not measured by the external standards administered by men and that righteousness before God was not measured by those same external standards recognized by men - confirmed God's exclusive jurisdiction over the hearts of men. Thus, Christ concluded this section of the Sermon on the Mount with a legal standard foreign to any human judge:

"Be ye therefore perfect, even as your Father in heaven is perfect."<sup>32</sup>

Those responsible for the birth and the flowering of the English common law never encroached upon this exclusive jurisdiction that God exercised over men's hearts. They recognized that while God could judge the "fornicators" and "idolators," the "effeminate," the "abusers of themselves with mankind," the "thieves," the "covetous," the "drunkards," the "revilers," the "extortioners,"<sup>33</sup> God had granted the civil government officials no authority to judge the sinner, but authority only to judge his sinful acts. Therefore, no civil authority could judge the fornicator for being a fornicator, but only for acts of fornication committed by him.

The common law of crimes reflected this principle of jurisdiction in the Latin word *actus reus* (meaning guilty act). "Criminal intent, unaccompanied by a criminal act (*actus reus*) is not punishable."<sup>34</sup> As late as 1962, United States Supreme Court Justice John Marshall Harlan affirmed this fundamental Biblical principle:

[I]n this case the trial court's instructions permitted the jury to find the appellant guilty on no more proof than that he was present in California while he was addicted to narcotics. Since addiction alone cannot reasonably be thought to amount to more than a compelling propensity to use narcotics, the effect of this instruction was to authorize criminal punishment for a bare desire to commit a criminal act.

. . . [This statute as applied] is an arbitrary imposition which exceeds the power that the state may exercise in enacting its criminal law.<sup>35</sup>

Likewise, the common law of torts never denied a man a remedy for harm done to him by a wrongdoer solely on the ground that the injured man was "unrighteous." Proof of an act of contributory negligence was required before the jury or judge could deny to the injured party his right to be compensated. But God has made it clear that "the unrighteous shall not inherit the kingdom

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31. Matthew 5:44-45.

32. Matthew 5:48.

33. See, 1 Corinthians 6:9-10.

34. Clark and Marshall, A TREATISE ON THE LAW OF CRIMES (1958), 176.

35. *Robinson v. California*, 370 U.S. 660, 678-79 (1962).

of God;<sup>36</sup> and therefore, that man's righteousness before his fellow men reflects the limits on man's authority rather than God's standards that govern men's hearts.

In short, the common law recognized God's exclusive claim to judge men's hearts. Indeed, God has revealed in the Holy Scriptures that no human authority - not the state, nor the church, nor the family, nor even the individual - may judge another man's heart. In fact, no man has any authority even to judge his own heart as Paul reminded the Christians at Corinth:

[H]e that judgeth me is the Lord. Therefore, judge nothing before the time, until the Lord come, who . . . will make manifest the counsels of the hearts.<sup>37</sup>

While the common law carefully excluded matters of the heart from the civil authorities, it did not similarly protect man's mind. Indeed, in the centuries just preceding the American Revolution, the common law of treason included "imagining and compassing the death of the king." Moreover, the common law embraced a variety of criminal "offenses against God and religion." Included, therefore, in Blackstone's survey of the common law of crimes were apostasy (defined as a believer's renunciation of Christianity, by embracing either a false religion or no religion at all), heresy (the public and obstinate denial of Christianity's essential doctrines), and blasphemy (the public exposure of Christianity to contempt and ridicule). Several of these common law offenses appeared in the early statutes of some of the original thirteen colonies. For example, both heresy and blasphemy were listed as capital offenses in the 1641 Massachusetts Body of Liberties.

Today, such offenses as heresy and blasphemy have been erased from America's common law and statute books. They were eliminated in the latter part of the 18th and early part of the 19th centuries in response to a move to cut back the jurisdiction of the civil government over the affairs of the church. This move, prompted by minority Christian denominations like the Baptists in Virginia, and led by American statesmen like James Madison and Thomas Jefferson, resulted first in the religious freedom guarantees of the 1776 Virginia Constitution and ultimately in the First Amendment of the United States Constitution. In his 1784 MEMORIAL AND REMONSTRANCE ON THE RELIGIOUS RIGHTS OF MAN, James Madison explained that at the heart of religious freedom was an issue of jurisdiction:

We hold it for a 'fundamental and undeniable truth' 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. This right is, in its nature, an unalienable right. It is unalienable, because the opinions of men, depending only on the evidence contemplated in their own minds, cannot follow the dictates of other men; it is unalienable, also, because what is here a right towards men, is a duty towards the creator. It is the duty of every man to render the creator such homage, and such only as he believes to be acceptable to him; this duty is precedent both in order of time and degree of obligation to the claims of civil society. While we assert for ourselves a freedom to embrace, to profess and to observe the religion which we believe to be of divine origin, we cannot deny an equal freedom to those

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36. 1 Corinthians 6:9(a).

37. 1 Corinthians 4:4(b)-5.

whose minds have not yet yielded to the evidence which has convinced us. If this freedom be abused, it is an offense against God, not against man. To God therefore, not to man, must an account be rendered.

Madison's remarkable statements about God's exclusive jurisdiction over men's minds are in complete harmony with the even more remarkable answer that Jesus gave to Pontius Pilate's question about the nature of Christ's kingdom:

"Art thou the king of the Jews? . . . What hast thou done?" Jesus answered, "My kingdom is not of this world . . . To this end, was I born, and for this cause came I into the world, that I should bear witness unto the truth."<sup>38</sup>

By this statement, Christ denied that Caesar had any jurisdiction to determine what is true. Moreover, He denied to the state any authority to teach, "to bear witness to the truth." He claimed for Himself the exclusive right to men's minds and therefore, the right to delegate the authority to judge and to influence opinions to whomever He chose.

In the Great Commission, Christ made it clear that while he denied Caesar any authority to teach, He commanded His church to assume that task:

"Go ye therefore, and teach all nations . . . teaching them to observe all things whatsoever I have commanded you . . ."<sup>39</sup>

This command to the church was not limited to "religious subjects" such as salvation, but included all things whatsoever - history, science, law, all knowledge. For Paul has reminded us in Colossians that in Christ "are hid all the treasures of wisdom and knowledge." Col. 2:3.

The early church took Christ's command seriously. Immediately after Pentecost, the church gathered continually in devotion to the "apostles teaching."<sup>40</sup> The apostles and early church leaders not only taught the specific message of salvation but they grounded that message in history lessons concerning God's dealings with Israel.<sup>41</sup>

In fact, their teaching touched on the fundamentals of a wide-range of subjects. Paul, for example, in his sermon in Athens taught the foundations of physics, chemistry and biology. "God that made the world and all things therein . . . giveth to all life, and breath, and all things."<sup>42</sup> He spoke the essential truth about anthropology, history and politics:

[God] hath made of one blood all nations of men to dwell on the face of the earth, and hath

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38. John 18:35-37.

39. Matthew 28:19-20.

40. Acts 2:42.

41. See, e.g., Acts 7:2-53; 13:16-41.

42. Acts 17:24-25.

determined the times before appointed, and the bounds of their habitation."<sup>43</sup>

He also answered questions about sociology, psychology and philosophy: "For in Him [God] we live and move and have our being."<sup>44</sup> And as if ahead of his time, he uncovered the truths of such modern disciplines as futurology, gerontology and thanatology:

[H]e [God] hath appointed a day in which He will judge the world in righteousness by that man whom He hath ordained; whereof He hath given assurance unto all men in that He hath raised him from the dead.<sup>45</sup>

Such teaching not only turned the Greek world upside down but the Hebrew world as well. Is it any wonder then that the Jewish Council, the religious department of the Roman Empire of Israel, ordered Peter and John to stop teaching in the name of Jesus?<sup>46</sup> Given this early history of the church, we should not be surprised that the modern day "pharisees" who sit on the United States Supreme Court have excluded the Bible as the Word of God and the Ten Commandments from America's public school classrooms.<sup>47</sup> The justices know that the Bible, as the foundation of all wisdom and knowledge, poses the greatest threat to the man-centered philosophy that dominates every subject in the state-operated schools today.

But the teaching in today's "public schools" not only contradicts the Biblical truths about creation, sin and life after death, it rests upon the false premise that Caesar has authority to "bear witness to truth." Christ did not give to the state any jurisdiction over education. The early church refused to acknowledge any such jurisdiction as evidenced by their steadfast refusal to comply with the Jewish Council's order to stop teaching in the name of Jesus: "We ought to obey God rather than men."<sup>48</sup> They truly believed that Christ had delegated to the church the authority to teach. But they did not believe that such authority excluded God's original injunction that the parents instruct their children.<sup>49</sup> Rather, they used their authority as apostles to encourage and exhort parents to obey God's command. Thus, Paul wrote to the Ephesians: "Fathers . . . bring . . . up [your children] in the discipline and instruction of the Lord."<sup>50</sup>

Having already delegated the authority to teach to the family and to the church, God left no room for Caesar to assume any jurisdiction whatsoever over truth or over its instruction. Had Christ given to the State jurisdiction over education, then the State would have inevitably encroached upon God's exclusive jurisdiction over men's hearts. As the writer of Proverbs has warned: "For as [a man] thinketh in his heart, so is he."<sup>51</sup> James Madison saw this Biblical principle in his famous REMONSTRANCE on religious freedom when he denied that any civil magistrate could be a

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43. Acts 17:26.

44. Acts 17:28.

45. Acts 17:31.

46. Acts 5:28.

47. *Abington School District v. Schempp*, 374 U.S. 203 (1963) and *Stone v. Graham*, 449 U.S. 39 (1980).

48. Acts 5:29.

49. Genesis 18:19.

50. Ephesians 6:4.

51. Proverbs 23:7.

"competent judge of truth." Thus, Madison claimed that what man believed to be true and what he taught to be true were duties "owed to the Creator," and therefore, not subject to the jurisdiction of Caesar.

Without question, God has denied to the State any jurisdiction over men's hearts and minds. In addition, God has denied to the State any authority to teach because in such authority lay the key to men's hearts and minds. Instead, God has given that authority to others, the family and the church, and has sent the Holy Spirit into the world to "convict the world concerning sin and righteousness and judgment."<sup>52</sup> As Madison put it in his Remonstrance: "the opinions of men can be directed only by reason and conviction, not by force or violence." Because the very nature of the State authority requires the wielding of the sword,<sup>53</sup> God has clearly disqualified Caesar from exercising any jurisdiction over education.

### **DEEDS: LOVE AND FORCE**

At the heart of God's claim for men's hearts and minds is the law of love. While that law undergirds the entire law,<sup>54</sup> it governs some acts exclusively. True worship of God, including praise, teaching the truth, and giving, must come from a heartfelt love, not from a fear of what other men might do. It is as Christ told the Samaritan woman at the well: "[T]rue worshippers shall worship the Father in spirit and truth."<sup>55</sup> Paul too, taught the same thing to the church at Corinth: "Let each one do just as he has purposed in his heart; not grudgingly or under compulsion; for God loves a cheerful giver."<sup>56</sup> The tithe, therefore, must be kept immune from the power of Caesar lest men be forced to act by threat of violence rather than be moved to act by their own reason and conviction.

But this exclusive jurisdiction of the law of love has not been confined to certain duties owed to God alone. Rather that same exclusive authority of love has prevailed in certain relationships between man and his neighbor. Christ taught this principle in His story of the Good Samaritan: Man ought to meet the needs of his neighbor out of a heart of compassion, not out of a fear of criminal or civil liability.<sup>57</sup>

Even the Mosaic law distinguished between wrongful acts that destroyed another man's property from those that failed to protect that property. While both wrongs deserved judgment, only the former was subject to a man-imposed penalty. For example, the law required a thief to pay restitution for stolen property, but did not authorize any human-administered penalty for the man who failed to rescue another's donkey in distress.<sup>58</sup> Likewise, God's law-order for Israel authorized restitution for lost property when a man breached his trust arising from a business or other special relationship, but that same law-order provided no human-administered remedy for failure to help a

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52. John 16:8.

53. Romans 13:4.

54. Matthew 22:37-40.

55. John 4:23.

56. 2 Corinthians 9:7.

57. Luke 10:30-37.

58. Contrast Exodus 22:1 with Exodus 23:4-5.

poor man in need.<sup>59</sup> Yet, both acts violated God's law. The difference was that the former was not only governed by God's law of love but also by God's law of restitution. The latter, however, was governed exclusively by the law of love.

These jurisdictional distinctions were reflected in the common law. No man was subjected to a civil or criminal penalty for having failed to come to the rescue of another in distress or in need unless a special relationship had been established between the plaintiff and the defendant. The duty to rescue and the duty to help the needy were moral, not legal, ones. Therefore, such duties were subject exclusively to God's law of love.

God's exclusive jurisdiction under the law of love was affirmed in Section 16 the 1776 Virginia Constitution:

[A]ll men are equally entitled to the 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 toward each other.

At the very heart of a "mutual duty" is the assumption that man has a choice to act without threat of force or violence. To tax a person to support a government program to help the needy under threat of civil or criminal prosecution of nonpayment of that tax is the very antithesis of Christian charity. Yet that element of force undergirds all social welfare programs. Aid to dependent children, to the disabled, to the unemployed and to the handicapped, retirement funds and medicare for the aged, financed by tax revenues, violate the law of love. Such aid must come from a man's heart of compassion uninfluenced by the threats of the sword, in order to comply with God's law and with constitutional principles such as those in the above-quoted Virginia document.

### **DEEDS: ROD, STAFF AND SWORD**

Even deeds that are not to be exclusively governed by the law of love may nevertheless not be subject to the sword of Caesar. God has not ordained the civil authorities as the only human institutions to exercise jurisdiction over other human beings. To the contrary, God created the family as the primary governing authority upon which the success of the civil government depends. And God equipped that institution with the right to enforce the law pertaining to family relations by means of the rod limited by the law of love.

At the time that Cain killed Abel, God had not yet created any nation. Instead, He had given man only the family. When Cain expressed fear that another would kill him for having murdered his brother, God responded with His assurance that no man had authority to impose the death penalty upon Cain. Indeed, God told Cain that if anyone breached that limited authority by killing Cain, God would avenge Cain "seven fold." Genesis 4:15-16. Later, God created the nations out of Noah and his three sons and gave man the authority, indeed the duty, to impose the death penalty for murder.<sup>60</sup>

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59. Contrast Exodus 22:9 with Leviticus 25:35-36.

60. Genesis 9:6.

While God did not grant to the family the authority to wield the sword, he did grant to the family authority to wield the rod as a disciplinary measure to instruct the children in the way of righteousness.<sup>61</sup> As God gave the family this limited authority to use force, He authorized the parents, not the state, to discipline their children.<sup>62</sup> Only if the child became incorrigible to that parental authority did God subject the child's actions to the jurisdiction of the state.<sup>63</sup> Absent such proof of family breakdown, the child was to be immune from state power.

The rod of the family is not the only alternative that God has provided in addition to the sword of Caesar. God has also created the staff of the church. Paul has captured well the authority of the church over one of its misbehaving members in his letter to the church at Corinth:

I have written unto you not to keep company, if any man that is called a brother be a fornicator, or covetous, or an idolator, or a railer, or a drunkard, or an extortioner; with such an one no not to eat.<sup>64</sup>

Moreover, Paul admonished the Christians at Corinth that disputes among themselves were to be resolved within the church, not in the civil courts.<sup>65</sup> The staff, not the sword, was to govern property and other disputes among the brethren. Again, only upon proof of breakdown of the relationship was the State authorized to intrude.<sup>66</sup>

At common law voluntary associations through contract were likewise self-governing. Terms of employment, prices of goods and services and other like matters were subject to the contracting parties, not to the State. This law followed the Biblical pattern that individuals were granted authority to enter into whatever economic relationships that they found suitable. Only upon proof of breakdown was the State authorized to intrude.<sup>67</sup>

This common law principle of the inviolability of contract obligations was intended to be constitutionally protected by Act I, Section 10 of the United States Constitution: "No state shall . . . pass any . . . law impairing the obligation of contracts." As Chief Justice John Marshall wrote in dissent in *Ogden v. Saunders*:<sup>68</sup>

[I]ndividuals do not derive from government their right to contract, but bring that right with them into society; that obligation is not conferred on contracts by positive law, but is intrinsic and is conferred by the act of the parties. This results from the right which every man retains to acquire property, to dispose of that property according to his own judgment, and to pledge himself for a future act.

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61. Proverbs 23:13-14.

62. Ephesians 6:4.

63. Deuteronomy 21:18-21.

64. 1 Corinthians 5:11.

65. 1 Corinthians 6:1-8.

66. Matthew 18:15-17.

67. See, Matthew 20:1-15 and Deuteronomy 24:14-15.

68. 25 U.S. (12 Wheat.) 213, 347, 6 L.Ed. 606, 652 (1827).

## CONCLUSION

In summary, God has allocated jurisdiction between Himself and man and has distributed man's jurisdiction among several governing authorities. By His law God has provided for both liberty and order and has safe guarded man against both anarchical and totalitarian rule.

By rejecting God's word, modern man has not embarked upon a new quest for liberty and justice. Rather, he has simply chosen to repeat Israel's mistakes during the time of her judges when "every man did that which was right in his own eyes."<sup>69</sup> Israel did not find justice and liberty without God as their king; neither will modern nations achieve those goals as long as their king is man. Only God's law of rightful authority can satisfy man's longing for freedom and justice and only God's people can lead mankind to establish the governing authorities necessary to realize God's plan for all people before the second coming of Christ.<sup>70</sup>

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69. Judges 21:25.

70. Matthew 28:18-20.

## CHAPTER 3

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# Equality and Mankind

Since the United States Supreme Court ruled that segregation in public schools violated the equal protection clause of the Fourteenth Amendment of the United States Constitution, issues concerning "equal rights" have dominated American politics. At first, America's sizeable black population dominated the appeals for equality in the nation's legislatures and courts. Soon, other identifiable "ethnic" groups, most notably Mexican-Americans, joined the fight against "racial discrimination."

While claims that equality protects American citizens from discrimination on account of "race" or "national origin" have continued to be heard more than thirty years after the 1954 *Brown* decision, they no longer monopolize the equal rights marketplace. Indeed, since the Equal Rights Amendment was first proposed in Congress in the early 1970's, claims of equal rights for women have occupied center stage. Even after the requisite number of states failed to ratify the ERA within the time set by Congress, the fight against sex discrimination in the name of equality has continued unabated.

Now, homosexuals have become increasingly visible participants in the American political and legal mainstream with their claims against discrimination on account of sexual orientation or sexual preference.

The equality banner has not only been raised on behalf of blacks and other ethnic groups, women, and homosexuals, but it has become a convenient rallying cry for men, for illegitimate children, and even for minority religious and political groups who wish to avoid suffering for their peculiar views. Indeed, fundamentalist Christians recently sought and won a federal bill designed to afford public school students engaging in Bible studies or other "religious activities" on public school property "equal access" to that property on the same terms as students engaging in "non-religious activities."

With such a wide range of political activists marching under one umbrella, the meaning of equality has become quite confused. On the one hand, "equality" for blacks has resulted in the elimination of legally required or permitted policies that "racially" separate athletic teams, prison facilities, and restrooms. On the other hand, "equality" for women has not resulted in the elimination of legally required and permitted policies that sexually separate athletic teams, prison facilities, and restrooms.

Moreover, the meaning of equality has become self-contradictory. Equality for blacks and women has sometimes yielded "racial" and sexual preferences for some, and denied the same to others, so that everyone can be made equal. To the "white male" who has been denied hard-earned job promotions because an "affirmative action" program has been instituted as a result of a collective

bargaining agreement between his union and his employer, he must think that the black man or white woman who has been chosen in his stead has benefitted from an equality slogan taken from the pages of George Orwell's *ANIMAL FARM*: "All are created equal, but some are more equal than others."

But the militant black or feminist is not the only one who sounds hypocritical in the fight for "equal rights." If a Seventh Day Adventist insists that his employer cannot fire him for refusing to work on Saturdays, contrary to his religious beliefs, how can his brother Adventist who wishes to employ only Adventists to work in his vegetarian restaurant refuse to hire a Hindu? Indeed, in the name of equality, Bible-believing Christians have now secured the right of public school students to hold Bible studies on campus. What if a backsliding believer living openly in sin insists on being included in the fellowship?

Not only has the "equal rights" movement in America spawned confusion and contradiction, but it has become increasingly dangerous. As "discrimination" has become the "dirty" word in American politics and law, even traditional distinctions between criminals and law abiding citizens, even though enshrined in the 13th Amendment of the United States Constitution, have been attacked. While that direct attack has failed, a more subtle threat to the legality of distinguishing between people who do right and those who do wrong is being vigorously fought at every level of government. In the name of "equality" militant homosexual groups have insisted that they be given legal protection to live openly as homosexuals without discrimination by employers, landlords, or business proprietors. In the beginning, their claim rested on a very simple proposition: that their sexual live style was not chosen, but was imposed by their genes and environment and, therefore, like the color of skin or national origin, or biological sex, "sexual orientation" was an illegitimate basis for discrimination.

More recently, many homosexuals have been insisting that they have not been programmed, but that they have chosen to practice homosexuality. This new claim has resulted in new language, "sexual preference" has been substituted for "sexual orientation." Ironically, this new focus in the homosexual's quest for "equality" has rested upon an analogy with religion, rather than race and sex. If religious preferences must be respected equally because they cannot be adjudged to be right or wrong, then so must sexual lifestyles. This argument has been especially successful in those states whose legislatures have repealed the traditional criminal laws prohibiting homosexual conduct.

Whatever the equality claim - whether it be based upon sexual orientation or sexual preference - if it can be successfully invoked on behalf of homosexuals, then it can be utilized by others such as thieves, murderers, rapists, and even "racists" and "sexists." If homosexuality is a product of one's genes and environment, then so is theft, murder, and rape. And if the right to choose to practice one's sexual orientation must be affirmed to preserve the homosexual's identity, then so should that right be equally available to those with proclivities to steal, to kill, and to treat women as sex objects.

At stake, then, in the battle for equality in America is not just the legitimacy or illegitimacy of race, sex, and religious distinctions, but the legitimacy of any and all distinctions. To even begin to address the current issues, one must go to the heart of the matter and rediscover the true meaning of equality.

## LEGAL EQUALITY OF OPPORTUNITY

In both the Old and the New Testaments, the reader is reminded that legally God is no respecter of persons.<sup>1</sup> He does not have one standard of justice for the poor and another for the rich. In His Court of Justice, He treats the powerless and the powerful the same. Moreover, as judge, He does not prefer males over females, slaves over free, educated over uneducated, Jew over Gentile. All are equally condemned by the law of sin and death, and all are equally entitled to salvation by the law of the Spirit of life.<sup>2</sup> The opportunity for damnation or salvation is the same for all.

Nevertheless, God does respect the person according to his choice.<sup>3</sup> If a man refuses the free gift of salvation, then God will judge him according to his works; if he accepts God's free gift, then man escapes that judgment.<sup>4</sup> Even among those who choose Christ, God rewards those who put their faith to good works but not those who do not.<sup>5</sup>

Moreover, God makes distinctions not based upon man's choice. He chooses whom He wishes to become the political leader of a nation.<sup>6</sup> He chooses whom he wishes to be gifted for one calling as contrasted to another.<sup>7</sup> And He chooses the nation or the person He wishes to be His spokesman.<sup>8</sup>

Equality before God, then, does not mean equality of participation in God's creation; rather, it means equality of opportunity for God's justice. While the laws of God guarantee equality of opportunity, they do not guarantee any particular political or economic office or position. Equality, then, is quintessentially a legal term. Thus, God included the legal equality of opportunity principle within the law of Moses. Because God has made no legal distinction for salvation purposes between the rich and the poor and the powerful and the powerless, so Israel was to apply the same standard of justice to each of the two groups.<sup>9</sup>

If a legal system is to be consistent with God's law, then, it must incorporate this principle of equality. In the history of the church, this principle was embodied in the canon law term, *ius commune*. That principle, in turn, became the very foundation of law in England. Thus, the English law became known as the "common law."<sup>10</sup> But the English law never quite covered everyone. The king and his favorite friends enjoyed special privileges and immunities by the king's prerogative. Sometimes, these privileges and immunities were conferred for political reasons and sometimes for economic ones. Not until the English exported their common law to America did that law become truly equally applicable to all.

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1. Deuteronomy 10:12-17 and Acts 10:34-45.
  2. Galatians 3:22,28 and Colossians 3:11.
  3. See, e.g., Genesis 4:4-5 and Hebrews 11:4.
  4. See, Revelation 20:12,15.
  5. Matthew 25:14-30.
  6. Daniel 2:21; 4:17,32.
  7. Exodus 31:1-6; Daniel 2:21,23; 1 Kings 3:6-13.
  8. Romans 9:10-12; Genesis 25:21-23.
  9. Leviticus 19:15; Deuteronomy 1:17; 16:19.
  10. F. Pollock and F. Maitland, HISTORY OF ENGLISH LAW, 176 (2d ed. 1968).

In his introduction to the first report of Connecticut law cases, Jesse Root noted that the American system of law and jurisprudence had been purified of the special prerogatives of the English.<sup>11</sup> Beginning with the July 4, 1776 Declaration of Independence, America's statesmen endorsed the principle that the common good could be achieved only through a faithful adherence to the principle of legal equality of all men:

We hold these truths to be self-evident that all men were created equal. That they are endowed by their Creator, with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness. That to secure these rights, governments are instituted among men.

State after state followed this Declaration with constitutional provisions that eliminated from their legal systems the odious special privileges of the English king, his family and his friends. For example, even prior to the Declaration on June 12, 1776, the Virginia constitution abolished "hereditary" access to legal and political privileges. All men were equally entitled to exercise legislative, executive, and judicial authority. The Delaware Constitution of September 11, 1776, for example, eliminated special privileges that had been afforded the established church in England. The Maryland Constitution of November 3, 1776, for example, abolished all titles of nobility. Finally, that same constitution prohibited monopolies, those legally guaranteed economic privileges that denied to others the equal right to economic opportunities.

These several declarations against the granting of special privileges and immunities later were summarized by one single declaration of equality before the law:

No law shall be passed granting to any citizen or class or citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens."<sup>12</sup>

Several changes took place in America in response to the new principle of equality. One of the most dramatic changes occurred in the laws governing the privilege of incorporation. Long cherished as a legal means to limit an investor's liability to the money committed to the corporate enterprise and to extend the life of a business beyond the lives of its founders, the English crown found it advantageous to grant the corporate franchise in exchange for political and economic favors. In America, the privilege to incorporate for the first time became available to anyone without regard to one's political, economic, or family status.

The equality of opportunity to incorporate was seized by the church and other voluntary charitable organizations as an effective legal tool to perpetuate themselves beyond the lives of their founders and to protect the assets of their benefactors. Indeed, the corporate entity, one legal person composed of many people as "shareholders," mirrored precisely the picture of the church that Paul painted in 1 Corinthians 12. More important, the principle of limited liability proved an effective means to afford immunity to the church under new constitutional religious freedom guarantees and

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11. J. Root, "The Origin of Government and Laws in Connecticut, 1798" quoted in *THE LEGAL MIND IN AMERICA* (32 C. P. Miller ed., 1962).

12. Art. I, Section 20, Oregon Constitution.

at the same time prevent abuses by those who would use those guarantees to their personal advantage.

While early America's statesmen worked consistently to eliminate from their young nation's law rules and regulations that granted favored treatment to people on account of family name, economic status, or political affiliation, they debated vigorously whether the law could include criteria related to ability. One of the most heated of these struggles was waged over the right to practice law. Out of this struggle emerged a consensus that criteria related to merit did not violate the principle of equality. Because God gifted some, but not others, to do certain kinds of work,<sup>13</sup> so man could ascertain by examination whether a particular person possessed the requisite ability to practice law. Such a law, then, did not breach the Biblical principle.<sup>14</sup>

While the prohibitions against the grant of special privileges to favored political and family friends has continued to be the norm in America, there has been a resurgence of the grant of special privileges to favored economic classes. Not only have the rich been given special treatment, but so have the poor. Indeed, the most widespread breach of the principle of legal equality has been committed by the enactment of laws that favor the poor. Eligibility standards for welfare benefits, for example, are keyed to one's economic status. Likewise, all modern income tax laws require the rich to pay at a higher percentage than the poor. Such discriminatory preferences have not been challenged because of an assumption that the poor, unlike the rich, are powerless. Yet, the Bible has warned that preferring the poor is comparable to the taking of a bribe.<sup>15</sup> Man, who has a responsibility to give to the poor, under the law of God, may, on account of guilt choose to meet that obligation by taking from another with whom the poor man has a dispute or by forcing others to contribute to the poor and thereby lessening his obligation.

While laws favoring the poor permeate the twentieth century American legal system, there also remain laws that favor the rich over the poor. For example, New York City controls entry into the taxicab business through a licensing system which limits access solely on the basis of the payment of a fee. Such laws violate the principle of legal equality of opportunity.

### **ONE RACE, MANY NATIONS**

In order to take advantage of the principle of legal equality, one must be recognized by law as a human being. For nearly one hundred years after the United States became a nation an entire class of people were denied the legal privileges and immunities afforded by the common law. This class was composed of those who had been brought from the nations of Africa to be slaves in America.

