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## Biblical Law in America: Historical Perspectives and Potentials for Reform

*John W. Welch\**

This article presents a sort of *apologia*, an apology for greater awareness of biblical law in connection with the study of American legal history and the underlying fabric of the common law. Following a brief introduction to the modern study and broad relevance of biblical law, I review the prevalence and importance of biblical law in American colonial law, consider the influence of these biblical foundations on American law in general, and finally draw attention to some of the ways in which biblical law generates prospects for legal reforms alleviating some of the problems and challenges faced by the American legal system as it continues on into the twenty-first century. This article strives to show that the study of biblical law has much to offer to anyone interested not only in the history of American law but also in its future.

### I. THE RELEVANCE OF BIBLICAL LAW

The study of legal materials in the Bible has changed dramatically in recent years. With these changes should come a shift in the way legal scholars view the current significance of biblical law. No longer do careful scholars view the Bible merely from parochial or inspirational points of view. Although most readers in the past have used the Bible simply as a repository of divinely revealed dicta, modern students bring greater sophistication to the understanding of this complex collection of ancient writings. Not only serving as the

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This article is based on a paper presented on October 17, 1997, at the annual meeting of the American Society for Legal History in Minneapolis, and on a public lecture delivered at Brigham Young University on January 31, 2002, in conjunction with the Library of Congress exhibition entitled *Religion and the Founding of the American Republic*.

religious foundation of biblical society, the texts of the Bible also functioned, as it were, as the constitution, the codes of civil and criminal procedure, as well as the handbooks of public and private law for the Israelite world of its day. Therefore, to see the Bible as relevant only to religious as opposed to legal interests or political applications is to misunderstand major portions of this text fundamentally.

The Bible is indeed a rich source of a variety of legal materials.<sup>1</sup> It comprises so-called law codes, including the Code of the Covenant,<sup>2</sup> the Holiness Code,<sup>3</sup> and the laws in Deuteronomy.<sup>4</sup> It also features law lists, such as the Ten Commandments in Exodus<sup>5</sup> and Deuteronomy,<sup>6</sup> or the cultic code in Exodus.<sup>7</sup> Actual lawsuits or legal proceedings are reported, namely the trial of the blasphemer,<sup>8</sup> the trial of the Sabbath breaker,<sup>9</sup> the resolution of the petitions of the daughters of Zelophehad,<sup>10</sup> the detection and trial of Achan,<sup>11</sup> the trial of Ahimelech,<sup>12</sup> as well as the trials of Naboth,<sup>13</sup> of Micah,<sup>14</sup> of Uriah ben Shemaiah,<sup>15</sup> and of Jeremiah himself.<sup>16</sup> Embedded in

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1. On the influence of the Bible in American law and politics, see generally Edward McGlynn Gaffney, Jr., *The Interaction of Biblical Religion and American Constitutional Law*, in *THE BIBLE IN AMERICAN LAW, POLITICS, AND POLITICAL RHETORIC* 89 (James Turner Johnson ed., 1985); Wilcomb E. Washburn, *Law and Authority in Colonial Virginia*, in *LAW AND AUTHORITY IN COLONIAL AMERICA* 116 (George Athan Billias ed., 1965); Clifford K. Shipton, *The Locus of Authority in Colonial Massachusetts*, in *LAW AND AUTHORITY IN COLONIAL AMERICA* 136 (George Athan Billias ed., 1965); Andrew C. Skinner, *The Influence of the Hebrew Bible on the Founders of the American Republic*, in *SACRED TEXT, SECULAR TIMES: THE HEBREW BIBLE IN THE MODERN WORLD* 13 (Leonard Jay Greenspoon & Bryan F. LeBeau eds., 2000); Bernard Meislin, *The Role of the Ten Commandments in American Judicial Decisions*, in *JEWISH LAW ASSOCIATION STUDIES III* 187 (A.M. Fuss ed., 1987).

2. *Exodus* 21:1–23:19.

3. *Leviticus* 19–26.

4. *Deuteronomy* 12–26.

5. *Exodus* 20.

6. *Deuteronomy* 5.

7. *Exodus* 34:17–28.

8. *Leviticus* 24:10–23.

9. *Numbers* 15:32–36.

10. *Numbers* 27:1–11; *Numbers* 36:1–11.

11. *Joshua* 7:1–26.

12. *1 Samuel* 22:6–23.

13. *1 Kings* 21:1–16.

14. *Jeremiah* 26:18–19; *Micah* 13.

15. *Jeremiah* 26:20–23.

16. *Jeremiah* 26:1–24.

almost every narrative story in the Bible are legal assumptions and cultural expectations, examples include the marriages of Abraham and the dealings of Jacob with Laban in Genesis,<sup>17</sup> the proceedings of Boaz before the elders at the town gate in the book of Ruth,<sup>18</sup> the killing of the rebel Sheba,<sup>19</sup> and the land transaction reported in Jeremiah,<sup>20</sup> to mention only a few. Prophetic speech forms (particularly the so-called prophetic lawsuit)<sup>21</sup> and proverbial wisdom sayings of the Bible also reflect the legal values and norms that stand at the root of the Judeo-Christian world. Nevertheless, despite the ubiquity of the Bible in the history of Western civilization, the breadth of legal subjects addressed in its law codes and legal sections is not widely understood or generally appreciated today. Indeed, biblical laws deal with topics ranging from criminal and penal law to judicial procedure and the administration of justice, commercial law, torts and injuries, family law, property law, estate planning, martial law, and social welfare, in addition to the laws concerning divine sanctity, cultic sacrifice, and religious taboos that usually come to mind when people first think of law in the Bible.

Due to its role as a vast repository of legal wisdom and social justice, the Bible has long been valued as a source of basic norms and rubrics. Thus, legal provisions in the Bible drew the attention of religious reformers and legal advocates, as well as clergymen and devotional readers, in the seventeenth and eighteenth centuries. Illustrative of this point, as will be discussed in detail below, American colonial legislators were no exception in this regard.<sup>22</sup>

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17. *Genesis* 31:25–55.

18. *Ruth* 4:1–12.

19. *2 Samuel* 20.

20. *Jeremiah* 32:10–14.

21. See KIRSTEN NIELSEN, *YAHWEH AS PROSECUTOR AND JUDGE: AN INVESTIGATION OF THE PROPHETIC LAWSUIT* (Frederick Cryer trans., 1978).

22. See Skinner, *supra* note 1, at 13 (“The further back one goes in American history, the more saturated with Hebraic references and allusions one finds American culture to be. Ironically, it is this Hebraic milieu rather than one grounded in the Christian New Testament, which most fueled the fires of motivation and imagination among American Christian colonists and founders of the Republic. Thus, Cecil Roth could write that were we to ‘deprive modern Europe and America of [their] Hebraic heritage . . . the result would be barely recognizable.’” (citing CECIL ROTH, *THE JEWISH CONTRIBUTION TO CIVILIZATION* 21 (1940)); Shipton, *supra* note 1, at 136 (“The century and a half during which the Colony and Province of Massachusetts Bay were trying to adjust law and authority in order to realize these principles [of biblical law] are critical ones in this long period of their evolution. But what went on in these years has been quite generally misunderstood by historians, particularly by those who

Particularly in New England, lawgivers drew heavily on isolated biblical provisions—which were, of course, taken out of context—in formulating their laws, especially their capital laws. This eclectic use of biblical law was consistent with the prevailing proof-text approach to the Bible employed generally by readers, preachers, and scholars in that day.

In the nineteenth and early twentieth centuries, books written about biblical law became more interested in compiling, classifying, and internally harmonizing the various legal provisions in the law of Moses, often in an effort simply to comprehend systematically this substantial and complex body of legal materials.<sup>23</sup> This approach, however, tended to marginalize biblical law from mainstream Anglo-American legal concerns by giving biblical law the appearance of a rigid, closed system of positive laws promulgated by a lawgiver far removed from contemporary society.

In the first half of the twentieth century, text critical scholars dominated the field of biblical law, hoping to discern clues about the authorship and dating of individual legal texts. These scholars, mostly inspired by German academicians but consonant with the enterprise of American legal realism, applied the techniques of higher criticism and the documentary hypothesis to segregate from each other the

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have not realized that in the period and the group with which we are concerned, religious and civil life were an integrated whole.”); ABRAHAM I. KATSH, *THE BIBLICAL HERITAGE OF AMERICAN DEMOCRACY* 113 (1977) (“This Hebraic influence gradually deepened as the institutions of the diverse colonies evolved and eventually merged into the underlying framework of the American Republic. The natural channels of this influence were from the first spiritual leaders of the communities, who drew their very livelihood from these Scriptural sources. Due to the religious nature of the new society, it was the ministers and preachers who in effect molded the forms of polity through their influence and nurtured its spirit by the personal examples and exhortations.”); Gaffney, *supra* note 1, at 81 (“The principal affirmation is that law and religion are two different but interrelated aspects of social experience—in all societies, but especially in Western society, and still more especially in American society today. Despite the tensions between them, one cannot flourish without the other.’ Legal culture has shaped the form and content of major themes of biblical religion both in ancient and modern times.” (citation omitted)).

