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## CHRISTIANITY AS PART OF THE COMMON LAW

JAYSON L. SPIEGEL\*

### INTRODUCTION

It cannot be controverted that religion plays a central role in American society. Perhaps the greatest genius of American society has been that by incorporating a promise of maximum freedom of conscience into the United States Constitution, we have guaranteed everyone the right to follow their conscience while assuring them that they will never suffer from official discrimination because their beliefs are inconsistent with those of the majority of the population. Although freedom of religion is not absolute,<sup>1</sup> there has been a continual progression toward maximizing religious liberty.<sup>2</sup>

In 1952, Justice Douglas wrote these immortal words:

We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma.<sup>3</sup>

Notwithstanding the American tradition of separation of church and state, there is a constant interaction between our religious and political institutions. As Justice Douglas himself wrote, the Constitution "does not say that in every and all respects there shall be a separation of church and state."<sup>4</sup> Indeed, each has greatly influenced the other. Our founding fathers were guided by their religious convictions in formulating our constitutional system and its attendant guarantees of liberty.<sup>5</sup> Similarly, religious liberty and the guarantee of full political rights for all regardless of faith were won not through violence but through the political and legal system.<sup>6</sup> Although the United States Supreme Court

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1. The United States Supreme Court recognized long ago that although freedom to believe is absolute, the state may prohibit activities undertaken in the name of religion which are injurious to society. *See, e.g., Reynolds v. United States*, 98 U.S. 145 (1878) (prohibition of polygamy upheld against freedom of religion challenge).

2. *See generally* A. STOKES & L. PFEFFER, *CHURCH AND STATE IN THE UNITED STATES* (1964).

3. *Zorach v. Clauson*, 343 U.S. 306, 313 (1952).

4. *Id.* at 312.

5. *See* A. STOKES & L. PFEFFER, *supra* note 2, at 9-20, 39-55.

6. *See id.* at 64-83.

has often moved to limit the overt government sponsorship of public symbols or ceremonies that are blatantly denominational or sectarian,<sup>7</sup> it is still accurate to say that our religious heritage has so pervasively impacted upon our political system as to create an almost seamless web of religious influence upon our public institutions.

In the early days of the Republic, and indeed until the explosion of religious liberty cases that began about 1947,<sup>8</sup> the influence of religious and moral principles upon our laws was often expressed in the concept that "Christianity is part of the common law of the United States." As late as 1931, the United States Supreme Court pronounced, "[w]e are a Christian people."<sup>9</sup> Regardless of how one interprets this judicial dicta, it cannot be gainsaid that the teachings of Christianity have had a pervasive impact upon all aspects of our legal system. The very essence of our criminal system and the bulk of the acts which we criminalize emerge from the Judaeo-Christian tradition;<sup>10</sup> in fact, crimes have often been defined in terms of being offensive to Christianity.<sup>11</sup> The influence of Christianity upon the law of domestic relations has perhaps been even more extensive.<sup>12</sup>

Although the Gospels themselves have specifically had a significant impact upon the development of our law, Christianity has influenced the law in another and perhaps more important sense. In the denotative sense, to be a Christian refers to an individual who embraces the religion which recognizes the divinity of Jesus of Nazareth. Many of our laws are derived in some form from the Gospels and teachings of the Christian religion. Blasphemy and Sunday Closing statutes are two examples.<sup>13</sup> In the connotative sense, however, to be a Christian refers to an individual who manifests a peaceful, charitable, humble or loving nature. Our laws represent a concerted effort to foster these attributes in society and increase harmony and brotherhood.<sup>14</sup> Although there are substantive due process limitations on the extent to which morality

7. See, e.g., *Stone v. Graham*, 449 U.S. 39 (1980).

8. The starting point for the post-war explosion of religious liberty cases is *Everson v. Board of Educ.*, 330 U.S. 1 (1947).

9. *United States v. Macintosh*, 283 U.S. 605 (1931).

10. See, e.g., 1 *Timothy* 1:9-10 wherein lawlessness, patricide, matricide, whoremongering, murder, fornication, sexual perversion, kidnapping, lying, and perjury are condemned as contrary to the law. See also Isaacs, *The Common Law of the Bible*, 7 A.B.A.J. 117 (1921) for an excellent treatment of the Old Testament influence upon criminal law.

11. The offense of "crime against nature" has often been defined as simply "[t]he abominable crime not fit to be named among Christians." *Hounselman v. People*, 168 Ill. 172, 48 N.E. 304 (1897).