While many justifications have been given for the institution of slavery, the most widely accepted one was based upon the claim that Negroes were an inferior or subservient "race." Many claimed that by classifying the slaves as something less than human, the ordinary legal rights enjoyed by "white men" could be denied to them without violating the principle of equality contained in the

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13. Exodus 31:1-5.

14. Cf. 1 Corinthians 12:12-30 and Ephesians 4:11-13.

15. See, Deuteronomy 1:17, 10:17, 16:19; Proverbs 28:21.

Declaration of Independence. Yet the Declaration's drafters were not totally convinced by this racial distinction. Indeed, Thomas Jefferson included a section in his original draft of the Declaration of Independence that laid the responsibility for the negro slave trade at the feet of King George III in the following language:

He has waged cruel war against human nature itself, violating its most sacred rights of life and liberty in the persons of a distant people who never offended him, capturing and carrying them into slavery in another hemisphere . . .

Implicit in the claim that negro slavery violated "human nature" was the proposition that the slavery system in America violated the principle that all men are created equal. In fact, prior to the drafting of the Declaration, Blackstone had already written that slavery as practiced in England violated the English common law because to hold absolute power over another's life or fortune was "repugnant to reason and principles of natural law."

America's Continental Congress, however, compromised by deleting Jefferson's charge against the king. Even Jefferson, himself, later justified slavery by denying the Genesis account of the common origin of mankind. Jefferson speculated that either the black "race" was originally a distinct race or made distinct by time and circumstance and in body and mind inferior to the white race. Jefferson's defense of slavery on these grounds prompted at least one Christian pastor to urge his fellow citizens not to vote for Jefferson for president in the 1802 election:

[Jefferson] does not adopt, as an article of his philosophy, the descent of the blacks as well as the whites from . . . [Adam and Eve] which came immediately from the hands of God. He is not sure . . . Now, how will all this accord with revealed truth? God, says the apostle Paul, "hath made of ONE BLOOD ALL NATIONS of men, for to dwell on ALL the face of the earth."

Notwithstanding, the failure of America's national leaders to reject racial inferiority as a justification for slavery, the people of Vermont prohibited slavery in their constitution of 1777. In 1780 the people of Massachusetts abolished slavery by declaring in the first article of their new constitution: "All men are born free and equal, and have certain natural, essential, and unalienable rights which are the right of enjoying and defending their lives and liberties, that of acquiring, possessing, and protecting property."

Other states followed Vermont and Massachusetts, but not all. The slavery issue led to the Civil War. Even after the war had been won by the anti-slavery North and slavery had been outlawed by the Thirteenth Amendment of the United States Constitution, the newly freed slave class did not enjoy the common law rights of their former owners. Several Southern states enacted "Black Codes" that denied to the new freedmen, for example, the right to own, buy or sell property.

These codes prompted Congress to enact the Civil Rights Act of 1866. That law provided that the new freedman was a citizen and, as such, entitled to the "same right . . . to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of

person and property, as is enjoyed by white citizens." President Andrew Johnson vetoed this act as beyond Congress' constitutional authority; nevertheless, the Congress enacted the bill into law over Johnson's veto. Thereafter, Congress secured ratification of the Fourteenth Amendment's "equal protection" clause to confirm its authority to prevent the states from denying the benefits of the common law to the newly freed slave class.

The "equality principle" embraced, therefore, by the Fourteenth Amendment was not designed to prohibit the granting of special privileges to a favored class, but the denial of ordinary legal rights enjoyed by all classes of people.<sup>16</sup> It rested upon the equality principle embodied in the law of human nature, that all men are created equally human, and that no distinctions between one group of men or another can legitimately be made if those distinctions rest upon "race," "color of skin," or "national origin." By affirming the oneness of human nature in its Constitution, America brought its legal system under the law of God as expressed in both the Old and New Testaments:

In the day that God created man, in the likeness of God made he him; male and female created he them; and blessed them, and called their name Adam, in the day when they were created.<sup>17</sup>

[God] hath made of one blood all nations of men for to dwell on all the face of the earth  
...<sup>18</sup>

This principle of unity of the human family did not, however, destroy the legitimate Biblical distinction among nations.<sup>19</sup> America's affairs with other nations and with citizens of other nations have always been governed by rules that protect the "political integrity" of the national and state governments. For example, citizens of other nations are not allowed to vote or hold political office.<sup>20</sup> Nevertheless, such non-citizens who reside in the land cannot be denied ordinary legal rights available to citizens. That would violate the legal equality of human nature as the Law of Moses has clearly held:

And if a stranger sojourn with thee in your land, ye shall not vex him. But the stranger that dwelleth with you shall be unto you as one born among you, and thou shalt love him as thyself; for ye were strangers in the land of Egypt.<sup>21</sup>

One law and one manner shall be for you, and for the stranger that sojourneth with you.<sup>22</sup>

In summary, "racial" distinctions are per se illegitimate for any purpose even as a remedy for past wrongs under so-called affirmative action programs. There is only one race. A nation's law

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16. *Slaughter House Cases*, 83 U.S. (16 Wall.) 36, 21 L.Ed. 394 (1873).

17. Genesis 5:1-2.

18. Acts 17:26.

19. *See*, Genesis 10.

20. *See*, Deuteronomy 17:15.

21. Leviticus 19:33-34.

22. Numbers 15:16.

must, therefore, regard "man as man" and be "color-blind" as Justice John Marshall Harlan wrote in dissent in *Plessy v. Ferguson*.<sup>23</sup> Distinctions based upon national origin must be limited to the maintenance of the political integrity of the nation and, therefore, are illegitimate bench marks for the allocation of legal privileges and immunities. Affirmative action programs that provide otherwise contradict the principle of legal equality of opportunity because they make available privileges solely on the basis of the place of birth. Supreme Court Justice John Paul Stevens has recently pointed out that the only precedent for affirmative action laws that define "race" are those of Nazi Germany. Such a legacy is ample warning that Americans should avoid racial categories even for "benign" purposes lest they reinstitute a legal system based upon the same discredited racial distinctions that were relied upon in support of slavery.

### ONE RACE, TWO SEXES

Distinction based upon "race" and "national origin" are not analogous to those based upon sex. God made one human race, but from the beginning He made that race "male and female."<sup>24</sup> God created many nations, but only two sexes. God's division of man into male and female was the foundation of the earliest human governing institution, the family. From the beginning God ordained that the two sexes play distinct roles within the family unit. God created the woman specifically to meet the man's need, thus she is his "help-meet."<sup>25</sup> God ordained that the male initiate with the female the formation of the family unit.<sup>26</sup> As initiator the male retained leadership within the family and, as leader, the male assumed primary responsibility to provide and to defend the family.<sup>27</sup>

Legal distinctions, therefore, that preserve the different roles for male and female within the family unit are legitimate. Indeed, the law of marriage, itself, is built upon the union of one male and one female.<sup>28</sup> The sexual union of two males or two females or of one male and many females or vice versa cannot, legally, constitute a family.

But what about sex distinctions outside of the family unit? Even in the 1980's the United States Supreme Court has affirmed the legitimacy of laws that protect females from being raped by males, but not vice versa.<sup>29</sup> Moreover, the Court has upheld a federal statute that prohibits the drafting of women into the armed forces for combat duty.<sup>30</sup> The former is based upon God's law that the male is the initiator of sexual relations and, therefore, solely responsible if he has sexual intercourse without the female's consent.<sup>31</sup> The latter is based upon God's law that the female be protected by the male. Even Deborah when she judged Israel did not exercise the authority of that office to lead the army into war contrary to the practices of every judge who occupied the office before her and

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23. 163 U.S. 537, 559 (1896).

24. Genesis 1:27.

25. Genesis 2:18,20-22.

26. Genesis 2:24.

27. Ephesians 5:22-23.

28. Matthew 19:4-6.

29. *Michael M. v. Superior Court*, 101 S.Ct. 1200 (1981).

30. *Rostker v. Goldberg*, 101 S.Ct. 2646 (1981).

31. Deuteronomy 22:25-29.

every one who came after.<sup>32</sup> It was to the shame of Barak, the man on whom Deborah called to lead the army, when he refused to go without Deborah. God demonstrated that truth when he allowed a woman to kill the leader of the enemy army before Barak could get to him.<sup>33</sup>

But throughout history sex distinctions have not been confined to Biblically legitimate purposes. For example, the common law of England and early America did not recognize the right of married women to own property. Consequently, married women found themselves barred from many professions and business opportunities. Such denials were oftentimes justified as required by "the law of the Creator," namely that the husband and wife are one person in the eyes of the laws.<sup>34</sup>

Even a cursory review of the Bible proves that the common law's denial of economic opportunity to married women violated the Law of God. Indeed, the writer of Proverbs has included in his description of a "good wife" a woman who personally participates in the economic life of the community in which she lives.<sup>35</sup> Without receiving of the benefits of legal recognition apart from her husband, a woman could not possibly attain to the "virtues" listed in Scripture.

Not only did the common law not recognize married women on a par with men, but women were not allowed to participate in the political life of the common law nations. For example, women did not gain the right to vote in all elections in the United States until 1920. This time the justification for discrimination was based upon the subservient role that the woman was assigned within the family.

Again careful review of the Bible reveals that denial of equal political opportunity to women violated the law of God. Although Israel's leaders were almost exclusively male, it was not because women were legally ineligible to assume political office. For example, when Moses led the people out of Egypt, his sister, Miriam, held the office of a prophet.<sup>36</sup> As such she played a key role in the political and religious life of the nation, as evidenced by her and Aaron's sinful effort to displace Moses as the leader of Israel.<sup>37</sup> The woman, Deborah, not only held the office of a prophet, but the office of judge, the one held by Moses, himself.<sup>38</sup> Notwithstanding their eligibility to serve, God preferred men to lead Israel because the political and family life were so symbiotic<sup>39</sup> and because the political and religious life were so inextricably combined.<sup>40</sup>

But in a Gentile nation where the family and church ties are separated by God's law of jurisdiction, women are less a threat to the law of male leadership in those institutions than they were in Israel. Nonetheless, because the family and the church should play the key roles of nurture of the young and teacher of the truth, it is not surprising that males dominate the political life of a nation

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32. See, Judges 2:16,18; 3:9-10; 4:4-9; 6:12-16.

33. Judges 4:9,22.

34. See, e.g., *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1872), at 141-142.

35. Proverbs 31:16, 24.

36. Exodus 15:20.

37. Numbers 12:1-2.

38. Judges 4:4.

39. See, Numbers 33:54 and Joshua 15:1.

40. See, Leviticus 8.

when those institutions are flourishing. Even so, male dominance should not mean that women are legally ineligible to participate in the political life of the nation.

Because women have suffered wrongfully from discrimination in America, Congress proposed in 1972 the Equal Rights Amendment as follows:

Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.

While the state legislatures failed to ratify this proposed amendment to the United States Constitution, supporters of the E.R.A. both inside and outside Congress are determined to obtain its passage. It should, however, be rejected because the principle of equality that it has endorsed is not Biblical.

E.R.A. proponents have consistently argued that sex, like race, is an illegitimate factor in determining legal and political rights. But the Bible teaches that sex is not like race: God made man into two distinct sexes, "male and female," but He did not make them into two or more distinct "races." Moreover, God has assigned males and females different roles in the family, an institution that must receive legal recognition and protection from the civil government. The E.R.A. would, if enacted, destroy the law of the family. For example, current rules under equal protection of the laws prohibits any law barring "interracial" marriage. If the E.R.A. is enacted, it would likewise prohibit any law barring "intersexual marriage, *i.e.*, homosexual marriages.

In summary, equality under the law for women must take into account the law of God that distinguishes between males and females for the purpose of protection of the family unit, of the sexual relationships between males and females, and of the protective role that the male is to play.

## **THE RIGHTEOUS AND THE UNRIGHTEOUS**

As has been pointed out in the previous section, the Equal Rights Amendment is not a measure designed to achieve equal opportunity for women; to the contrary, it is a direct attack on those women who choose to be housewives and mothers. If the E.R.A. is a direct attack on the home, then the civil rights movement for homosexuals is a direct attack on the well being of the nation. Throughout God's Word, man has been warned that sexual promiscuity, especially homosexuality, violates the Law of the Land. That law, if consistently and persistently disobeyed, will result in the defilement of the land occupied by the erring nation and will result in the disintegration of the people that compose that nation.

It is abundantly clear, therefore, that the principles of equality that apply to race and to sex are not applicable to practices that discriminate against homosexuals or others who violate the law. As we have already seen, any claim for equal treatment must be analyzed carefully to ascertain its place in God's law order. In light of the foregoing discussion several principles of equality have been uncovered. Each principle is different. Therefore, claims for equal treatment must be analyzed carefully to ascertain their place in God's law order. Given a Biblical framework, sex and race distinctions are clearly not governed by the same prohibitions against discrimination. Analogies

from one to the other necessarily break down. If this is true concerning claims about sex and race, it is also true about claims that homosexuals make concerning alleged discrimination against their sexual orientation or sexual preference.

When God created man, He created only one race and two sexes.<sup>41</sup> He created the female sex to meet the need of the male sex, and He ordained marriage of one male to one female as the means whereby the sexual union would be consummated.<sup>42</sup> God did not create any other legitimate means of sexual expression. God has, from the beginning, condemned all sexual intercourse between males and females when engaged in outside the once for a lifetime monogamous family unit. Both the Old and New Testaments contain numerous commands against such behavior.<sup>43</sup>

Moreover, God has condemned all sexual relationships that conflict with the one trust He has established between one husband (the male) and one wife (the female). Again both the Old and New Testament records are consistent. All homosexual unions, life-long or promiscuous, are forbidden.<sup>44</sup> Sexual intercourse with animals, likewise, has been outlawed.<sup>45</sup>

In short, God has ordained only two sexual orientations, one male for one female, and one female for one male; and only two acceptable preferences, one male for one female in a life-long marriage, and one female for one male in a like union. All other sexual orientations and preferences are "unrighteous," contrary to God's created order.

Discrimination based upon the distinction between the righteous and the unrighteous is not only permissible, but mandatory. God, Himself, has always blessed the righteous man and cursed the unrighteous man.<sup>46</sup> At the final judgment, God will separate the righteous from the unrighteous and reward the former with eternal life and the latter with eternal death.<sup>47</sup> Because God discriminates between the righteous and the unrighteous, then so must those human authorities ordained by God to enforce God's law order.<sup>48</sup> The writer of Proverbs has reminded his reader that "righteousness exalts a nation, but sin is a disgrace to any people."<sup>49</sup> Paul has instructed civil rulers to encourage good and to punish evil because they are "servants" of God.<sup>50</sup> Church authorities have been commanded to discipline, even to the point of exclusion from fellowship, those who claim to be Christians but who practice unrighteousness.<sup>51</sup>

In keeping with these guidelines, the statute law of America has contained a variety of

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41. Genesis 5:2.

42. Genesis 2:18,20-24; Matthew 19:4-6.

43. Exodus 20:14; Leviticus 20:10; Mark 10:11-12; Romans 13:9 (adultery); Leviticus 18:12,15 (incest); Matthew 15:19; 1 Corinthians 6:9 (fornication).

44. Leviticus 18:22, 20:13; Romans 1:26-27; 1 Corinthians 6:9.

45. Exodus 22:19; Leviticus 18:23, 20:15-16; Romans 1:26.

46. *See*, Genesis 6:5-18, 18:20-25; Deuteronomy 27:15-26, 28:1 *et. seq.*; Matthew 5:6.

47. *See*, 1 Corinthians 6:9-10; Matthew 25:31-46.

48. Amos 5:15; Malachi 3:18.

49. Proverbs 14:34.

50. Romans 13:4.

51. 1 Corinthians 5:9-13.

discriminatory rules against those who practice lawlessness. Proof of "good moral character" has long been required of those who seek to hold an office of trust, such as that of attorney. Homosexuals have been systematically excluded from the armed forces and other security sensitive government posts. Employers in the business world, landlords, and business proprietors have been allowed to discriminate against those who live in adultery, in fornication, or in homosexuality. Such laws and such liberty have reflected a legal system designed to conform to God's law order.

Recent efforts to repeal laws that discriminate against those who practice unrighteousness and to enact laws prohibiting such discriminatory practices are contrary to God's law. The righteous and the unrighteous are not equal before the law, nor are they fixed like race or sex, rather they represent two groups of people, each of which has made a choice - one to seek to conform to God's law and the other to rebel against that law. The law of those human institutions that God has ordained must, insofar as they have jurisdiction, distinguish between the righteous and the unrighteous and in doing so must prefer righteousness and discourage unrighteousness. It is as Paul said in 1 Tim. 1:8-10:

But we know that the law is good, if one uses it lawfully, realizing the fact that law is not made for a righteous man, but for those who are lawless and rebellious, for the ungodly and sinners, for the unholy and profane, for those who kill their fathers or mothers, for murderers and immoral men and homosexuals . . .(NAS).

## CHAPTER 4

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### **Fault and Liability**

According to the Biblical record of the fall of man, Adam, when questioned by God if he had eaten the "forbidden fruit," blamed Eve: "The woman who thou gavest to be with me, she gave me of the tree and I did eat."<sup>1</sup> Eve, when God asked her the same question, blamed the serpent: "The serpent beguiled me and I did eat."<sup>2</sup>

What began in the Garden of Eden at the time of the Fall has continued unabated throughout the ages. The Biblical record, alone, abounds with examples of men accusing others or blaming circumstances for their errors.<sup>3</sup> This habit of man's picturing himself as a victim of circumstance surely prompted Paul to write to the First Century Christians at Rome that man either accuses others for what he has done wrong or excuses himself for having done those wrongs.<sup>4</sup> It has been, indeed, the rare man who will assume responsibility for his actions without excuse or without explanation.

Nineteen centuries later the record has not changed. As a matter of fact, the assumption that "man is a victim" gave rise to a new class of journalists in early twentieth century America. Nicknamed "muckrakers" by President Theodore Roosevelt, these newspaper columnists and magazine essayists scoured the American civil government and corporate landscape with exposes of political and economic corruption. Laying blame for America's ills at the doorstep of the "system," these crusaders clamored for a "new America" without the corrupting influences that cause men to go bad.

Typical of the dialogue that took place between America's critics and defenders during this period was an exchange between Lincoln Steffens, famous for his scathing attacks on political corruption in America's cities, and an unknown Episcopal bishop. As Mr. Steffens recorded in his own words, he had finished a talk in Los Angeles, and had nearly concluded the question and answer period when "the bishop rose:"

"What we want to know," he said, "is who formed this system, who started it, not only in San Francisco and Los Angeles, in this or the last generation, but back, way back, in the beginning."

"Oh, I think, I see," I said. "You want to fix the fault at the very start of things . . . Most people . . . say it was Adam . . . But Adam . . . said that it was Eve . . . And Eve said . . ."

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1. Genesis 3:12.
  2. Genesis 3:13.
  3. *See, e.g.* I Samuel 15:20-21.
  4. Romans 2:14-15.

it was the serpent . . . Satan. Now I come and I am trying to show you that it was, it is, the apple."<sup>5</sup>

While Steffens no doubt intended his remark to be received humorously, he was dead serious about his analysis. Long an admirer of the Bolshevik revolution in Russia, Steffens believed in the perfectibility of man through changing his environment and ridding the world of the conditions that caused men to fail. He believed that if man no longer was tempted by the economic incentives of "capitalism" then political corruption would simply die away.

While these efforts of the early muckrakers never succeeded in transforming America's free enterprise system into Steffen's dream of a completely socialized welfare state, they left a legacy that has survived and prospered throughout the twentieth century. America's leaders have been, and continue to be persuaded, to pursue public policies designed to alter man's environment to solve problems that once were attributed to man's failure to respond correctly to that environment. President Lyndon Johnson's War on Poverty, for example, was designed to lift all Americans above the poverty line and, according to Johnson's Attorney General Ramsey Clark, thereby to solve the crime problem.<sup>6</sup>

In the 1980's violent crime, according to some members of the United States Senate and House of Representatives, could be attributed to the ready availability of hand guns, not to the irresponsible handling of such guns by some. Indeed, one of the popular correctional programs of the 1960's and 1970's was designed to finance college educations for convicted criminals on the assumption that having been deprived of a college diploma they had resorted to crime.

Such environmental solutions fell hard upon the American automobile industry when political activist, Ralph Nader, waged a successful campaign against America's highway safety program that up until the 1960's and 1970's concentrated primarily upon changing driver behavior by encouraging good driver habits and by penalizing bad ones. In his popular expose of the Chevrolet Corvair, UNSAFE AT ANY SPEED, Nader launched an unrelenting attack upon the automobile industry and its supporters. In his chapter entitled, "The Traffic Safety Establishment," Nader set the stage with this single-minded thesis:

The vehicle is the basic unit of . . . [the highway transport] system; the driver's adequacy is a function of his vehicle's adequacy.<sup>7</sup>

Armed with this theme Nader accused the automobile industry of diverting attention from its "ill-designed" cars and challenged it to make an accident-proof, or at least injury-proof, vehicle. Programs designed to educate, to exhort, to monitor, and to judge the individual driver were dismissed as no more than "a political strategy to defend special interests." As a consequence of Nader's crusade many safety changes were made to the American automobile with little discernible effect upon the death or injury rate upon the nation's highways.

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5. L. Steffens, *THE AUTOBIOGRAPHY OF LINCOLN STEFFENS* (1931, 2005 ed.) at 574.

6. *See*, R. Clark, *CRIME IN AMERICA*.

7. R. Nader, *UNSAFE AT ANY SPEED: THE DESIGNED-IN DANGERS OF THE AMERICAN AUTOMOBILE* (1965).

But Nader's impact has been felt beyond government regulations requiring automobiles to be equipped with certain safety devices. By shifting attention away from the individual driver's behavior as the primary reason for automobile accidents and the resulting property damage and personal injuries, Nader laid the foundation for an even more significant change, no-fault insurance. In a book published in 1965 two law professors, Robert Keeton of Harvard and Jeffrey O'Connell of Indiana University, proposed that claims for compensation for personal injuries and property damage arising from the routine automobile accident be handled without blaming anyone at all.<sup>8</sup>

At the heart of this proposal, now law in twenty-two states, each automobile driver is required to insure himself and his own car to cover for any automobile-accident-sustained loss and to give up any right to sue another person for such loss even if that other person was at fault. This is in exchange for immunity from any claim against him if he caused loss to another as a result of his faulty driving.

Keeton and O'Connell defended this proposal on two principal grounds. First, the operation of a motor vehicle is "an extremely complicated process" that requires "constant, subtle judgments of speed, motion, and with very little margin for error."<sup>9</sup> In other words, man is a victim, unable to control his car because what is required of him is more than any human being can handle. Second, the trial of routine automobile accidents requires witnesses to testify about events "often too commonplace to receive . . . the kind of attention needed for precise perception and memory of distinctive detail."<sup>10</sup> In other words, man is a victim unable to reconstruct accurately a picture of ordinary events to determine what has happened to him in the past. To Keeton and O'Connell then, "fault" has become an "unrealistic criterion" for handling the routine automobile accident because the driver has been overwhelmed by conditions of automobile driving. Under their new "no fault" system man has been placed where Keeton and O'Connell say that he belongs. A victim of the ordinary circumstances of life.

Such law reform movements have not been confined to changing man's environment, or to altering public policies to conform to that external environment such as has occurred recently in the automobile industry. During the late nineteenth and early twentieth centuries criminology experts began to theorize that the "crime problem" could be solved by eliminating certain "uneducable" people from society. A popular scheme administered by some American state authorities required the sterilization of certain people with undesirable traits so that those traits would not be passed on to yet another undesirable generation. Mr. Justice Oliver Wendell Holmes summarized this effort in a remarkably frank paragraph in his famous opinion in the case of *Buck v. Bell*:<sup>11</sup>

We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the state for these lesser sacrifices (forced sterili-zation) . . . in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to

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8. R. Keaton and J. O'Connell, BASIC PROTECTION FOR THE TRAFFIC VICTIM: A BLUEPRINT FOR REFORMING AUTOMOBILE INSURANCE (1965).

9. *Id.*, at .

10. *Id.*, at .

11. 274 U.S. 200 (1928).

execute degenerate offspring for crime, or let them starve for their imbecility, society can prevent those who are manifestly unfit for continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the fallopian tubes . . . Three generations of imbeciles are enough.

These views were once widely shared among the intelligentsia of Europe and America. For example, Margaret Sanger, founder of Planned Parenthood, encouraged the adoption of state mandated programs to select only the best to breed future generations. While her vision for a world populated by only those selected by a governing elite has not yet become reality the Planned Parenthood's program encouraging abortion and infanticide marks a step in that direction. And what has begun as a matter of individual "choice" may easily be transformed into a state mandated policy for the common good, for there are already many who believe that the world is over-populated by people who do not exercise self-restraint. Thus, Communist Chinese authorities have implemented a rigid population control program, including forced abortions of pregnant women who have already given birth to more children than their quotas allow.<sup>12</sup>

Practices of abortion at the discretion of the mother and her physician, infanticide at the request of the parents, and euthanasia within the discretion of the family inevitably lead to forced abortion, to required infanticide, and to commanded euthanasia. This is because they rest upon the view that man is but a complex animal, the product of impersonal evolutionary forces governed by time and chance. As such, every birth and every death is but an happenstance unless controlled by man according to the best scientific, economic, political, and social policies that he can invent. This faith in man's evolutionary origins has spawned an entire field of study, popularly known as "genetic engineering." While many schools of thought have developed within this broad field, one school stands out as willing to follow the logic of its presuppositions no matter where it leads. These are the sociobiologists.

Led by the pioneering work of Edward O. Wilson of Harvard, the sociobiologists contend that all animate life, including human beings, are no more and no less than the "end product of the war between the genes."<sup>13</sup> In other words, man is but a victim of his genetic makeup; and that makeup is but a particular manifestation of an endless battle among warring genes. The December 13, 1976 issue of TIME magazine describes this new science to its readers, as follows:

Sociobiology is essentially the evolutionary theory of Charles Darwin expressed in the terms of modern genetics: The central struggle of life is the drive to survive and reproduce.

But the chief actors in the sociobiologists' world are the "genes themselves." The TIME article continued:

Like the old aphorism, a chicken is just one egg's way of making another egg, a body can be viewed as merely a vehicle by which strings of genes produce other strings of genes.

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12. See, S. Mosher, CHINA.

13. E. O. Wilson, SOCIOBIOLOGY: THE NEW SYNTHESIS (1975).

Finally, TIME quoted one of the sociobiologist's major defenders who wrote:

[G]enes swarm in huge colonies safe inside gigantic lumbering robots, sealed off from the outside world, manipulating it by remote control. They are in you and me; they created us body and mind; and their preservation is the ultimate rationale for our existence . . . we are their survival machines . . .

While most biologists and other scientists do not agree with this sociobiologic thesis, they do share the sociobiologist's major premise: that man evolved by natural selection. Holding to an evolutionary premise inevitably drives a scientist to admit to the kinds of conclusions held by the sociobiologists, if they have the courage and honesty to say so. Consider, for example sociobiologist Wilson's introduction to his popular text on the subject:

[The brain] . . . evolved by natural selection. That simple biological statement must be pursued to explain ethics . . .<sup>14</sup>

Wilson then proceeds to explain that man's feelings of "guilt" and his acts of "altruism" are simply the product of his genes at work to perpetuate themselves. In other words, a man chooses not to commit suicide not because he believes suicide is inherently wrong or is selfish and detrimental to others who may grieve or otherwise suffer from his loss. Rather, he does not kill himself because his genes have programmed him not to do so in order that the genes, themselves, survive!

It is not surprising then that Wilson calls scientists and humanists to "consider together the possibility that the time has come for ethics to be removed temporarily from the hands of the philosophers and biologized." Such a "biologized ethic" would necessarily yield an "innate moral pluralism" because "no single set of moral standards" could be applied to all human populations - some of which are "at demographic equilibrium" while others are living in an episode "of overpopulation" or to all "sex-age classes within each population" - young children must be "self-centered and relatively disinclined to perform altruistic acts" while adults may be less so since the latter are strong enough to protect themselves while the former are very vulnerable to their parents and others.<sup>15</sup>

No wonder the sociobiologists call for changes in every area of life - including economics, international relations, and law. While Wilson's views summarized above were not available to Clarence Darrow, the defender of evolution in the famous *Scopes* trial, Darrow incorporated very similar thoughts into his closing argument in defense of two young men, Nathan Leopold and Richard Loeb, who had brutally murdered a 14 year old boy:

Why did they kill little Bobby Franks? Not for money, not for spite, not for hate. They killed him as they might kill a spider or a fly, for the experience. They killed him because they were made that way. Because somewhere in the infinite processes that go to the

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14. *Id.*

15. *Id.*, at .

making up of the boy or the man something slipped . . .<sup>16</sup>

More significantly, juvenile justice reformers around the turn of the nineteenth century reflected Wilson's views that the young should not be governed by the same standards as the adult. In response legislatures in every state of the union enacted juvenile codes to deal with youth crime and other activities associated popularly under the umbrella, juvenile delinquency. The underlying premise of these so-called enlightened "juvenile justice systems" is that man is determined by his environment and, if he has "misbehaved" then he must have a change in his environment, removal from his parent's home being one solution often utilized. Justice Abe Fortas, writing for the United States Supreme Court in the famous *Gault* case summarized the evolutionary faith of the juvenile court reformers:

[They b]elieved that society's role was not to ascertain whether the child was 'guilty' or 'innocent,' but 'what is he, how has he become what he is and what had best be done in his interest and in the interest of the state to save him from a downward career.' The child - essentially good, as they saw it - was to be made 'to feel that he is the object of (the state's) care and solicitude.' . . . The idea of crime and punishment was to be abandoned. The child was to be 'treated' and rehabilitated.<sup>17</sup>

Such legal policies based upon Darwin's evolutionary faith yields both loss of liberty and lawlessness. Even the United States Supreme Court recognized the threat to freedom when it struck down state juvenile codes that failed to afford the young comparable procedural safeguards to those granted to adults in criminal trials.<sup>18</sup> As for lawlessness, America has been bombarded for years with the statistical increases in crime among its young. Biologist A.E. Wilder-Smith has uncovered the reason for this steady and startling increase:

Most western-trained teachers have no belief in any non materialistic meaning of life at all. In fact, many . . . believe, and teach, that the origin of life . . . life itself, is one big accident . . . If life is an accident, then why not treat it as such? The students . . . have taken the cue more quickly than their teachers. If there is no divine plan or meaning behind life it becomes as cheap as an accident should be.<sup>19</sup>

And the apostle Paul warned that lawlessness was a direct product of an evolutionary faith:

Professing themselves to be wise, they become fools, and changed the glory of the uncorruptible God into an image made like corruptible man, and to birds, and four-footed beasts, and creeping things. Wherefore God gave them up to uncleanness through the lusts of their own hearts . . .<sup>20</sup>

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16. Trial transcript, *Illinois v. Nathan Leopold and Richard Loeb* (1924).