23. See JOSEPH BLENKINSOPP, *WISDOM AND LAW IN THE OLD TESTAMENT: THE ORDERING OF LIFE IN ISRAEL AND EARLY JUDAISM* (1983); H.B. CLARK, *BIBLICAL LAW* (1948); JACOB W. EHRLICH, *THE HOLY BIBLE AND THE LAW* (1962); ROGER S. GALER, *OLD TESTAMENT LAW FOR BIBLE STUDENTS: CLASSIFIED AND ARRANGED AS IN MODERN LEGAL SYSTEMS* (1922); C.B. MCAFIE, *MOSAIC LAW IN MODERN LIFE* (1906); H. SCHMOKEL, *DAS ANGEWANDTE RECHT IM ALTEN TESTAMENT* (1930); HENRY S. SIMONIS, *SOME ASPECTS OF THE ANCIENT JEWISH CIVIL LAW* (1928); R.J. THOMPSON, *MOSES AND THE LAW IN A CENTURY OF CRITICISM SINCE GRAF* (1970); H.M. WIENER, *STUDIES IN BIBLICAL LAW* (1907).

stylistically divergent bodies of law in the Bible.<sup>24</sup> At that time, the study of biblical law was mostly practiced by theologians as a limited subdiscipline within biblical studies. Driving their methodology was an unstated Darwinian model that all institutions evolve from simple to complex organisms as accretions occur in response to external stimuli and internal pressures.<sup>25</sup> While these efforts focused productive attention on the verbal particulars of biblical legal texts, the examination of the minutiae of the Hebrew text has, in many cases, proved to be a relatively sterile jurisprudential exercise, has raised as many questions as it has answered, and has probably left many legal historians or lawyers wondering if the study of biblical law is accessible to them and, if it is, whether the pursuit is worth the effort. During this period of biblical scholarship, interest in biblical law consequently almost disappeared in most circles.

A new discipline of biblical law, however—a discrete field of legal scholarship which attempts to understand the legal institutions and main juridical norms that comprised the legal system that operated in ancient Israel—has emerged mainly in the last fifty years. Owing largely to the contributions of scholars such as legal scholar David Daube,<sup>26</sup> law professor Ze'ev W. Falk,<sup>27</sup> barrister Bernard S. Jackson, and many others,<sup>28</sup> great strides have been made in reconstructing the legal system of ancient Israel and in understanding the fundamental values embedded in that justice system. This work by biblical scholars, many of whom are equally trained in the law, allows modern readers to undertake an examination of the main institutions of biblical law through techniques similar to those applied in any normal comparative or analytical law study. Accordingly, biblical legal texts have been examined through the tools of economics, semiotics,<sup>29</sup> feminine studies,<sup>30</sup> literature,<sup>31</sup> historical comparative

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24. See A. Alt, *The Origin of Israelite Law*, in OLD TESTAMENT HISTORY AND RELIGION (1966).

25. See ZE'EV W. FALK, HEBREW LAW IN BIBLICAL TIMES 1–3 (2001); UMBERTO CASSUTO, THE DOCUMENTARY HYPOTHESIS AND THE COMPOSITION OF THE PENTATEUCH: EIGHT LECTURES BY U. CASSUTO (Israel Abrahams trans., 1983).

26. John W. Welch, DAVID DAUBE BIBLIOGRAPHY (2001).

27. See FALK, *supra* note 25.

28. Raymond Westbrook, *Biblical Law*, in AN INTRODUCTION TO THE HISTORY AND SOURCES OF JEWISH LAW 15–17 (Neil S. Hecht et al. eds., 1996).

29. BERNARD S. JACKSON, STUDIES IN THE SEMIOTICS OF BIBLICAL LAW (2000).

30. CAROLYN PRESSLER, THE VIEW OF WOMEN FOUND IN THE DEUTERONOMIC FAMILY LAWS (1993).

studies,<sup>32</sup> anthropology, and many other modern methodologies. The extent of recent interest in the biblical law field can be measured, in part, by the *Biblical Law Bibliography* published initially in 1990, listing several thousand entries, to which another two thousand entries were added in an update published in a new journal dedicated solely to the study of law in the Bible and ancient Near East.<sup>33</sup> The overview of the discipline of biblical law by Raymond Westbrook, a lawyer and scholar of the ancient Near East, which appears in Oxford's *Introduction to the History and Sources of Jewish Law*,<sup>34</sup> provides an excellent point of entry for any scholar wishing to learn the latest thinking on the backgrounds, sources, and main institutions pertinent to this field. With this significant transformation in the scholarly understanding of biblical law, contemporary jurisprudence must once again redefine its attitudes toward the sources of law in the Bible and their relevance to current American law and society. It is even somewhat ironic that this new turn toward secular approaches in the study of legal materials in the ancient scriptures has opened the door for sacred writings to become applicable and useful in the modern world.

Nevertheless, twenty-first-century jurists may still be reluctant to entertain the need for, or to see any value in, studying biblical law. Such reluctance, however, will jeopardize one's ability to understand the broad legal elements in Western civilization and the American experience. As discussed below, several factors may contribute to this reluctance, but they are not insurmountable.

#### *A. Tension Between Law and Religion*

One may be hesitant to deal with the Bible because of its religious character in general. Tensions between law and religion, however, come from both sides.<sup>35</sup> Moreover, in a world in which religious motivations are increasingly significant in driving world politics, even those most squeamish about giving to anything religious even the slightest presence in the secular liberal state must

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31. JOSEPH SPRINKE, *THE BOOK OF THE COVENANT: A LITERARY APPROACH* (1995).

32. MOSHE WEINFELD, *SOCIAL JUSTICE IN ANCIENT ISRAEL* (1995).

33. JOHN W. WELCH, *BIBLICAL LAW BIBLIOGRAPHY* (1990 & Supp. 1997).

34. Westbrook, *supra* note 28.

35. See Thomas L. Shaffer, *The Tensions Between Law in America and the Religious Tradition*, in *THE WEIGHTIER MATTERS OF THE LAW: ESSAYS ON LAW AND RELIGION* 325 (John Witte, Jr. & Frank S. Alexander eds., 1988).

pay attention to how law and religion have always interacted.<sup>36</sup> It also promotes a higher comfort level in dealing with this intersection in the sphere of biblical law in particular to realize that it not only regulated religious practices but also functioned in the ancient Israelite state much as did the laws in the lands of its surrounding neighbors. It is a mistake to view biblical law simply as ecclesiastical law or merely as an outgrowth of religious impulses.

### *B. Claims of Divine Origins*

Others may dismiss the Bible out of hand because it claims divine origins for some of its precepts. Biblical law can be studied, however, as a practical legal system, quite independent of its truth claims or assertions of divine origins. Hammurabi and other lawgivers in antiquity regularly claimed divine origins for their laws,<sup>37</sup> but that

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36. See STEPHEN BOTEIN, *EARLY AMERICAN LAW AND SOCIETY* 18 (1983); HAROLD J. BERMAN, *THE INTERACTION OF LAW AND RELIGION* 50 (1965) (“It is the religious and legal beliefs and practices of a particular society, and not some ideal religion and some ideal law, that give the members of that society their faith in the future, on the one hand, and their social cohesion, on the other. And the religious and legal beliefs and practices of a particular community are always intimately related to the unique experience of that community, its unique history.”); Shaffer, *supra* note 35, at 316–24; Meislin, *supra* note 1, at 187, 189–200 (“My search through American law reports for Ten Commandment references amply supports [this] contention that ‘no affinity is more strongly marked than that likeness in the strength and prominence of the moral fibre, which, notwithstanding immense elements of difference, knits in some special sort the genius and history of us English, and our American descendants across the Atlantic, to the genius and history of the Hebrew people.’”) (citation omitted); Mark A. Noll, *The Bible in Revolutionary America*, in *THE BIBLE IN AMERICAN LAW, POLITICS, AND POLITICAL RHETORIC* (James Turner Johnson ed., 1985) (“It should not be surprising that even the least orthodox of the founders of the nation paid some attention to scripture, for they lived at a time when to be an educated member of the Atlantic community was to know the Bible. . . .

