

Excellence *of the* Common Law

Compared & Contrasted
With

Civil Law

In Light of History,
Nature & Scripture

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EXCELLENCE OF THE COMMON LAW:
COMPARED AND CONTRASTED WITH CIVIL LAW
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Summary of Contents

<i>Historical Précis</i>		3
<i>Summary of Contents</i>		5
<i>Table of Contents</i>		7
<i>Acknowledgments</i>		15
<i>Preface</i>		19
Chapter 1	Introduction	27
Chapter 2	Civil Law: Origin & Growth	65
Chapter 3	Common Law: Origin & Growth	198
Chapter 4	Common Law & Scripture	485
Chapter 5	Common Law & Civil Law Contrasted	673
Chapter 6	Conclusion	863
<i>Appendices</i>		911
<i>Bibliography</i>		977
<i>Hebrew, Aramaic & Greek Word & Phrase Index</i>		990
<i>Scripture Index</i>		1000
<i>Word Index</i>		1008

Table of Contents

<i>Historical Précis</i>	3
<i>Summary of Contents</i>	5
<i>Table of Contents</i>	7
<i>Acknowledgments</i>	15
<i>Preface</i>	19

Chapter 1

Introduction

§ 1.1	Threshold Matters	27
§ 1.2	Worth of Legal History	35
§ 1.3	Common Law: Every Man's Law	43
§ 1.4	Common Law: Tradition of First Principles	46
§ 1.5	Common-Law Ideals Define America	50
§ 1.6	Common Law Reveals America's Character	55
§ 1.7	Common Law –vs– Civil Law: Introductory Contrast	58

Chapter 2

Civil Law: Origin & Growth

§ 2.1	Babylon: Conceived in Civil Law	66
§ 2.1.1	Nimrod & Babylon's Settlement	71
§ 2.1.2	Nimrod & Civil Law's Sons of the Sun	77
§ 2.1.3	Tower of Babel: First Ziggurat	82
§ 2.2	Rome: Babylon's Early Influence	84
§ 2.3	Pergamos Deeds Babylonian Power to Rome	92
§ 2.4	Cities: The Babylonian Order's Central Trait	98
§ 2.5	Roman Agricultural Order	102
§ 2.6	Emperor Worship	104
§ 2.6.1	Molech Worship	107
§ 2.6.2	Julius Cæsar & Emperor Worship	110
§ 2.7	Development of Roman Government: An Overview	114
§ 2.7.1	Pontifex Maximus, Patrician & Consul	117
§ 2.7.2	Praetor, Judex & Jurisconsult	121
§ 2.7.3	The Writings of Gaius	128
§ 2.7.4	Civil Law Claims Scripture's Title	131

Table of Contents

§ 2.7.5	Justinian's Code: Civil Law Compiled	133
§ 2.7.6	Roman Civil-Law: Training & Method	136
§ 2.8	Civil Law Spawns the Imperial Church	140
§ 2.8.1	Holy Roman Empire	146
§ 2.8.2	The Imperial Church Claims Justinian's Code	147
§ 2.8.3	Canon Law: Civil Law for the Imperial Church	154
§ 2.9	Russia	158
§ 2.10	Asia Minor & Greece	163
§ 2.11	Italy, Spain & Early France	164
§ 2.12	France, Scotland, South Africa, Asia & North America	167
§ 2.13	Germany	171
§ 2.14	Modern Civil-Law Development	176
§ 2.14.1	Legal Science: Civil Law's New Label	181
§ 2.14.2	Modern Civil-Law Procedure	185
§ 2.14.3	Modern Civil-Law Criminal Procedure	187
§ 2.15	Islamic Law & Government	189
§ 2.16	Talmudic Law & Government	191
§ 2.17	Civil Law's Maxims	192