17. *In re Gault*, 387 U.S. 1 (1967).

18. *Id.*

19. A. E. Wilder-Smith, *MAN'S ORIGIN/MAN'S DESTINY* (1975).

20. Romans 1:22-24.

Those lusts, Paul continued, turn men to lives full of "all unrighteousness, fornication, wickedness, covetousness, maliciousness . . . envy, murder, debate, deceit, malignity . . ." <sup>21</sup> Further, Paul added, men become "whisperers, backbiters, haters of God, spiteful, proud, boasters, inventors of evil things, disobedient to parents, without understanding, covenant breakers, without natural affection, implacable, unmerciful . . ." <sup>22</sup>

Paul's description of the reality of the Roman Empire in which those early Christians lived comes very close to modern day America. For as Rome was dominated by a pagan view of the origin of man, including a theory of natural selection, America has been dominated for the past fifty to one hundred years by a like evolutionary faith. The reform movements described previously in this chapter - those of the "muckrakers," of "Nader's Raiders," and of the sociobiologists are all based upon that common faith. They desire a legal system that would prevent harm either by eliminating "wrong" living environments or "wrong" human beings. But America's legal system from the beginning has rested upon a different faith - a belief that man is a morally responsible creature who may be blamed for causing injury to others and who may not be excused for having a "faulty" character or having been raised in a "faulty" environment.

#### **MAN: CREATED IN THE IMAGE OF GOD**

The common law of England that America's colonists brought with them when they settled the "New World" rested upon an unqualified endorsement of the Biblical truth. At the heart of that truth was that man may be praised for making right choices and blamed for making wrong choices. In this way the common law authorized the civil rulers to fulfill their mandate under Romans 13:

For rulers are not a terror to good works, but to the evil . . . For he is a minister of God to thee for good . . . for he is the minister of God, a revenger to execute wrath upon him that doeth evil. <sup>23</sup>

The common law was preoccupied with the task of sorting out wrong from right conduct and ascribing blame to those who commit wrongful acts because it was based upon the belief that man played a unique role in a universe created by God.

The book of Genesis teaches that God created man in His own image. <sup>24</sup> In contrast, Genesis teaches that God created all other living beings "after their kind." <sup>25</sup> Only man bears the image of God. Because God is a spiritual Being, not a physical one, the image of God in man is spirit, not physical. <sup>26</sup>

The book of Genesis also teaches that the Spirit precedes and creates the physical world.

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21. Romans 1:29.

22. Romans 1:29-30.

23. Romans 13:3-4.

24. Genesis 1:27.

25. *E.g.*, Genesis 1:21,24-25.

26. John 4:24 and Genesis 2:7.

Genesis 1:1 says "In the beginning God . . ." not "In the beginning soup" or some other eternally existing physical phenomena. It follows, therefore, that the Creator Spirit God governs the physical world by the means by which He created it, by His Word. Thus, Genesis 1:3 states that when God spoke light into the physical world, light came into that world. God rules the created physical universe by spiritual means.

When God created man as a spirit being, He gave him a unique goal: to subdue the earth and to have dominion over all its creatures, except man.<sup>27</sup> That role, to exercise dominion, was directly connected with God's having created man in His image: "Let us make man in our image, after our likeness, and let them have dominion . . ." <sup>28</sup> By endowing man with spirit, man was enabled to carry out the dominion mandate. Without that spiritual aspect, man would not have the ability to raise above the physical, but could only conform to it.

To fulfill the dominion mandate, then, God did not program man: rather, He "commanded" man to obey His plan for His creation. Therefore, when God placed Adam into the Garden of Eden, He assigned to Adam the responsibility to "cultivate and keep" it. Genesis 2:15. At the same time God told Adam that He had a plan and He commanded Adam not to eat of "the tree of the knowledge of good and evil."<sup>29</sup> God did not command any other creature not to eat of that tree: they were programmed not to do so. Only man was given a choice to obey or not to obey.

Having given man a "choice," God gave him the ability to choose rightly. And that choice was both "real" and "fair" for God had created everything "very good," that is, without fault.<sup>30</sup> So when Adam and Eve failed in the garden, God did not accept Adam's excuse that Eve did it. God had not made her faulty, her genetic code was in order, and she had the ability to control her thoughts and her action. Neither did God accept Eve's excuse that the serpent fooled her. God had not made a faulty environment, the garden was in order, and both Adam and Eve had the ability to respond correctly even when that environment was entered by the evil one, Satan.

Because God had created both the garden and all of its creatures "very good," He cannot be blamed for the wrong that Adam and Eve committed in the Garden. Yet that was what Adam and Eve both attempted to do in that first encounter with their Creator after the Fall. And that is what men like Steffens, Nader, Keeton, O'Connell, Holmes, and Wilson have done as they attribute man's failures to his genes or to his environment. The opposite is true. God gave man the ability, indeed the duty, to rise above the natural forces of the genetic code and of the physical environment to make things happen according to God's plan and purpose. As God spoke the entire universe into being, God created man to work with Him to bring to pass His plan and purpose for that universe. Man, therefore, causes things to happen within God's creation. If man obeys God, he causes good to happen; if he disobeys God he causes bad things to happen. From the beginning God created man in such a way that he was not just a product of physical forces whether it be his genes or his environment or a combination of both.

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27. Genesis 1:28.

28. Genesis 1:27.

29. Genesis 2:16-17.

30. Genesis 1:31.

Jesus Christ reminded man of this reality when he voiced objection to the Pharisaical practice of seeking solutions to evil in the world by applying rules that touch only man's external behavior but not his "heart." Thus, He taught His disciples the parable that "nothing outside the man which going into him can defile him, but the things which proceed out of the man are what defile the man."<sup>31</sup> In response to the disciple's question about this parable Christ explained:

[F]rom within out of the heart of men, proceed the evil thoughts and fornications, thefts, murders, adulteries, deeds of coveting and wickedness, as well as deceit, sensuality, envy, slander, pride, and foolishness . . .<sup>32</sup>

In the law schools of America this fundamental truth is not taught, even though the law that is taught depends upon its being true. Instead, law professors typically offer other reasons for the fact that the criminal law, for example, does not accept defenses based upon environmental or genetic determinism. Peter Low, John Calvin Jeffries, Jr., and Richard J. Bonnie, three University of Virginia law professors, have written in their text from which they teach their students the following explanation:

The underlying premise of the criminal law is that it is morally right to treat people as responsible moral agents, whatever the fact of the matter, because any other view would be inconsistent with the values of individual autonomy and freedom that the law should reflect and with the perception of each other on which people at least think they are governing their daily lives.<sup>33</sup>

These authors go on to explain:

Determinism is rejected by the criminal law, in other words, not because it is a false scientific theory but because it should be rejected in light of the proper normative premises on which the criminal law should function.<sup>34</sup>

In short, these authors have instructed their students to believe in what they are teaching, not because it is true, but because man wants his freedom and wants to have it by holding wrongdoers responsible for their criminal acts. But if what they profess is not true, how long will their students go on believing? The answer may be found in any randomly selected courtroom across America where judges and juries find guilty those charged with crime, but, in turn, have difficulty imposing upon them the penalties that they so deserve. The real reason why it takes so long to bring a convicted murderer sentenced to death to pay the price is that America's judges, educated by men such as the University of Virginia professors quoted above, do not really believe that those convicted are really responsible for what they have done. Therefore, any excuse, even a slight procedural error in the trial, may be sufficient to send the case back for another trial.

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31. Mark 7:15.

32. Mark 7:21-22.

33. P. Low, J. Jeffries, & R. Bonnie, *CRIMINAL LAW: CASES AND MATERIALS* (1982), 7.

34. *Id.*

This false view of man has not only raised havoc in the courtroom, it has invaded the daily lives of America's families and communities. Ordinary people are no longer sure that they can rightfully hold others morally responsible. Therefore, even family discipline, school decorum, and employment relations have suffered from the evolutionists' faith that man is determined by a natural selection process conditioned by his genes and his environment.

### **MAN: CAUSE OR CONDITIONED**

On an ordinary day in the life of an ordinary family people constantly make decisions based upon the simple question: Who did it? Who made the mess in the kitchen? Who left the toy truck on the stairs? Who tracked this mud on the carpet? With questions like these man seeks to know who "made the difference" between a good condition and a bad one. These questions are the everyday stuff of the courtroom or of the law office. Who caused the accident? What went wrong? Did the doctor leave the sponge in the patient's stomach? Or was it the nurse? Again lawyers want to know who "made the difference" between a good outcome and a bad one.

If a child should answer his mother's question about the toy on the stairway, that Adam and Eve did it - it's all because of the Fall - the child would soon learn that his "sinful condition" did not "cause" the toy to be left in a dangerous place. Likewise, should the doctor answer the lawyer's questions about the sponge left in the patient's stomach in the same manner, the doctor would receive a lecture that the law distinguishes between "causes" and "conditions." This distinction between "cause" and "condition" is basic to life and to law because it is at the heart of determining if a man has chosen a right or wrong response to the environment in which he lives.

That has been so from the beginning when Adam and Eve chose to eat of the forbidden fruit. It was their decision to eat of it that caused sin and death to enter the world.<sup>35</sup> The garden, the "apple," and even the temptation of the devil were all "conditions" that set the stage for Adam's and Eve's opportunity to choose to obey God, but none "caused" them to make the wrong choice. Likewise, when one gets into his car in the twentieth century, the car, the highway, the traffic patterns, and even the temptations to speed - "Put a Tiger in Your Tank" -are all "conditions" that set the stage for the driver to choose to obey or disobey the traffic laws. None will be the "cause" of the driver's misbehavior. A gun is a necessary condition for a murder by a firearm, but it can never be the "cause."

From these simple examples, one may learn that an inanimate physical object may be a "condition," but never a "cause." That is because only those physical beings endowed with a spiritual dimension may "cause" anything in a world created and operated by an infinite spiritual being. Also, from these simple examples one may learn that difficulties arise if a question is raised about whether the cause was one person or another. If the boy answers his mother's question about who left the toy on the stairway with the statement "Joey (his brother) did it," the mother has a problem of who caused it, Joey or his brother. If the doctor blames the nurse for having left the sponge in the patient's stomach, then the lawyer has a similar problem. But even here, the assumption remains the same: Man has been created in such a way that he can be identified as the

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35. Romans 5:12.

one who "made the difference" in the outcome.

This distinction between "cause" and "condition" and between two possible "causes" are crucial to any effort to find "fault." That is why law students often study "causation" at the beginning of their instruction in torts, the area of law governing the recovery of damages for losses caused by others' wrongdoing. In that study he quickly learns that the common law has several rules reflecting the basic distinction between "causes" and "conditions." He will also learn that the common law includes such defenses as an "act of God" to excuse man when an extraordinary event has occurred in such a way as to call the event a "coincidence." For example, he will learn that a driver of a car is not responsible for the death of his passenger killed by a lightning strike even though the driver was exceeding the speed limit and, presumably, would not have been in the place where the lightning struck. Some events occur that man cannot be held responsible for because God actively participate in His creation and allows, for reasons man does not know, "bad things to happen to good people." Under such circumstances man's act is but a condition upon a much larger stage where God and other spiritual beings are in charge.<sup>36</sup>

But today's law student will also not be taught to respect such reasons given by 18th and 19th century lawyers. Instead, he will learn that the "act of God" defense between "cause" and "condition" is archaic and outmoded. Most likely, he will be directed to a modern authority, like Prosser on Torts, where he will read that the "real reason" for the "act of God" defense is as follows:

If the defendant escapes responsibility, it is because the policy of the law does not safeguard the plaintiff against such a risk . . . [I]f the defendant drives through the state of New Jersey at an excessive speed, and arrives in Philadelphia in time to be stuck by lightning, his speed is a not unimportant cause of the accident, since without it he would not have been there in time; and if he is not liable to his passenger, it is because in the eyes of the law his negligence did not extend to such a risk. The attempt to deal with such cases in the language of causation can lead only to confusion.<sup>37</sup>

The reason that Prosser believes that causation is confusing, is because he is confused about the true distinction between "cause" and "condition."

In a philosophical sense, the consequences of an act go forward to eternity, and the causes of an event go back to the discovery of America and beyond. "The fatal trespass done by Eve was the cause of all our woe." But any attempt to impose responsibility upon such a basis would result in infinite liability for all wrongful acts, and would "set society on edge and fill the courts with endless litigation."<sup>38</sup>

Having rejected God's reality of man as a limited causal agent, Prosser concludes that it is up to man to determine the limits of legal responsibility according to "some idea of justice and policy."<sup>39</sup>

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36. See, e.g. Job 1:6-12.

37. Prosser, TORTS (19 ), .

38. *Id.*, at .

39. *Id.*, at .

Those ideas of justice range from solutions based upon "administrative possibility and convenience" to those founded upon some group's demand for justice. To understand more fully the implications of this kind of thinking, one need only examine the efforts to redress the harm caused by past racial discrimination through civil government imposed affirmative action programs.

In May 1977 the United States Congress authorized the expenditure of federal funds for local public work projects. In order to receive these funds state and local government authorities were allowed to secure goods and services from businesses submitting competitive bids, except that 10% of such goods and services were to be purchased through businesses owned or controlled by members of a statutorily identified minority group. The Congress justified this special exemption from competitive bidding for members of the named minorities on the ground that it was a remedy for past discrimination. Yet Congress cited no evidence and required no proof that any of the beneficiaries had ever been wronged by the state and local governments covered by the law.

This fact prompted Supreme Court Justice John Paul Stevens to observe that the real reason for the exemption was the strength of the "Black Caucus," lobbying in the United States House of Representatives to make sure that their constituents got "a piece of the action." But the Caucus could never have obtained their objective if the Congress was guided by the Biblical principle that no one is entitled to any "remedy" for any loss other than that "caused" by an individually identified and properly proved wrongdoer. As God revealed through Moses in the Book of Deuteronomy, the sons are not to pay for the sins of their fathers.<sup>40</sup> Whatever wrongs that the Black people have suffered in America through slavery, separate but equal and other discriminatory policies, those wrongs can never be righted by holding the present generation for the sins of the past generation, or some members of a present generation for the sins of other members of that generation. Yet, that is what all affirmative action programs are designed to do. They are possible only in a world where the policy makers have forgotten God's distinctions between "causes" and "conditions" and, consequently, where they have ignored an absolute essential condition of justice, the proof of individual responsibility for having caused the harm for which redress is sought. Any effort to obtain "racial justice" apart from those foundational principles will yield not only injustice, but will foster the very animosity and discontent that have plagued America's black and white communities for decades.

In summary, individual responsibility is the keystone to justice. God has created man in such a way that he may respond rightly or wrongly to his environment. Rewarding right choices and penalizing wrong choices contributes both to order and to liberty. Any departure from that basic principle destroys the very fabric of society as God has created it to be.

### **MAN: REASONABLE OR PERFECT**

Along with the displacement of "individual fault" by "systemic fault" has come the assumption of perfectibility, that alterations in man's genes and environment will bring a perfect system run by perfect men. No doubt one reason why Congress and other governmental bodies have adopted "affirmative action" programs is that they, along with several United States Supreme Court justices,

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40. Deuteronomy 24:16.

believe that such programs, if pursued long enough, can rid society of "all vestiges of past discrimination." They think that once a society is cleansed of its racist heritage, then by comprehensive enforcement of laws prohibiting discrimination racism can be eradicated "root and branch."

Such a drive for perfection in race relations has been felt in other areas and at other times. In the early history of the common law people were held liable if they caused damage to another even if the injury was an "accident." But as the common law matured recovery was not allowed, with few exceptions, without proof of negligence or intent. The common law definitions of crimes, however, always required more proof than that the defendant did not act perfectly. For example, Blackstone in his COMMENTARIES noted that the killing of another human being did not constitute murder unless there was "malice aforethought." This common law definition rested upon the Biblical distinction between murder on the one hand and accidental homicide on the other.

He that smiteth a man, so that he die, shall surely be put to death. And if a man lie not in wait, but God deliver him unto his hand; then I will appoint thee a place whither he shall flee. But if a man come presumptuously upon his neighbor, to slay him with guile; thou shalt take him from mine altar, that he may die.<sup>41</sup>

Blackstone even utilized a Biblical fact example from Deuteronomy 19:4-5 to illustrate the point that man's authority to punish another for killing a human being depended upon proof of intent to harm.

The common law requirement of intent to harm or other comparable mental culpability has been continued as a prerequisite for proof of criminal activity in most cases. Nevertheless, beginning in the early twentieth century legislatures in America began to raise the standard of conduct to the level of perfection in their attempts to control the traffic in illegal drugs, in the stock market, and in other "business activities."

This development in the criminal law was paralleled by one in civil tort law where a standard of "strict liability" has been extended especially to the manufacturers and sellers of products. While the drive towards the perfectibility standard in the criminal law has been generally deplored, the efforts to hold businesses to the higher perfectibility standard has been generally approved. In support of the requirement that a manufacturer's product work perfectly or else he must pay for any damage caused are statements such as the following:

The purpose of . . . [strict] liability is not to regulate conduct with a view of eliminating accidents, but rather to remove the economic consequences of accidents from the victim who is unprepared to bear them and place the risk on the enterprise . . . The risk . . . becomes part of the cost of doing business and can be effectively distributed among the public through insurance or by a direct reflection in the price of the goods or service.<sup>42</sup>

In effect, strict liability imposed upon the manufacturer of an accidentally designed or

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41. Exodus 21:12-14.

42. Prosser, *supra* at ,

constructed product or delivered service is justified by the assertion that the one who has the most money or who is in a position to force others to pay for his mistakes must pay. Implicit also is the assumption that a business enterprise could do better if it really wanted to do so, but everyone knows that the businessman just wants to make a buck.

The Bible teaches quite a different standard of justice. First of all, God revealed through Moses that a judge must "not show partiality in judgment" but "shall hear the small and the great alike."<sup>43</sup> The ability to pay or not to pay a judgment under the Biblical standard was to be absolutely irrelevant: "You shall do no injustice in judgment; you shall not be partial to the poor nor defer to the great, but you are to judge you neighbor fairly."<sup>44</sup> Indeed, the danger of favoritism to the poor was one of the first illustrations of injustice that God revealed to Moses: "You shall not follow a multitude in doing evil, nor shall you testify in a dispute so as to turn aside after a multitude in order to pervert justice; nor shall you be partial to a poor man in his dispute."<sup>45</sup>

Even if the standard of perfection applied notwithstanding a defendant's ability or inability to pay, the Bible has not authorized any civil government to hold its citizens or residents to such a standard. Because man himself is not perfect, he has no right to hold others to a standard that he cannot meet. Only God can do that as Christ taught in his sermon on the mount: "Be ye therefore perfect, even as your Father which is in heaven is perfect." Matthew 5:48. At best, man has authority to hold his fellow man to a standard of ordinary care or to some other standard short of perfection. Otherwise, the civil ruler will usurp a role that God has reserved to Himself and to the church.<sup>46</sup>

This legal standard of ordinary care does not, however, apply to the standard itself. All are presumed to know the law; ignorance of the law is no excuse. The reason for this rule is found in the Bible as well. Paul, in his letter to the church at Rome, wrote that all know the law because the law, an "invisible thing" of God, is "clearly seen, being understood by the things that are made, even his eternal power and Godhead, so that they are without excuse." Romans 1:20. Moreover, God wrote the law upon the heart of every man so that their conscience bears witness to the standards of behavior that are required.<sup>47</sup>

The common law reflected this Biblical reality by denying to any litigants all opportunity to prove that he had good reason not to know the law. The common law rule that ignorance of the law is no excuse has been retained even by twentieth century scholars and jurists. Yet, because they have no faith in God or in His Word the modern legal expert has rejected the Biblical defense for the rule. But he has found nothing satisfactory to replace the Biblical justification, having reduced the rule to a matter of expediency with such arguments that "public policy sacrifices the individual to the general good."

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43. Deuteronomy 1:17.

44. Leviticus 19:15.

45. Exodus 23:2-3.

46. *See*, Ephesians 4:12-13.

47. *See*, Romans 2:14-15.

Such a policy argument has not been accepted, however, by these same experts who favor a more liberalized insanity defense to excuse criminal wrongdoing. At one time many legal scholars and judges favored Judge David Bazelon's view that no one was "criminally responsible if his unlawful act was the product of mental disease or defect." Known as the "Durham test" this rule became law in the District of Columbia in 1954 only to be abandoned 18 years later because it threatened to undermine the principle of fault in the criminal law: Almost any lawyer could find some medical expert who would testify that a defendant was mentally ill and on that account could not stop himself from committing the crime of which he was accused. In other words, the Durham rule could be manipulated by lawyers and experts to require proof that an individual defendant was "perfect" before he could be held morally responsible.

The traditional common law governing the insanity defense was not based upon any ideal of the perfect man. To the contrary, known as the M'Naghten rule, it excused criminal conduct only if the defendant suffered from a mental disease or defect that totally impaired his ability to know right from wrong or to know the nature and quality of the act he was doing. Any effect short of such total impairment of reason did not excuse the defendant, but was simply a condition that he was required to overcome. Those who endorsed and applied the M'Naghten rule believed that man's will could not be impaired by disease or defect and so refused to accept any contention that a defendant could have an "irresistible impulse" to commit a crime. His condition and his environment may not be perfect, they acknowledged, but it is a fallen and imperfect world in which man lived. Only diseases and defects that robbed man completely of his reason were accepted excuses.

The M'Naghten rule remains law in some American states, but most have adopted a rule that stakes a middle ground between M'Naghten and the now discredited "Durham test." In 1955 the prestigious American Law Institute began drafting a Model Penal Code. In that code they formulated an insanity test that reads as follows:

A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect, he lacks a substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law.

This rule incorporated an excuse for an "impaired will" and allowed for a defense even though the defendant was not totally mentally incapacitated by the disease or defect. Even though this rule has expanded the insanity defense beyond the M'Naghten rule it has retained the basic principle that man need not be proved perfect before he can be held morally responsible for his acts. Indeed, in the criminal law all men are presumed sane, therefore, they intend the "natural and probable consequences of their acts." Such a presumption and rule reflect God's reality that even in a fallen and imperfect world man, created in God's image, has the ability to overcome great obstacles, including defects and diseases of the mind.

A beautiful illustration of the truth of this assumption is given in the account in Mark's gospel of the encounter between Jesus Christ and the Gadarene demoniac.<sup>48</sup> Often bound by chains, that he broke at will, and tormented to the point of cutting himself with stones, this demon-possessed

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48. Mark 5:1-20.

man lived naked in a cemetery. When he saw Jesus, "he ran and worshipped him;" yet, when Jesus talked to him, the demons that lived in him spoke. After Jesus delivered him from the "legion" of demons that controlled his life, he put on clothes and talked with Christ for he had been restored to a "right mind." Without question this man would be diagnosed by medical experts of the twentieth century as suffering from a serious mental disease. Nevertheless, he had sufficient control over his will that he came to Jesus and worshipped him even though he lacked control over his mind to converse with him. Although imperfect the demon-possessed man had been created in the image of God and had sufficient free will to overcome all barriers to his coming to Christ for healing and for salvation.

### **MAN: RIGHT AND WRONG**

While it may be reasonable to hold a man responsible for overcoming imperfection of the mind and of the body, it would not be reasonable to hold him responsible for those imperfections and their symptoms. That is the testimony of each of the three formulations of the insanity defenses. Whatever their differences, each requires proof that the defendant suffers from a mental disease or defect. Indeed, the American Law Institute drafted a provision declaring that "repeated criminal or otherwise anti-social conduct," alone was not sufficient to prove such a disease or defect. Again this view reflects the Biblical distinction between sin and illness. The latter is a consequence of sin, either personal<sup>49</sup> or general,<sup>50</sup> and, therefore, can never be the occasion for blame or fault-finding. As the United States Supreme Court recently stated, "even one day in prison would be cruel and unusual punishment for the 'crime' of having a common cold."

But what qualifies as an illness or disease? In 1975, the American Psychiatric Association voted that homosexuality was not an illness. They had already voted some time previously that homosexuality was not a "sin." Experts have gone back and forth over the years trying to decide if alcoholism and drug addiction are sins or illnesses. Are these questions to be decided by majority vote? If so, a vote of the experts or a vote of the populace?

In a recent article published in the *WORLD PRESS REVIEW* the author claimed that "illness" was not a "thing," but a "judgment" made by those who are given the power to impose their will on the rest of us.<sup>51</sup> Earlier in a satirical novel written in the late nineteenth century, Samuel Butler wrote of a fictional land called EREHWON (nowhere spelled backwards) in which a man suffering from tuberculosis was sentenced to life imprisonment at hard labor; whereas had he feigned tuberculosis to defraud his insurance company he would have been "sent to a hospital as for a moral ailment."<sup>52</sup> While a twentieth century American may find this nonsensical, he must take note of the fact that he is in the midst of a series of serious fights over whether certain activity will remain within the criminal code or will be transferred to the realm of the medical doctor.

In 1962 the United States Supreme Court concluded that drug addiction was an illness and that

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49. *See*, Numbers 12.

50. John 9:1-3.

51. \_\_\_\_\_, *WORLD PRESS REVIEW*.

52. S. Butler, *EREHWON, OR OVER THE RANGE* (1872).

therefore, no one could be punished for being a drug addict or for having the symptoms of such an addict. Five years later the Court faced the question whether alcoholism was an illness and whether an alcoholic whose symptomatic behavior included being drunk in public could be punished. This time the Court said no, it is not clear that alcoholism was a disease, and no, it is uncertain that chronic alcoholism impairs the ability of the alcoholic not to get drunk in public. What apparently made the difference between the two cases was that in the first case the prosecutor conceded that drug addiction was an illness whereas in the second case he did not concede that alcoholism was an illness. What was at stake in both cases was whether the foundational assumption of the criminal law system was to remain: that man is a morally responsible being subject to an objective moral code that sets standards for right and wrong behavior. The United States Supreme Court sidestepped this matter in the second case by tossing the ball back to the legislature to define its criminal code taking into account "the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man."

Nowhere have we seen this tension between the traditional criminal law and evolving views of man more clearly than in the matter of homosexuality. At common law homosexual conduct was a felony, "crime against nature" or, more recently, sodomy. Such conduct was wrong not because a majority of the people said so or because the experts believed it to be, but because the common law reflected "the law of nature and of nature's God." God, by His Word, determined what was wrong and man, in obedience, enacted laws in accordance with God's Law if he had authority in the matter. Because both the Old Testament<sup>53</sup> and the New Testament<sup>54</sup> condemned homosexuality as sin, not sickness, civil rulers were required by Romans 13:4 to prohibit homosexual behavior. This was not a matter subject to majority vote.

The common law's definition of right and wrong in such areas as homosexuality, then, did not turn upon a societal consensus. Rather, it reflected an objective law order imposed upon man by God, as illustrated in the Biblical account of man's first sin. While both Adam and Eve, at the time they ate of the tree of the knowledge of good and evil, believed that it was all right to do so, this unanimous societal consensus of two did not nullify the fact that it was wrong to do so. God's objective law-order dictated the standards of right and wrong to man whose duty was only to obey.

Because most twentieth century legislators, judges, lawyers, and legal scholars deny that God has anything to do with a nation's legal system, they believe that they may call good what God has called evil. So in the aftermath of the repeal of the common law prohibitions against sodomy and other "adult consensual private sexual acts," homosexual rights groups have claimed not only immunity from criminal sanctions for their sinful behavior but civil rights protection for that behavior. The legislative and judicial response has been to submit this claim to the latest Gallup poll or to their own reason to ascertain its validity. As a consequence America's legal standards of right and wrong have become subjected to the democratic marketplace long dominated by special interest groups. If homosexual rights groups are able to dominate a legislative body, such as they have in San Francisco, then they are able to make what they do "right" and to make what others do against them "wrong." Thus, it is "wrong" in San Francisco for an employer or landlord to "discriminate"

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53. See, e.g., Leviticus 18:22.