. . . . Important as the Bible was for political leaders in the generation that established independence, it was an even more significant force for the next generation, whose task was to work out the meaning of the Revolution for an emerging American culture.” *Id.* at 39–40. “The conclusion to which this evidence points is that nearly everyone of consequence in America’s early political history was, if not evangelically committed to scripture, at least conversant with its content. To one degree or another, the Bible was important for America’s first great public representatives.” *Id.* at 41.); Harold J. Berman, *The Origins of Western Legal Science*, 90 *HARV. L. REV.* 894, 897 (1976–77) (“Religious factors were also at work. The creation of modern legal systems was, in the first instance, a response to a revolutionary change within the Church and in the relation of the Church to the secular authorities.”).

37. MARTHA T. ROTH, *LAW COLLECTIONS FROM MESOPOTAMIA AND ASIA MINOR* 76–81 (1995).



does not deter modern minds from recognizing the significance of those laws in world history.

### *C. Separation of Church and State*

Modern scholarship, along with secular politics, typically maintains a strict separation of church and state, religion and law. But this is strictly a post-enlightenment phenomenon. Even Thomas Jefferson crossed out the preceding word “eternal” in the draft of his Danbury letter when he coined the phrase “wall of separation.”<sup>38</sup> The current categorical constructs of “church” and “state” did not exist two hundred years ago, let alone in any ancient society.<sup>39</sup> Thus, as the modern liberal world becomes more and more removed from its historical and biblical or religious roots, people will have a harder and harder time understanding the past in which religion and the Bible played an enormously significant and influential role. Nevertheless, as Harold Berman and others have extensively demonstrated, religion, Christianity, and the Bible have had a great impact on the development of American laws and legal systems.<sup>40</sup>

### *D. Arcane Nature of Biblical Text*

Other barriers may exist because of the technical and foreign nature of biblical and ancient Near Eastern legal studies. In some respects, the sources are esoteric and arcane. But modern translations and commentaries now exist that make this body of scholarship less remote and much more accessible.

### *E. Relevance of Biblical Law*

Moreover, one needs not worry that biblical law will be found to be irrelevant. In teaching biblical law to law students for twenty years, I have noticed that its topics and underlying policies have always proved to be surprisingly relevant and stimulating to me and to my students. Not only do Israelite and other Near Eastern texts promulgate rules that deal with problems and address legal issues

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38. JAMES H. HUTSON, RELIGION AND THE FOUNDING OF THE AMERICAN REPUBLIC 85 (1998).

39. See Noll, *supra* note 36, at 39–42 (discussing the influence of the Bible on the Founding Fathers).

40. Berman, *supra* note 36, at 49.

that still arise in society today, but comparison and analysis is also illuminating and profitable for American law students precisely because the roots of the legal system in the United States are so deeply intertwined with biblical law. Thus, the study of its solutions and value structures helps to illuminate the issues and elements that both shaped the origins of American law and also remain relevant in modern times.

With these ideas as a prologue, one can recognize and appreciate the dominant role of biblical law in colonial America. Especially in New England, the Bible served as the bedrock of most principles of early American jurisprudence.

## II. BIBLICAL LAW IN COLONIAL AMERICA

The first step in approaching biblical law in America is to become aware of the prevalence of the Bible in early American history. The Bible was nothing short of the underlying fabric upon which American society was founded. Most people are surprised to learn, however, how large a role the Bible played in the formulation of the earliest laws of several of the American colonies. Indeed, it has rightly been concluded that “the ideal polity of early Puritan New England was thought to comprehend divine intentions as revealed in Mosaic law.”<sup>41</sup> The rule of law began, not with the rules of man but with the rules of God. One Puritan document directly states, “[T]he more any law smells of man, the more unprofitable,” and thus, it asserts, the only proper laws were in fact “divine ordinances, revealed in the pages of Holy Writ and administered according to deductions and rules gathered from the Word of God.”<sup>42</sup>

While the profound influence of biblical law on early American colonial law is obvious to those who have studied seventeenth century law in America, few publications have actually examined such things as the way in which Calvin’s experiment in theocracy at Geneva influenced the Puritans’ view of law (who believed that the judicial language in the law of Moses was binding on all people and should be incorporated into the laws of the land), and how these attitudes were then put into practice in drafting early colonial laws

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41. See BOTEIN, *supra* note 36, at 25.

42. This view is cited in THE LAWS AND LIBERTIES OF MASSACHUSETTS 1641–1691, xvi (John D. Cushing ed., 1976).

and permeated the whole mode of Puritan life and thought.<sup>43</sup> Few people may be aware of this phenomenon partly because so few copies of these early laws have survived, some being completely lost to scholars for many years. Thus, the recently published encyclopedia of *Religion and American Law* laments, “The role of the Bible in influencing American constitutional thought has only recently begun to attract significant scholarly attention,” even though the influence of the Bible on American thought in general has long been widely recognized.<sup>44</sup> A recent Brandeis University Press publication on *Hebrew and the Bible in America* in its first two hundred years makes no mention whatever of law or the influence of the Bible on the early American legal experience.<sup>45</sup>

Without wishing to overstate the influence of biblical thought in the history of early American law,<sup>46</sup> the full extent of the influence of the Bible on colonial law has never been adequately assessed or appreciated. One could quote several scholars such as Patrick O’Neil, who concludes, “In the early era of the formation of American law, the Bible acted as an important source of law,”<sup>47</sup> but conclusory statements such as these are no substitute for looking at the documents themselves. The following amassing of evidence offers a window into the quantity and the quality of biblical law that was used in early colonial American law.

#### *A. Explicit Use of Biblical Law*

A broadside entitled “The Capital Laws of New England as They Stand Now in Force in the Commonwealth, 1641, 1642” was printed in England in 1643 (near the beginning of the Cromwellian era).<sup>48</sup> This document appears to be the earliest publication of

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43. See George L. Haskins, *The Beginnings of Partible Inheritance in the American Colonies*, in *ESSAYS IN THE HISTORY OF EARLY AMERICAN LAW* 204, 236 (David H. Flaherty ed., 1969).

44. Patrick M. O’Neil, *Bible in American Constitution*, in *RELIGION AND AMERICAN LAW: AN ENCYCLOPEDIA* 29 (Paul Finkelman ed., 2000).

45. *HEBREW AND THE BIBLE IN AMERICA: THE FIRST TWO CENTURIES* (Shalom Goldman ed., 1993).

46. DAVID H. FLAHERTY, *ESSAYS IN THE HISTORY OF EARLY AMERICAN LAW* (David H. Flaherty ed., 1969).

47. Patrick M. O’Neil, *Bible in American Law*, in *RELIGION AND AMERICAN LAW: AN ENCYCLOPEDIA* 30 (Paul Finkelman ed., 2000).

48. *Reprinted in THE LAWS AND LIBERTIES OF MASSACHUSETTS 1641–1691* (John D. Cushing ed., 1976).

American law. It was based on a now-lost document called the “judicials of Moses,” prepared as early as 1636 by John Cotton and Nathaniel Ward, only sixteen years after the landing of the pilgrims at Plymouth Rock.<sup>49</sup> The obvious biblical content and source attributions in this early publication may well come as a surprise to most modern readers:

Capitall Lawes, Established within the Jurisdiction of Massachusetts

1. If any man after legall conviction, shall have or worship any other God, but the Lord God, he shall be put to death. *Deut.* 13. 6, &c. and 17. 2. &c. *Exodus* 22. 20.
2. If any man or woman be a Witch, that is, hath or consulteth with a familiar spirit, they shall be put to death. *Exod.* 22. 18. *Lev.* 20. 27. *Deut.* 18. 10, 11.
3. If any person shall blaspheme the Name of God the Father, Sonne, or Holy Ghost, with direct, expresse, presumptuous, or high-handed blasphemy, or shall curse God in the like manner, he shall be put to death. *Lev.* 24. 15, 16.
4. If any person shall commit any wilfull murther, which is manslaughter, committed upon premeditate malice, hatred, or cruelty, not in a mans necessary and just defence, nor by meer casuatie, against his will; he shall be put to death. *Exod.* 21. 12, 13, 14. *Num.* 35. 30, 31.
5. If any person slayeth another suddenly in his anger, or cruelty of passion, he shall be put to death. *Num.* 35. 20, 21. *Lev.* 24. 17.
6. If any person shall slay another through guile, either by poysonings, or other such divilish practice; he shall be put to death. *Exod.* 21. 14.
7. If a man or woman shall lye with any beast, or bruit creature, by carnall copulation, they shall surely be put to death; and the beast shall be slaine, and buried. *Lev.* 20. 15, 16.

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49. See BOTEIN, *supra* note 36, at 25 (“In 1636, at the request of legislators eager to lay the groundwork for an infant jurisdiction, John Cotton had drawn up a code known as ‘Moses his Judicials.’ This was not adopted, but some of its Hebraic content resurfaced in the ‘Body of Liberties’ formulated in 1641 by another minister, Nathaniel Ward, who had also been trained as a lawyer in the mother country.”).