Chapter 3

Common Law: Origin & Growth

§ 3.1	Pre-Anglo-Saxon Britain	199
§ 3.2	Anglo-Saxon Arrival in Britain	203
§ 3.2.1	Weird & Doom: Anglo-Saxon Fate & Judgment	205
§ 3.2.2	Brief of the Anglo-Saxon Folk Law	209
§ 3.2.3	The Anglo-Saxon Farming Village	215
§ 3.2.3.1	Anglo-Saxon Land-Use Custom	219
§ 3.2.3.2	Serfdom: Villeins & Cottiers	225
§ 3.2.3.3	The Copyholder	227
§ 3.2.3.4	The Hundred Courts	229
§ 3.2.4	Anglo-Saxon Limited Government	232
§ 3.2.5	Anglo-Saxon Common Law: Custom Unwritten	237
§ 3.3	Scripture Steadies the Common Law	241
§ 3.4	Alfred the Great: His Times & the Common Law	245
§ 3.5	The Anglo-Danes & Cimbri	250
§ 3.6	Norman Invaders Confirm Common Law	259
§ 3.7	Why the Common Law Persisted in England	270
§ 3.8	Common Law Resists Civil Law	275

Table of Contents

§ 3.8.1	Common Law: The Phrase's Origin & Use	285
§ 3.8.2	Steven Langton: Magna Carta –vs– Canon Law	288
§ 3.8.3	Henry de Bracton: Justice –vs– Jurisprudence	291
§ 3.8.4	Development of Parliament	294
§ 3.8.5	John Wyclif: Case Law –vs– Tyrannic Law	305
§ 3.8.6	John Fortescue: Limited King –vs– Absolute King	313
§ 3.8.7	Præmunire: Common-Law Patriotism	314
§ 3.8.8	John Calvin: Civilian	318
§ 3.8.9	Edward Coke: Due Process –vs– Absolute King	325
§ 3.8.10	Nicholas Fuller: Right of Silence –vs– Forced Oath	328
§ 3.8.11	John Lilburne: Saxon Ideals –vs– Norman Judges	330
§ 3.8.12	Westminster Confession & Magna Carta	332
§ 3.8.13	The Great Writ: Habeas Corpus	334
	§ 3.8.13.1 The Great Writ: England & America	338
	§ 3.8.13.2 Suspension of the Great Writ	345
§ 3.9	Roman Civil Law in Common-Law England	351
§ 3.9.1	Civil Law's Divine Right of Kings	356
§ 3.9.2	English Kings & Divine Right	360
§ 3.9.3	Wigamores: Puritians & Covenanters	373
§ 3.9.4	Civil Law's Inquisition	376
§ 3.9.5	Common Law's Neck Verse	378
§ 3.10	The Common Lawyer: Emergence & Development	380
§ 3.10.1	Law French	385
§ 3.10.2	Character of the Common Lawyer	386
§ 3.10.3	Inns of Court	391
§ 3.10.4	Early English Bar Divisions	397
§ 3.10.5	Solicitor & Barrister	399
§ 3.10.6	Chancery & Equity Practice	400
§ 3.10.7	Early English Courts & Bar	407
§ 3.10.8	Recent English Courts & Bar	413
§ 3.11	Common Law in the American Colonies & States	416
§ 3.11.1	Salem Witchcraft Trials: Common Law Ignored	420
§ 3.11.2	The Colonial Common Lawyer	427
§ 3.11.3	Rights in Property & Property in Rights	428
§ 3.11.4	James Otis & the Writs of Assistance	431
§ 3.11.5	American Liking for Common Law & Blackstone	432
§ 3.11.6	Common-Law Homeland Security	439
§ 3.11.7	The Mercenary & the Civil-Law State	442
§ 3.11.8	Common Law & American Anglophobia	444

Table of Contents

§ 3.11.8.1	The Case of Andrew Jackson	446
§ 3.11.8.2	The Case of Albion Illinois	448
§ 3.11.9	The American Common Lawyer	452
§ 3.11.10	Dueling: Trial by Battle in America	460
§ 3.11.11	Separation of Powers: Common Law's Standard	463
§ 3.11.11.1	American Separation of Powers	468
§ 3.11.11.2	The Jury's Final Say	475
§ 3.11.12	Magna Carta's Speedy-Trial Right in America	476
§ 3.11.13	American Law: More English Than England's	477