12. See generally H. CLARK, *LAW OF DOMESTIC RELATIONS* 32-33, 642-50 (1968).

13. See, e.g., *Kilgour v. Miks*, 6 G. & J. 268, 274 (Md. 1834) where the Maryland Court of Appeals wrote that "Ours is a christian community, and a day set apart as the day of rest, consecrated by the resurrection of our Saviour, and embraces the next twenty-four hours next ensuing the midnight of Saturday."

14. The preamble to the federal Constitution provides that the Constitution is established to

may be legislated,<sup>15</sup> our statute books and court reports are full of instances where the law seeks to guide our behavior towards a moral end. For example, the deduction of charitable contributions allowed by the Internal Revenue Code<sup>16</sup> is designed specifically to induce contributions to charity. Since our religious heritage has had such a far-reaching impact upon our legal system, this paper will analyze the history of the doctrine that Christianity is part of the common law.

## II. THE COMMON LAW

According to Black's Law Dictionary, common law is defined as follows:

As distinguished from law created by the enactment of legislatures, the common law comprises the body of those principles and rules of action, relating to the government and security of persons and property, which derive their authority solely from usages and customs of immemorial antiquity, or from the judgments and decrees of the courts recognizing, affirming, and enforcing such usages and customs.<sup>17</sup>

The common law's origins are indeed shrouded in history since its precepts have been derived from Greek, Roman, Mosaic, Germanic and Christian jurisprudence.<sup>18</sup> Scholars have maintained that despite the disparate origins of the common law it has at all times been derived from "general rules binding on all men as moral and rational beings, and discoverable by human reason without any special aid of revelation."<sup>19</sup> Accordingly, everyone can equally ascertain this law of nature by rational processes.<sup>20</sup> As Lord Coke wrote,

For reason is the life of the law nay the common law itself is nothing else but reason, which is to be understood of an artificial perfection of reason, gotten by long study, observation and experience, and not of every man's natural reason; for *nemo nascitur artifex* . . . no man out of his own private reason ought to be wiser than the law, which is the perfection of reason.<sup>21</sup>

The touchstone of the rational process which yields the common law has been referred to as "first principles,"<sup>22</sup> or more commonly, "natural law." Natural law, according to Pound, generally refers to the "princi-

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"establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare and secure the Blessings of Liberty . . ." U.S. CONST. preamble.

15. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

16. 26 U.S.C. § 170a (1982). See 1 S. SURREY, W. WARREN, P. MCDANIEL & H. AULT, *FEDERAL INCOME TAXATION* 246 (1972).

17. BLACK'S LAW DICTIONARY 251 (rev. 5th ed. 1979).

18. O. HOLMES, *THE COMMON LAW* 1 (1881).

19. F. POLLOCK, *THE GENIUS OF THE COMMON LAW* 11 (1912).

20. *Id.*

21. R. POUND & T. PLUCKNETT, *READINGS ON THE HISTORY & SYSTEM OF THE COMMON LAW* v (3d ed. 1927) (citing COKE ON LITTLETON 976 (1628)).

22. *Id.* (citing ST. GERMAIN, *DOCTOR AND STUDENT* ch. 5 (1523)).

ples which philosophy and ethics discover as those which should govern human actions and relations."<sup>23</sup> As prelates trained in Christian philosophy came to dominate the English legal system, English jurisprudence came to recognize the natural law, to which the church is loyal, as controlling.<sup>24</sup> The great English legal minds including John of Salisbury, Fortescue, St. German, Coke, Holt, and Blackstone, embraced the notion that since the common law is derived from natural law, and, therefore, from the law of God, any act of Parliament inconsistent with this law would be void.<sup>25</sup>

This is not to say that the common law is a static concept. As Holmes explains, it is "always approaching, and never reaching, consistency."<sup>26</sup> By following precedents and providing reasons for decisions, judges continually refine the law.<sup>27</sup> He writes:

[L]ife of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even [w]hen, the prejudices which judges share with their fellow-men, have had a good deal to do . . . in determining the rules by which men are governed.<sup>28</sup>

The law finds new reasons to justify timeless truths, when the old reasons are no longer suitable.<sup>29</sup> As Pollock writes, "[T]he Genius of the [common law] has somehow contrived to extract from all the theoretical confusion a body of law which is quite well understood by those who handle it, and quite sufficient for every day needs, and how the reputation of being, on the whole just and merciful."<sup>30</sup>

### III. EARLY ENGLISH CASES

Leading English jurists have long considered the law of God to be part of the law of England. Also, the Church of England is "established" in the Erastian sense, with the king as "the only supreme head on earth of the Church of England."<sup>31</sup> As a result of these two factors it is not surprising that English courts often looked to Christianity for the content of their decisions.

One of the earliest recorded instances of a court relying explicitly on Christian doctrine was in *Calvin's Case*,<sup>32</sup> wherein Lord Coke, relying

23. *Id.* at 8.