8. If a man lyeth with mankinde, as he lyeth with a woman, both of them have committed abomination, they both shall surely be put to death. *Lev.* 20. 13.

9. If any person committeth adultery with a married, or espoused wife, the Adulterer, and the Adulteresse, shall surely be put to death. *Lev.* 20. 10. *and* 16. 20. *Deut.* 22. 23, 24.

10. If any man shall unlawfully have carnall copulation with any woman-childe under ten yeares old, either with, or without her consent, he shall be put to death.

11. If any man shall forcibly, and without consent, ravish any maid or woman that is lawfully married or contracted, he shall be put to death. *Deut.* 22. 25. &c.

12. If any man shall ravish any maid or single woman (committing carnall copulation with her by force, against her will) that is above the age of ten yeares; he shall be either punished with death, or with some other grievous punishment, according to circumstances, at the discretion of the Judges: and this Law to continue till the Court take further order.

13. If any man stealeth a man, or man-kinde, he shall surely be put to death. *Exod* 21. 16.

14. If any man rise up by false wnesse wittingly, and of purpose to take away any mans life, he shall be put to death. *Deut.* 19. 16. 18, 19.

15. If any man shall conspire, or attempt any invasion, insurrection, or publick rebellion against our Common-wealth, or shall indeavour to surprize any Towne or Townes, Fort or Forts therein: or shall treacherously, or perfidiously attempt the alteration and subversion of our frame of pollity, or government fundamentally, he shall be put to death. *Num.* 16. 2 *Sam.* 3. & 18. & 20.<sup>50</sup>

In skillful fashion, the 1641 capital laws of New England were collected and crafted from the texts of the Bible. These capital offenses included three affronts against God (idolatry, witchcraft [an

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50. The Capital Laws of New England as They Stand Now in Force in the Commonwealth, 1641, 1642, *reprinted in* THE LAWS AND LIBERTIES OF MASSACHUSETTS 1641-1691 (John D. Cushing ed., 1976).

offense that presumed loyalty to some other spiritual power besides the true God], and blasphemy), three kinds of manslaughter (premeditated murder, crimes of cruel passion, and killing by stealth), six types of sexual offenses (bestiality, homosexuality, adultery, child abuse, statutory rape, and forcible rape), and three crimes against other people (kidnapping, perjury in a capital case, and treasonous sedition). Nor is the biblical influence unacknowledged—scripture references are supplied as authority for each of these capital laws in much the same fashion as other laws of this period cited previous legislative sessions for the legal imprimature behind each provision. The legal craftsmen of these provisions clearly knew their Bible well. Indeed, the idea that a man or a woman could be a “witch” comes directly from the Bible. Exodus 22:18 was understood to include both men and women in the Talmud, which is emphatically consistent with explicit language in Leviticus 20:27. A careful check of the biblical references cited, however, will readily show that the Puritan legislators were not slavishly tied to the biblical text.<sup>51</sup> They stood ready and willing to paraphrase, restate, combine, and modify biblical laws to suit the current sensibilities and needs of their colony. For example, in the first provision in this 1641 declaration, the lawgiver begins with the provision that a person is subject to the death penalty for idolatry or heresy only “after legal conviction” as a first time offender. No such provisions for due process and judicial warning are found anywhere in the Bible. Likewise, these laws only went so far with biblical mandates. Thus stoning, which is the proper form of punishment for blasphemy as prescribed in Leviticus 20, was not to be used in Boston.

#### *B. Expansion and Development of Biblical Law*

This utilization of biblical law was not a passing fancy in colonial America. Slightly modified forms of the 1641 Capital Laws persisted in colonial law throughout the seventeenth century. A collection of laws dated 1647 (and printed in Cambridge, England, in 1648) restates and codifies the same list of capital offenses. At this time, some of its provisions were expanded and developed. For example,

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51. See Shipton, *supra* note 1, at 140–43; KATSH, *supra* note 22, at 126–31; PETER CHARLES HOFFER, *LAW AND PEOPLE IN COLONIAL AMERICA* 16–24 (1992).

section 3 on blasphemy was greatly enlarged to read (new words are shown here in italics):

3. If any person *within this Jurisdiction whether Christian or Pagan shall wittingly and willingly presume to blaspheme the holy Name of God, Father, Son or Holy Ghost, with direct, expresse, presumptuous, or high-handed blasphemy, either by wilfull or obstinate denying the true God, or his Creation, or Government of the world: or shall curse God in like manner, or reproach the holy Religion of God as if it were but a politick device to keep ignorant men in awe; or shall utter any other kinde of Blasphemy of the like nature & degree they shall be put to death. Levit. 24. 15. 16.*<sup>52</sup>

Going well beyond the biblical source, the law of blasphemy now more severely included denying, cursing, or reproaching the true God, his creation or government of the world, or the holy religion of God. At the same time, the biblical requirement that the same law shall apply to foreigners as well as citizens, “as well for the stranger, as for one of your own country,”<sup>53</sup> seems to stand behind the express application of this section to Christians as well as pagans, keeping the new legislation in this respect in harmony with scriptural law. As a mitigating factor, the new law softened the harsh result of the trial of the blasphemer in Leviticus 24, which sentenced to death a man who spoke the name of God in a fit of anger in the midst of a fight, and now called for the punishment only of those who debase God “wittingly and willingly” in a “wilfull or obstinate” frame of mind. Thus the American tradition of modifying, amending, revising, and constantly tinkering with legislation, even if its root lies in holy writ, was born at an early stage in colonial legal history.

Elsewhere in the 1648 publication, biblical law was also used as the basis for non-criminal law. For example, it lists the civil remedies for fornication, as adopted in 1642, as follows: “[I]f any man shall commit Fornication with any single woman, they shall be punished either by enjoyning to Marriage, or Fine, or coporall punishment, or all or any of these as the Judges in the courts of Assistants shall

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52. THE BOOK OF THE GENERAL LAWES AND LIBERTYES CONCERNING THE INHABITANTS OF THE MASSACHUSETTS 5 (1647), *reprinted in* THE LAWS AND LIBERTIES OF MASSACHUSETTS 1641–1691, at 11 (John D. Cushing ed., 1976).

53. *See* Leviticus 24:16–22.

appoint most agreeable to the word of God.”<sup>54</sup> Indeed, the “word of God” calls for similar outcomes, although at the hands of the female’s father, namely a fine of fifty shekels and the requirement of marriage without any right of divorce,<sup>55</sup> culpable with the generic possibility of flogging.<sup>56</sup>

Eight years later, virtually the same list of capital laws, again with interesting modifications and additions, appeared in 1656 in the laws of New Haven, a neighboring colony that was closely connected with Massachusetts.<sup>57</sup> Interestingly, in New Haven, in order to be convicted of blasphemy a person was required to blasphemy while “professing the true God,”<sup>58</sup> which effectively transformed the crime from blasphemy to leading others into apostasy.<sup>59</sup> Most noticeably, the brief prohibition against male homosexuality was greatly expanded, complete with scripture references to Romans 1:26, Jude 1:7, and Genesis 38:9 to include lesbianism, child abuse, sodomy, and male masturbation in the presence of others.<sup>60</sup>

### *C. Guiding Principles from Biblical Law*

As was the case in Massachusetts, the New Haven legislature also turned to the Bible for guiding principles in drafting its civil laws. Thus, “to prevent or suppress other thefts, and pilfrings,” any person who had “stollen, assisted, or any way have been accessory to the stealing of any Cattel of what sort soever, or Swine” was required

54. THE BOOK OF THE GENERAL LAWES AND LIBERTYES CONCERNING THE INHABITANTS OF THE MASSACHUSETTS 23 (1647), *reprinted in* THE LAWS AND LIBERTIES OF MASSACHUSETTS 1641–1691, at 29 (John D. Cushing ed., 1976).

55. *Deuteronomy* 22:29.

56. *Deuteronomy* 25:1–3.

57. NEW-HAVEN’S SETTLING IN NEW-ENGLAND AND SOME LAWES FOR GOVERNMENT (1656), *reprinted in* THE EARLIEST LAWS OF THE NEW HAVEN AND CONNECTICUT COLONIES 1639–1673 (John D. Cushing ed., 1977).

58. *Id.* at 18. (“If any person within this Jurisdiction, professing the true God, shall wittingly and willingly presume to blasphem the holy name of God, Father, Son, or Holy Ghost, with direct, expresse, presumptuous, or high-handed blasphemy, either by willfull or obstinate denying the true God, or his Creation, or Government of the world, or shall curse God, father, Son, or Holy ghost, or reproach the holy Religion of God, as if it were but a politick device to keep ignorant men in awe; or shall utter any other kind of blasphemy of like nature, and degree, such person shall be put to death. Lev. 24.15, 16.”).