54. See, e.g., 1 Corinthians 6:9.

against an open and active homosexual.

By such a standard, nothing is inherently wrong. According to this view then, thieves or murderers may become sufficiently powerful to dominate a city or state so that its council or legislature may enact a "law" making it "wrong" to discriminate against thieves and murderers. After all, we are told, that is the democratic way. Those who support the homosexual rights movement have assured the public that thievery and murder are not like homosexuality, that the former harm others, but homosexuals are no threat to anyone else. Recent disclosures concerning the public health menace of unrestrained homosexual behavior has not deterred such statements; to the contrary, such evidence has either been suppressed or been used as the basis for cries for tax subsidies to help the homosexual to live his chosen lifestyle without risk to his health.

What is right or wrong does not turn upon whether social scientists have discovered if some activity harms or does not harm others. Nor does right or wrong depend upon what is intuitive within the hearts and minds of a nation's people or her legislators or judges. What determines right and wrong is God, the Creator of all things. What happens when man disregards this basic truth has not only been amply demonstrated by the homosexual rights movement, but by the United States Supreme Court's ruling allowing a woman and her doctor to abort the woman's baby and by the "prochoice" movement that that ruling has spawned.

For many years the legislatures of the American states have provided a remedy against those who have negligently deprived another of his life. Known as the "wrongful death" laws, a dead person's surviving relatives or estate may sue the negligent party and collect damages for the loss of a loved one's life. Following the court's abortion decision, people began to sue medical doctors for "wrongful birth" and "wrongful life." Claiming that the doctor had a duty to inform couples of the likelihood of a defective child or other undesired risk, some disappointed parents of an "unwanted child" have successfully recovered damages for the cost of rearing such a child and for emotional harm. While some courts have denied such claims and some legislatures have outlawed them, they have not done so because they believe that actions contributing to life, wanted or not, can never be wrong. Rather, they have assumed that even if it is wrong to give life under some circumstances, it is simply too difficult to determine the damage caused. In effect, most, if not all, of the legal experts have assumed that whether the life of a child is right or wrong, good or bad, depends solely upon the mother or upon the parents.

## CONCLUSION

Such moral relativism threatens both liberty and law as God has warned man through the experiences of Israel in the time of Judges. Because "every man did that which was right in his own eyes."<sup>55</sup> Israel became a nation torn between anarchy in Judges 19 and totalitarianism in Judges 20. Only when the rule of law was restored through Samuel and through the covenant Kingships of Saul and David did Israel have both freedom and order. Even during the short reign of Saul, however, the nation was threatened by totalitarianism in 1 Samuel 13 and anarchy in 1 Samuel 15. God, in His mercy, removed Saul as king and, thereby, gave Israel her greatest period in history under

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55. Judges 21:25.

beloved King David.

The United States of America is not immune from destruction. If she persists in substituting man's standards of right and wrong for God's, then she, too, risks destruction. The situational ethic that calls for decisions, the morality of which turns on the circumstances, has brought America to the brink of anarchy in sexual behavior, in birth and death, and in entertainment and the arts. At the same time, this ethic has imposed near totalitarian rule in areas such as "race relations," education, and social welfare.

As the writer of Proverbs has said: "Righteousness exalteth a nation: but sin is a reproach to any people."<sup>56</sup> The righteousness of which he wrote is that of God as revealed through nature and the Scriptures, not that of fallen man whether democratically determined or authoritatively imposed.

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56. Proverbs 14:34.

## CHAPTER 5

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# Vow and Contract

*We hold these truths to be self-evident: that all men are created equal: that they are endowed, by their Creator, with certain unalienable rights, that among these are life, liberty and the pursuit of happiness. That to secure these rights, governments are instituted among men . . .*

Almost all Americans are familiar with these words from the famous 1776 Declaration of Independence. Few, however, know the legal and political significance of them. Today most assume that the language and ideas expressed in the Declaration are a product of the "natural law," that is, "human reason applying the test of good and bad to human conduct."<sup>1</sup> But the truth is that the Declaration's text and claims were rooted in God's revelation, the Bible.

First of all, America's founders believed in the Genesis account of the origin of man: "All men are *created*." They did not hold to either ancient or current scientific theories that man "evolved." Their belief in the Biblical account of man's origin had direct political and legal significance. Man's Creator made each man "equal" and "endowed" him with "certain unalienable rights." In other words, America's founders believed in God-given rights, not man-invented or state-granted rights. Their devotion to liberty rested upon their faith in their Creator, the God of the Old and New Testaments,<sup>2</sup> not in any philosopher or statesman, and certainly not in the State.

This devotion was strengthened further by their knowledge that the rights given by the Creator were "unalienable," that is, they were irrevocable, not subject to modification, and not capable of being given away. The Virginia Bill of Rights, written one month earlier, spelled this truth out in unmistakably clear language: "That all men have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity." Those who signed the Declaration agreed that even the People could not give up their God-given rights because God had given man authority only to "secure" them through properly constituted civil governments.

This concept of limited civil authority came directly from John Locke's SECOND TREATISE ON GOVERNMENT which, in turn, rested upon earlier writings, especially LEX REX published in 1644 by Samuel Rutherford. Rutherford's view that the purpose of civil government was to secure man's God-given rights rested squarely upon the Biblical passages that recorded the establishment of the constitutional monarchy in ancient Israel. While the elders of that nation had asked for "a king to

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1. C. Becker, THE DECLARATION OF INDEPENDENCE (1959), 60-61.  
2. Isaiah 40:28 and 1 Peter 4:19.

judge us like all the nations",<sup>3</sup> God gave them a covenant king bound by the laws of God.<sup>4</sup> Thus, God in his mercy saved the people from a king who would take from the people all that they desired.<sup>5</sup> Thus, Samuel, after anointing Saul king, "told the people the manner of the kingdom, and wrote it in a book . . ."<sup>6</sup>

The Declaration of Independence followed this Biblical pattern, as did the early state and United States Constitutions all written in the last quarter of the eighteenth century. David Hoffman, a leading legal scholar and educator of the early nineteenth century, acknowledged America's indebtedness to Biblical Israel when he attributed her constitutional history to the "theory of the social compact disclosed in the pages of the Old Testament."

Thus, as Samuel had done for the people of Israel, the Congress did for the American people; they wrote the manner of the new nation in the Declaration of Independence. It was a nation founded upon "the laws of nature and of nature's God." The Congress chose these words because they were well understood by all Americans to mean God's will as revealed in nature and in the Scriptures.

It was, also, a nation whose leaders committed themselves to the security of the people's God-given rights. To that end, Congress specifically named the three major rights that God had given to man: "Life, Liberty, and the Pursuit of Happiness."

From beginning to end the Bible affirms life:

And the Lord God formed man of the dust of the ground, and breathed into his nostrils the breath of life . . .<sup>7</sup>

And he showed me a pure river of water of life . . . proceeding out of the throne of God and of the Lamb.<sup>8</sup>

Between these two events the Bible teaches that all life is a gift from God.<sup>9</sup> Consequently, the Bible attests to the sanctity of all human life.<sup>10</sup> Moreover, it reveals the fragility of life<sup>11</sup> and, therefore, the need for its protection by the civil authorities.<sup>12</sup> In sum, it emphasizes that because life is God-given, it is an unalienable right not to be taken by any man except as forfeited by a man who has committed a crime deserving of capital punishment.<sup>13</sup>

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3. 1 Samuel 8:5.

4. Deuteronomy 17:14-20.

5. *See*, 1 Samuel 8:11-18.

6. 1 Samuel 10:24.

7. Genesis 2:7.

8. Revelation 22:1.

9. John 1:1-4.

10. Genesis 9:5-6.

11. Ecclesiastes 12:6-7

12. 1 Timothy 2:1-2.

13. Genesis 9:6.

As the Bible affirms life, so it affirms liberty. At the beginning the Bible contains the account of how God created Adam and Eve with the freedom to obey or to disobey His commandments in the garden.<sup>14</sup> In its closing verse the Bible holds out an invitation to everyone: "And the Spirit and the bride say, Come. And him that heareth say, Come. And him that is athirst come. And whosoever will, let him take the water of life freely."<sup>15</sup> In between, both the Old Testament and the New Testament repeat the message of liberty:

The Spirit of the Lord God is upon me . . . to proclaim liberty to the captives, and the opening of the prison to them that are bound.<sup>16</sup>

Stand fast therefore in the liberty wherewith Christ hath made us free.<sup>17</sup>

So, the Liberty Bell in Philadelphia has inscribed upon it these words from Leviticus 25:10: "Proclaim liberty throughout all the land." The liberty proclaimed is not given by man, for the Bible states that no man can confer liberty on another man without putting that man in bondage.<sup>18</sup> The spirit of God is the sole given of liberty,<sup>19</sup> and therefore, those freedoms that God has given are inalienable rights toward all men.

James Madison captured this thinking of America's forefathers best in his 1784 MEMORIAL AND REMONSTRANCE. He wrote as follows:

Before any man can be considered as a member of civil society, he must be considered as a subject of the governor of the universe, and if a member of civil society, who enters into any subordinate association, must always do it with a reservation of his duty to the general authority, much more must every man who becomes a member of any particular civil society so it *with saving allegiance to the universal sovereign*.

As important as liberty and life are to man and to America's founders, the Bible gives an equal place to "happiness." The Psalms, alone, pronounce happiness upon the man who pursues the right way to enjoy life and liberty.<sup>20</sup> Jesus Christ, in His Sermon on the Mount, lays claim on happiness for all those who follow His example of humility, mercy and peace.<sup>21</sup>

At the heart of the Biblical call to happiness is man's freedom to choose. God does not force man to be happy, He did not create him that way. Nor can the state or any other human institution require their subjects or members to be happy. The Bible commands each individual man to choose to do what is right and receive the blessings that God has for him.<sup>22</sup> Therefore, the civil ruler,

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14. See, Genesis 3:1-13.

15. Revelation 22:17.

16. Isaiah 61:1.

17. Galatians 5:1.

18. 2 Peter 2:19.

19. 2 Corinthians 3:17.

20. Psalms 1:1; 32:1-2, 34:8; 89:5; 128:1.

21. Matthew 5:3,7,9.

22. Proverbs 8:34-35.

according to the Bible, is to preserve for his subjects every opportunity that God has provided for "the pursuit of happiness."<sup>23</sup>

One of the great opportunities for happiness for man, the Bible records, is to "eat and drink, and enjoy the good of all his labour . . ." <sup>24</sup> This opportunity to enjoy material prosperity comes from God who gives to each man his portion to enjoy.<sup>25</sup> This gift of God, in turn, comes to those who carry out the dominion mandate as God pronounced in the beginning when He created man:

And God blessed them, and God said unto them, Be fruitful and multiply, and replenish the earth, and subdue it, and have dominion . . .<sup>26</sup>

To exercise the dominion mandate God pronounced man free to use his gifts, his opportunities, and his resources to acquire, possess, and sell property. This great freedom was at the heart of the Declaration's "Pursuit of Happiness" as the more detailed statement of the Virginia Bill of Rights, written one month earlier, gave evidence:

That all men . . . have certain inherent rights . . . namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.

Other early state contributions affirmed that economic liberty occupied a central place in the God-given right to pursue happiness. For example, the preamble of the constitution of the state of Pennsylvania, adopted on August 17, 1776, restated the purpose of government and the source of man's rights: "[A]ll governments ought to be instituted . . . to enable the individuals who compose it to enjoy their natural rights, and the other blessings which the Author of existence has bestowed upon man." Further, it acknowledged that the goodness of "the great Governor of the universe" had allowed the people of Pennsylvania to organize a government best suited to "promote the general happiness of the people of this state, and their posterity." Following immediately on the heels of this preamble, came this first paragraph of the peoples' Bill of Rights:

That all men . . . have certain natural, inherent and inalienable rights, amongst which are, the enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety.

Approximately one year after the people of Pennsylvania adopted their constitution, the people of Vermont adopted a constitution containing the same references to God in its preamble and the same language in its first article. About four years later the people of Massachusetts "acknowledging . . . the goodness of the great Legislator of the universe" formed a new constitution of civil government dedicated to the security of men's "natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of

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23. Cf. Romans 13:4(a).

24. Ecclesiastes 3:13.

25. Ecclesiastes 5:18-19.

26. Genesis 1:28.

acquiring, possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness."

On the basis of this documentary evidence one may confidently conclude that America's founding statesmen based their political and legal ideas upon their belief in God and committed the new nation to securing those rights that God had given to all men. Moreover, one may with equal assurance conclude that America's founding fathers believed that the "pursuit of happiness" included the economic life and liberties given by God to man and ranked that right equally with the physical, mental, and spiritual life and liberties given by God to man.

Having ranked economic freedom at the head of the list of God-given rights, America's founders carefully included in the early state and United States constitutions protection against the means so often used by despotic government to deprive the people of their lives and of their liberties. Thus, the constitution of Maryland, adopted on November 3, 1776, protected a citizen from being deprived of his "property" as well as of his "life" and "liberty" except "by the judgment of his peers, or by the law of the land." Indeed, the Bill of Rights of the United States Constitution, adopted in 1791, contained the same "due process" protection for "property" as it did for "life" and "liberty."

Because the civil authorities held the judicial power, namely, the authority to punish evildoers upon proof of wrongdoing they often misused the courts to take away arbitrarily a man's life, liberty, and property, contrary to the law of the land. It was not surprising then that the Maryland and the United States Constitutions included due process protection that applied equally to all three God-given rights. Such a clause "in one form of language or another," was inserted into "all the state declarations of rights adopted prior to the Constitution of the United States."<sup>27</sup>

In addition to the misuse of judicial power, civil rulers often misused their legislative power to deprive the people of their God-given rights. In response the United States Constitution denied to the states the power to "pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts."<sup>28</sup> Each of these prohibitions was designed to protect the people from the exercise of legislative power that did not rightfully belong to the states. Each was also designed to protect each of the three God-given rights named in the Declaration of Independence.

The people of Maryland led the way to forbid the enactment of bills of attainder, a major threat to the God-given right to life. Such bills were acts of legislatures that declared a particular person guilty of a felony of treason and condemned that person to death. They were used by English kings to get rid of their political opponents without having to go through the regular judicial procedure that guaranteed such safeguards as trial by jury and the right to counsel. American constitutions declared that their legislatures had no authority to exercise judicial power. That belonged exclusively to the Courts.

The people of Delaware took the lead to outlaw *ex post facto* laws, a major threat to liberty. Such laws were enacted by tyrannical legislative bodies to make an act illegal and then to apply that

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27. R. Perry, ed., *SOURCES OF OUR LIBERTIES* (1972), 429.

28. U.S. CONST., art. I, § 10.

law retroactively to people who had engaged in the activity at the time when it was perfectly legal. At the heart of the prohibition against *ex post facto* laws was the preservation of the essential condition for true liberty, advance notice of a new law so that the people have an opportunity to make an intelligent choice.

Congress, itself, took the lead to prohibit "laws impairing the obligations of contracts." Within a few years after the American Revolution, several state legislatures had enacted statutes that relieved debtors of their obligations to creditors. So in 1787 Congress provided in the Northwest Ordinance, the charter for all states to be formed out of the territory northwest of the Ohio River, that no state legislature could pass any law "that shall, in any manner whatsoever, interfere with or affect private contracts, or engagements, *bona fide*, and without fraud previously formed."

By the time the constitutional convention met in September 1787, America's leading statesmen recognized that even this guarantee was not sufficient. So they inserted two very significant limitations upon state legislative power over private contracts into Article I, Section 10 of the United States Constitution.

Of first importance was the prohibition against any state legislature's making "anything but gold and silver coin a tender in the payment of debts." By this clause the Framers hoped to relieve all creditors from legislation that would substitute a currency of depreciating value or any other like thing as a means for discharging debt. Madison captured the reason for this clause in THE FEDERALIST PAPERS, #44:

The loss which America has sustained since the peace, from the pestilent effects of paper money on the necessary confidence between man and man . . . constitutes an enormous debt against the states . . .

How a debt could be discharged was to be left to the parties to the contract except insofar that the national Congress may discharge debts under its bankruptcy power.

Not only had states modified private contracts through the issuance of paper money, they had changed the rules governing private contracts to favor debtors who desired relief from their obligations. The Constitution was written to prohibit any state legislature from enacting any "law impairing the obligation of contracts." As historian Charles A. Beard has observed, Chief Justice John Marshall, "who ought to have known what the framers of the Constitution intended better than any man on the supreme bench," believed that "legislation affecting adversely the obligation of future contracts was just as unconstitutional as legislation attacking contracts already made."

James Madison echoed John Marshall when he wrote in defense of the prohibition against "laws impairing the obligation of contracts" that such laws were "contrary to the first principles of the social compact." He believed that the provision was a "constitutional bulwark in favor of personal security and private rights" designed to protect "the business of society" from "sudden changes and legislative interferences in cases affecting personal rights."

In other words, the prohibition against "laws impairing the obligation of contracts" was

designed to keep individuals free to enter into those relationships, business and otherwise, that each individual desired for his own personal happiness. The civil government was to be excluded from dictating a public policy of "happiness" upon the people. If someone wished to spend his hard-earned money upon a house, instead of a cow, that was his business, not the business of his elected representatives. If he wanted to pay \$100 for a horse that was, in the estimation of most, worth only \$75, that was also his business. The legislatures of the states were limited in their authority: They could outlaw no bargain so long as it was made without fraud and for a lawful purpose. The people had the God-given right to decide whether to enter into a bargain for goods and services and to set the price and terms thereof. That was their liberty of contract and that liberty was the heart of the Declaration affirmation of the "pursuit of happiness."

### **LIBERTY OF CONTRACT**

The freedom of each individual to set the terms of a contract without interference from the state legislatures has survived for over two hundred years, but not without serious compromise. While a housewife may still find different prices for the same grocery items at different stores, she has to pay for her electric or garbage service at a price fixed by the state. While a man may hire a household servant or a yard man and the two may freely agree to the hours of work per week and the hourly wage, he cannot do the same in his business where he is regulated by maximum hour and minimum wage laws. In fact, it is accurate to say that most businesses must comply with numerous state laws regulating their hiring practices and their buying and selling.

Because of the proliferation of such state interventionist policies into the economic lives of all Americans, it is difficult to conclude that the Declaration's framers' goals of securing the God-given right to pursue happiness is any longer alive. Indeed, efforts abound to seek state laws or court rulings to impose particular groups' version of happiness on the rest of their fellow citizens. For example, emboldened by their success to force employers to pay women "equal wages for equal work," many feminist organizations now clamor for "equal wages for comparable work." While their earlier effort has largely succeeded in equalizing pay for males and females who do the same job, their latest claim would require civil government authorities to determine how much a particular kind of job was worth.

While "comparable worth" legislation was defeated in several state legislatures in 1985, the Congress has had several such bills before it. In testimony before the House Post Office and Civil Service Committee, Phyllis Schlafly noted that Comparable Worth advocates habitually devalue "the physical and working-condition factors" in order to enhance the societal value of jobs requiring college or other special educational training. Thus, in a recent comparable worth study conducted for the state of Washington, nurses were ranked above electricians and truck drivers because the demand for "knowledge and skills" in nursing was weighted more heavily than the "working conditions" for truck drivers and electricians.

Such comparable worth evaluations are designed to freeze the wages of "overpaid" employee categories and to raise the wages of the "underpaid." Whether or not one is "underpaid" or "overpaid" would not be determined by any objective standard, but by a civil government bureaucrat or judge who, in turn, would rely on a study that can hardly be termed "scientific." How does one

rate the "mental demands" on a nurse as contrasted with an electrician or truck driver. Such an assessment is best left to the economic marketplace where each individual may determine for himself how much he is worth.

Comparable worth legislation is not designed to eliminate sex discrimination from the employment marketplace, but is designed to eliminate altogether the free marketplace of employment. For example, in Illinois nurses have sued the state claiming that they should be paid equally with the electricians and sanitary engineers. Eleven female prison guards have intervened in opposition to the lawsuit because they work in a "male-dominated" job that has been rated "overpaid" by the study relied upon by the nurses. Presumably, if the nurses win the law suit, they the pay for prison guards, including the eleven intervenors, would be frozen until the pay for secretaries, for example, was raised to a higher level than prison guards. Such a lawsuit would be unthinkable if America was truly committed to securing the liberty of contract originally guaranteed by Article I, Section 10 of the United States Constitution.

But that constitutional guarantee was first eroded by the United States Supreme Court in 1827. In that year, the Court upheld by a vote of four to three a New York law that required all future contracts to be subject to its bankruptcy law that allowed a debtor to be discharged from all of his obligations. Chief Justice John Marshall dissented. In doing so he wrote a powerful opinion setting forth the principle of liberty of contract that undergirded the Constitution's contract obligation clause.

First, the Chief Justice rejected the argument that the right to contract, and therefore the obligations created thereby, were "the creature of society." To the contrary, he asserted that such right and obligations "exist anterior to, and independent of society." Next the Chief Justice asked if that right and those obligations were lost when a man entered into a civil society. He answered that question in the negative by reminding his reader that the only purpose for entering society was to obtain a more effective remedy for the breach of contracts because the only purpose of civil government was to secure man's God-given rights, including "the right to barter." Finally, the Chief Justice concluded that the civil government could not "exercise" the individual's God-given right to contract, because by the law of nature the obligation of contracts can only be "conferred by the act of the parties":

This results from the right which every man maintains to acquire property, to dispose of that property according to his own judgment, and to pledge himself for a future act.<sup>29</sup>

While Chief Justice Marshall's views about the liberty of contract did not prevail in the interpretation of the contract obligation clause, they did by and large prevail in the state legislatures for about fifty years. Beginning in the late nineteenth century and the early twentieth century, however, Marshall's views on liberty of contract reemerged in the United States Supreme Court, but erroneously under the due process clause of the Fourteenth Amendment. In 1897 a unanimous Court concluded that the "liberty" guaranteed by the due process clause included:

Not only the right . . . to be free from the mere physical restraint of his person . . . but the

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29. *Ogden v. Saunders*, 25 U.S. 213 (1827), at 346.

term is deemed to embrace the right . . . to be free in the enjoyments of all his faculties . . . to pursue any livelihood or avocation and for that purpose to enter into all contracts which may be proper, necessary, and essential . . .<sup>30</sup>

In support of this conclusion the Court cited an earlier opinion that linked the liberty of contract to the Declaration of Independence:

The right to follow any of the common occupations of life is an inalienable right. It was formulated as such under the phrase "pursuit of happiness" in the Declaration of Independence.<sup>31</sup>

Because the Court failed to place this liberty where it belonged in the constitutional guarantee prohibiting the "laws impairing the obligation of contract," the liberty of contract that it endorsed was soon lost. By the 1940's the Court had retreated from its effort to protect contract rights under the due process clause and had consigned "economic liberty" to the role of a second-class citizen in the constellation of constitutional rights. Only one reason accounts sufficiently for this state of affairs: The Court abandoned the original constitutional assumption of a God-given right of individuals to contract and substituted a new assumption of a civil right of individuals to contract so long as it was exercised consistent with "public policy."

This erosion of the liberty to contract has not only taken place in constitutional law, but also it has occurred in the common law. For example, every state in the union has enacted the Uniform Commercial Code that declares unenforceable any "contract or any clause of the contract to have been unconscionable at the time that it was made." According to one New York court, this statute "enacts the moral sense of the community into the law of commercial transactions." Such a statute enables a judge or a jury to substitute what he or they would have agreed to pay for good or services for that agreed to by the buyer and seller even though there has been no proof of fraud or other wrongdoing. In other words, the law authorizes the civil government to set the price terms of the contract according to its own view of the "morality" of those terms.

## THE SANCTITY OF PROMISES

State intervention into the setting of the terms and prices of contracts has become a double-edged sword. Not only have such policies as maximum hours and minimum wages, comparable worth, and unconscionability undermined the liberty of contract, they have threatened to subvert the sanctity of one's own promises. Without assurance that people will be held to perform their contract promises, the stability and confidence of commercial relationships will be lost. Recent efforts that have substituted a situation ethic for God's absolute standards in the performance of contract promises, if allowed to continue and to multiply, could send America's business world into a chaos of uncertainty and confusion.

Contract law in the western world has been based for years upon a Biblical foundation. Hugo Grotius, a Dutch jurist of the 17th century, wrote:

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30. *Allgeyer v. Louisiana*, 165 U.S. 578 (1897), at 589.

31. *Id.*, citing *Butcher's Union Slaughterhouse Co. v. Crescent City Live-Stock Landing Co.*, 111 U.S. 746, at 762.

On this subject we are supplied with noble arguments from the divine oracles which inform us that God, himself, who can be limited by no established rule of law, would act contrary to his own nature if he did not perform his promises. From whence it follows, that the obligation to perform promises, spring from the nature of the unchangeable justice, which is an attribute of God, and common to all who bear his image in the use of reason.<sup>32</sup>

From this premise Grotius concluded:

It is a most sacred command of nature and guides the whole order of human life, that every man fulfill his contracts.<sup>33</sup>

An eighteenth century Swiss jurist, Emerich de Vattel elaborated upon this conclusion as follows:

It is shown by the law of nature, that he who has made a promise to any one, has conferred on him a true right to require the thing promised . . .<sup>34</sup>

Vattel further observed:

There would be no more security, no longer any commerce between mankind, did they not believe themselves obliged to preserve their faith and to keep their word.<sup>35</sup>

Early American lawyers like Henry Wheaton, compiler of several volumes of United States Supreme Court cases in the early nineteenth century, relied upon Grotius and Vattel as authoritative on the common law of contracts. Indeed, the common law was considered by one of Wheaton's contemporaries, Jesse Root, to have been "derived from the law of nature and of revelation - those rules and maxims of immutable truth and justice, which arise from the eternal fitness of things . . ." In light of such strong evidence that the law of contracts in early America owed its origin to God's law in nature and in the Holy Scriptures it is most fitting to review that law here.

In the book of Ecclesiastes, God has warned man to pay to God that which he has vowed.<sup>36</sup> That law was revealed by God through Moses in Deuteronomy 23:21:

When thou shalt vow a vow unto the Lord thy God, thou shalt not slack to pay it: For the Lord thy God will surely require it of thee; and it would be sin in thee.

The sanctity of a vow to God is absolute. Neither fraud nor foolishness justifies its nonperformance.<sup>37</sup> Therefore, the writer of Proverbs has warned that "it is a snare to the man . . . after vows to make inquiry."<sup>38</sup> Even so, if a man keeps a vow even to his own hurt, God has promised to bless him richly.<sup>39</sup>

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32. H. Grotius, *ON THE LAW OF WAR AND PEACE* (1625), as translated by A.C. Campbell, at 117.

33. *Id.*, at \_\_\_\_.

34. E. De Vattel, *THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW*, Bk. 2 §163 (1758).

35. *Id.*, at \_\_\_\_.

36. Ecclesiastes 5:4.

37. *See*, Joshua 9:19-20 and Judges 11:30,39.

38. Proverbs 20:25.

39. Psalm 15:1-5.

These Biblical commands concerning man's vows to God are not limited to man's relationship to God. Rather, the sanctity-of-promise principle has been extended to man's relationship to his fellow man:

You should be careful to perform what goes out from your lips, just as you have voluntarily vowed to the Lord your God, what you have promised.<sup>40</sup>

This law of promise may be illustrated through several examples of mutual agreements entered into by men as recorded in the book of Genesis.

Abraham and Abimelech exchanged promises to resolve a dispute over a water well. They swore not to deal falsely with each other and sealed their agreement with an oath.<sup>41</sup> Isaac and Abimelech later affirmed this agreement in like manner after Abraham's death.<sup>42</sup> Abraham extracted an oath from his servant before sending him off to fetch a bride for Isaac.<sup>43</sup> Before Jacob fed Esau, Esau promised to sell his birthright.<sup>44</sup> In the book of Joshua, Rahab and the Israelite spies exchanged promises as consideration for her hiding them from the Jericho king's men<sup>45</sup> and Joshua and his men honored their promise to protect the Gibeonites from the latter's enemies.<sup>46</sup> Believers and unbelievers alike relied upon the "law of nature and of nature's God" that obligated a man to perform his promises to his fellow man.

At the heart of God's law governing the sanctity of promise is God's faithfulness to perform his promises. Because man is created in the image of God, God expects man to be no less faithful than He. Yet because of sin man has not met that high standard as Numbers 23:19 attests:

God is not a man that he should lie; neither the son of man, that he should repent: Hath he said, and shall he not do it? Or hath he spoken, and shall not he make it good?

This record of broken promises led God to authorize civil rulers to protect those men who keep their promises from the harm caused by those who break their promises, if the activity in which they are engaged is subject to the jurisdiction of these authorities. Thus, Chief Justice John Marshall in 1827 acknowledged that the civil ruler had a duty to furnish a remedy for such breaches of contract. Indeed, the several early state constitutions guaranteed

That every freeman for every injury done him in his goods, lands, or person by any other person, ought to have remedy by the course of the law of the land, and ought to have justice and right for the injury done him freely without sale, fully without any denial,

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40. Deuteronomy 23:23.