Chapter 4 Common Law & Scripture

§ 4.1	Common Law & Scripture	486
§ 4.1.1	Like Principles: Common Law & Scripture	492
§ 4.1.2	Authority's Fountain	502
§ 4.1.2.1	Scripture: The Final Standard	506
§ 4.1.2.2	God Holds His Word Above His Name	520
§ 4.1.2.3	God's Word –vs– Justinian's Code	523
§ 4.1.2.4	God's Word –vs– Greek Thought	527
§ 4.1.2.5	Pure Reason: Satan's Decoy	529
§ 4.1.2.6	The Lawgiver's Final Jurisdiction	532
§ 4.2	Common Law: One Source by Three Channels	537
§ 4.3	The Jury in Scripture	540
§ 4.3.1	The Oath: The Jury Foundation	547
§ 4.3.2	Jury Ideals	555
§ 4.3.2.1	Juror Independence	569
§ 4.3.2.2	Fear of Displeasing the Lord	571
§ 4.3.2.3	Acts Discretionary & Administrative	573
§ 4.3.2.4	Channel of God's Justice & Mercy	575
§ 4.3.2.5	Justice, Mercy & Grace	580
§ 4.3.3	Juror –vs– Legislator	584
§ 4.3.4	Jury Adaptability	587
§ 4.3.5	Jury Authority & Power	590
§ 4.3.6	Twelve Jurors –vs– One Judge	592
§ 4.3.7	The Jury & Government	595
§ 4.3.8	The Grand Jury	597
§ 4.4	Going to Law	600
§ 4.5	Common Law's Rule of Law	602

Table of Contents

§ 4.5.1	Idolatry's Rule of Law	605
§ 4.5.2	Rule of Law in Scripture	607
§ 4.6	Common Law & Loyalty to Law	609
§ 4.7	Tyndale's Phrase: The Powers That Be	617
§ 4.8	The Right Question –vs– A Justifying Query	622
§ 4.8.1	Due Process –vs– Passions of Judges	624
§ 4.8.2	Capital Trials & Due Process: Biblical Standards	626
§ 4.9	Common Law's Right to Keep Silent	630
§ 4.9.1	Wisdom of the Right to Keep Silent	632
§ 4.9.2	Erosion of the Right to Keep Silent	635
§ 4.9.3	Scripture & Being Slow to Speak	635
§ 4.10	Common-Law Outlawry	637
§ 4.11	Man's Revenge –vs– A Sober Reckoning	641
§ 4.12	Cruel and Strange Punishment	645
§ 4.13	New Law—Though Old in Time	646
§ 4.14	Independent Judges: The Constitution's Demand	648
§ 4.15	The State: Babylon's Power Tool of Seduction	650
§ 4.16	Common Law's Accord With Scripture	652

Chapter 5 Common Law & Civil Law Contrasted

§ 5.1	Rival Worldviews: Common Law –vs– Civil Law	674
§ 5.2	Natural Law: Common Sense –vs– Baseless Logic	679
§ 5.2.1	Conscience: Natural Law –vs– Legal Positivism	689
§ 5.2.1.1	Fountain of Law: God –vs– the State	691
§ 5.2.1.2	The Ten Matters: Laws of Nature's God	696
§ 5.2.1.3	Natural Law: Scholastics –vs– Scripture	700
§ 5.2.1.4	Facts –vs– Speculation	702
§ 5.2.1.5	Court Findings –vs– State Legislation	709
§ 5.2.1.5.1	Legislative Infallibility	716
§ 5.2.1.5.2	Legislative Finality	717
§ 5.2.1.5.3	Danger of Legislation	718
§ 5.2.1.5.4	Stare Decisis & Precedent	720
§ 5.2.1.6	Counsel –vs– Dogma	722
§ 5.2.1.7	Law –vs– Legalism	723
§ 5.2.1.8	Nature's Laws –vs– Priestcraft	729
§ 5.2.1.9	Due Process –vs– Scholasticism	732
§ 5.2.1.9.1	Law of the Land	735