59. *Id.*; *cf.* *Deuteronomy* 13:6–11.

60. NEW-HAVEN’S SETTLING IN NEW-ENGLAND AND SOME LAWES FOR GOVERNMENT (1656), THE EARLIEST LAWS OF THE NEW HAVEN AND CONNECTICUT COLONIES 1639–1673 (John D. Cushing ed., 1977).



to “make such restitution to the owner, as the Court considering all circumstances shall judge most agreeable to the word of God.”<sup>61</sup> By specific reference, the provisions of Exodus 22:1–5, regarding the theft of oxen, sheep, or donkeys, were to be applied in such cases.<sup>62</sup>

The pervasive use of the Bible as the undergirding spirit of the laws of New Haven is most clearly manifested in the opening charge given to the court as it was organized and instructed according to these “Lawes for Government.” The following directives are quoted at some length to convey a clear idea of the dominant role that biblical precepts played in the foundations of the legal system in New Haven. At the head of several enumerated duties of the court, its first priority was to affirmatively maintain the “purity of religion,” and the second priority was to humbly acknowledge that legal authority ultimately emanates from God:

This Court thus framed, shall first with all care, and diligence from time to time provide for the maintenance of the purity of Religion, and suppress the contrary, according to their best Light, and directions from the word of God [citing *Psalms* 2:10–12 and 1 *Timothy* 2:2].

Secondly, though they humbly acknowledge, that the Supream power of making Lawes, and of repealing them, belongs to God onely, and that by him this power is given to Jesus Christ as Mediator, *Math.* 28. 19. *Joh.* 5. 22. And that the Lawes for holinesse, and Righteousnesse, are already made, and given us in the Scriptures, which in matters morall, or of morall equity, may not be altered by humane power, or authority, *Moses* onely shewed *Israel* the Lawes, and Statutes of God, and the *Sanedrim* the highest Court, among the *Jewes*, must attend those Lawes. Yet Civill Rulers, and Courts, and this Generall Court in particular . . . are the Ministers of God, for the good of the people; And have power to declare, publish, and establish, for the plantations within their Jurisdictions, the Lawes he hath made, and to make, and repeale Orders for smaller matters, not particularly determined in Scripture, according to the more Generall Rules of Righteousnesse . . . .<sup>63</sup>

Significantly, in all major matters, the legal outcome was “determined in Scripture,” and the jurisdiction of the court resides

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61. *Id.* at 17.

62. *Id.*

63. *Id.* at 11 (citing *Deuteronomy* 5:8, 17:11, and *Romans* 13:4).

solely in the “smaller matters” of mundane enforcement of general law for the “good of the people.”

*D. Adaptive Persistence of Biblical Law*

Back in Massachusetts, a revised and updated collection of the General Lawes and Libertyes of that colony was issued in 1660.<sup>64</sup> Once again, most of the Capital Lawes from 1641 were included (sections 10 and 11, regarding sex with a girl under the age of ten and rape, were deleted, probably as already covered by other sections) and two new sections that had been adopted in 1649 were added:

13. If any Child, or Children, above sixteen years old, and of sufficient understanding, shall CURSE, or SMITE their natural FATHER or MOTHER, he or they shall be putt to death, unless it can be sufficiently testified, that the Parents have been very unChristianly negligent in the education of such children: or so provoked them by extream & cruel correction, that they have been forced thereunto, to preserve themselves from death or maiming: *Exod. 21 17, Lev 20, 9, Exod 21 15.*

14: If a man have a STUBBORNE or REBELLIOUS SON of sufficient yeares and understanding (viz) sixteen yeares of age, which will not obey the voice of his Father, or the voyce of his Mother, and that when they have chastned him, will not hearken unto them, then shall his Father and Mother, being his natural Parents lay hold on him, and bring him to the Magistrates assembled in Court, and testifie unto them, that their Son is stubborn and rebellious, and will not obey their voyce and chastisement, but lives in sundry notorious crimes: Such a Son shall be put to death. *Deut: 22 [21]. 20, 21.*<sup>65</sup>

These provisions regarding insolent and rebellious children come, in principle, directly from the Bible, although once again with ample adaptation. The ancient law regarding a child who struck or cursed his father or mother literally applied only to a son and presumably not to a daughter, and no exculpation due to parental

64. THE BOOK OF THE GENERAL LAWES AND LIBERTYES CONCERNING THE INHABITANTS OF THE MASSACHUSETTS (1660), *reprinted in* THE LAWS AND LIBERTIES OF MASSACHUSETTS 1641–1691, at 69 (John D. Cushing ed., 1976).

65. *Id.* at 9, *reprinted in* THE LAWS AND LIBERTIES OF MASSACHUSETTS 1641–1691, at 79 (John D. Cushing ed., 1976).

neglect or cruelty was stated.<sup>66</sup> Likewise, to the ancient law regarding a rebellious son has been added the age of accountability at sixteen and the requirement that the parents must both be his natural parents, not stepparents or adoptive parents.<sup>67</sup>

Essentially the same list of capital statutes is perpetuated in the laws of Massachusetts published in 1672,<sup>68</sup> with the reappearance of the prohibition against “carnal copulation with a woman childe under the age of ten years,” which originally appeared on the 1641 list but had been dropped in 1648. Now this offense was reinstated with emphasis, “as being more inhumane and unnatural in it self, and more perriulous to the life and well-being of the Childe.”<sup>69</sup>

In the same year, 1672, laws promulgated in the Connecticut Colony reiterated the traditional Capital Laws, with the unique addition of a prohibition against arson:

13. If any person of the age of sixteen years and upward, shall wilfully and of purpose fire any Dwelling-House, Barn or out House, he shall be put to death, or suffer such other severe punishment as the Court of Assistants shall determine; if no prejudice or hazard to the life of any person come thereby, and also satisfie all damages to the wronger or agrieved party.<sup>70</sup>

Thus, throughout the seventeenth century, the traditional list of capital laws concisely defined the cases under which a person could be put to death within the jurisdiction of Massachusetts and the surrounding colonies. These provisions raise many intriguing questions about the selection and modification of these biblical provisions. But more than looking at the details of these individual provisions, if one wants to know what a particular legal system values most, it is generally best to look first to its use of capital punishment, especially in premodern societies. Here one finds what these systems considered crucial to the social order. As is readily apparent, the Bible played a crucial role in the legal fabric of community life in early America.

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66. *Exodus* 21:15–17.

67. *Deuteronomy* 21:15–21.

68. THE GENERAL LAWS AND LIBERTIES OF THE MASSACHUSETTS COLONY: REVISED & RE-PRINTED (1672), *reprinted in* THE LAWS AND LIBERTIES OF MASSACHUSETTS 1641–1691, at 240 (John D. Cushing ed., 1976).

69. *Id.* at 15, *reprinted in* THE LAWS AND LIBERTIES OF MASSACHUSETTS 1641–1691, at 241 (John D. Cushing ed., 1976).

70. THE GENERAL LAWS AND LIBERTIES OF CONECTICUT COLONIES: REVISED AND REPUBLISHED BY ORDER OF THE GENERAL COURT 9 (1672).

While the capital laws in their traditional form with biblical references drop out of the Acts and Laws of the king's province in the Massachusetts Bay in 1699, the influence of the Bible and religion was still prominently visible in these regulations printed in Boston. For example, a new section regarding "the better observation and keeping the Lords-Day" provided:

[A]ll and every person and persons whatsoever, shall on that Day carefully apply themselves to Duties of Religion and Piety, publicly and privately; and that no Tradesman, Artificer, Labourer or other person whatsoever, shall upon the Land or Water, do or exercise any Labour, Business, or Work of their ordinary Callings; nor use any Game, Sport, Play or Recreation on the Lords-Day, or any part thereof; (works of necessity and charity only excepted) upon pain that every person so offending shall forfeit *Five Shillings*.<sup>71</sup>

Likewise, in New Haven, debt slavery resulted when a thief who could not make restitution received whippings of no more than forty stripes, which reflected biblical provisions.<sup>72</sup> In Connecticut, two or three witnesses were required in capital cases.<sup>73</sup> In Quaker Pennsylvania, cursing, swearing, or blasphemy were against the law; debt servitude was limited to seven years (five for a married man); two-fold restitution was exacted for stealing an animal, with four-fold restitution if the stolen cattle could not be returned.<sup>74</sup> All of these provisions are familiar to biblicalists.