41. Genesis 21:22-32.

42. Genesis 26:26-31.

43. Genesis 24:1-9.

44. Genesis 25:29-34.

45. Joshua 2:8-21.

46. Joshua 9:15, 10:5-7.

speedily without delay, according to the law of the land.<sup>47</sup>

The "law of the land" referred to in these early constitutions was the common law. The common law of contracts reflected the Biblical principle of the sanctity of promise. Fordham University law professors, John Calamari and Joseph Perillo, have acknowledged that the "natural law" of sanctity of promise was rooted in the belief that "failure to perform a promise made by a free act of the will was an offense against the Deity."

Again, Chief Justice John Marshall captured well the sanctity-of-promise principle in his opinion striking down an effort by the Georgia legislature to reacquire land that an earlier corrupted legislature had sold. The Chief Justice ruled that such sale even though obtained through fraud and bribery could not be rescinded if a good faith purchaser had obtained title to the land sold. Therefore, he found the Georgia statute rescinding that sale an unconstitutional "law impairing the obligations of contract."

For Marshall, the liberty of contract guaranteed by this clause was "hand-in-glove" with the sanctity of obligation created by an individual's exercise of his liberty. This was so because the making of the contract, itself, created legal obligations that, in turn, vested "absolute rights" that no legislature could annul.

For many years Marshall's view of the sanctity of contract obligations prevailed in the courts. That principle was reflected in the common law rule that no man could be excused from fulfilling his promise on the ground that it was impossible to do so. For example, in a 1647 English case, a man had promised to pay rent under a lease of some income producing property. During part of the lease period the property was occupied by a hostile invading army so that the renter was expelled from the land and kept from using it. Nevertheless, the court held that the renter was liable to pay his rent: "Though the whole army has been alien enemies, yet he ought to pay his rent." The court reasoned that the lessee's obligation was an absolute one and he was "bound to make it good."

Clearly, this rigorous common law rule was based upon the Biblical principle that, while no one was required to make any promise,<sup>48</sup> if he did promise he must perform that promise even if it hurt.<sup>49</sup> As the writer of Ecclesiastes put it: "Better is it that thou shouldest not vow, than that thou shouldest vow and not pay."<sup>50</sup>

In twentieth century America the absolute common law rule has been replaced by one that allows a promisor to escape having to perform his promise if he is able to prove that unexpected circumstances made his performance "commercially impracticable." According to a leading court opinion, this "doctrine ultimately represents the ever-shifting line, drawn . . . hopefully responsive to commercial practices and mores, at which the community's interest in having contracts enforced according to their terms is outweighed by the commercial senselessness of requiring performance."

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47. DELAWARE DECLARATION OF RIGHTS, Sept. 11, 1776, Sect. 12.

48. Deuteronomy 23:22.

49. Psalm 15:4.

50. Ecclesiastes 5:5.

In other words, the law of contract promise in America is no longer governed by the absolute sanctity of promises as decreed by God's law, but by the situational ethic of fallen and sinful man.

A case decided by the United States District Court in Pennsylvania provides an excellent illustration of what happens to contract promises under the new rules that depart from the sanctity-of-promise principle.<sup>51</sup> In that case, ALCOA contracted with Essex Corporation to convert alumina into molten aluminum at a price fixed by a formula tied to the wholesale price index for industrial commodities. After a few years, the price formula did not work in the way that the parties had expected because of an unanticipated sharp increase in oil prices and because of unanticipated pollution control costs. Consequently, ALCOA's electricity cost soared so that it began to suffer tremendous losses estimated to be over \$60 million if ALCOA had to perform its contract obligation.

The federal district judge decided that ALCOA did not have to perform its promise. He modified the contract to take into account the unforeseen inflationary circumstances that had made ALCOA's agreement no longer profitable. While the court claimed that it had followed a rule that would not allow anyone to break a contract promise just because it had become unprofitable, nevertheless the only justification given by the court for allowing ALCOA to break its promise was that ALCOA's "expected profit" had turned into a "serious loss." To the court, this meant that the enforcement of its contract obligation "would be commercially senseless and unjust" and would frustrate "ALCOA's 'principle purpose' in making the contract," namely "to earn money."

Under doctrines such as these, courts will inevitably favor the large business interests over the small, the powerful over the weak, and the more economically significant over the less. Only firm adherence to the sanctity-of-promise principle will keep the judge, the lawyer, and the businessman on the straight and narrow path of true justice. For as God revealed to Moses in Deuteronomy 1:17: "Ye shall not respect persons in judgment; but ye shall hear the small as well as the great; ye shall not be afraid of the face of man; for the judgment is God's . . . ."

But the interests of the powerful and rich will not always be favored when the sanctity-of-promise principle is compromised. As the rich and powerful now have the "commercial impracticability" rule, the poor and powerless have the "unconscionability" rule. That rule may be invoked on behalf of consumers who have made purchases under the influence of a powerful sales pitch and of their own foolishness. In a recent New York case, for example, a welfare family purchased for \$900 a freezer, the normal retail price for which was \$300. Because they bought the freezer on credit, the total purchase price soared to \$1,234.00.

After paying a little over \$600, the purchaser defaulted, and the seller sued for the remaining balance. The court ruled that the seller "had already been amply compensated," found the price terms "unconscionable," and allowed the purchaser to keep the freezer without having to pay any more money to the seller. In support of its ruling, the court decided that the seller's profit margin was "too high" and that his credit charges were disproportionate to the value of the freezer. Moreover, the court reasoned that the seller, although guilty of no fraud and coercion, had taken advantage of "[t]he very limited financial resources of the purchaser." In other words, the court found that the

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51. *Aluminum Co. Of America v. Essex Group* (1980).

purchaser's promise to pay was "negated by gross inequality of bargaining power" between an ordinary businessman and a welfare recipient.

Under such applications of the doctrine of "unconscionability," courts will inevitably favor the poor over the rich, the powerless over the powerful, and the fool over the intelligent. Yet God revealed to Moses in Exodus 23:2-3 that showing partiality to the poor was a serious miscarriage of justice:

Thou shalt not follow a multitude to do evil; neither shalt thou speak in a cause to decline after many to wrest judgment; neither shalt thou countenance a poor man in his cause.

This principle of partiality was the same as the one governing the judge who is tempted to favor the powerful over the powerless:

Ye shall do no unrighteousness in judgment; thou shalt not respect the person of the poor, nor honor the person of the mighty: But in righteousness shalt thou judge the neighbor.<sup>52</sup>

Not only do the modern doctrines of "commercial impracticability" violate God's command to be impartial in judgment, they deprive the "excused" promise-breaker from the blessings that God has for promise-keepers. In Psalm 15, David gives testimony that anyone who "swearth to his own hurt, and changeth not" shall abide with God in his "tabernacle" and shall dwell on God's "holy hill." So there are significant blessings that a man will receive if he keeps his promises. Moreover, David adds that the one who keeps his promises "shall never be moved," because those who seek first God's righteousness shall have every material need met.<sup>53</sup>

In contrast, those who break their promises are "fools."<sup>54</sup> While they may be relieved of a burden in the short-run, they will not profit in the long-run: "Ill-gotten gains do not profit."<sup>55</sup> Indeed, while he seeks the quick and easy remedy of relieving himself of the immediate cost of his promises, he will inevitably lose the very prosperity that he desires.<sup>56</sup> A civil ruler has been established by God to do "good" to those under his authority.<sup>57</sup> If he is to perform his God-required duty, then he should enforce contract promises according to the absolute standards of the law of God.

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52. Leviticus 19:15.

53. Matthew 6:33. *Cf.* Proverbs 13:21(b).

54. Ecclesiastes 5:4.

55. Proverbs 10:2(a).

56. Proverbs 28:22.

57. Romans 13:4(a).

## PROMISES: LAW AND LOVE

Even though a man is bound by God's law to keep all of his promises, the civil ruler has not been authorized to enforce all of them. Some are illegal and, therefore, unenforceable; and some are exclusively enforceable by God and, therefore, outside the civil rulers' jurisdiction.

In his magnificent opinion affirming liberty of contract, Chief Justice John Marshall acknowledge that a civil ruler could prohibit certain contracts that are "deemed mischievous" and, therefore, illegal. At common law, such illegal and unenforceable contracts were agreements to pay a bribe, to pay for a murder, to engage in prostitution, to gamble, and the like. Such contracts were illegal because the object or purpose of the agreement could not be achieved without violating God's law.

Some objects, like bribery and murder, are explicitly forbidden by the Holy Scriptures.<sup>58</sup> Other objects, such as prostitution and gambling, violated the fundamental covenantal law of God. All of God's laws governing sexual relationships are rooted in the law of the marriage covenant, that a man and a woman may engage in sexual intercourse only if they commit to the other for life.<sup>59</sup> Any other sexual relationship is, by definition, illegal.<sup>60</sup> Any law prohibiting gambling is rooted in the law of the dominion covenant, that man is to "subdue" and "rule" the earth and its creatures.<sup>61</sup> A gambler turns the dominion covenant on its head by allowing himself to be "subdued" and "ruled" by the earth and its creatures,<sup>62</sup> for he has chosen a life governed by "chance," by the probabilities of an impersonal natural world, instead of one governed by Divine Providence. Therefore, any gambling contract is, *per se*, illegal.

As twentieth century America has abandoned the absolute sanctity of contract promises, it has moved away from an absolute standard governing the legality of contracts. In the 1960's, 1970's, and 1980's state legislatures have repealed their laws prohibiting adultery and fornication. As a direct consequence their courts have begun to recognize as valid, contracts between males and females for sexual companionship and support even though they are not valid marriages. Judges in the state of California have been on the cutting edge of this revolution. In the 1970's, the California Supreme Court decided several cases involving nonmarital cohabitation agreements culminating in 1976 with the dispute between Lee Marvin, Hollywood actor, and his former live-in female partner. The woman claimed that she and Marvin, married to another woman, had agreed to live as husband and wife and, in consideration for her services as "companion, homemaker, housewife, and cook," Marvin would provide her financial support "for the rest of her life." Marvin denied liability on the ground that the alleged contract was an illegal one and, therefore, unenforceable.

The Supreme Court ruled in favor of the woman because the agreement was not explicitly for "sexual services" and, therefore, not a contract of prostitution. Instead, the Supreme Court decided

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58. Amos 5:12 (bribery); Exodus 20:13 (murder).

59. See, Genesis 2:24, Matthew 19:3-6.

60. See, 1 Corinthians 6:16.

61. Genesis 1:26,28.

62. See, Ecclesiastes 9:11.

that a man and a woman living together as husband and wife outside of marriage was a widely accepted practice, and consequently, no longer illegal:

The mores of society have indeed changed so radically in regard to cohabitation that we cannot impose a standard based upon alleged moral considerations that have apparently been so widely abandoned by so many.<sup>63</sup>

The unstated assumption of this court opinion is that man may make whatever he wishes moral or immoral, that there is no objective moral standard governing his behavior. But men cannot make right what God has declared wrong even if all men everywhere agree to do so. Adam and Eve learned that lesson in the Garden of Eden.<sup>64</sup> While the consequences of decisions such as that rendered in the Lee Marvin case may not be seen in the short-run, the "apparent benefit" of not allowing Lee Marvin to get away with it will certainly be lost after a season. The natural punishment for disobedience of God's law will inevitably come.<sup>65</sup>

Some state legislatures have chosen to disregard the self-executing nature of God's law-order by instituting state lotteries and other gambling enterprises to raise revenues without having to raise taxes. Despite the initial quick pay-off, state legislative bodies that have not yet done likewise would do well to resist the temptation. They will in due time reap a harvest of righteousness.<sup>66</sup>

Not only have legislators and judges substituted their own appraisals of right and wrong for those revealed and established by God, they have expanded their jurisdictions beyond that granted by God to them. At common law it has long been recognized that some areas of life are not subject to the enforcement power of the state. As Chief Justice John Marshall put it:

Obligations purely moral, are to be enforced by the operation of internal and invisible agents, not by the agency of human laws.<sup>67</sup>

A legal system based upon the assumption that there is no God or that, if He exists, He has nothing to do with law and politics, will inevitably eliminate the areas of life where man is free from the coercive power of the state. No better illustration can be given than that concerning man's obligation to the poor and needy.

Throughout the Old and New Testaments, God has made it clear that those who prosper materially are obliged to help those who do not. As a consequence, God ordained certain rules governing a rich man's dealing with the poor. First of all, he was not to loan to a poor man "at interest." That practice was forbidden under the prohibitions against usury:

And if thy brother be waxen poor . . . then thou shalt relieve him: yea though he be a

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63. *Marvin v. Marvin*, 18 Cal.3d 660 (1976).

64. See, Genesis 2:17-18 and 3.

65. Galatians 6:7-8(a).

66. Galatians 6:8(b)-9.

67. *Ogden v. Saunders*, dissenting opinion, 25 U.S. (12 Wheat.) 213, 6 L.Ed 606 (1827).

stranger or a sojourner . . . Take thou no usury of him, or increase . . . Thou shalt not give him thy money upon usury, nor lend him thy victuals for increase.<sup>68</sup>

To most people today the word "usury" has come to mean "excessive interest." But that is not its Biblical meaning. As Dr. Gary North has ably demonstrated: "Any increase taken from the poor in return for having made a loan" is condemned by the Bible as usurious. Interest in ordinary business transactions was allowed, however, as profit for the service of lending money to another who had need of it. Again, Dr. North has summarized this truth as follows:

There is no Biblical evidence, nor have Christian casuists generally argued, that the prohibition (against usury) restricted interest received on business loans, so long as the lender shared the risks of failure along with the borrower.<sup>69</sup>

God's solution to the illicit, high-interest, immoral loan-shark business was to command all men to reach out in love to the truly needy by lending to them without charging interest.<sup>70</sup> He did not authorize the civil ruler to interfere with the freedom of contract by setting an artificial limit to the percent of interest that could be earned by a lender. That, like all other terms of a contract, was to be set solely by the parties. "The rate of interest, like all prices," was to be "a product of the law of supply and demand."

If those with plenty refused to lend to the poor at all or only upon interest, could the civil ruler require him to do what God had commanded? At common law the answer to such a question would have turned on whether the obligation was a "legal" or "moral" one. The distinction between legal and moral obligations lay at the heart of several common law contract doctrines. For example, not all of man's promises constituted enforceable contracts; only those that resulted in an agreement with consideration were recognized in the courts. Thereby, the law excluded from enforcement by civil rulers promises to invite someone to dinner or to engage in some other "social activity." In essence, the rules governing contract relations were designed to exclude all exchanges of promise outside the world of commercial activities. The performance or nonperformance of such promises were left to the individual parties and to God.

A contract to lend money to a poor man was not treated by the Bible as an ordinary commercial transaction. Those who lent to the poor were commanded to do so out of love, not out of a desire to make a profit:

If there be among you a poor man . . . in the land . . . thou shalt not harden thine heart, nor shut thine hand from thy poor brother: But thou shalt open thine hand wide unto him . . .

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Anyone lending to a poor man, therefore, should expect nothing in return even if the poor man may

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68. Leviticus 25:35-37.

69. G. North,

70. Deuteronomy 15:7-11 and Leviticus 25:35-36.

71. Deuteronomy 15:7-8.

be morally indebted to pay the lender back. Such a lender is assured by God that he will receive his reward:

Thou shalt surely give him, and thine heart shall not be grieved when thou givest unto him: because that for this thing the Lord thy God shall bless thee in all thy works, and in all that thou puttest thine hand unto.<sup>72</sup>

Not only does God promise to bless those who do give to the poor, He has promised to curse those who do not:

He that oppresseth the poor to increase his riches, and he that giveth to the rich, shall surely come to want.<sup>73</sup>

He that giveth unto the poor shall not lack: but he that hideth his eyes shall have many a curse.<sup>74</sup>

Given God's built-in reward and punishment system, the poor are not without an enforcement system should the rich fail in their obligation to them. Any effort by civil rulers to enforce this obligation by taxation or other coercion necessarily violates the nature of the obligation. Lending or giving to the poor, being outside the sphere of ordinary commercial activity, is governed exclusively by the law of love. Therefore, man's obligations to the poor are subject solely to the jurisdiction of God. All efforts to supply the needs of the poor through tax funded and state-operated welfare programs are illegal because unauthorized by God.

## CONCLUSION

Man's God-given ability to make and to keep his promises is the glue that cements all of his relationships in society. His unwillingness to keep his promises is a constant threat to societal well-being. God has, therefore, established laws that govern promise making and keeping and that allocate authority to enforce those laws. Unless man abides by both sets of laws, he will not obtain the happiness that he so desires:

And it shall come to pass, if thou shalt hearken diligently unto the voice of the Lord thy God, to observe and to do all his commandments . . . that the Lord thy God will set thee on high above all the nations of the earth: And all these blessings shall come on thee, and overtake thee . . . But it shall come to pass, if thou wilt not hearken unto the voice of the Lord thy God, to observe to do all his commandments . . . that all these curses shall come upon thee, and overtake thee . . .<sup>75</sup>

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72. Deuteronomy 15:10.

73. Proverbs 22:16.

74. Proverbs 28:27.

75. Deuteronomy 28:1-2,15.

## CHAPTER 6

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# Dominion and Property

Few lawyers who are engaged in the daily practice of their profession take the time or make the effort to explore why the law is the way it is. Most leave such questions to the professors or to others who enjoy the "philosophical aspects" of the law. Yet the answers to the question, "why," provide the key to a successful practice. This is true about every area of law, but is especially true in estate planning and in the drafting of wills and trusts.

As advocate, an estate planning lawyer can do a very effective job if he drafts the necessary legal documents to effect the property owner's will under the existing rule of law. As counselor, the lawyer may by simply knowing the legal rules help a property owner avoid unwanted tax liability or avoid probate delays, but he cannot by that same knowledge help the owner to know his duties to his family, to his God, and to his country. Yet many clients seek such counsel from their lawyers.

No lawyer can give good counsel in these areas if he does not know the foundational principles upon which property ownership and family inheritance are based. Yet most lawyers have never been taught those principles. The purpose of this chapter is to uncover the foundation for private property ownership, the existence of which makes an estate planning practice possible, and to state the justification for the system of private property and family inheritance. From this study, a lawyer will learn how to guide his clients' efforts to plan their estates consistent not only with the laws of men, but the Law of God.

### GENESIS AND THE COMMON LAW OF PROPERTY

There is nothing which so generally strikes the imagination and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, to the total exclusion of the right of any other individual in the universe.<sup>1</sup>

With this sentence Sir William Blackstone introduced the reader of his *COMMENTARIES* to the subject of the law of private property. Not content with teaching only the rules that governed personal and real property ownership in his time, Blackstone sought to uncover the foundations of private property law. He found them in chapter 1 of the book of Genesis;

In the beginning of the world, we 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

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1. W. Blackstone, *COMMENTARIES ON THE LAWS OF ENGLAND* (1776), Vol 2, 2.

the air, and over every living thing that moveth upon the earth."<sup>2</sup>

In short, Blackstone believed that the biblical account of origins was true. Moreover, he believed that Genesis 1:26 and 1:28 gave man "the only true and solid foundation of man's dominion over external things" and, thereby, he dismissed "whatever airy metaphysical notions may have been stated by fanciful writers upon this subject."<sup>3</sup>

While Blackstone did not identify what those "airy metaphysical notions" and who those "fanciful writers" were, his American counterpart, James Kent, did. Author of the COMMENTARIES ON AMERICAN LAW and a jurist and law teacher of great stature in his time, Kent spelled out the ideas and the writers that both he and Blackstone found unpersuasive;

To suppose a state of man prior to the existence of any notions of separate property, when all things were in common, and 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 poets which forms such a delightful picture in the fictions, adorned by the muse of Hesiod, Lucretius, Ovid, and Virgil.<sup>4</sup>

What ideas about man's origins did Blackstone and Kent reject when they dismissed writers like Hesiod and Lucretius? Hesiod was a Greek poet who lived in the Eighth century before Christ. In his poem, "Works and Days," he traced the history of mankind from a golden age, in which all men lived happily upon a fruitful earth that spontaneously satisfied all men's needs, to an age of iron, in which men worked to meet their needs but failed. For Hesiod, exercising dominion over the land through hard work had been necessitated by the evil conditions in which man lived. But there had been a better time when man had known an easier way of life, and in Hesiod's opinion, this had been lost because the "gods" had failed to create the kind of men that they had at first.<sup>5</sup>

Lucretius, a Roman poet who lived in the 1st century before Christ, claimed that the earth, not "gods," had given birth to mankind. In Book V of his great work, ON THE NATURE OF THINGS, Lucretius claimed that all life had evolved over time and that these evolutionary processes of "Mother Nature" accounted for the origin of all things. He believed that only the "fittest survived" and that man had slowly evolved from a nomadic insecure cave-like existence to a more secure and settled life in cities and town. According to Lucretius, then, men invented property ownership and its rules and procedures, in order to survive as a species.<sup>6</sup>

Blackstone and Kent rejected both views. Kent wrote:

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? And yet we find the Roman

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2. Genesis 1:28.

3. W. Blackstone, *supra* note 1, at 3.

4. J. Kent, COMMENTARIES ON AMERICAN LAW (1827), Vol 2, 255.

5. Hesiod, WORKS AND DAYS (c. 65 B.C.), 90-180.

6. Lucretius, ON THE NATURE OF THINGS, (c. 65 B.C.) pt. 5.

historians and philosophers rivalling the language of poetry in their descriptions of some imaginary state of nature, which it was impossible to know and idle to conjecture.<sup>7</sup>

Instead, they relied upon the Bible as offering man the only reliable true account of man's origins:

No such state was intended for man in the benevolent dispensation of providence; and in following the migration of nations, *apart from the book of Genesis*, human curiosity is unable to penetrate beyond the pages of history . . .<sup>8</sup>

By relying upon the book of Genesis as the true history of origins, Blackstone and Kent rejected the evolutionary speculations of Lecretius and, therefore, the notion that man invented private property in order to meet the necessities of survival as a species. Instead, Kent concluded that "the sense of property is inherent in the human breast" having been put there by God, Himself:

Man was fitted and intended by the Author of his being for society and government, and for the acquisition and enjoyment of property. It is to speak correctly, the law of his nature . . .<sup>9</sup>

In short, Blackstone and Kent attributed the origin of the common law of private property ownership to God's law as revealed in the Bible. They rejected all Greek and Roman authorities who held to a view of origins inconsistent with the book of Genesis. Blackstone and Kent could not have built a common law of property ownership upon the Genesis foundation had not the church succeeded in earlier centuries to displace the Greek and Roman world view that had theretofore dominated the entire western world.

Paul, the great apostle of the early church, launched the first attacks upon Roman and Greek thought. In his letter to the church at Rome, Paul wrote specifically about the evolutionary theories of men that apparently were widely held:

Professing themselves to be wise, they become fools, and changed the glory of the incorruptible God into an image made like to corruptible man, and to birds, and four-footed beasts, and creeping things.<sup>10</sup>

Paul further stated that men who, like Lucretius, embraced views that man was made in the image of animals did not do so out of ignorance. To the contrary, Paul asserted that they knew better; they had suppressed the truth because of their desire to deny God.<sup>11</sup> Indeed, Lucretius was a follower of the Greek philosopher, Epicures, who believed that man should "eat, drink and be merry for tomorrow he may die." In order to free men to follow the Epicurean call to personal pleasure, Lucretius characterized the entire universe and its creatures, including man, as having occurred by

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7. J. Kent, *supra* note 4, at 255-266.

8. *Id.*

9. *Id.*

10. Romans 1:22-23.

11. Romans 1:18-21,25.

chance through the working of impersonal naturalistic forces. Thereby, he hoped to prove that the world was not directed by God or any other divine agency and that, therefore, man need not fear punishment for any wrongdoing.<sup>12</sup>

Paul asserted that just the opposite was true. God's law operated whether man believed it or not. And the consequences of man's denying God and God's having created man in His image, were devastating:

For this cause God gave them up unto vile affections . . . And even as they did not like to retain God in their knowledge, God gave them over to a reprobate mind, to do those things which are not convenient . . .<sup>13</sup>

Among the things that Paul listed were "covetousness," "envy," and "covenant breakers."<sup>14</sup> In other words, a system of private property ownership cannot survive long after the Genesis world-view has been rejected.

In early America, the security of property ownership was maintained because its leaders and its people adhered to the belief that Genesis accounted for the origin of man and that account justified private property ownership. Thus, one of the classic examples of an unconstitutional law that was repeated again and again was summarized as follows: That no legislature may pass "a law that takes property from A and gives it to B."<sup>15</sup>

While that phrase is repeated even today, it has hollow ring to it as legislatures have attempted to redistribute wealth through a variety of subtle schemes, including urban renewal, graduated income taxes, confiscatory inheritance and estate taxes, and corporate and individual social welfare programs like farm price support and aid for dependent children.

An open attack against private property ownership was successfully waged by the Hawaii legislature in its Land Reform Act of 1967.<sup>16</sup> Under that Act a group of lessees living on single-family residential lots within tracts of at least five acres in size may force the owner to "sell" the lots to them at a price set by the Hawaii Housing Authority. This Act was justified on the ground that too few people owned too much land in Hawaii and that, consequently, land prices were inflated and the public tranquility and welfare was injured.

A unanimous United State Supreme Court upheld this act of the Hawaii legislature. It summarized its holding in one sentence: "Redistribution of fees simple to correct deficiencies in the market determined by the state legislature to be attributable to land oligopoly is a rational exercise of the eminent domain power."<sup>17</sup> In effect, the Hawaii legislature and the Supreme Court have said

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12. FUNK AND WAGNALLS NEW ENCYCLOPEDIA (R. Phillips ed., 1979), Vol. 15, 325.

13. Romans 1:26-28.

14. Romans 1:29-31.

15. See, e.g., *Calder v. Bull*, 3 U.S. (3 Dallas) 386 (1798).

16. The fact summary is taken from the United States Supreme Court opinion in *Hawaii Housing Authority v. Midkiff*, 81 L.Ed. 2d 186 (1984).

17. *Id.*, at 199.

that it is all right to covet another person's property and to take it so long as you pay him what you want to pay him and so long as there are more of you than there are of him. Indeed, the entire Hawaii land redistribution scheme is a macrocosmic picture of that painted in I Kings chapter 21 of the Bible where King Ahab sought to force Naboth to sell his vineyard because it was "near unto my house," and where Ahab's wife, Jezebel, succeeded in acquiring Naboth's property through the misuse of civil power. Such views of private property ownership and of the power of the civil authorities are possible only in societies where men have "changed the truth of God into a lie, and worshipped and served the creature more than the Creator . . ."18

Paul's Christian world view set forth in the book of Romans and Blackstone's and Kent's endorsement of Genesis in their chapters on private property law have been abandoned in America because men have lost faith in the historicity of the Biblical account of man's origins. That common faith was shattered in 1859 upon the publication of Charles Darwin's *THE ORIGIN OF SPECIES*. Gradually, Darwin's "modern scientific speculations" gave new life to the long-discredited Greek and Roman view of the origin of man. As the historicity of the book of Genesis was lost, the security of property ownership was put in jeopardy. That fact is best proved by a brief examination of the works of Karl Marx and Frederick Engels, the father of modern day communism.

Marx and Engels hypothesized a "pre-history of society" that included "common ownership of land" and "the primitive form of society everywhere from India to Ireland."<sup>19</sup> They claimed that these early societies, characterized by common ownership of all property and by economic classlessness, were, in fact, the ideal "primitive Communistic society" towards which all naturalistic historical forces were directed. Marx called in his *COMMUNIST MANIFESTO* for a return to that ideal state by urging the destruction of the artificial "bourgeois society" and the "abolition of bourgeois property." Thus, he summarized the major program of any new Communistic society to be: "The Abolition of private property."<sup>20</sup>

Marx's and Engel's thesis of the early history of mankind is, in reality, a synthesis of the views of Hesiod and Lucretius. Hesiod hypothesized an early golden age of mankind without economic distinctions and Lucretius hypothesized a world governed by naturalistic forces. Marx and Engels simply posited a world corrupted by a capitalistic economic system that was doomed by nature to fail on an inevitable road back to an ideal state where all property was used by all people in common. But they rested their thesis upon nineteenth century anthropological studies that claimed that primitive man had lived a tranquil life because all property had been held in common.<sup>21</sup>

Without the wide acceptance of the Darwinian evolutionary thesis, the Genesis record of special creation would have been an insurmountable barrier to wide-spread acceptance of Communist views. At first the Darwinian revolution swept the "propertied class" who defended the status quo by reliance upon the law of the survival of the fittest.<sup>22</sup> The heyday of social Darwinism peaked in the

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18. Romans 1:25.

19. F. Engels, "The Communist Manifesto" in *MAN AND THE STATE: THE POLITICAL PHILOSOPHERS* (S. Commins & R. Linscott 1947), 487-488, n. 1.

20. K. Marx, *THE COMMUNIST MANIFESTO* (1847), pt. 2.

21. See, H.L. Morgan, *ANCIENT SOCIETY* (1877).

22. R. Hofstadter, *SOCIAL DARWINISM IN AMERICAN THOUGHT* (rev. ed. 1959), 5-7.

1920's and 1930's when the opponents of the "propertied class" claimed that "economic necessity" required the state to take control of property in order to protect the lives of the "less fortunate."<sup>23</sup> Having themselves abandoned the notion that God had given them the right to own and to control their own property, the owners were unable to withstand the relentless attack upon private property being waged at all levels and in all departments of civil government.