Table of Contents

	§ 5.2.1.9.2	Law of the Mystic	737
	§ 5.2.1.9.3	Focus: Process –vs– Result	739
	§ 5.2.1.9.4	Torture –vs– Due Process	745
	§ 5.2.1.9.5	Torture’s Goal: Confession	751
	§ 5.2.1.10	Presumption of Innocence	756
	§ 5.2.1.11	Reasonable Doubt of Guilt	757
§ 5.2.2		Adversarial –vs– Inquisitorial	760
	§ 5.2.2.1	Real Case & Controversy	768
	§ 5.2.2.2	Cross-Examination: Engine of Truth	770
	§ 5.2.2.3	Powers: Separate –vs– Gathered	781
	§ 5.2.2.4	Judicial Dissent –vs– State Solidarity	782
§ 5.2.3		Universities: Humanism –vs– Providence	786
§ 5.2.4		Revolution: Reality –vs– Utopia	789
§ 5.2.5		Day of Man & the Day of the Lord	798
§ 5.3		Civil Law’s Wide Appeal & Reception	801
	§ 5.3.1	Civil Law’s Semi-Deified State	805
	§ 5.3.2	Civil Law Demands Central Control	811
	§ 5.3.3	Daniel’s Roman Empire: Civil Law Among Men	815
	§ 5.3.4	Civil Law’s Weapons: Fear & False Security	817
	§ 5.3.5	Money: Common Law –vs– Civil Law	819
§ 5.4		Common Law: Controlled by First Principles	820
	§ 5.4.1	Common Law: Some First Principles	827
	§ 5.4.2	From General Principle to Specific Application	836
	§ 5.4.3	Common Law’s Five Facets	838
	§ 5.4.4	Common Law –vs– Republican Forms	841
	§ 5.4.5	Democracy: Tyranny’s Lurking Place	846
	§ 5.4.5.1	Majority Power Over the Courts	850
	§ 5.4.5.2	Jury Veto of the Majority Will	852
§ 5.5		Major Differences: Common Law –vs– Civil Law	854

Chapter 6 Conclusion

§ 6.1		Summing Up	863
§ 6.2		False Safety	868
§ 6.3		Present Danger: Administrative Law & Fear	870
	§ 6.3.1	Executive Orders	877
	§ 6.3.2	Government Lawyers as Judges	879
	§ 6.3.3	Government Control of Lawyers	881

Table of Contents

§ 6.3.4	The Abused Admiralty Clause	884
§ 6.3.5	The Abused Commerce Clause	887
§ 6.3.6	Ignorance of the Common-Law	887
§ 6.4	Constitutional Limits & Limits of the Constitution	887
§ 6.5	The Minority: A Specific Call	898
§ 6.6	Ideals	904

Appendices

1.	The Miner's Law: Nature's Law at Work	911
2.	Scripture's View of Law & Government: Key Terms	932
2.1	<i>Cosmos</i> (ὁ κόσμος) & Man's Time of Governing	933
2.2	<i>Dunamis</i> (δυναμεις): Bridled –vs– Uncontrolled Power	937
2.3	<i>Yada</i> (יָדָע): God's Knowledge –vs– Humanists' Knowledge	940
2.4	<i>Echadth</i> (אֶחָד): A Unit With Unity	942
2.5	<i>Shalom</i> (שָׁלוֹם): God's Ordering for Domestic Tranquility	945
2.6	<i>Mishpat</i> (מִשְׁפָּט): Ordering Government in God's Order	948
2.7	Hebrew and Greek Terms for Law Contrasted	951
2.8	Kingdom: Scripture's Term for Jurisdiction	953
2.9	<i>Ka-dthosh</i> (קָדוֹשׁ): Drawing God's Distinctions	958
2.10	<i>Logos</i> (λογος) Sure Word –vs– <i>'Rayma</i> (ῥημα) Allegation	960
2.11	Summing Up Key Bible Terms for Law & Government	961
3.	Western Calendar: Development	962
4.	British Sovereigns	965
5.	Noteworthy Civil-Law Dates	969
6.	Noteworthy Common-Law Dates	970
7.	The Unregrettable Regret	972
	<i>Bibliography</i>	977
	<i>Hebrew, Aramaic & Greek Word & Phrase Index</i>	990
	<i>Scripture Index</i>	1000
	<i>Word Index</i>	1008

Preface

*Personality can only be developed in the realm of individual choice. And that realm, in the modern state, is being slowly but steadily eradicated.*⁴

THREE principles of law and government arising from both nature and Scripture lie at the foundation of the common-law tradition. *First*, the only lawful exercise of law and government is ministerial: every magistrate and officer holds his office, authority, and power at the pleasure of God to whom he is responsible and to whom he will answer for the doing of his office. *Second*, God alone is LORD of the individual conscience: each individual, from the private person serving as juror to the public magistrate and officer, is responsible before God to inform his conscience aright and to exercise independent judgment in determining his convictions and acting upon them; his duty of independent discernment is non-delegable. *Third*, obedience to any command contrary to God's desire is always wrong.