### III. THE IMPACT OF BIBLICAL LAW ON AMERICAN LAW

Naturally, one must not overstate the influence of the Bible on the development of law in America. Nevertheless, by one count, eleven percent of colonial laws were directly based on biblical texts, ranging from zero percent in Virginia to forty percent in New England.<sup>75</sup> And even these impressive statistics do not tell the whole

71. ACTS AND LAWS OF HIS MAJESTIES PROVINCE OF THE MASSACHUSETTS-BAY, IN NEW ENGLAND 17 (1699).

72. *See Exodus 22:3; Deuteronomy 25:3.*

73. THE GENERAL LAWS AND LIBERTIES OF CONECTICUT COLONIES: REVISED AND REPRINTED BY ORDER OF THE GENERAL COURT 9 (1972); *see also Deuteronomy 19:15.*

74. LAWS OF THE PROVINCE OF PENNSILVANIA (1714), *reprinted in* THE EARLIEST PRINTED LAWS OF PENNSYLVANIA 1681-1713 (John D. Cushing ed., 1978); *see also Exodus 21:2, 22:1-5.*

75. O'Neil, *supra* note 47, at 31.

story. From decade to decade, the story changes within individual colonies, and many more provisions were indirectly based on the Bible. As the *Encyclopedia of Religion and American Law* states, “It is impossible to list all these indirect influences which Scripture has had on the minds of judges, lawmakers, and the electorate,” for many aspects of American law were “strongly shaped by the popular understanding of biblical morality.”<sup>76</sup>

From this strong use of the Bible in colonial American law, one may detect several important attitudes or ways in which biblical law has contributed to the fundamental development of American legal thought.

*A. Seeing Church and State as Hand-in-Hand Partners*

Embedded deep in the American legal system is an expectation or presumption of the concurrent validity, if not necessity, of basic religious or moral virtues thriving in the heart of the American state. It may have originally been an accident of history, but the use of biblical law filled an important gap in the life of the pioneer pilgrims who first came to America.<sup>77</sup> Their charters did not allow them to enact law as such, and yet they needed to regulate their community. As the preface to the “Book of the General Laws and Liberties of Massachusetts,” adopted in 1644 and published in 1648, makes clear, the colonists began with a strong assumption that a society must have laws: “For a commonwealth without laws is like a ship without rigging and steerage.”<sup>78</sup> To find such social sails and helm, these Americans turned first to the Bible. Its rules were not adopted or officially “voted in Court.”<sup>79</sup> They could not be adopted without exceeding the scope of the colony’s authority, but then, brilliantly, neither did they need to be, for they were accepted as transcending any human authority. Moreover, the New Testament epistle to the Romans specifically sanctioned the cooperation of religious believers

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76. *Id.* at 30.

77. See BOTEIN, *supra* note 36, at 18.

78. THE BOOK OF THE GENERAL LAWEs AND LIBERTYEs CONCERNING THE INHABITANTS OF THE MASSACHUSETTS A2 (1647), *reprinted in* THE LAWS AND LIBERTIES OF MASSACHUSETTS 1641–1691, at 5 (John D. Cushing ed., 1976).

79. *Id.*; see also Skinner, *supra* note 1, at 13–14; KATSH, *supra* note 22, 91–102; Mark DeWolfe Howe, *The Source and Nature of Law in Colonial Massachusetts*, in LAW AND AUTHORITY IN COLONIAL AMERICA (George Athan Billias ed., 1985).

and secular institutions.<sup>80</sup> The emergent collaboration between church and state (even if these two arms remain separate while at the same time working together) has remained a fundamental axiom embedded in the nature of American polity ever since.<sup>81</sup>

*B. Appealing to Citations of Authority*

From the beginning in American legal thinking, jurists were assiduous about citing legal authority for principles they espoused. The force of the authority, rather than the mechanics of the law, became an essential ingredient in the American sense of justice. This particular approach to authority and precedent is fundamental to American jurisprudence, but it is not intuitively present in all legal systems. Thus, the laws of 1648 began with a recognition of authority in God's establishment of the law of Moses and its political institutions: "So soon as God has set up political government among his people Israel, he gave them a body of laws for judgement both in civil and criminal causes."<sup>82</sup> One sees the appeal to specific justifying authority in numerous biblical citations throughout these early laws, not only regarding serious capital matters but even in regard to mundane matters, such as regulation concerning the weights and measures used by bakers, which followed the biblical prohibitions against deceptive or fraudulent weights and measures.<sup>83</sup>

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80. *Romans* 13:1-7.

81. See Gaffney, *supra* note 1, at 88. Gaffney discusses the influence imposed by the Bible on several areas of Constitutional theories including the following: (1) the freedom of expression ("Biblical religion, then, cannot be viewed simply as an ancient prototype of repression and uniformity that is contrary to the model of free expression so cherished in our liberal democracy. On the contrary, the bold speech and the variety of beliefs witnessed to in the biblical record makes the Bible one of the significant ancient sources of freedom of expression. Viewed in this way, the Bible can continue to serve modern American society by providing the motivation to believing members of that society to speak their minds courageously but without hubris on a variety of social issues concerning which the voice of religious conscience is entirely appropriate." *Id.* at 89); (2) freedom of association ("Although concerned intensely with persons, the Bible does not view them as isolated atoms, but as interrelated, socially connected parts of a whole, or as members of a community." *Id.* at 92.); and (3) limited government ("The biblical traditions on limited governmental authority cannot be used to support the particular allocations of powers made in the American constitution. But these traditions can serve as a powerful motivating force for persons to challenge such authority whenever it exceeds the bounds of legitimacy." *Id.* at 96.).

82. THE BOOK OF THE GENERAL LAWES AND LIBERTYES CONCERNING THE INHABITANTS OF THE MASSACHUSETTS A2 (1647), *reprinted in* THE LAWS AND LIBERTIES OF MASSACHUSETTS 1641-1691, at 5 (John D. Cushing ed., 1976).

83. NEW-HAVEN'S SETTLING IN NEW-ENGLAND AND SOME LAWES FOR GOVERNMENT

*C. Emphasizing Codification, Publication, and Public Education*

Law needs to be set forth, proclaimed, and published. In order to be bound, the public must know and accept the law. These principles are in operation from the beginning of American law, necessitated in part by the complexity of the Bible and its susceptibility to various divisive interpretations. Thus, codification was necessary. “Often acclaimed as the first English-language codification of laws, the 1648 book exists in only one copy,” found today in the Huntington Library in San Marino, California.<sup>84</sup> Just as the Bible required the law to be proclaimed and taught among the people so that they might hear and fear,<sup>85</sup> the Colonialists went to great lengths to have their laws published and taught. Even when no printing presses existed in the New World in the earliest years, the settlers returned to London or Cambridge to have their laws printed.<sup>86</sup>

Codification, collection, and articulation were perceived as necessary because it is not sufficient to give people principles alone: “It is very unsafe and injurious to the body of the people to put them [to require them] to learn their duty and libertie from general rules.”<sup>87</sup> Someone must organize and set forth the requirements. Conceptually, this is an important point in legal history, constituting the beginnings of much larger collections of laws in America, such as the United States Code.

Growing out of this emphasis on publishing and promulgating the law, the sense of embracing the law was seen in America as a matter of personal commitment, as much it had once been a matter of individual covenant in Deuteronomy 27. As the preface to the 1648 publication states, each person has a personal duty to embrace and obey the law for the common welfare, even to “thy [personal] disadvantage; for so another must observe some other law for thy

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12 (1656), *reprinted in* THE EARLIEST LAWS OF THE NEW HAVEN AND CONNECTICUT COLONIES 1639–1673 (John D. Cushing ed., 1977).

84. THE LAWS AND LIBERTIES OF MASSACHUSETTS 1641–1691, at xxi (John D. Cushing ed., 1976).

85. *Deuteronomy* 19:20, 31:11–12.

86. As discussed previously, *supra* Part II, the earliest of Massachusetts’s laws were printed in Cambridge and New Haven’s laws were printed in England.