If man is free to speculate about his origins and consequently, about the origin of property ownership, then he is free to institute whatever "law" he wishes to govern that ownership or to abolish private property altogether. Only if man returns to the faith of Blackstone and Kent is private property secure.

### **DOMINION MANDATE: FAMILY AUTHORITY**

As Creator of all things, God is the rightful owner of all that He has created. God revealed that truth to Abraham when the latter saved Lot from the kings who had conquered Sodom where Lot then lived: "And Melchizedek . . . priest of the most high God . . . said, Blessed be Abram of the most high God, possessor of heaven and earth."<sup>24</sup> So Abraham gave God a tenth of the spoils that he obtained in recognition that all that he had was a gift from God.<sup>25</sup>

As Creator, God is the sole rightful owner of all that He has created.<sup>26</sup> In the book of Revelation, John wrote of God: "[F]or thou hast created all things, and for thy pleasure they are and were created."<sup>27</sup> Thus, Paul wrote about Christ, the Word by which all things were made by God:<sup>28</sup> "[A]ll things were created by him, and for him . . ."<sup>29</sup>

As sole proprietor of the heavens and the earth and all things therein, God has sole and unlimited authority to determine how and by whom those created things will be used, possessed, disposed of, and otherwise dealt with. In the beginning, God granted authority to man over His created order with these words:

Let us make man in our image, after our likeness: and let them have dominion over the fish of the sea and over the fowl of the air, and over the cattle, and over all the earth, and over every creeping thing that creepeth upon the earth.<sup>30</sup>

This grant of authority was a limited one. First, God gave dominion authority to man and to no other of his creatures. Second, God gave man dominion authority over all of the earth's creatures, including the birds of the air, but not over his fellow men. Third, God gave man dominion authority

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23. See, e.g., *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 57 S.Ct. 578, 81 L.Ed. 703 (1937).

24. Genesis 14:18-19.

25. Genesis 14:20.

26. Psalms 24:1, 50:9-12.

27. Revelation 4:11.

28. John 1:3.

29. Colossians 1:16.

30. Genesis 1:26.

over the earth, but not over the heavens, including the earth's atmosphere. Finally, God gave dominion authority to man in his capacity as husband or wife; In other words, God gave dominion authority to the family unit, not to the church, or to the state, or to any other institution. All of these limitations have significance for the law of property, but the last one is the very foundation for the law of private property.

After God created man, both male and female, He blessed them and said: "Be fruitful, and multiply, and replenish the earth, and subdue it: and have dominion . . ."31 By these words, God made unmistakably clear that dominion authority was to be exercised by the family. Only a husband and wife were able and authorized to have children. By coupling His command to have children with his grant of dominion authority, God specified the institution through which dominion was to be exercised. Thereafter, the Bible records from Adam and Eve onward that the family was to carry out, and in most instances, did carry out the dominion mandate. It was, after all, Adam and Eve as husband and wife who were to till the garden of Eden.<sup>32</sup> Even after they were expelled from the garden, their sons, Abel and Cain, exercised dominion, the former was a shepherd and the latter was a farmer.<sup>33</sup> After the flood, Noah became a "husband man, and he planted a vineyard."<sup>34</sup>

In the times of Abraham, Isaac, and Jacob, families owned lands, animals, and other properties. Private property held by families was normative. From time to time, disputes arose over the ownership of property and were resolved, in favor of one family or another. Not until the great famine throughout the Middle Eastern world, was there a significant disruption of this pattern of family ownership of property as recorded in Genesis. In those days, Joseph "bought all the land of Egypt for Pharaoh; for the Egyptians sold every man his field, because the famine prevailed over them: so the land became Pharaoh's."<sup>35</sup> As a consequence of this destruction of family ownership, the people of Egypt became Pharaoh's slaves.<sup>36</sup> Only the Jews in Egypt kept their property and their freedom. After the death of Joseph and of the Pharaoh whom he served, the Jews lost their property and became slaves of Pharaoh.<sup>37</sup>

Before Moses led the people of Israel out of bondage to the promised land, they had experienced first hand what happens to a people that no longer had family dominion over property. Before they entered the promised land, God spoke through Moses that the land would be divided among the twelve tribes politically and distributed by lot to each family within the tribal political boundary.<sup>38</sup> After they entered the land, the tribal political boundaries were established and the land was distributed family by family.<sup>39</sup>

In order to preserve family property ownership, several laws were given by God through Moses;

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31. Genesis 1:28.

32. Genesis 2:15,18.

33. Genesis 4:2.

34. Genesis 9:20.

35. Genesis 47:20.

36. Genesis 47:20-23.

37. Exodus 1:11.

38. Numbers 26:52-56.

39. *See, e.g.,* Joshua 16:1-8.

the jubilee and the right of redemption were two of the most important. Each was designed to preserve a family's property inheritance.<sup>40</sup> The authority of the rulers of Israel was to protect and to preserve the families and their properties, not to displace them and to take over their dominion responsibility.

The dominion mandate that placed families in authority over God's created order to subdue it and rule over it remained unchanged in the New Testament. Christ, Himself, affirmed the law of private property in his teachings. For example, in the Sermon on the Mount He promised that God would give to all those who "seek first His kingdom and His righteousness" dominion over those things necessary to feed, house, and to clothe oneself and his family.<sup>41</sup> Thus, He reminded his disciples who had left family, friends, and possessions that they would "receive an hundred-fold now in this time, houses, and brethren, and sisters, and mothers, and children, and lands . . ."<sup>42</sup>

Moreover, Christ used the law of private property to teach God's kingdom truths through several of his parables. In Matthew 20, Jesus likened the kingdom of heaven to a landowner who paid all of his laborers the same wage even though some had worked longer than others. In justification, Jesus said on behalf of the landowner: "Is it not lawful for me to do what I will with what is mine own? Is thine eye evil, because I am good?"<sup>43</sup> That property ownership was a family affair enabled Jesus to teach about the future of the Kingdom of God in the parable of the landowner who planted a vineyard and went on a journey.<sup>44</sup> The lessees who desired to have the landowner's vineyard for themselves were destined for destruction when they took it upon themselves to kill the landowner's son who was the rightful heir to the property.<sup>45</sup>

The apostles of the first century church followed Christ's footsteps. Even when the people were sharing everything in common,<sup>46</sup> Peter affirmed the right of each individual believer to keep what property they owned. Thus, he told Ananias who secretly kept part of the sales price of one of his possessions: "[W]hy hath satan filled thine heart to lie to the Holy Ghost, and to keep back part of the price of the land? While it remained, was it not thine own? And after it was sold, was it not in thine own power?"<sup>47</sup> Moreover, Paul affirmed that even though the church would take care of the poor and the needy, it would not do so as a substitute for the family whose responsibility for its own could not be shirked:

Honour widows that are widows indeed. But if any widow have children or nephews, let them learn first to show piety at home, and to requite their parents; for that is good and acceptable before God.<sup>48</sup>

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40. See, Leviticus 25:10,23-27.

41. Matthew 6:25-33.

42. Mark 10:30.

43. Matthew 20:15.

44. Matthew 21:33-40.

45. Matthew 21:41.

46. Acts 2:44-45.

47. Acts 5:3-4.

48. 1 Timothy 5:3-4.

Indeed, Paul went beyond this simple example of family responsibility by stating a general proposition: "But if any provide not for his own, and specially for those of his own house, he hath denied the faith, and is worse than an infidel."<sup>49</sup> Such commands to provide for family members presupposed a system of private property ownership family by family as authorized by the dominion mandate.

Not surprisingly then, when the institution of private property is attacked, then so is the family. For example, it is recorded in the first chapter of Exodus that before they were enslaved "the children of Israel were fruitful, and increased abundantly, and multiplied, and waxed exceeding mighty; and the land was filled with them."<sup>50</sup> Fearing a takeover of their own country, the Egyptians enslaved the Jews, "[b]ut the more they afflicted them, the more they multiplied and grew . . ."<sup>51</sup> Recognizing that they could not eliminate the threat of a Jewish take-over solely by confiscating their property and enslaving them, the Egyptians set about to destroy the Jewish families by eliminating all of their new born sons. The Egyptians failed only because the Jewish "midwives" feared God and delivered the sons as well as the daughters alive.<sup>52</sup>

As the Egyptians attempted to destroy the Hebrew families in order to exercise total dominion over their lives, so the Marxists realize that the Christian family must be abolished if they are to succeed in their goal of abolishing private property. Karl Marx believed that the family would inevitably vanish as private property ownership was eliminated:

Abolition of the family! Even the most radical flare up at this infamous proposal of the Communists. On what foundation is the present family, the bourgeois family, based? On capital, on private gain . . . The bourgeois family will vanish as a matter of course when its complement vanishes, and both will vanish with the vanishing of capital.<sup>53</sup>

Marx's Communist comrade, Frederick Engels, explained why monogamous marriage would disappear with the abolition of private property:

With the transfer of the means of production into common ownership, the single family ceases to be the economic unit of society. Private housekeeping is transformed into a social industry.<sup>54</sup>

Engels, then, contended that with the abolition of the Christian family a woman would be free to give herself completely to the man that she loved without having to consider the economic consequences. In fact, Engels argued that the elimination of private property would "bring about the gradual growth of unconstrained sexual intercourse" for all.<sup>55</sup>

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49. 1 Timothy 5:8.

50. Exodus 1:7.

51. Exodus 1:12.

52. Exodus 1:16,17.

53. K. Marx, *supra* note 20.

54. F. Engels, *ORIGIN OF THE FAMILY, PRIVATE PROPERTY, AND THE STATE* (1884), 67.

55. *Id.*

The foundational assumption of the Marx/Engels thesis that with the abolition of private property would come the abolition of the family was simple:

It [the monogamous family] was the first form of the family to be based, not on natural, but on economic conditions - on the victory of private property over primitive, natural communal property.<sup>56</sup>

So, the basis for the Communist program to eliminate the Christian family was the same as that upon which they rested their case against private property: A rejection of the historicity of the book of Genesis in favor of a view that originally man held all things in common.

While the Marxist view has not completely triumphed even in those nations that have become Communist, it would be a mistake to ignore the influence that Marxist thought has had even in countries that are not Communist. For example, the so-called women's liberation movement in America has hardly helped the woman who desires to be a full-time housewife and mother. Careful examination of the feminist cries for equal rights, comparable pay for comparable work, tax-supported day care centers, and the like all favor women who desire to establish an economic life independent of their families. The blueprint of these efforts in the 1970's and 1980's was written by Lenin in 1920:

The working woman's movement has for its objective the fight for the economic and social, and not merely formal, equality of women. The main task is to draw the women into socially productive labour, extricate them from 'domestic slavery,' free them from their stultifying and humiliating resignation to the perpetual and exclusive atmosphere of the kitchen and nursery. It is a long struggle . . . But the struggle will end with the complete triumph of Communism.<sup>57</sup>

Indeed, Lenin's blueprint for the emancipation of women included "the abolition of the private ownership of land and the factories." For, in his opinion, "This and this alone opens up the way towards a complete and actual emancipation of woman, her liberation from 'household slavery' through the transition of petty individual housekeeping to a large-scale socialized domestic services (sic)."<sup>58</sup>

Any attack upon the Christian family necessarily threatens the institution of private property because God coupled the two at the very beginning of creation. And any effort to destroy either the family or private property is doomed to fail because as the writer of Ecclesiastes has aptly stated: "Consider the work of God, For who is able to straighten what he has bent?"<sup>59</sup> Even the most zealous Communist nations have had to accommodate the Christian family and private property, for the forced socialization of property and mankind is an unattainable figment of man's imagination.

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56. *Id.*, at 57.

57. Lenin, *WOMEN AND COMMUNISM* (1950), 63.

58. Lenin, *THE EMANCIPATION OF WOMEN* (1966), 84.

59. Ecclesiastes 7:13.

Ownership of property by entities other than families may be justified as a means for families to carry out their dominion authority, but never as a substitute. Corporate and partnership ownership are such means because ultimately the ownership resides in the families represented by the corporate shareholders and by the partners. But state ownership for the purpose of carrying out the dominion mandate can never be justified as such a means because the taxpayers do not have ownership rights in the civil government's property. Civil governments may own property but only for the limited purpose of carrying out its legislative, executive, and judicial duties. Therefore, the power of eminent domain, that is, the taking of property for "public purposes," may be exercised only for that limited proprietary purpose. Urban renewal projects and land redistribution programs are for dominion purposes and, therefore, within the family's authority alone.

### **PRIVATE PROPERTY OWNERSHIP: GOD'S GIFT**

While God granted man authority to exercise dominion in Genesis chapter 1, it would be a serious mistake to assume that the grant of authority conveyed any title to any man or to mankind in general. Yet that mistake was made by two great spokesmen for the institution and the preservation of private property. Sir William Blackstone simply assumed that the dominion mandate constituted an "immediate gift of the Creator" of the "earth . . . and all things therein" which thereby became "the general property of all mankind."<sup>60</sup> John Locke, relying solely upon King David's statement in Psalm 115:16, also assumed that God had given the earth and its contents "to mankind in common."<sup>61</sup>

Having made this assumption, Blackstone and Locke were forced to find justification for private and exclusive ownership. Blackstone decided that private ownership came into being out of "necessity": As men multiplied, they could no longer share all things in common, so men began to appropriate particular lands, animals, and goods to themselves on a permanent basis. Therefore, Blackstone concluded that "bodily labour . . . is universally allowed to give the fairest and most reasonable title to an exclusive property therein." Of course, as Blackstone himself admitted, sometimes the only labor necessary to acquire such title was to take possession before anyone else.<sup>62</sup>

Before Blackstone, John Locke had developed the classic defense of the labor theory of private property. He believed that, even while all property was held in common by all men, of necessity some of that property became exclusively owned by individual men; otherwise, how could a man eat or sleep. In order, however, to give greater permanency to private property ownership, Locke reasoned as follows:

Though the earth and all inferior creatures be common to all men, yet every man has a property in his own person: this nobody has a right to but himself. The labor of his body and the work of his hands, we may say, are properly his.<sup>63</sup>

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60. W. Blackstone, *supra* note 1, at 3.

61. J. Locke, *SECOND TREATISE OF GOVERNMENT* (1764), 18.

62. W. Blackstone, *supra* note 1, at 5.

63. Locke, *supra* note 61, at 19.

From this simple truth, Locke then stated his thesis:

Whatsoever then he [a man] removes out of the state that nature has provided . . . he has mixed his labor with, and joined to it something that is his own, and thereby makes it his property.<sup>64</sup>

He backed up his thesis with a repetition of his initial assumption:

God gave the world to men in common; but since he gave it them for their benefit and the greatest convenience of life they were capable to draw from it, it cannot be supposed that he meant it should always remain in common . . . He gave it to the use of the industrial and rational - and labor was to be his title to it . . .<sup>65</sup>

Karl Marx's attack against the institution of private property was, in reality, an attack on Blackstone's and Locke's labor justification for private property ownership. Marx observed that the extent of private property ownership was not directly proportioned to the labor of the individual who owned the property. Indeed, he claimed that the working class were being deprived of their fair share of private property by a ruling class that had used its political and economic power to exploit those who had not been "born into the right family." So Marx concluded that if the labor theory of property ownership was to work as Blackstone and Locke described it, property must be owned by the State and distributed equally to all productive members of society.<sup>66</sup>

But Locke and Blackstone were wrong in their description of the origin of private property ownership and, therefore, were wrong to justify private property ownership on the basis of the owner's labor. If Locke and Blackstone were wrong, then so was Marx. In fact, the Bible teaches from the beginning that men have title to property as a gift from God, not as a result of their labor and that men hold that title and increase their holdings in proportion to their obedience to God or to the unmerited grace of God.

No man received any title to any land, living creature, or created thing as a consequence of God's statement of the dominion mandate. The grant of dominion to man was a statement of authority, not a conveyance of title. God did not convey title to anyone until he did so by putting Adam into the Garden of Eden. And he gave Adam the garden before, not after, Adam did any work in it.<sup>67</sup> Adam and Eve lost title to the garden as a direct consequence of their disobedience to the Lord; and their act of disobedience had nothing to do with their labor; rather it was eating a fruit that God, Himself, had produced and had told them not to eat.<sup>68</sup>

This brief account of God's relationship with Adam and Eve proves that God never gave title of all the earth and its contents to all mankind in common. Rather, he gave to two, Adam and Eve,

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64. *Id.*

65. *Id.*

66. *See*, Marx, *supra* note 20.

67. Genesis 2:15.

68. Genesis 3:22-23.

title to a specific piece of real estate in a specific geographic location. Moreover, this account reveals that even Adam and Eve did not earn title to the garden, it was given to them by God.

While the Bible does not specifically deal with all of God's property transactions with all men thereafter, it does give several examples from which one may infer that God has never changed from that first property conveyance. For example, Abraham became a rich man, but it was certainly not because he deserved it. In obedience, Abraham responded to God's call to move from Haran to Canaan. Upon Abraham's arrival in Canaan, God promised to give the land to Abraham's seed. In the meantime, a famine struck the land so that Abraham went to Egypt where his wife was taken into Pharaoh's court. In payment the Pharaoh gave to Abraham "sheep, and oxen, and he asses, and menservants, and maid servants, and she asses, and camels." But Abraham had lied to Pharaoh; he had told him that Sarah, his wife, was his sister. Notwithstanding, God was merciful; He sent a plague upon the Pharaoh. Pharaoh returned Sarah to Abraham and sent Abraham away "and all that he had."<sup>69</sup> "And Abram [Abraham] was very rich in cattle, in silver and in gold."<sup>70</sup>

Later, Abraham lied again about Sarah to Abimelech, another rich king. Even when Abimelech discovered Abraham's deceit, he returned Sarah to her husband along with "sheep, and oxen, and manservants, and womanservants" and along with "a thousand pieces of silver."<sup>71</sup> Truly, Abraham prospered not because of his own personal labor or even because of his righteousness, but because of God's unmerited grace and mercy.

Abraham's son, Isaac, likewise prospered. In fact, he pulled the same trick on Abimelech as had his father by telling Abimelech that his wife, Rebekah, was his sister.<sup>72</sup> Even though Abimelech discovered Isaac's deceitful act, he allowed Isaac to remain in his land:

Then Isaac sowed in that land, and received in the same year an hundredfold: And the Lord blessed him. And the man waxed great . . . and grew until he became very great: For he had possession of flocks, and possession of herds, and great store of servants . . .<sup>73</sup>

As God blessed Isaac, he blessed Isaac's son, Jacob. While Jacob worked diligently for his father-in-law, Laban, he did not become rich until God supernaturally intervened and increased Jacob's flocks and cattle out of proportion to the labor that he exerted.<sup>74</sup> From that time on, God watched over Jacob and his twelve sons. While their fortunes waxed and waned, God prospered them even while slaves in Egypt. And when it came time for the Israelites to leave Egypt for the promised land, God moved upon the Egyptians to do a remarkable thing:

And the children of Israel did according to the word of Moses; and they . . . [requested] of the Egyptians jewels of silver, and jewels of gold, and raiment: And the Lord gave the

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69. Genesis 12:16,20.

70. Genesis 13:2.

71. Genesis 20:2,14,16.

72. Genesis 26:6-8.

73. Genesis 26:12-14.

74. Genesis 30:25-43.

people favor in the sight of the Egyptians, so that they . . . [let them have their request]. And they spoiled the Egyptians.<sup>75</sup>

Forty years later after God had met their every need in the wilderness,<sup>76</sup> the people of Israel entered the promised land where God distributed to each family, except for Joshua and Caleb, their real estate by lot.<sup>77</sup> This method of distribution and conveyance was chosen by God to forever remind the people that the land they owned was a gift from God:

The lot is cast into the lap; but the whole disposing thereof is of the Lord.<sup>78</sup>

God's property transactions with his chosen people, Israel, reflect a normative principle that governs all men: No man earns any title to any property, real or personal, it is a gift of God. That is the testimony of the Old Testament book of Job. Job, a rich man by the standard of any nation and of any time,<sup>79</sup> lost all that he had. Through it all, Job was sustained by his knowledge that all he had was a gift from God:

Naked came I out of my mother's womb, and naked shall I return thither: The Lord gave, and the Lord hath taken away; blessed be the name of the Lord.<sup>80</sup>

Job was restored to even greater material prosperity after his trial of faith not because Job earned it by his labor, but because God "gave Job twice as much as he had before."<sup>81</sup> God's blessing came because of His mercy and His goodness, not because Job deserved it. In the end, it was for Job as it had been in the beginning. God had placed a hedge of protection about Job and his household and had blessed "the work of his hands, and his substance is increased in the land."<sup>82</sup>

The New Testament confirms the Old: private property ownership is a gift of God. In the Sermon on the Mount, Christ reminded his listeners that God blesses all men with whatever material prosperity that He, God, chooses for each to have. Because God care for each human being even more than all of His other creatures, Christ assured mankind that, as God takes care of the birds and the flowers, He will take care of man. Therefore, Christ promised to those who seek first God's kingdom and God's righteousness that all their material needs - food, clothing, and housing - would be met.<sup>83</sup> Thus, He urged men not to serve "mammon" but to serve God.<sup>84</sup>

Still, Christ acknowledged that material prosperity may come even to those who serve "mammon." Again, such prosperity is a gift of God because in His mercy and lovingkindness God

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75. Exodus 12:35-36.

76. Deuteronomy 8:3-4.

77. Joshua 14:1-2.

78. Proverbs 16:33.

79. Job 1:1-3.

80. Job 1:21.

81. Job 42:10.

82. Job 1:10.

83. Matthew 6:25-33.

84. Matthew 6:24.

"maketh his sun to rise on the evil and on the good, and sendeth rain on the just and on the unjust."<sup>85</sup> God's mercy triumphs over judgment, as James put it in James 2:13; therefore, God extends his material blessings even to those who do not know or fear Him.<sup>86</sup>

But the material prosperity of the wicked will be short-lived. God preserves his blessings only for those who fear Him and obey Him.<sup>87</sup> Jesus reminded his followers of this truth through a simple parable. Warning a man who sought Jesus' help to obtain his rightful family inheritance, Jesus taught that a man's wealth was not measured by the abundance of his material possessions for

The ground of a rich man brought forth plentifully: and he thought . . . What shall I do . . . And he said . . . I will . . . build greater [barns]; and there will I bestow all . . . my goods. And I will say . . . take thine ease, eat, drink and be merry.<sup>88</sup>

Then Jesus said that God required "the soul" of that man that very night so that he never enjoyed the wealth that he had accumulated: "So is he that layeth up treasure for himself and is not rich toward God."<sup>89</sup>

Richness toward God may or may not come in the form of material wealth. But as in the case of Abraham, Isaac, and Jacob, it may. In all cases, however, God has promised to meet every material need - food, clothing, housing - of those who fear Him.<sup>90</sup>

At the heart of God's plan for man, however, is the dominion mandate. Therefore, those who act to subdue and to rule over God's earth and its creatures will by God's law prosper materially. Those who do not will not.<sup>91</sup> Prosperity in the former case comes because of obedience; poverty in the latter case comes because of disobedience. Again, no man earns anything by his labor, only by his obedience.

That is the teaching of the Old Testament. In Deuteronomy 29, Moses reminded the people of Israel that, if they kept "the words of the covenant" and did them, they would "prosper" in all that they did.<sup>92</sup> Earlier in chapter 28, Moses gave God's promise that He would bless them for their obedience with an overwhelming material prosperity. But that prosperity would elude Israel if they disobeyed, even if they worked hard:

Thou shalt carry much seed out into the field, and shalt gather but little in; for the locust shall consume it.<sup>93</sup>

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85. Matthew 5:45.

86. See, Psalms 36.

87. Psalms 37.

88. Luke 12:16-19.

89. Luke 12:21.

90. Psalms 37:22-26.

91. Proverbs 6:6-11.

92. Deuteronomy 29:9.

93. Deuteronomy 28:38.

This was proved true not only at the time when Israel was taken captive by the Babylonians but seventy years later when they returned to the promised land:

Now therefore thus saith the Lord of hosts; Consider your ways. Ye have sown much, and bring in little . . . and he that earneth wages earneth wages to put it into a bag with holes . . . Ye looked for much and lo, it came to little . . .<sup>94</sup>

Through the prophet Haggai, God gave the reason why: The people of Israel had failed to rebuild God's temple as He had commanded:

Therefore the heaven over you is stayed from dew, and the earth is stayed from her fruit. And I called for a drought upon the land . . . and upon men . . . and upon all the labour of the hands.<sup>95</sup>

Material prosperity through obedience and by God's mercy is, also, the teaching in the New Testament. Christ taught this lesson vividly through the parables of the talent and of the unjust steward. In the parable of the talents, each of three people is given a certain amount of money; one is given five talents, another two, and a third one. The first gained five more talents; the second gained two additional; and the last none. The first two received a reward not for their labor but for their faithfulness: "Well done thou good and faithful servant . . ."<sup>96</sup> The third one lost even what his master had given him because he had no faith to invest it in anything.<sup>97</sup>

In the parable of the unjust steward, Christ's message is once again that the one who is faithful will be rewarded by God. This time the lesson is directly related to material prosperity:

He that is faithful in that which is least is faithful also in much: And he that is unjust in the least is unjust also in much. If therefore ye have not been faithful in the unrighteous mammon, how will you commit to your trust the true riches?<sup>98</sup>

So it is God's mercy and man's faithfulness and obedience that accounts for a man's possessions, not a man's labor. Because God has created all men equal before Him, then all are equally eligible for God's material blessings. That was the faith of America's forefathers when they wrote these words of the Declaration of Independence: "That all men are created equal, that they are endowed by their Creator with certain unalienable rights; that among these . . . [is] the pursuit of happiness; that to secure these rights governments are instituted among men . . ."

One of the means by which the "pursuit of happiness" was secured was the common law of property that defined and defended men's interests in personal and real property. One of the great principles of the common law was that of possession. Ownership of property often was proved by

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94. Haggai 1:5-6,9.

95. Haggai 1:10-11.

96. Matthew 25:21,23.

97. Matthew 25:24-29.

98. Luke 16:10-11.

evidence of possession, with proof of first possession tantamount to proof of ownership. A man was not required to prove that he had labored for the claimed property or that he had worked to enhance its value. It was enough that he had been the first one to reduce it to his possession. One of the classic cases at common law used by law teacher to teach the importance of possession is *Pierson v. Post*. In this 1805 New York case, a dispute was resolved between two men who claimed to win the same wild fox. One man claimed ownership because he had flushed out the fox and was in "hot pursuit" of it; the other claimed ownership because, while the other was in "hot pursuit," he shot, killed and carried the fox away. The Court ruled for the latter because he alone had possession of the fox.<sup>99</sup> No one argued and no one discussed whose "labor" had been expended in obtaining the fox!

Not only did the concept of possession in the common law of property reflect the assumption that ownership did not depend on the claimant's labor, so did the description of the deed to real estate.

In America, a deed to a home has long identified the land upon which it sits as a specifically number "lot" in a particular subdivision or other part of the city or county. Significantly, this use of the term "lot" directly reflected the biblical influence on the common law of property. In his 1828 dictionary, Noah Webster included several definitions for the word "lot," all of which reflect its divine meaning:

1. That which, in human speech, is called chance, hazard, fortune; but in strictness of language is the determination of Providence; as, the land shall be divided by lot. Num. xxvi.
2. That by which the fate or portion of one is determined; that by which an event is committed to chance, that is, to the determination of Providence; as, to cast lots, to draw lots. The lot is cast into the lap, but the whole disposing thereof is of the Lord. Prov. xvi.
6. In the U. States, a piece or division of land; perhaps originally assigned by drawing lots, but now any portion, piece or division. So we say a man has a lot of land in Broadway, or in the meadow . . .<sup>100</sup>

Given that Blackstone, Kent, and other great expositors of the common law of property attributed its very origins to the Bible, it is not surprising that its principles, its practices, and its language were directly, or indirectly, derived from the Bible.

### **STEWARDSHIP: MAN'S RESPONSIBILITY TO GOD**

God's grant of authority to man to exercise dominion was a grant of stewardship responsibility. Man was to bring God's earth and His creatures into order and into productivity in order that God's

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99. 3 Caines 175 (1805).

100. N. Webster, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828).

creative purpose be realized. Therefore, God placed Adam in the Garden of Eden "to dress it and to keep it."<sup>101</sup> Only because man sinned has he in his frustration perverted God's original instructions. Through the ages, man often has not "dressed" the land, he has "stripped" it; and he has not "kept" the land, had has "destroyed" it. Indeed, man has been "at war" with God's creation because the land has been cursed by Adam's sin:

[C]ursed is the ground for My sake . . . Thorns . . . and thistles shall it bring forth to thee  
 . . .<sup>102</sup>

This curse will not be lifted until Jesus Christ comes again for as Paul has written in his letter to the church at Rome: "[T]he whole creation groaneth and travaileth in pain together until now," but it "shall be delivered from the bondage of corruption into the glorious liberty of the children of God."<sup>103</sup>

In the meantime, man is required by God to carry out his stewardship responsibilities under the dominion mandate.