Moreover, when the individual answers to God for the doing of his office, God will never allow him to take refuge in his frank obedience to, or tacit agreement with, the judgment of any other mortal or combination thereof, regardless of threats, demonstrations of power, claims to authority, or assertions of infallibility. One's only true safe harbor is in one's obedience to the God of Scripture, as one informs one's conscience aright with Scripture and whets one's discernment into evermore-sharp obedience. The common-law tradition rests on the foregoing three principles for its foundation and is consonant⁵ with them. Any doctrine or act said to be a part of the common-law tradition that is

⁴ J. GERSHAM MACHEN, CHRISTIANITY AND LIBERALISM 11 (1923).

⁵ This book further uses the terms *consonant* and *inconsonant* to set apart those human expressions of law (principles and standards) in accord (consonant) with truth from those in discord (inconsonant) with truth. Thus, if obedience to true law violates some human expression of law, or obedience to the human expression violates true law, that human expression is inconsonant with truth.

Preface

inconsonant with any of these three is not. By contrast, the civil-law tradition is inconsonant with the foregoing three principles.

Popular politics will erode our liberty of life and property unless experiential and right knowledge of our common-law courts and government is second nature to the individual American. Good government is right government, but right government will prevail only as individuals found it on common-law ideals as the courts articulate them in response to real controversies. Though at times legislation can be a catalyst to right action, reliable evidence of the law and good government emerges best, not through the broad and undiscerning brush of legislators, but from individual cases and issues sharpened in the courts.⁶

Our Constitution is not *legislation*, as civil-law advocates take the term: a product of superior reasoning of an elitist class, the power to command the future, to make men what the legislator wills them to be. The Constitution is, rather, common-law principles of government put to paper using common-law terms: the fruit of centuries of struggle, both in court and out of court—thus its staying power, strength, and reliability. Though legislation has its common-law and constitutional use, America will get along well with little legislation. In order, however, for the principles of the Constitution to prevail, the local county court with the Jury—not the statehouse or the federal capitol—must become foremost in the American’s awareness of law and government. Because the Constitution’s ideals of law and government arise from common-law principles uncovered and refined by jury verdicts and judicial findings in tailored application, these ideals will fail without accessible and reliable common-law courts.

Common-law due process, real only in practice, builds the backbone of the Constitution and breaths life into its members, emboldening its adversarial blood. Thus, due process supplies the spinal support that enables the Constitution to stand upright and the animating principle that enables it to walk with us in practice. Indeed, common-law due process is the life force of constitutional law, enlivening its principles to safeguard our rights of liberty, without which the Constitution is an empty, dispirited form. By contrast, civil law is utopian in outlook,

⁶ This book uses the term *courts* in two contexts: the common-law tradition and the civil-law tradition. Used in the context of the common-law tradition, “courts” connotes individual jurors and judges; used in the context of the civil-law tradition, the term denotes judges only. Common-law courts conduct contests over the soundness of purported law and its application in particular circumstances; civil-law tribunals are places where inquisitors determine legislative will and issue decrees.

Preface

putting a wishbone for the backbone and an unbound government of men for a government bound by law.

History shows that in a country where the individual partakes in the process of particular justice (the only kind of justice) by serving as juror, the widespread understanding that comes only from such experience tethers law and government to the common sense of the common law. Further, such close participation in the courts encourages confidence in the law, resulting in respect for its precepts, encouraging lawful behavior. As Americans, however, give undue time and attention to legislators seeking to remedy the novel conflicts that forever bob forth from the flux of mankind—but precious-little time and attention to understanding and invoking our common-law first principles—, legislators will work like osteoporosis, decalcifying the Constitution’s backbone, which is the common-law tradition.

Government dependent on legislators discourages close individual participation in the processes of particular justice necessary for confidence in the law and respect for its precepts. By its very nature, legislation denies the minority opinion on any given matter and commands the majority will. The tone of legislation is broad and commanding; the tone of a true common-law court is fitting and reserved. Legislation decrees; courts make findings and render opinions. The statutory commands of a faceless state are dogmatic, undiscerning, impersonal, and thus, often disheartening. With independent jurors and courts, however, jury verdicts and reasonable court opinions can be respectable and acceptable, allaying and assuaging the envious and vengeful spirit of the civil law.