87. THE BOOK OF THE GENERAL LAWES AND LIBERTYES CONCERNING THE INHABITANTS OF THE MASSACHUSETTS A2 (1647), *reprinted in* THE LAWS AND LIBERTIES OF MASSACHUSETTS 1641–1691, at 6 (John D. Cushing ed., 1976).

good, though to his own damage; thus must we be content to bear one anothers burden and so fullfill the law of Christ.”<sup>88</sup>

*D. Seeing Laws as Principles, Subject to Restatement and Adaptation*

Americans typically understand law as a body of rules that are distilled from principles, capable of and in need of periodic restatement and adaptation to meet current circumstances. This understanding was at work from the beginning in these early laws, and it grew out of the way in which these people interpreted and applied biblical principles, restating them and deducing from them rules for their use. This procedure was articulated expressly as early as 1648: “These [the biblical rules] were brief and fundamental principles, yet withall so full and comprehensive as out of them clear deductions were to be drawn to all particular cases in future times.”<sup>89</sup> This principle is inherently at work throughout the colonies. In 1647, Rhode Island law resulted from a restatement of the law of accidental slaying, as set forth by the honorable judge of Israel “in the 19th [chapter] of his 5th book [Deuteronomy].”<sup>90</sup> This provision even included a modified concept of asylum: an inadvertent slayer must forfeit his property, but by submitting to trial he will be pardoned.<sup>91</sup> In 1656, the laws of New Haven tried to respect the “double portion” afforded to the eldest son, as required in Deuteronomy 21:17, but they also allowed the court discretion to give more to the widow and less to the son.<sup>92</sup> Similarly, in 1714, the Pennsylvania legislature drew on the principle of punitive damages in Exodus 22:1, 4, which required double restitution of a stolen sheep or ox if the animal is found still alive, while four- or five-fold punitive damages are imposed if the animal has been killed or sold.<sup>93</sup> The same rule was adapted for use in Pennsylvania, but now it was

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88. *Id.*

89. *Id.*

90. PROCEEDINGS OF THE FIRST GENERAL ASSEMBLY OF “THE INCORPORATION OF PROVIDENCE PLANTATIONS,” AND THE CODE OF LAWS ADOPTED BY THAT ASSEMBLY IN 1647, *reprinted in* THE EARLIEST ACTS AND LAWS OF THE COLONY OF RHODE ISLAND AND PROVIDENCE PLANTATIONS 1647–1719, at 20 (1977).

91. *Id.*

92. NEW-HAVEN’S SETTLING IN NEW-ENGLAND AND SOME LAWES FOR GOVERNMENT 12 (1656), *reprinted in* THE EARLIEST LAWS OF THE NEW HAVEN AND CONNECTICUT COLONIES 1639–1673 (John D. Cushing ed., 1977).

93. LAWS OF THE PROVINCE OF PENNSILVANIA (1714), *reprinted in* THE EARLIEST PRINTED LAWS OF PENNSYLVANIA 1681–1713 (John D. Cushing ed., 1978).



extended to cover goods (not only animals); double satisfaction was required in addition to the return of the stolen property, with four-fold satisfaction if the goods or cattle are not found.<sup>94</sup> In addition, a public whipping of twenty-one lashes and the wearing of a “T” for six months (for Thief) were added beyond anything the Bible would require.<sup>95</sup>

*E. Producing a Basis for Unification and Efficient  
Implementation of the Law*

Of the many further similar examples that might be offered, one other major contribution that biblical law made in shaping American jurisprudence was its sense of unification and equality. Mark DeWolfe Howe has identified the successful unification of “law” into one common domain as one of the great achievements of American colonial law.<sup>96</sup> Consider the legal world out of which the Colonialists had come.<sup>97</sup> In it, the great English judge Edward Coke had recognized fifteen different brands of English law.<sup>98</sup> In it, different bodies of law, with idiosyncratic concepts, jurisdictions, and procedures, were each applied in numerous kinds of courts that proliferated in the King’s realm. There were courts of common pleas, the Exchequer, and the Queen’s Bench; there were laws of the Admiral, the Bishop, the Mayor, the local lord, the Star Chamber, the Court of Chivalry, the Court of Requests, and Court of Chancery, and so on.<sup>99</sup> Due to this multiplicity, it would have been almost impossible for a British subject to answer the question, “under what law are you living?”<sup>100</sup> In stark contrast to this cacophony of courts in the Old World, as Howe has argued, the Colonialist could boast that he lived, for the first time, under a “unified judicial system.”<sup>101</sup> In the New World, the fledgling colonies featured only one kind of court, a single court of general jurisdiction, applying all the law, equally in all kinds of cases.<sup>102</sup> This

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94. *Id.*

95. *Id.*

96. *See* Howe, *supra* note 78, at 1–2.

97. *See id.*

98. *See id.* at 2 (citing Sir Edward Coke on Littleton).

99. *See id.*

100. *See id.* at 3.

101. *See id.* at 4.

102. *See id.*

was an amazing step forward in legal history, probably more revolutionary than has been realized and recognized. But what Howe does not note is the undeniable role that the Bible played in this development. For the Bible transcended all these various brands of law. The Bible was the great unifying force that commanded ultimate loyalty and juridical respect. Ultimately, it was the harmony between the laws of God and the proper laws of any state that allowed the Americans to see every kind of law as belonging to a single order and system of law.

Returning to the preface to the 1648 General Laws and Liberties, one sees this unity clearly articulated in its concluding and undergirding declaration:

That distinction which is put between the Lawes of God and the lawes of men, becomes a snare to many as is it mis-applied in the ordering of their obedience to civil Authoritie; for when the Authoritie is of God and that in way of an Ordinance *Rom.* 13. 1. and when the administration of it is according to deductions, and rules gathered from the word of God, and the clear light of nature in civil nations, surely there is no humane law that tendeth to [common] good (according to those principles) but the same is mediately a law of God, and that in way of an Ordinance which all are to submit unto and that for conscience sake. *Rom.* 13. 5.<sup>103</sup>

If, as this eloquent proposition insists, all law is ultimately “a law of God,” then it readily follows that all law falls under a single category and unified hand of jurisdiction. The force of this revolutionary idea impelled directly forward the ideal of one nation, under God, and hence equality before that law for all.

#### *F. A Lasting Legacy*

Although it is no longer common to hear lawyers cite the Bible as legal authority in court, except perhaps when playing to the jury, the influence of biblical law continued to be felt in American jurisprudence well into the twentieth century.<sup>104</sup> It was accepted implicitly by legal historians as recently as 1943 that “many provisions of biblical law are still seen in American statutes and court

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103. THE BOOK OF THE GENERAL LAWES AND LIBERTYES CONCERNING THE INHABITANTS OF THE MASSACHUSETTS 2 (1647), reprinted in THE LAWS AND LIBERTIES OF MASSACHUSETTS 1641–1691, at 6 (John D. Cushing ed., 1976).

104. See Meislin, *supra* note 1.

decisions.”<sup>105</sup> In 1923, a prominent legal publication asserted, “Allusions to the Bible are perhaps more frequent than to any book other than professional law treatises and previous decisions.”<sup>106</sup> The Constitution of North Carolina in 1776 and other states excluded from office all nonbelievers in the Protestant religion or the divine authority of the Old or New Testament,<sup>107</sup> and many early American cases held that biblical law was a part and parcel of the common law. Thus, displaying a representation of the Ten Commandments on the wall of a courtroom or other public building is not, strictly speaking, simply a matter of church iconography; such a depiction simultaneously presents several underlying policies deeply ingrained in the character of American common law.<sup>108</sup>

#### IV. PROSPECTS FOR CONTINUING APPLICATION AND REFORM

If biblical law has been a significant historical factor in the legal history of America, and if biblical principles and values are interwoven into the fabric of the legal system modern American lawyers have inherited, then studying the values operating in and behind the biblical legal system should offer insights into the nature of law in America today and, consequently, into possible solutions suitable to some of the problems now confronted in that legal world today. For the law is a seamless web, and if the American legal system in actuality presupposes certain underlying values that were essential to the underpinnings of American society at the time that system was put in place, it is unlikely that the superstructure built on that foundation will continue to stand if that foundation is simply taken away. To the extent that a modern system is derived from biblical social precepts or even unwittingly presupposes that such precepts are operational in society, the lack of any of the essential elements of that constitutive system may give rise to serious problems in the resultant system. If an airplane is designed with the assumption that the plane will have a rudder, if the rudder is taken away, the airplane cannot be expected to function properly.

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105. H.B. CLARK, *BIBLICAL LAW* 37 (1943).

106. *Id.*

107. *See id.* at 38.

108. Amy Green, *Sides Going Toe-to-Toe on 10 Commandments*, *DESERET NEWS*, Apr. 13, 2002, at E1 (referencing the decision in *Am. Civil Liberties Union of Tenn. v. Hamilton County, Tenn.*, 202 F. Supp. 2d 757 (2002)).

In the study of biblical law, I have noted several values that were essential to the fabric and operation of that legal system. I will mention only a few of these policies here, suggesting ways in which strengthening or observing similar principles today could produce sound results in the legal well-being of America in the coming decades.

*A. Commitment to Legal Order*

Biblical law presupposed that individual members of the community would respect the law and were bound to obey the law out of inner devotion to a civil order that makes freedom possible. Law in the biblical period operated without police, investigators, paid prosecutors, or judges. Its rules and remedies were fashioned with a voluntary compliance system in mind. Largely grounded in the solemn making of personal and national covenants, the biblical law system presumed that people would be loyal to the lawgiver and have no other god before him, and would show respect to the lawgiver and to the name of the law.