First, because man has been made in the image of God and because God as Creator is the owner of the heavens and the earth, man has the capacity to create and thereby become an owner of that portion of God's creation to which he has applied his creative ability. Udo Middleman has put it this way:

Property rights . . . exist in Scripture . . . [W]hat is really protected is man's creative mental activity - his ideas which are externalized into things which he owns and has a right to possess and to enjoy.<sup>104</sup>

Second, because God has given all men all that they have, they, in turn, ought to be ready to give back to God and to others. Such a duty cannot, however, be enforced by civil law without destroying the very community of love and sharing that God has intended. Again, Udo Middleman has captured the very essence of the injustice perpetuated by "enactment and execution of social legislation" that has pulled society "into an uncreative redistribution of wealth:"

Men who have made real contributions have had their creativity destroyed because their right over what they have created have been violated. The work of their hands has been taken from them. On the other hand, those who have received the property of others have had their own creativity destroyed because they no longer are required to search for ways to support themselves.<sup>105</sup>

This latter point was emphasized twice by Paul in his letters to the Thessalonians where he

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101. Genesis 2:15.

102. Genesis 3:17-18.

103. Romans 8:22,21.

104. U. Middleman, *PROEXISTENCE* (1974), 41.

105. *Id.*, at 42-43.

urged all Christians to work and not to expect a free ride if they did not.<sup>106</sup> As Middleman has observed:

If it because our general outlook that even if a man does not work he will nevertheless live on the basis of the wealth of those who do work, then man as a creative agent dies. Paul says, if a person does not work, he should not eat. If he does not work, he has no property. Let him live without property, let him live without bread. When bread comes by free distribution, then man really dies.<sup>107</sup>

Third, those who do work and are blessed by God with material prosperity should be content with what they have,<sup>108</sup> should not make the accumulation of wealth their goal,<sup>109</sup> but should give of what God has given to them:

Charge them that are rich in this world, that they be not highminded; nor trust in uncertain riches, but in the living God, who giveth us richly all things to enjoy; That they do good, that they be rich in good works, ready to distribute . . .<sup>110</sup>

In order for this to occur, those who have must have the liberty to choose to do as God commands. Otherwise, the very essence of his duty to the poor will be violated by transforming what can only be voluntary giving into an involuntary taking.

But man's first responsibility before God is not the taking care of the poor; rather, it is the taking care of the members of his family. At common law, this duty was recognized by laws that required a husband to support his wife and a father to meet the needs of his children.<sup>111</sup> The earliest common law guaranteed support for the wife until her death and an inheritance for the children. Later, a child's inheritance could be modified or taken away if the decedent chose to do so by a duly executed will.<sup>112</sup>

If the decedent could disinherit his children, could the civil government do so? Sir William Blackstone thought it could. He believed that a child inherited from his father only because he was most likely to be present at his father's death, and therefore, to take possession of his father's property immediately after his death. The common law that guaranteed the child's inheritance, in Blackstone's view, was simply an expedient rule to resolve disputes over a dead man's property.<sup>113</sup>

But America's James Kent disagreed. He believed that the owner alone had "[t]he right to transmit property by descent, to one's own offspring" and that that right was "dictated by the voice

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106. 1 Thessalonians 4:9-12, 2 Thessalonians 3:10-12.

107. U. Middleman, *supra* note 104, at 46.

108. 1 Timothy 6:6-8.

109. 1 Timothy 6:9-10.

110. 1 Timothy 6:17-18.

111. H. Clark, *LAW OF DOMESTIC RELATION* (1968), 181-82, 189.

112. W. Blackstone, *supra* note 1, at 12.

113. W. Blackstone, *supra* note 1, at 10.

of the law of nature . . ."<sup>114</sup> Some, like Virginia's great legal scholar St. George Tucker, agreed with Kent:

The affection of parents towards their children is the most powerful and universal principle which nature has planted in the human breast; and it cannot be conceived, even in the most savage state, that anyone is so destitute of that affection and of reason, who would not revolt at the position, that a stranger has as good a right as his children to the property of the deceased parent.<sup>115</sup>

Other, like United States Supreme Court Justice Joseph Story, agreed with Blackstone:

Whatever right a man may have to property, it does not follow that he has the right . . . [to] transmit it, at his decease, to his children, or heirs.<sup>116</sup>

Early in the history of the American common law, Blackstone's and Story's views were adopted by the courts. For example, the Virginia Supreme Court announced that

[T]he right to take property by devise or descent is the creature of the [civil] law and secured and protected by its authority. The legislature . . . may tomorrow, if it pleases, absolutely repeal the statute of wills and that of descents and distributions and declare that upon the death of a party, his property shall be applied to payment of his debts and the residue appropriated to public uses.<sup>117</sup>

No American state legislature had done what the Virginia court suggested that it could. In fact, all states have provided by statute protection for a surviving spouse and for surviving children if the property is not disposed of by a will. Indeed, even heirs outside the members of the immediate family take precedence over the state.<sup>118</sup> As for property disposed of by a will, most states protect the inheritance right of a child unless it is crystal clear that the deceased parent deliberately intended to disinherit him.<sup>119</sup>

Notwithstanding these statutory protections of family inheritance, the states have assumed that they may impose inheritance and estate taxes as a means by which property may be redistributed for the good of the whole. The assumption upon which such taxes are imposed is that the state could take the entire estate for public purposes if it so desired. But such an assumption is contrary to the law of dominion. God gave the family authority to own property for dominion purposes. The State has duly constituted to secure that dominion authority not to usurp it. Therefore, only the owner has authority to dispose of his property at death. And he has a duty to see that his family is provided for. Both the Old and the New Testament establish this fact. The writer of the book of Proverbs affirmed

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114. See, e.g., J. Kent, *supra* note 4, at 263.

115. W. Blackstone, *supra* note 1, (Tucker ed., 1803), Vol. 3, at 10 (fn.).

116. J. McClellan, JOSEPH STORY AND THE AMERICAN CONSTITUTION (1971), 320.

117. R. Chester, INHERITANCE, WEALTH AND SOCIETY (1982), 37.

118. See, R. Mennel, WILLS AND TRUSTS IN A NUTSHELL (1979), 6-7.

119. See, *Id.*, at 26-27.

that "[h]ouses and riches are the inheritance of fathers"<sup>120</sup> not the civil rulers. And Paul, although speaking of spiritual matters, confirmed this principle when he wrote to the church at Corinth: "[F]or the children ought not to lay up for the parents, but the parents for the children."<sup>121</sup>

It would be a mistake, however, to assume that a child was entitled to an inheritance no matter what. To the contrary, a rebellious child, or a lawless child could and should be disinherited by his father. Only those children who has given evidence that they will exercise dominion in a responsible manner should be blessed by a father's inheritance. "He that troubleth his own house shall inherit the wind"<sup>122</sup> wrote the wise author of the book of Proverbs. But the decision to disinherit belongs to the owner of the property not to the State.

Likewise, the owner has the sole authority to include in his will provision for charity and for the church. Because God has graced him with the blessings of material things he ought to give to the needy not only his lifetime but upon his death.<sup>123</sup> He should also tithe his estate for the benefit of the works of God.<sup>124</sup> Both of these are to be done voluntarily as they are duties enforceable solely by God.

Payment of debts and of taxes, however, may be enforced by the civil ruler. As for taxes, the civil government is entitled to a portion in return for any service rendered in the administration of the estate, including its protection while awaiting disposition. In addition, the civil government may receive taxes that are owed for the protection that it afforded the owner from such threats as theft.<sup>125</sup> Under no circumstances, however, should a tax be levied for any other purpose. Such a tax would be confiscatory in nature and, therefore, theft. The prophet Ezekiel warned those who would rule Israel in the latter days to be careful not to levy taxes that compromised a family's inheritance:

[T]he prince shall not take of the people's inheritance by oppression, to thrust them out of their possession; but he shall given his sons inheritance out of his own possession: that my people be not scattered every man from his possession.<sup>126</sup>

## CONCLUSION

The laws of God presuppose private property rights. Two of the Ten Commandments specifically protect them: "Thou shalt not steal" and "Thou shalt not covet . . ."<sup>127</sup> "Moreover," as Udo Middleman has so aptly observed, "true communion and true community are based upon property rights. For unless a person owns something he can share, there can be no community."<sup>128</sup>

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120. Proverbs 19:14.

121. 2 Corinthians 12:14(b); *Cf.* Proverbs 13:22(a).

122. Proverbs 11:29.

123. *Cf.* Leviticus 19:9-10.

124. *Cf.* Malachi 3:8-10.

125. Romans 13:4,6-7(a).

126. Ezekiel 46:18.

127. Exodus 20:15,17.

128. U. Middleman, *supra* note 104, at 42.

Private property, and its necessary partner - the free enterprise system - are, therefore, required by God's law. Efforts to centralize dominion of property in the State violate God's grant of dominion authority to the family and God's grant of limited protective authority to the State. Nevertheless, no private property or free enterprise system will long endure unless those who prosper materially under that system acknowledge in both word and deed that all that they have is a gift of God. Selfish pride and greed will not only destroy those who live by them, but they will, if widespread, destroy the nation in which they live:

Hear this, O ye that swallow up the needy, even to make the poor of the land to fail, saying, When will the new moon be gone, that we may sell coin? and the sabbath, that we may set forth wheat, making the ephah small, and the shekel great, and falsifying the balances by deceit? . . . The Lord has sworn by the . . . [pride] of Jacob . . . Shall not the land tremble for this, and everyone mourn that dwelleth therein? and it shall rise up wholly as a flood; and it shall be cast out and drowned . . .<sup>129</sup>

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129. Amos 8:4-5,7-8.

## CHAPTER 7

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# Restitution and Punishment

In the May, 1985 issue of the American Bar Association Journal J.S. Bainbridge, Jr., a Baltimore lawyer, made the startling claim that "[r]etribution has returned to criminal justice." Documenting the failure of the criminal law to rehabilitate offenders, Mr. Bainbridge supported his claim on the grounds that legislators, judges, and scholars had lately discovered the shortcomings of the rehabilitative ideal: "Rehabilitation is being passed over like a dish that didn't digest well."<sup>1</sup>

But the demise of rehabilitation in the criminal law will not guarantee that retribution will return to center-stage. Legal scholars, especially, have been reluctant to embrace a philosophy of punishment linked closely to retribution: indeed they greatly fear any penal philosophy based upon retribution. Overwhelmingly they favor the widely embraced utilitarian philosophy of deterrence. They endorse a criminal penalty only if it is likely to restrain convicted offenders from committing other crimes or to deter others from engaging in crime. They believe that the role of retribution is a limited one to be applied only when their utilitarian purpose infringes unreasonably upon individual autonomy.<sup>2</sup>

In their popular criminal law textbook, law professors Wayne La Fave and the late Austin Scott, Jr., have summarized this conventional wisdom:

The broad aim of the criminal law is . . . to prevent harm to society . . . . This is accomplished by punishing those who have done harm, and by threatening with punishment those who would do harm.<sup>3</sup>

Having maintained that no criminal penalty, whether retributive or rehabilitative in effect, may be justified unless it deters criminal behavior, America's law teachers and scholars both within the classroom and in the public marketplace have directed the debate about criminal law penalties to one issue: Do they work?

Ironically, law teachers and scholars prefer their utilitarian theories even though it has been proved that penalties imposed upon people after they have been convicted of criminal activity do not work very well. Criminology experts have conducted studies that question whether anyone is deterred by the conviction of another person and whether even the convicted criminal, himself, is deterred except during the period of time of incarceration.<sup>4</sup> Some social scientists have even

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1. Bainbridge, "The Return of Retribution," 71 A.B.A.J. (1985), 61.
  2. *See, e.g.*, H. Packer, *THE LIMITS OF THE CRIMINAL SANCTION* (1968), 19-70.
  3. W. La Fave and A. Scott, *CRIMINAL LAW* (1972), 9.
  4. *See, e.g.*, Nagin, "General Deterrence: A Review of the Empirical Evidence," in *DETERRENCE AND*

suggested that a much more efficient and effective system would provide "treatment" to "cure" actual and potential criminal offenders whose behavior is, in their opinion, determined not chosen.<sup>5</sup>

Almost all law teachers and scholars, lawyers and judges, legislators and ordinary people have refused this invitation. But on what grounds? In their casebook on criminal law three University of Virginia law professors have summarized the most popular reason:

The underlying premise of the criminal law is that it is morally right to treat people as responsible moral agents, whatever the fact of the matter, because any other view would be inconsistent with the values of individual autonomy and freedom that the law should reflect and with the perceptions of each other on which people at least think they are governing their daily lives.<sup>6</sup>

Law students who are taught by these three professors and by most of their colleagues learn that, while the social scientists may have accurately described the real world and the reality of man's condition in it, the law must ignore that reality to achieve other more important goals. In the words of the three Virginia law professors quoted above:

Determinism is rejected by the criminal law, in other words, not because it is a false scientific theory but because it should be rejected in light of the proper normative premises on which the criminal law should function.<sup>7</sup>

By divorcing the criminal law from "scientific reality" law teachers and scholars have freed themselves to keep their favored deterrence rationale for the criminal law without having to account for its failures. By embracing the criminal law's traditional requirements that a man may be punished for conduct only if he may be blamed for making a wrong choice and that his punishment must be proportionate to the seriousness of his offense, they are able to preserve liberty. But they are free to sacrifice that liberty if such principles interfere with the overriding utilitarian objective to deter crime. By refusing to decide whether or not man is a free moral agent, the typical law teacher and scholar may pick and choose according to his own hidden agenda. Consequently, he has held the criminal law captive to a series of uneasy compromises between "two contending philosophical views regarding the ultimate purpose of punishment . . . to prevent or minimize criminal behavior . . . [or] to impose upon the criminal his just deserts."<sup>8</sup>

Not only have law students suffered at the hands of their double-minded teachers, the American public has suffered as well. In the 1960's, for example, legal experts championed new programs to finance employment and educational opportunities for convicted felons so that they will not return to their previous lives of crime. Taxpayers found themselves paying for such programs; yet they had to pay for their own children's education or training for employment. Later, they discovered that

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INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES (1978), 95, 135-36. *Also see*, D. Glaser, THE EFFECTIVENESS OF A PRISON AND PAROLE SYSTEM (1964).

5. *See, e.g.*, K. Menninger, THE CRIME OF PUNISHMENT (1968), 264-270.

6. P. Low, J. Jeffries and R. Bonnie, CRIMINAL LAW, CASES AND MATERIALS (1982), 7.

7. *Id.*

8. *Id.*, at 1-2.

such expensive rehabilitation programs have not "deterred" those who have benefitted from them.<sup>9</sup>

In the 1980's ordinary citizens watch in dismay expensive appeals and long delays as lawyers and courts review and rereview for legal errors the trial records of convicted murderers sentenced to death. Why? Partly, because the experts cannot agree that the death penalty deters crime and, also, because they are frightened by the imposition of such a "final penalty" when they are not sure if convicted murderers are really morally responsible for the deaths of their victims.

Such examples, and they could be multiplied without great effort, establish with certainty that the deterrent rationale cannot support any system of criminal law that, in fact, administers true justice. On the one hand, failures will never be discovered until after the programs have been implemented at great cost to liberty and to security. On the other hand, the lives of human beings and the well-being of human society cannot be subjected to scientific experimentation without treating men as mice in a psychological maze.

Notwithstanding this irrefutable dilemma, leaders of America's legal community have been unwilling to jettison the utilitarian concept of deterrence which justifies punishment in preventive terms. At the heart of their refusal is a misunderstanding of the true purpose of criminal punishment as given by God to man and revealed to the nation of Israel through their prophet, Moses.

### **EYE FOR EYE, TOOTH FOR TOOTH: RESTITUTION NOT RETRIBUTION**

Many legal scholars cite the Old Testament passages calling for an "eye for eye, tooth for tooth" as the foundation for the "retributive view" of criminal punishment.<sup>10</sup> The late Herbert Packer attacked these Old Testament verses, known as the *lex talionis*, as calling for the satisfaction of "what is essentially a community blood lust." He claimed that the only purpose of the *lex talionis* was to achieve revenge against the wrongdoer: The criminal must be "paid back" for his crime and he must "pay back" society. On these grounds Packer dismissed the *lex talionis* as having "no useful place in a theory of justification for punishment, because what it expresses is nothing more than dogma, unverifiable and on its face implausible."<sup>11</sup>

What has made the *lex talionis* so implausible to Packer and to fellow colleagues has been twofold: 1) Their aversion to any truth based upon the Christian faith in God's revelation to man; and 2) their dogmatic faith in the scientific method as the only source of knowledge. As a consequence of these prejudices Packer and his fellow law teachers and scholars have mistaken the true purpose and meaning of the *lex talionis*.

They have assumed that the Old Testament standard requiring an "eye for an eye" and a "tooth for a tooth" is to be literally applied. They have made this assumption for one simple reason: They have not carefully studied the *lex talionis* in the context in which it appears in three of the books of Moses - Exodus, Leviticus, and Deuteronomy. In each of these passages it is clear that the rule of

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9. See, e.g., J. Wilson, ed., CRIME AND PUBLIC POLICY (1983), 103-105, 220-223, 253.

10. See, e.g., J. Kaplan, CRIMINAL JUSTICE (1973), 9.

11. H. Packer, THE LIMITS OF THE CRIMINAL SANCTION (1968), 37-39.

"eye for eye" and "tooth for tooth" was never intended to be applied literally. Rather, it was intended to be a principled guide for tailoring all remedies, civil and criminal, to restore a person injured in accordance with the blameworthiness of the wrongdoer and the seriousness of the injury of the person wronged.

In Deuteronomy, chapter 19, God revealed to Moses the crime of perjury and specified the penalty to be imposed on those instances where the perjurer has accused another of having committed a crime.<sup>12</sup> Upon conviction of such an offense, God commanded that the offender suffer the same penalty that the one against whom he had falsely testified would have suffered if his testimony had been true.<sup>13</sup> For example, if the perjurer had falsely testified that another had stolen and destroyed one of his oxen, then the perjurer would have been required to pay the one against whom he had falsely testified 5 oxen according to the rule of Exodus 22:1. Or if the perjurer had testified falsely that another had committed murder, then the perjurer would pay with his life as if he, the false witness, had committed murder.

These penalties were justified in this passage as conforming with the Biblical command of an "eye for eye, tooth for tooth."<sup>14</sup> Yet, if Packer was correct that the *lex talionis* called for retaliation, an equivalent "pay back" for the wrong done, the penalty should have been literally applied, a "lie for a lie." But that was not the case; rather, the penalty was to fit according to the blameworthiness of the offender and to the harm suffered by the one wronged. By this passage alone, then, it is clear that the "eye for eye/tooth for tooth" rule stated a general principle, not a specific command to be literally applied in every case.

Another passage, this one from Leviticus chapter 24, confirms this reading of the *lex talionis*. In verses 17 through 21, God revealed to Moses the penalties for murder, assault and battery, and destruction of property, specifically the killing of another's animal.<sup>15</sup> Each of the prescribed penalties was linked specifically to the *lex talionis* principle in verse 20: "Breach for breach, eye for eye, tooth for tooth . . ." At first glance, it appears that the penalty is to be literally applied: "[H]e that killeth any man shall be put to death . . . [H]e that killeth a beast shall make it good; beast for beast . . . [I]f a man cause a blemish in his neighbor; as he hath done, so shall it be done to him."<sup>16</sup> But careful study of these verses in context reveals otherwise. Following verse 20, containing the recitation of the "eye for eye/tooth for tooth" principle is verse 21, which reads, as follows:

And he that killeth a beast, he shall restore it; and he that killeth a man, he shall be put to death.

A literal application of the *lex talionis* would have required the killer of the beast to allow the owner of that beast to kill one of the killer's beasts. Instead, as Exodus 22:1 prescribes, the convicted beast killer was required to provide four live sheep in exchange for the one sheep that he killed, or five live

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12. Deuteronomy 19:15-18.

13. Deuteronomy 19:19.

14. Deuteronomy 19:20-21.

15. Leviticus 24:17-19.

16. *Id.*

oxen in exchange for the one ox that he killed. Again, this passage from Leviticus confirms that the *lex talionis* principle is not to be literally applied.

In fact, the Leviticus passage leads the careful Bible reader to Exodus chapter 21 where "eye for eye/tooth for tooth" was first revealed to Moses just after he received the Ten Commandments. In that chapter, God revealed the remedy for assault and battery not to be a returned blow of the same magnitude and to the same part of the guilty party's body as the one that had been delivered; instead, the one guilty of assault was to pay damages resulting from lost wages and medical expenses.<sup>17</sup> This remedy appears with a host of others beginning with the death penalty for murder<sup>18</sup> and ending with an exchange of a live ox for a dead one,<sup>19</sup> all of which are sandwiched around the "eye for eye/tooth for tooth" principle. Anyone, other than the already prejudiced reader, would see clearly that God never intended that man literally apply that principle. Because it was not to be taken literally, it was never intended to embody the revenge or retaliation purpose that has been attributed to it by its critics. To the contrary, as Dr. R.J. Rushdoony has stated:

The principle of restitution is basic to Biblical law; it appears with especial prominence in laws under the sixth and eighth commandments, but it is basic to the purpose of the whole law. The "eye for eye, tooth for tooth" concept is not retaliation, but restitution.<sup>20</sup>

As a restitutionary principle, the "eye for eye, tooth for tooth" principle serves as a safeguard against revenge and retaliation. It limits the available remedies to those proportionate to the blame of the offender and to the harm caused. Moreover, it directs the attention of the judge or other minister of justice to ascertain the specific restitutionary purpose and its primary recipient. Relevant scripture reveals that the victim of crime is often the primary beneficiary of a correct application of the "eye for eye, tooth for tooth" rule. And where the victim is not the primary beneficiary, the purpose of the *lex talionis* is to restore the offender or society.

## RESTITUTION AND VICTIMS

One of the great scandals of twentieth century America has been its prison system. In recent years almost no one has come to its defense. Certainly few take seriously any longer the original purpose of a penitentiary, a place to which a convicted criminal is sent to repent, to do penance, and to come out morally regenerated. Instead, the state and federal prisons have become moral cesspools rampant with violence, sexual perversion, and corruption. Moreover, they have served for years as "graduate schools of crime" especially for young offenders who, during their time of incarceration have learned a variety of new skills from their elders.<sup>21</sup>

If incarceration makes little sense generally, then it makes even less sense as appropriate punishment for those whose crimes are offense against property, such as theft. In an article in the

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17. Exodus 21:19.

18. Exodus 21:12.

19. Exodus 21:36.

20. R. Rushdoony, *INSTITUTES OF BIBLICAL LAW* (1973), 272.

21. See, e.g., Greenwood, "Controlling the Crime Rate Through Imprisonment," in J. Wilson, *CRIME AND PUBLIC POLICY* (1983), 252-53.

Detroit College of Law Review Charles Colson, founder and director of Prison Fellowship, and Daniel Benson, professor of law at Texas Tech University, have called for the implementation of "restitution programs" designed to compensate victims for losses resulting from crimes against property. As the authors have ably demonstrated, a criminal justice system without any mechanism for compensating victims for losses suffered cannot properly be called a system of justice. In America victims of crime have been "virtually ignored . . . not compensated in most cases . . . given little or no help in recovering losses . . . and left entirely to their own resources in picking up their lives and adjusting to what has befallen them."<sup>22</sup> To aggravate this sad state of affairs, these same victims, as taxpayers, must pay higher taxes to house, clothe, and feed the very ones who have injured them.

To support their proposal to establish programs of restitution, Colson and Benson have cited data suggesting that restitution programs, already begun on a trial basis in the United States, have been effective deterrents to criminal behavior as well as sources of substantial financial assistance for their victims.<sup>23</sup> More significantly, they have relied upon the Biblical law requiring restitution to the victim, especially in those instances of crimes against property. In Exodus, chapter 22, the word, "restitution" or one of its derivatives, appears six times in the first twelve verses. For a stolen and destroyed ox, the thief was required to "restore" to its owner five oxen; for a stolen and destroyed sheep, the thief was liable to "restore" to its owner four sheep.<sup>24</sup> Of the sheep or ox was found alive, then the thief was required to "restore double."<sup>25</sup> For an act of trespass, the trespasser was required to "make restitution" and in some circumstances to pay double.<sup>26</sup> For acts of embezzlement, the guilty one was to pay double or otherwise to make restitution.<sup>27</sup>

These Biblical commands to pay a greater sum than the exact monetary value of the property stolen or destroyed were necessary to pay for the "pain and suffering" that follows whenever anyone has been wronged by another person. Indeed, as Justice Oliver Wendell Holmes, Jr., once said: "Even a dog distinguishes between being stumbled over and being kicked."<sup>28</sup> Moreover, the value of "Old Bessie" to her owner often exceeds the dollar amount that he might receive by selling her. The Biblical requirements of five-fold, four-fold, and double money damages reflected the reality of the pain and suffering that the wrongdoer had inflicted.

Such a measure of damages has long been used in America's civil justice system to compensate for injuries caused by negligent driving of an automobile or other like wrongs. While a few legal scholars have called compensation for "pain and suffering" a camouflage for excessive lawyer's fees, most have conceded that such money damages above and beyond the out-of-pocket loss are legitimate. Thus, standard jury instructions in civil tort cases include directions to award a victorious plaintiff with an amount to make restitution for the plaintiff's pain and suffering.

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22. Colson and Benson, "Restitution as an Alternative to Imprisonment," 11 DET. COLL. OF LAW REV. (1980), 523, 525-26.

23. *Id.*, at 565-76.

24. Exodus 22:1.

25. Exodus 22:4.

26. Exodus 22:6,9.

27. Exodus 22:7,10-12.

28. O. Holmes, THE COMMON LAW (1881), 3.

Such restitutionary remedies were designed to make the victim whole, to do all that was humanly possible to place him in as good a position as he was before the commission of the crime. Because man, unlike God, was unable to restore an animal back to life and to heal the victim of the pain and suffering experienced, money damages or other substitutes were required. The greater the loss and the more serious the offense, the greater the amount of damages or other substitute property was required in conformity with the "eye for eye, tooth for tooth" principle. Thus, if an ox were stolen and killed, five oxen were required, but if the ox were merely stolen, that ox plus another were required.<sup>29</sup>

As Colson and Benson have pointed out, the criminal penalties for theft in America do not reflect these Biblical commands. Instead of paying restitution to their victims, thieves may be required to pay a fine to the state and to serve time in prison. A system of restitutionary remedies designed to repay the victims for their losses would be like the one that already exists in the civil tort system that provides compensation for out-of-pocket expenses and for pain and suffering.

Some may object, however, to this proposal because most convicted thieves are financially unable to pay their victims anything. God has provided that in the event that the thief has "nothing, then he shall be sold for his theft."<sup>30</sup> Under the "eye for eye/tooth for tooth" principle, the offender would be set free as soon as he made restitution to the victim. If the victim preferred, he could sell the offender rather than hold him in servitude.

Such a system could be instituted today. The 13th Amendment of the United States Constitution allows for "involuntary servitude" upon conviction of a crime.<sup>31</sup> In fact, such servitude limited to making restitution to the victim is not as enslaving as the current system of incarceration with its "prolonged imprisonment, with all the deterioration, corruption, destruction of family, impairment of earning ability and the bitterness that goes along with it." Moreover, "the basic principle being applied in the rendering and enforcement of a civil judgment in a tort suit is substantially the same: a civil defendant is forced by the legal system to pay for the loss or injury that he caused."<sup>32</sup>

Restitution to the victim need not be limited to crimes against property. For example, one guilty of an assault and battery on the person of another ought to pay for the loss of wages and for expenses for medical treatment.<sup>33</sup> Even a male guilty of "statutory rape" ought to pay recompense for the damage caused to the young lady.<sup>34</sup> While money cannot completely restore anyone who suffers personal injury wrongfully inflicted, it is the best restitutionary remedy that man has to offer. Because money damages in civil tort actions for personal injury have always been available, it would not be difficult to allow for them in a criminal action. And as was the case with property loss, the damage award should include compensation for "pain and suffering" as well as for out-of-pocket

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29. Exodus 22:1,4.

30. Exodus 22:3.

31. "Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States . . ."

32. Colson and Benson, *supra* note 22, at 555.

33. Exodus 21:19.

34. *See*, Exodus 22:17.

losses such as medical expenses and earnings lost. Such compensation could exceed 5 times the actual expenses without violating the "eye for eye/tooth for tooth" principle, because injury to a human being is more serious than injury to one's ox.<sup>35</sup>

At one time in the history of the administration of criminal justice in America, restitutionary payments to victims measured by the Biblical "eye for eye/tooth for tooth" standard were authorized. For example, in 1790 the First Congress enacted a law against theft that provided that any offender, "on conviction, be fined not exceeding the fourfold value of the property so stolen." One-half of this fine was to be paid to the owner of the goods and the other half as a reward to the informer and prosecutor.<sup>36</sup> Restitution to the victim through criminal fines is not, therefore, unprecedented in America.

In recent years state legislatures have begun to respond to pleas on behalf of crime victims by enacting laws providing for restitution for victims. For example, on July 10, 1985, the Governor of Michigan signed into law a bill authorizing the sentencing judge to order a convicted criminal to make restitution for losses to property or for injuries to person caused by his criminal conduct. While the restitution provided may not exceed the market value of the property lost or the cost of medical expenses and loss of wages, the Michigan statute does authorize the judge to "require that the defendant make restitution in services in lieu of money." Moreover, the law prohibits the convicted defendant from profiting from any sales of a book or other recollection regarding his criminal activity until restitution to his victim is paid in full and until reimbursement to the state for the cost of room and board in prison is made.<sup>37</sup> Steps such as this are certainly significant ones towards reinstating Biblical principles of restitution for victims in the administration of criminal justice in America.