The authority of the United States and of the several states lies only within the course and processes of the common law. The politicizing⁷ of

⁷ Used in the Babylonian-Greco tradition, the root *πολις* (*polis: city*) and its derivatives (*e.g., politics, political, policy*) and in the Babylonian-Roman tradition, the root *civil* and its derivatives (*e.g., civic, civilian, civilization*) are all Babylonian terms meant to convey civil-law doctrines; thus do civil-law advocates and tribunals use them. Though nowadays often adopted into our common-law speech, at bottom these words concern popularity, majorities, the higher good of the group as opposed to individual rights, and other expediencies of city life.

To manipulate the stirred confusion of politics (city life) at the cost of all other matters is at the heart of the civil-law because politics and politicians breed and command stagnancy, which maintains the all-embracing purpose of the civil-law tradition: *status quo*. For all its fussing and activity, politics perpetrates popular opinion, displaces individual conscience with positive law, and prosecutes genuine passion for truth. Civil law is concerned with the *status quo* because it allows those in power to remain and makes their task easy. In short, politics and politicians seek popularity by falling in at the head of popular opinion, which tends to suppress and stagnate their consciences.

Preface

every American through popular politics in disregard of the common-law tradition will never bring lasting national strength. Popular politics lacks any keen sense of the eternal majesty of the law and will ultimately dissatisfy and discourage; only the triumph of true law in individual cases through due process satisfies. The strength, uniqueness, and aspiration of our common-law government is not the consensus of popular politics, but the insistence upon right due process, i.e., according to the regular course of the common law. For example, in the common-law tradition, the legislator uses popular politics to check executive power; the courts (litigants, jurors, and judges) champion the quest for true law as a check on executive power and legislative majorities.

To place hope in the strong arm of executive power or popular politics is to trust the government of a man or of men in popular assembly. Confidence in executive power and legislative majorities in exclusion of the proven processes of the common law to effect discernment between good and evil, right and wrong will bring the tyranny of the total state. Where jurors, witnesses, or litigants give attention to intelligent participation in the processes of the common-law tradition, they insist upon a government of law. Intelligent experience, rightly informed with a sense of common-law due process, will supply the boldness necessary to assert common-law limits for government, enabling freedom⁸ in deed. Only in the common-law tradition is “political or civil liberty . . . the very end and scope of the constitution”⁹ of law and government. Broad participation in popular politics can satisfy expedience, but good government overcomes only through individual understanding that comes by partaking in our common-law courts.

The common law focuses on due process, not on a desired result. Following the right process by asking the right question can yield a right outcome, viz., justice; following the wrong processes by asking the wrong questions will never yield the right outcome.¹⁰ The processes of the common-law tradition are consonant with Holy Writ. The one having outfitted his conscience with the principles of Scripture, and having

⁸ *Freedom* in Scripture is the individual right accompanied with the power to do that which one ought. The Anglos, Saxons, and Danes freedom meant to have been loosed (freed or *free of*) from the sentence of judgment (doom or *dom*): free of doom, which includes freedom from the crushing discouragement of guilt, debt, and desperation.

⁹ 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 6 (photo. reprint 1979) (1st ed. 1765).

¹⁰ See generally § 4.8 of this book (illustrating from *Luke* 10:25–37 the process of the common law: to seek first the right question and not some self-justifying query).

Preface

informed his understanding with the common law's applications of those principles, will occupy and hold the ground allotted him against evil.

Ignorance of our common-law tradition's courts and the Jury has spread from the Church outward. The Church, by offering justice through the Jury, will teach the application of the above-cited three first principles: All human government is derived, God alone is LORD of the individual conscience, and every attempt to find refuge in obedience to *the powers that be* for ultimate justification of one's actions will fail. Justice supplies the minimum requirements of duty concerning one's relationships with others and is best-learned and known through experience.

Experiencing the saving grace of God brings the understanding and appreciation necessary to motivate one to the ever-wiser obedience—i.e., refined by ever-keener discernment—God desires. The obedience of faith is the fruit of understanding God's acceptance (grace) enabled by the satisfaction of His justice in the sacrifice of Christ. Moreover, lack of appreciation of God's graciousness results in lawlessness.