Likewise, presupposed in the Preamble to the United States Constitution and in other works of the day (such as Adam Smith's *The Theory of Moral Sentiments*) is the assumption that citizens will willingly respect and charitably obey the law.<sup>109</sup>

Democracy as a political *modus vivendi* presupposes a moral basis and background; it is moral before it is political. For a people to rule, there must prevail among them a hunger for justice and righteousness and a thirst for liberty, both for oneself and one's brother; without these fundamental virtues, a people, even if living under a form of democracy, will find itself in fact living under tyrannous masters.<sup>110</sup>

Democracy in America has succeeded because its society has possessed an underlying moral order, and historically that order has been informed largely by basic ideals supplied by the Bible, especially "in shaping popular social values in the early United States."<sup>111</sup>

In the American legal system today, one counts on this assumption even to the point of expecting individual citizens to

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109. U.S. CONST. pmb.; ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* (Knud Haakonssen ed., Cambridge Univ. Press 2002).

110. KATSH, *supra* note 22, at 138.

111. Noll, *supra* note 36, at 48.

report their taxes voluntarily and to comply with the law for the common good. Being free from government intervention and regulation assumes that each member of the society will voluntarily honor and respect the law without intrusive compulsion or governmental constraint. Of course, this objective will not always be realized in every case, but the system as a whole assumes that most people will honor and respect the law most of the time. Reforms aimed at encouraging voluntary compliance and, concurrently, more stringently punishing those who abuse this fundamentally essential value of American law should therefore be considered and implemented.

### *B. Knowledge of the Law*

Biblical law assumed that every person was knowledgeable of the law. Parents were required to teach the law to their children, and rulers would read the law publicly to the entire community at least once every seven years. While it would be impossible to read the United States Code Annotated to every American citizen, even if it were read constantly and streamed over the Internet continuously for seven years, improvements in communication with television and electronic publication now make it possible for the laws of the United States and of the individual states to be published and made available and understandable to people much more widely than ever before, not only to the relatively exclusive group of lawyers who can afford to use Lexis and Westlaw. Public access to the law should be given higher priority in America. If programs make access to the law more user friendly, individual citizens will probably take a greater interest in researching and studying laws relevant to their own circumstances and keep up to date on amendments and changes in the law.

### *C. Duties and Social Justice*

The biblical concept of justice has more to do with shaping and encouraging social duties in protecting the weak, the poor, the widows, and the orphans, than it does with asserting and protecting individual rights or liberties. In other words, the underlying jurisprudence of the Bible is more based on principles of duty than on concepts of rights. Such duties include the duty not to kill, not to steal, and not to take sexual or economic advantage of others. While the vindication and protection of individual rights against

government power has been the monumental achievement of the American experiment, the roots of that legal system should remind modern citizens that rights do not exist independent of duties. The biblical method of limiting governmental powers (as is found, for example, in the paragraph of the king in Deuteronomy 17:14–20) was not to grant to individuals enhanced rights against the king, but to impose higher levels of duties on people in power. Rulers are not ordinary people because they wield extraordinary powers. Reformers might well consider how all those who were entrusted or blessed with rights and privileges in the ancient world were held to higher standards of conduct and performance than were those who were without.

#### *D. Accountability in Using the Judicial Process*

Biblical law placed high entry barriers on those initiating lawsuits. In this system, which punished a losing litigant by doing to him “as he had thought to have done unto his brother,”<sup>112</sup> it is not surprising that few court cases are chronicled in the biblical narratives. Knowing the high stakes of failure, most litigants probably found other ways to negotiate, settle, resolve, mediate, or alternatively end their legal disputes. In a country that is becoming more and more litigious, and while the legal profession is seeking ways to encourage alternative dispute resolution, reformers might well recognize that the biblical system worked for hundreds of years, efficiently and successfully, in large part because significant responsibility was placed on litigants to be sure that the actions they brought were sincere and well founded. In eagerness to give every litigant a day in court, perhaps the American system has bent over too far in the direction of lowering the entry barriers to court. Of course, defendants need to be given all of the protections of the Constitution, but with respect to civil law plaintiffs a legal system need not be and cannot be open to all comers, unless they are willing to bear more of the burden they may wrongly impose on others or on the society.

#### *E. Honesty and Talionic Penalties for Perjury*

One of the major problems creating backlogs in courts today is the pervasive problem of perjury. District attorneys and prosecutors

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112. *Deuteronomy* 19:19.

with whom I have spoken report that perjury is rampant and that they assume that virtually every witness is lying to some degree. Yet perjury is hardly ever studied, let alone prosecuted. The stakes are too small, and the difficulty in getting a conviction is too high.

Yet here again, biblical law may provide some insight. The biblical legal system worked largely because it exacted high penalties for perjury.<sup>113</sup> The prohibition against bearing false witness was aimed not so much against lying in general but more particularly against committing perjury in a judicial proceeding, especially where the name of God was invoked in bearing testimony as a witness (and therefore offending God by such prevarication). Biblical law assumed that people would tell the truth, and oaths were taken very seriously. If they did not tell the truth, false witnesses were punished by suffering the consequences that would have befallen the person against whom they had falsely testified.<sup>114</sup>

While I would not advocate that particular remedy for perjury in the twenty-first century, biblical law points toward a crucial premise necessary to the proper functioning of any system of law that promotes limitations on governmental powers and the protection of individual freedoms. That important premise is the assumption that people will tell the truth. If people do not tell the truth, the system sputters.

The question is what to do about the rampant perjury in our courtrooms and depositions. Here again, biblical law may have some insights to offer. One of the underlying principles of biblical justice is the concept of talionic punishment, the idea that a punishment should suit the crime.<sup>115</sup> The biblical formulas of “an eye for an eye and a tooth for a tooth,” have been grossly misunderstood. This rubric is not a principle of vengeance or retaliation, but an equitable principle of equivalence, and probably one of limitation and restraint. The text says, “an eye for an eye,” and this would also mean no more than an eye. Many implementations of this principle in biblical narratives show that the talionic principle also embodied in a poetic sense. Proper justice returns to a person that which is deserved. So for example, when Ahab put Naboth to death through a miscarriage of justice, Ahab himself was soon killed in battle; and as the dogs had

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113. *Deuteronomy* 19:15–19.

114. *Deuteronomy* 19:19.

115. See FALK, *supra* note 25, at 6; JACKSON, *supra* note 29.

licked the blood of Naboth, so the dogs licked the blood of Ahab.<sup>116</sup> This is talionic justice.

Although the principle of having the punishment fit the crime has not been forgotten in British and American literature (as one of the songs in Gilbert and Sullivan's *Mikado* makes clear), the principle has been largely overlooked as a judicial tool in modern law. Occasionally judges will use this principle in fashioning creative remedies, such as requiring people to pick up trash on the highway instead of fining them for their littering, but for the most part we prefer to fine people or put them in prison than to exact such penalties.

Fines and prison terms are not, however, practicable deterrents in the case of perjury. But, with creative thought, the talionic principle may be especially helpful in punishing perjurers. If a person commits perjury, that person should not be trusted; and so, a punishment that would fit the crime of perjury would be one that would deny that person of the privileges of being trusted within the legal system from that point forward. For instance, biblical jurisprudence might deny perjurers the legal privilege of trust by disqualifying them from serving as a director of a corporation, a trustee of a trust, or to hold other fiduciary positions. For some people, especially those who serve as trustees of their own pension plans, this could be a serious deterrent. For rank and file members of society, most people cherish their credit rating. If people knew that judges had the power to report perjury in such a way as to enter it on a person's credit record, they might be less inclined to lie on the witness stand. And in drastic cases, the government might want to presume that such a person would also have likely lied on his or her tax returns. A modern application of the biblical talionic principle might be to punish the perjurer by requiring the Internal Revenue Service to audit the offender for all open years. One might rationally guess that a higher incidence of tax fraud would be found among perjurers than among the average body of citizens.

#### *F. A Source of Insight*

In ways such as these, the study of the use of the Bible in Colonial and American law may open to modern legal thinkers

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116. 1 *Kings* 21:19, 22:28.



insights and potentials for reform that will not only make sense but will have a high likelihood of success because they are consistent with the underlying character of the American legal system. Many other similar examples could be given; for example, biblical law was not administered impersonally; plaintiffs and defendants met in court personally, not through lawyers who denied them this important channel of remorse, repentance, and reconciliation. Biblical law assiduously guarded judicial integrity; taking gifts (even after a lawsuit was concluded) was not tolerated.<sup>117</sup> Returning to the roots of one's language or culture, customs or traditions, often produces important insights and possibilities for future success. The same result can be expected in returning to the roots of one's laws and system of justice. This is not to say that modern America should return to an understanding of law and the Bible as it was misunderstood by the Puritans, and this is not to argue for the return of biblical law as such. But if understanding the past will ever help one to understand the future, then understanding biblical law and its influence in getting us to where we now stand should also help in getting us on in the pursuit of justice and the future enjoyment of liberty in America under American law.

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117. *Exodus* 23:6–8.