## **RESTITUTION AND OFFENDERS**

A criminal justice system that incorporated restitution for the victim of crime would, in turn, provide for restitution for the criminal offender. In the New Testament a man named Zacchaeus encountered Jesus Christ. In that eventful meeting Zacchaeus promised the Lord that if he had "taken anything from any man by false accusation" he would "restore him four fold."<sup>38</sup> Christ's response to Zacchaeus was immediate: "This day is salvation come to this house forasmuch as he also is a son of Abraham."<sup>39</sup>

Compliance with God's command to restore a person wronged, if accompanied by true repentance as in the case of Zacchaeus, brings reconciliation between the wrongdoer and his Creator and between the wrongdoer and his victim.<sup>40</sup> As Colson and Benson have noted pilot victim restitution programs in the United States have brought rehabilitation to offenders and deterrence

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35. See, Exodus 22:1 and Genesis 9:6.

36. An Act for the Punishment of Certain Crimes Against the United States, Section 16, 1 Stat. 116 (1790).

37. Act No. 87, Public Acts of 1985, State of Michigan.

38. Luke 19:8.

39. Luke 19:9.

40. 1 Timothy 2:5.

from further criminal activities. This dual restitutionary role of the proper application of the Biblical sanctions for recompensing the crime victim was revealed to Moses in Leviticus, chapter 6, where God commanded that an offender who volunteers to make restitution must present an offering to the Lord for atonement for the sin committed and make restitutionary payment to his victim.<sup>41</sup>

But in many cases criminal offenders will not exhibit the kind of repentant attitude evidenced by Zacchaeus and reflected in Leviticus. In the Old Testament such offenders faced corporal punishment:

If there be a controversy between men . . . the judges . . . shall justify the righteous, and condemn the wicked. And it shall be, if the wicked man be worthy to be beaten, that the judge shall cause him to lie down, and to be beaten before his face, according to his fault, by a certain number."<sup>42</sup>

The severity of the beating administered was subjected to the "eye for eye/tooth for tooth" principle. Thus, a convicted man, deserving of physical punishment "according to his fault," could not be beaten beyond forty times lest the offender "seem vile unto thee."<sup>43</sup>

For what purpose did the Bible prescribe such physical punishment for certain wrongdoers? Again, the answer is restitution, but this time restitution for the offender.

The Book of Proverbs documents that physical punishment administered according to the Law of God restores the offender's soul, that is, it relieves him from the burden of his guilt:

The blueness of a wound cleanseth away evil; so do stripes the inward parts of the belly.<sup>44</sup>

Withhold not correction from the child: for if thou beatest him with the rod, he shall not die. Thou shalt beat him with the rod, he shall not die."<sup>45</sup>

Moreover, physical punishment has been designed by God to restore the offender to true knowledge and wisdom. Again, according to the writer of Proverbs:

[A] rod is for the back of him that is void of understanding.<sup>46</sup>

Foolishness is bound in the heart of a child, but the rod of correction shall drive it far from him.<sup>47</sup>

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41. Leviticus 6:1-7.

42. Deuteronomy 25:1-2.

43. Deuteronomy 25:3.

44. Proverbs 20:30.

45. Proverbs 23:13-14.

46. Proverbs 10:13.

47. Proverbs 22:15.

The rod and reproof give wisdom . . .<sup>48</sup>

Almost all penological experts in twentieth century America have, however, rejected these truths in God's word. Indeed, most Americans without hesitation would reject physical punishment of convicted criminals. Indeed, the outcry against corporal punishment has become so intense that some have already attempted to discourage and ultimately to prohibit parents from spanking their children.<sup>49</sup> Indeed, in Europe the Swedish parliament has already outlawed corporal punishment as a means of disciplining children.<sup>50</sup>

Such opposition to corporal punishment of convicted felons and of rebellious children has been reinforced by judicial opinions such as one written by Judge Harry Blackmun before he became a justice of the United States Supreme Court. In *Jackson v. Bishop*,<sup>51</sup> Judge Blackmun ruled that the Arkansas practice of whipping prisoners with the strap, despite all safeguards, violated the United States Constitution's Eighth Amendment that prohibits "cruel and unusual punishment." The Arkansas authorities maintained that whipping was necessary to maintain discipline. Under an earlier court order the Board that supervised the Arkansas prison system had adopted rules that limited the use of physical punishment, in part, as follows: 1) Proof of a "major offense;" 2) No more than ten lashes, the exact number to be determined by a four-man board of inquiry; and 3) An opportunity for the inmate to be heard.

In the trial court, penology experts and inmates testified that "corporal punishment generates hate . . . [and] frustrates correctional and rehabilitative goals." At the appellate level Judge Blackmun concluded, in addition, that no matter what safeguards were employed, there would always be abuses of the authority to inflict physical punishment and that, in light of "contemporary concepts of decency and human dignity" any corporal punishment violated the constitutional prohibition against cruel and unusual punishment. In drawing this conclusion Judge Blackmun followed earlier United States Supreme Court opinions that declared that the meaning of "cruel and unusual" depended upon "the evolving standards of decency that mark the progress of a maturing society."<sup>52</sup>

Judge Blackmun's ruling was possible if one agreed with the Supreme Court's assumption that it had the power to change the original meaning of the constitutional text. Unquestionably, the framers did not intend to outlaw corporal punishment because the same Congress that had adopted the constitutional prohibition against cruel and unusual punishment had enacted a law that required certain convicted thieves to "be publicly whipped, not exceeding thirty-nine stripes."<sup>53</sup> Indeed, corporal punishment for certain offenders was not uncommon in America in colonial times. For example, Section 43 of the Massachusetts Body of Liberties provided for such punishment as prescribed by Biblical principles:

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48. Proverbs 29:15.

49. BATTERED WOMEN: ISSUES OF PUBLIC POLICY (U.S. Commission on Civil Rights, 1978), 479-80.

50. R. Docksay, YOU WON'T GET SPANKED IN SWEDEN (1980), 8.

51. 404 F.2d 571 (8th Cir. 1968).

52. *Trop v. Dulles*, 356 U.S. 86, 102; 78 S.Ct. 590, 598 (1958).

53. *Supra*, note 36.

No man shall be beaten with above 40 stripes, nor shall any true gentleman, nor any man equal to a gentleman be punished with whipping, unless his crime be very shameful, and his course of life vicious and profligate.<sup>54</sup>

And Section 46 of that same document proved that such corporal punishments did not, per se, violate any prohibition against "cruel and unusual" punishments;

For bodily punishments we allow amongst us none that are inhumane, Barbarous or cruel.<sup>55</sup>

While provisions for corporal punishment of certain convicted criminals remained on the books as late as 1972<sup>56</sup> such practice has long been discontinued. Perhaps, this occurred because obvious abuses had taken place in England and America<sup>57</sup> just as they had in Israel when Jesus Christ, Himself, was beaten<sup>58</sup> and when the early church's apostles had likewise suffered for preaching the Gospel.<sup>59</sup> Perhaps, this practice discontinued because civil authorities began to listen to penology experts and to convicted felons, as had Judge Blackmun in the *Jackson* case, and concluded that, even with carefully enforced safeguards, physical punishment was counter productive.

Whatever the reason, God has reminded a nation's leaders through the Book of Proverbs that: "there is a way which seemeth right to a man, but the end thereof are the ways of death."<sup>60</sup> Moreover, He has warned those leaders that if they seek the best for their nation they will follow God's laws for nations: "Righteousness exalteth a nation: but sin is a reproach to any people."<sup>61</sup> The Holy Spirit through the Apostle Paul repeated this warning in the form of a command to the civil rulers:

For rulers are not a terror to good works, but to the evil . . . for he is the minister [servant] of God, a revenger to execute wrath upon him that doeth evil.<sup>62</sup>

The remedy for abuse of power is not to disregard God's clear command that in appropriate cases convicted criminals should be physically punished, but to see that the civil rulers abide by the "eye for eye/tooth for tooth" principle of proportionality. By completely abandoning such punishment in the criminal justice system and by threatening to stop the practice of such punishment of children in the home, America's leaders have not only robbed its law-abiding citizenry of the protection that God affords them, but it has stolen from the offenders themselves opportunities for spiritual and intellectual restoration, the divinely guaranteed benefits of corporal punishment.

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54. R. Perry, ed., *SOURCES OF OUR LIBERTIES* (1972), 153.

55. *Id.*

56. *See*, 11 Dela. Code, §§631, 811, and 3905-08, *also* G. Newman, *JUST AND FAITHFUL* (1983), 129.

57. Newman, *supra* note 56, at 28-35.

58. Matthew 27:26.

59. Acts 5:40; 16:23 and 2 Corinthians 11:24.

60. Proverbs 14:12, 16:25.

61. Proverbs 14:34.

62. Romans 13:3-4.

In a book on dealing with the problem of depression, authors Don Baker and Emery Nester have dramatically documented the therapeutic effect of corporal punishment properly administered according to Biblical standards.

One young man had returned from Vietnam a psychological cripple. His mood swings would take him from the extremes of deep depression to acts of insane violence.

He had accidentally killed some Vietnamese children.

The counselor had been working with him for months, trying to help him gain release from the overpowering sense of guilt that bound him. David finally persuaded him to verbally relive those tragic moments in "Nam." We listened spellbound as he painted a grim word picture of the scene that smoldered in his mind.

When finally he had said it all and had left us mentally staring at the lifeless corpses of innocent children, he began to cry. The convulsive sobs that followed racked his entire body.

No one moved to comfort him. No attempt was made to quiet him; we all sat mute and still.

Finally, as his crying began to subside, David said quietly, "And you feel that you need to be punished for what you did?" The young veteran began nodding his head and saying, "Yes, yes . . . I need to be punished. Yes, yes."

To my utter amazement, David moved from his chair, picked up a wooden ruler, and said, "Hold out your hands." As the ex-soldier obeyed, the therapist began beating his hands and his forearms mercilessly.

I expected just token punishment - a symbolic beating. But David didn't stop, and we recoiled as we saw that ruler come down again and again on hands that began reddening and swelling with each successive blow.

After what seemed an eternity, the beating ended. The tears gone, the look of pain had eased. Our counselor took that grown man in his arms and held him close as a father would his son, all the time repeating, "It's all right. It's all right. It's over. It's over."

The rest of us then crowded close and held that Vietnam veteran until he began to relax. He looked at the therapist and then at the rest of us and began to sob in relief, uttering over and over again. "Thank you, thank you."<sup>63</sup>

In addition to this contemporary testimony of the restorative effect of corporal punishment,

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63. D. Baker and E. Nester, *DEPRESSION* (1983), 60.

others are beginning to question the almost universal assumption that corporal punishment of convicted criminals is "cruel and unusual." In 1983 Graeme Newman, professor of criminology and dean of the School of Criminal Justice, State university of New York, Albany, published *JUST AND PAINFUL: A CASE FOR THE CORPORAL PUNISHMENT OF CRIMINALS*. In this short, but well-documented study, Dean Newman demonstrated that "none of the research substantiates" the claim "that corporal punishment causes humiliation and terror." To the contrary, Dean Newman pointed out, "it is well established that prison rests on a platform of humiliation and terror."<sup>64</sup>

At the conclusion of his study the dean issued "A punishment Manifesto" that included the following two proposals:

- (1) Acute corporal punishment should be introduced to fill the gap between severe punishment of prison and the non-punishment of probation . . .
- (2) For violent crime in which the victim was terrified and humiliated . . . a violent corporal punishment should be considered, such as whipping . . .<sup>65</sup>

In part, Dean Newman's endorsement of corporal punishment was based upon his concurrence with the proposition that through suffering pain "the offender can come to understand the evil of his offense."<sup>66</sup>

## RESTITUTION AND SOCIETY

In his book on the limitations of the criminal sanction, Herbert Packer cited the death penalty for murder as the most "conspicuous example" of the revenge theory underpinning the *lex talionis*. At first glance it appears that Packer is right. Capital punishment imposed upon a murderer prevents any possible remedy that would restore the victim or that would make restitution to the victim's family. And only those with a preference for the macabre would argue that killing the offender would be good for his soul or for his mind. Careful examination of the Biblical provisions commanding the death penalty for murder, however, reveals that it, too, has a restitutionary purpose, namely, to restore the nation or society in which the murder occurred.

From the time of the first murder, when Cain killed Abel, the unlawful taking of innocent blood has literally "defiled" the land where the murder took place. This "law of the land" was first revealed by God in his encounter with Cain after he had murdered his brother: "And he [God] said, what hast thou done? The voice of thy brother's blood crieth unto me from the ground."<sup>67</sup>

God elaborated upon this law in his instructions to the nation of Israel through the prophet, Moses:

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64. F. Newman, *JUST AND PAINFUL* (1983), 8.

65. *Id.*, at 139.

66. *Id.*, at 100.

67. Genesis 4:10.

Whoso killeth any person, the murderer shall be put to death by the mouth of the witnesses . . . Moreover, ye shall take no satisfaction for the life of a murderer . . . but he shall surely be put to death . . . So ye shall not pollute the land wherein ye are: for blood it defileth the land: and the land cannot be cleansed of the blood that is shed therein, but the blood of him that shed it.<sup>68</sup>

Finally, God announced through the Psalmist that the nation of Israel had been destroyed and its people scattered, in part, because of its failure to enforce the law of murder and to impose the death penalty upon those guilty of shedding innocent blood:

Yea, they . . . shed innocent blood, even the blood of their sons and of their daughters, whom they sacrificed unto the idols of Canaan: and the land was polluted with blood . . . Therefore was the wrath of the Lord kindled against his people . . . And he gave them into the hand of the heathen.<sup>69</sup>

The prophet Isaiah has made it clear that this "law of the land" has not been limited by God to the geographical boundaries of Israel or to the historical period of the Old Testament. In a timeless prophecy concerning the history of nations past, present and future Isaiah proclaimed that "the earth . . . is defiled under the inhabitants thereof; because they have transgressed the laws, changed the ordinances, broken the everlasting covenant."<sup>70</sup> Part of the covenant referred to in this passage undoubtedly includes the covenant that God made with all nations through the patriarch, Noah: "Whoso sheddeth man's blood, by man shall his blood be shed: For in the image of God made he man."<sup>71</sup> That covenant has bound all nations ever since. The prophet, Habakkuk, warned that God still brings judgment upon any nation that habitually violates "the law of the land."<sup>72</sup>

Notwithstanding this consistent Old Testament record, G. Aiken Taylor, editor of the *PRESBYTERIAN JOURNAL* has observed:

Within the Christian community . . . it is widely believed that the Christian "ethic" demands the abolition of capital punishment. Some Christian leaders declare that the New Testament modifies the Old Testament in this respect and that Jesus Christ would have rejected capital punishment.<sup>73</sup>

For example, the Southern Presbyterian Assembly's Christian Relations Committee reported in 1961 "that the New Testament 'ethics of love' effectively forbids capital punishment and that the process of rehabilitation which is 'God's redemption' should not be denied any man."<sup>74</sup> But does capital punishment deny to the man executed an opportunity to come to a saving knowledge of Jesus

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68. Numbers 35:30-31,33.

69. Psalm 106:38-41.

70. Isaiah 24:5.

71. Genesis 9:6.

72. Habakkuk 2:1-17.

73. Taylor, *Capital Punishment - Right and Necessary*, in *ESSAYS ON THE DEATH PENALTY* (T. Ingram, ed., 1963), 47.

74. *Id.*

Christ? To this speculation C.S. Lewis has replied: "I do not know whether a murderer is more likely to repent and make a good end on the gallows a few weeks after his trial or in the prison infirmary thirty years later."<sup>75</sup>

Lewis' comment certainly fits the picture that Jesus Christ, Himself, painted for Nicodemus in their conversation about the Christian, born again salvation experience:

The wind bloweth where it listeth, and thou hearest the sound thereof, but canst not tell whence it cometh, and whither it goeth: So is everyone that is born of the Spirit.<sup>76</sup>

In fact, the Bible record gives assurance that the death penalty, even if erroneously imposed, cannot possibly deny anyone the opportunity to be saved. For as Christ has promised all mankind, the Father's will cannot be thwarted by any created thing, including the death penalty:

All that the Father giveth me shall come to me . . . And this is the Father's will which hath sent me, that of all which he hath given me I should lose nothing, but should raise it up again at the last day.<sup>77</sup>

Another argument made by some Christians is actually based upon one of the Ten Commandments, "Thou shalt not kill."<sup>78</sup> Does the sixth commandment prohibit capital punishment? Those who make that claim inevitably place God in contradiction to Himself. The God who wrote the Ten Commandments on the two tablets of stone and who gave them to Moses,<sup>79</sup> was the same God who commanded the people of Israel through the same Moses to take the life of anyone who was found guilty of murder.<sup>80</sup> As God has witnessed of Himself, he cannot lie<sup>81</sup> and, therefore, cannot give to contradictory commandments. His Word is one harmonious whole, as the writer of Proverbs has reminded us:

Every word of God is pure [tested]; he is a shield unto them that put their trust in him. Add thou not unto his words, lest he reprove thee, and thou be found a liar.<sup>82</sup>

Finally, some have argued against capital punishment on the basis of two events in the life of Jesus Christ, the Sermon on the Mount and the defense of the adulteress. The passage most often cited from the Sermon is as follows:

Ye have heard that it hath been said, "An eye for an eye and a tooth for a tooth;" but I say unto you, that ye resist not evil; But also whosoever shall smite thee on the right, turn to

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75. C.S. Lewis, *The Humanitarian Theory of Punishment*, in *GOD IN THE DOCK* (1970), 287.

76. John 3:8.

77. John 6:37,39.

78. Exodus 20:13.

79. Exodus 31:18.

80. Exodus 21:12,14, Leviticus 24:17, Numbers 35:30-34, Deuteronomy 19:11-12.

81. Numbers 23:19, Titus 1:2.

82. Proverbs 30:5-6.

him the other, also.<sup>83</sup>

If this statement dictates the repeal of capital punishment on the ground that Jesus rejected the "eye for eye/tooth for tooth" rule of the Old Testament, then for the same reason it requires abolition of all forms of punishment, including the discipline of children. How else could one live and not violate the command "to turn the other cheek." But that was not Christ's message here. The New Testament affirms the right of civil authorities to punish evil doers<sup>84</sup> and the right of fathers to discipline their children.<sup>85</sup> Christ, Himself, reminded his followers to "render therefore unto Caesar the things which be Caesar's."<sup>86</sup> Clearly, then, Christ in His Sermon did not call for an anarchical society governed solely by the law of love.

What He did teach, however, is that those who desired to live in the Kingdom of God could not do so simply by conforming their outward behavior to the rules of civil society. Thus, He told His listeners that hating a man in one's heart is murder and lusting after a woman in one's heart is adultery.<sup>87</sup> While civil authorities had no jurisdiction over a man's heart,<sup>88</sup> God did. Therefore, if a man desired to enter God's kingdom his righteousness must exceed that of the law-abiding citizen of a nation on earth.<sup>89</sup>

In light of this analysis Christ did not even address the question of civil authority in His Sermon on the Mount. He limited His remarks to the responsibilities and duties of those who desired to be right with God. His reference to the "eye for eye/tooth for tooth" principle simply meant that one may be entitled in a human court to a favorable judgment, but that alone would not give that person favor in God's court. The "turn the other cheek" principle applicable in God's system of justice required that even when one has been wronged by another, the one wronged must forgive the wrongdoer and reach out to him in love.<sup>90</sup>

As Christ did not modify or change the authority of civil rulers in His Sermon on the Mount, He did not do so in His defense of the adulteress. In that case Christ contended that only those "without sin" could execute judgment upon the adulterous woman.<sup>91</sup> Of course, not one sitting in judgment qualified.<sup>92</sup> If this passage dictated the demise of capital punishment,<sup>93</sup> because Jesus required those in judgment to be sinless, then for the same reason it would require the elimination of all punishment, including the discipline of children. But that was not Christ's message. As has been stated above in the analysis of the Sermon on the Mount, the New Testament affirms the right of civil rulers to wield the sword against evil doers and of fathers to discipline their children.

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83. Matthew 5:38-39.

84. Romans 13:1-4, 1 Peter 2:13-14.

85. Ephesians 6:4.

86. Luke 20:25.

87. Matthew 5:22,28.

88. Matthew 5:21.

89. Matthew 5:20.

90. Matthew 5:42-45.

91. John 8:7.

92. John 8:9-10.

93. Anyone committing adultery in Israel deserved death. Leviticus 10:20.

What was Christ's message then? It was a message for the church. The Pharisees and Scribes, the religious leaders of the Jewish community at the time of Christ, sought to continue to exercise the authority that God had given them when Israel was an independent nation and still fulfilling the purposes and plan of God. They had overlooked two things: 1) That Israel had failed to obey God and God had now instituted a new plan to reach all nations with His salvation message;<sup>94</sup> and 2) they had the power to stone the adulteress not from God, but from the Roman Empire.<sup>95</sup> Christ taught in this encounter that the Church had no authority to judge or condemn, but only to bring the message of salvation to the lost. After all, Christ came to save the world, not to judge it.<sup>96</sup> His disciples could do no more than what Christ authorized them to do. Therefore, He rebuked James and John who desired to bring down the fire of judgment upon a village of Samaritans who had rejected the gospel:

Ye know not what manner of spirit ye are of. For the Son of Man is not come to destroy men's lives, but to save them.<sup>97</sup>

In summary, the New Testament, especially Christ's teachings, has not repealed capital punishment. Civil rulers still have the authority, indeed the duty under the Noahic covenant, to impose the death penalty upon any one duly convicted of murder.<sup>98</sup> That was certainly the teaching of the common law at the time of the founding of the United States of America. Indeed, Sir William Blackstone in his COMMENTARIES taught that murder was an unpardonable offense. He supported his view by explicit reference to the Bible:

We are next to consider the crime of deliberate and wilful murder; a crime . . . which is I believe punished almost universally throughout the world with death. The words of the mosaical law (over and above the general precept to Noah, that "whoso sheddeth man's blood, by man shall his blood be shed") are very emphatical in prohibiting the pardon of murderers.<sup>99</sup>

Quoting from Numbers chapter 35, Blackstone reminded his readers of "the law of the land:"

[Y]e 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.<sup>100</sup>

Finally, Blackstone hailed the common law that prohibited the king from pardoning a murderer, and criticized the Polish monarch who thought proper to remit the penalties of murder to all the nobility, in an edict with this arrogant preamble, "*nos, divini juris rignonem moderantes, Etc.*"<sup>101</sup>

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94. Romans 9:24-33.

95. John 11:48.

96. John 12:47.

97. Luke 9:55-56.

98. Whether or not there is authority to impose the death penalty for offense beyond murder is beyond the scope of this essay. See, e.g., Deuteronomy 22:25-26.

99. W. Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND (1769), Vol. IV, at 194.

100. *Id.*

101. *Id.*, at 94.

This Latin phrase, "we, moderating the rigors of divine justice," could very well be inserted as the introduction to many twentieth century court opinions and legislative enactments that have modified God's law governing the death penalty. For example, in 1976 the United States Supreme Court found North Carolina's mandatory death penalty for murder unconstitutional under the cruel-and-unusual punishment prohibition of the Eighth Amendment.<sup>102</sup> The Court objected to the statute's "withdrawing all sentencing discretion from juries in capital cases" on two principal grounds: First, that juries would simply disregard their legal duty to impose the death penalty by haphazard refusals to convict of the capital offense; and second, that a mandatory death penalty statute fails "to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death."

As for the first point, if all laws were subject to constitutional infirmity on account of speculations that those with a duty to enforce them would do so only haphazardly, few laws would survive. Probable disobedience of civil duty should never be grounds for the unconstitutionality of any law.

On the second point, the Court has adopted as constitutionally-mandated a system of sentencing that directly contradicts the Biblical principle that "the penalty must fit the crime." By requiring the sentencing authority to examine the character of a convicted murderer, and the particular circumstances of the murder, the Court has not only disregarded the Biblical norm that all convicted murderers deserve the death penalty, but it has multiplied opportunities for unfairness in the administration of that penalty.

Moses instructed the judges of Israel to show no "respect" of "persons in judgment."<sup>103</sup> The writer of Proverbs echoed the Mosaic law:

These things also belong to the wise. It is not good to have respect of persons in judgment.<sup>104</sup>

By requiring the death penalty to be tailored to the individual, the Court has virtually invited the civil authorities to favor the "great" over the "small,"<sup>105</sup> the "mighty" over the "powerless,"<sup>106</sup> and the "rich over the "poor."<sup>107</sup> Yet, "the law of the land" is violated by anyone who commits murder whether it is his first and only offense after an otherwise exemplary life or the last in a series of offenses by one "trapped" in a lifestyle of crime. In disregard of this law requiring death of one who has spilled innocent blood, the Court has ordained that "a just and appropriate sentence" must take into account "both the offender and the offense" in order to comply with the "progressive and humanizing development . . . [of] enlightened policy" of the last half of the twentieth century.<sup>108</sup> The

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102. *Woodsen v. North Carolina*, 428 U.S. 280 (1976).

103. Deuteronomy 1:17, 16:19.

104. Proverbs 24:24. *Cf.*, Proverbs 28:21.

105. Deuteronomy 1:17.

106. Leviticus 19:15.

107. James 2:3-4.

108. *Woodsen*, *supra* note 102, at 304.

Polish monarch to whom Blackstone referred in his COMMENTARIES would undoubtedly have concurred with this opinion as the best way to protect the "noble class" without having to say so.

Because of a growing public opinion favoring the death penalty for murder, executions have begun to appear more frequently in several states in America. But capital punishment should not depend upon the ebb and flow of public opinion as if it were subject to a popularity contest. The "law of the land" does not change whether by public referendum or initiative or by legislative enactment or judicial fiat. Nor should the Noachic covenant commanding all nations to protect innocent blood by putting to death convicted murderers depend on who wins the philosophical debate whether capital punishment "denies the executed person's humanity" or "affirms the murdered victim's humanity." That was settled by God, Himself, when He disclosed to Noah the reason for capital punishment for murder: "For in the image of God made he man."<sup>109</sup>

## CONCLUSION

If a society follows the "eye for eye/tooth for tooth" principle and if it adheres to the restitutionary purposes of that principle, then the criminal law will have the deterrent effect that the experts claim to desire. That is the promise of God's word as revealed to Moses in Deuteronomy.<sup>110</sup> So long as those experts seek their utilitarian goals of deterrence they will find those goals always eluding them as they, themselves, have acknowledged:

The utilitarian concept of deterrence . . . justifies punishment in preventive terms and as such makes an assertion that in principle is subject to empirical verification. We should be able to find out, in other words, whether criminal punishment in fact deters people from committing crimes and more precisely, which sanctions and in what amounts provide the most effective deterrents. Yet to date, we have been unable to do so in a manner that can claim general recognition and acceptance in the scientific community.<sup>111</sup>

More importantly, these experts will be tempted to tamper and to experiment with man's freedom and dignity in order to achieve their higher goals, as Oliver Wendell Holmes, Jr., was willing to do:

If I were having a philosophical talk with a man I was going to have hanged (or electrocuted) I should say, "I don't doubt that your act was inevitable for you but to make it more avoidable by others we propose to sacrifice you to the common good. You may regard yourself as a soldier dying for your country if you like. But the law must keep its promises."<sup>112</sup>

Holmes' view that punishment may be justified for the "common good," even though the individual punished did not deserve it was not at all novel. Caiaphas, the Jewish high priest, advocated the

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109. Genesis 9:6.

110. Deuteronomy 17:13, 19:20.

111. Low, Jeffries and Bonnie, *supra* note 6, at 17-18.

112. Howe, ed., HOLMES-LASKI LETTERS (1953), 806.

same thing when he called for the crucifixion of Jesus: "[I]t is expedient for you that one man should die for the people, and that the whole nation should not perish."<sup>113</sup> As Dean Newman of the State University of New York, Albany, has pointed out, the lesson to be learned from this passage of Scripture is the one taught by Dante who "reserved the 8th circle of Hell for the utilitarians of history:"

This was the punishment for Caiaphas . . . [He] was to be crucified to the ground across the road where people could not help stepping on his body as they passed through. The logic of the punishment is indeed satisfying: the body is used by others as a means to go somewhere . . . This punitive expression of the crime lays bare the basic injustice of the utilitarian philosophy: it treats men as means rather than ends.<sup>114</sup>

C.S. Lewis was absolutely right when he urged England to turn away from the so-called modern theories that justified criminal punishment for the purpose of deterring others by example. He called for a return to the traditional common law justification of deserved punishment "not solely, not even primarily, in the interests of society, but in the interests of liberty:"

If the justification of exemplary punishment is not based upon desert but solely on its efficacy as a deterrent, it is not absolutely necessary that the man we punish should even have committed the crime.<sup>115</sup>

America, too, ought to be called back to its original Judeo-Christian roots and be recommitted to a system of restitutionary justice that will restore both liberty and order to a society that has suffered long enough from the "best" that its "brightest" have had to offer.

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113. John 11:50.

114. Newman, *supra* note 56, at 98-99.

115. Lewis, *supra* note 75, at 291.