Consonant with Scripture, the common-law tradition insists upon a limited executive, legislature, and judiciary, each with defined power meant to curb the other two. The legislator—as the executive—breathes politics, i.e., the majority principle. To gain his office and remain, he must imbibe the atmosphere of the majority spirit, and will pay dearly if he grieves that spirit. His failure to respond to the urgency of the immediate is to court political peril. Even if committed to enacting legislation good and true, he must first divine the dominant political impulse: legislators are crowd pleasers. History shows that while dictators and tyrants seek to dominate and enslave others to themselves in the present, legislators unbridled in their drive to satisfy in the present, will enslave their constituents for the future. In short, people clothe their legislators with authority to bind them in perpetual debt to moneylenders. This atrocity, legislators have proven willing to do in an effort to relieve the majority's fear.

The common-law judiciary and Jury, on the other hand, work in a tradition of law and government not only separate from the majority principle, but even demanding denial of the majority. Still, men at their best are only men at best; those filling the judicial task and juror's role are—as are those filling the legislative offices—fallible. Though the majority, or democratic, spirit sometimes creeps into the courts, it is a foreign spirit there; it remains the duty of the juror and judge to sense its trespass and resist it, causing it to flee.

Preface

Thus, the dignity and duty of the courts demands that the Jury and judge work in an atmosphere of right and law, never majority and might. Whether emerging from the guts of the individual juror, the conscience of the litigant, the informed zeal of the lawyer or judge, or out of simple moral outrage of any of these. The Spirit of right moves where He wills and at His pleasure can enter the judicial process through any portal of the participants' personalities. Unlike the civil law, the common law never limits the point of entry of right, law, and justice into government to trained and perfected human reason (a downright impossibility) expressed by a written code.

Though the common-law tradition is consonant with the Word of God written, it depends upon the God-bestowed natural ability of each person to find truth in fact and law. The taint of sin, however, has corrupted every aspect of the individual's being, exposing him to the control of evil. Consequently, the enlightening of truth to his understanding occurs only as the Holy Spirit accesses and arouses his consciousness through one of the tainted portals of his personality. Through the weakness of his fear or foolishness, pathos or bathos, the strength of his courage or windows of lucidity in his reason, God channels truth into law and government among men. As God counseled truth into the High Court of Israel through the nefarious schemes of Caiaphas and into the understanding of the prophet Balaam through the mouth of the jenny,¹¹ God counsels truth into the judicial process through any participant in that process, regardless of his spiritual state or motivation.

Common-law courts look for the entry of truth by many avenues and especially through the juror, drawn at random from all settings and walks-of-life. From the human perspective, therefore, the common-law tradition is not foremost a moral order of imperial legalism, but rather, a tradition of process out of which Providence shows us the fitting application of moral principle. By demanding faithful observance of adversarial due process, the common-law tradition requires that we trust Providence for the outcome: the uncovering of truth and the revealing of

¹¹ Both the English and the Hebrew tongues tell apart the *jenny* (אֶתוֹן: *athone*) from the *jack* (חֲמוֹר: *chamor*); Scripture is careful to distinguish the two. For the reader familiar with the ways of donkeys and mules, Moses, in recounting the events concerning Balaam, is careful to point out that Balaam's ass was a jenny and records her stubborn behavior, likely leading her master, Balaam, to think she was in heat. In the minds of Moses' readers, nothing could be more contrary, full of empty noise, and unlikely to speak reason and truth. Because a jenny in such condition brays, neighs, and whinnys without ceasing, American teamsters dubbed such a one *whinny jenny*.

Preface

the fitting application of the law in spite of our ignorance, biases, and mortal frailties.

In sum, the civil-law tradition seeks conformity to the will of the state as expressed in its legislation; the common law adheres to right process, focusing its attention on insuring the process due each party before the court. The common law relies on observance of due process to render up a right and fitting outcome. Thus, the aim of the common law is to follow the course of due process with a view toward individual justice; the goal of the civil law is universal compliance with the will of the state. Civil law begins its analysis of legal questions by first affirming legislation to be the true and one-size-fits-all *universal application* of justice to any particular legal dispute. Common law, on the other hand, begins by affirming that following the regular course of due process provides the best opportunity for emergence of the *fitting application* of the principle. Civil-law judges venerate the legislative code; common-law courts allow the adversity afforded by due process to test legislation's application. While legislators are blown about by political winds, common-law courts are steady subjects of fixed principles of law.