24. R. O'SULLIVAN, CHRISTIAN PHILOSOPHY IN THE COMMON LAW 24 (1947).

25. R. POUND & T. PLUCKNETT, *supra* note 21, at 33 (citing 1 W. BLACKSTONE, COMMENTARIES 41; Bonham's case, 77 Eng. Rep. 638 (1610)).

26. O. HOLMES, *supra* note 18, at 36.

27. *Id.* at 37.

28. *Id.* at 1.

29. *Id.* at 36.

30. F. POLLOCK, *supra* note 19, at 87.

31. Act of Supremacy, 26 Hen. 8 c.1 (1534).

32. 77 Eng. Rep. 377 (1608).

on the Second Epistle to the Corinthians, held that infidels could not maintain an action in court.<sup>33</sup> Years later, this holding was severely criticized by Chief Justice Willes, who wrote, "Even the devils themselves, whose subjects, [Lord Coke] says, the heathens are, cannot have worse principles: and besides the irreligion of it, it is a most impolitic notion and would at once destroy all that trade and commerce from which all this nation reaps such good benefits."<sup>34</sup>

However, the leading early English opinion in this area is *Taylor's Case*. It is worth setting out in full:

An information exhibited against him in the Crown-Office, for uttering of divers blasphemous expressions, horrible to hear, [viz.] that Jesus Christ was a bastard, a whoremaster, religion was a cheat; and that he neither feared God, the devil, or man.

Being upon his trial, he acknowledged the speaking of the words, except the word bastard; and for the rest, he pretended to mean them in another sense than they ordinarily bear, [viz.] whoremaster, i.e. that Christ was master of the whore of Babylon, and such kind of evasions for the rest. But all the words being proved by several witnesses, he was found guilty.

And Hale said, that such kind of wicked blasphemous words were not only an offence to God and religion, but a crime against the laws, State and Government, and therefore punishable in this Court. For to say, religion is a cheat, is to dissolve all those obligations whereby the civil societies are preserved, and that Christianity is parcel of the laws of England; and therefore to reproach the Christian religion is to speak in subversion of the law.

Wherefore they gave judgment upon him, [viz.] to stand in the pillory in three several places, and to pay one thousand marks fine, and to find sureties for his good behaviour during life.<sup>35</sup>

Hale's statement is the first explicit judicial pronouncement that Christianity is part of the common law. Until *Taylor's Case*, blasphemy was considered an ecclesiastical offense. Hale probably included his Famous dictum in order to extend the jurisdiction of the civil courts to include blasphemy.<sup>36</sup> Fifty-two years later, blasphemy became a criminal offense. In *Woolston's Case*,<sup>37</sup> a clergyman was prosecuted for making jokes about the miracles performed by Christ. Lord Raymond rejected the argument that the clergyman's statements were mere differences of opinion cognizable only in ecclesiastical courts. Lord Raymond stated:

I would have it taken notice of, that we not meddle with differences in

33. 2 *Corinthians* 6:14.

34. *Omychund v. Barker*, 1 Atk. 22, Willes 538, 26 Eng. Rep. 15 (1744).

35. *R. v. Taylor*, 1 Vent. 293, 3 Keb. 607, 86 Eng. Rep. 189 (1676).

36. *Bowman v. Secular Society*, [1916-17] 1 All E.R. 1 (1917).

37. *R. v. Woolston*, 94 Eng. Rep. 655 (1909).

opinion, and that we interpose only where the very root of Christianity [is spoken of] . . . . [T]o say, [that] an attempt to subvert the establish[ed] religion is not punishable by those laws upon which it is establish[ed] is an absurdity.<sup>38</sup>

Although he was a supporter of religious tolerance, Lord Mansfield also believed that blaspheming Christianity was a crime. In 1767 he held in *Evans v. Chamberlain of London*, "The eternal principles of natural religion are part of the common law; the essential principles of revealed religion are part of the common law, so that any person reviling, subverting or ridiculing them may be prosecuted at common law."<sup>39</sup> Consequently, the common law crime of blasphemy traces its origin to the historic battle between the civil and ecclesiastical courts.

In *De Costa v. De Paz*,<sup>40</sup> the English courts handed down perhaps the most bizarre holding in this area. A bill was brought to enforce a will of a recently deceased Jew who directed that 1,200 pounds be spent for the maintenance of a synagogue and the propagation of his faith. The Lord Chancellor argued that such a charity could not be established because it was contrary to the Christian religion and hence English law. Lord Hardwicke, noting that this was not a case where a charity was set up to aid the Jewish poor, wrote:

[B]ut this is a bequest for the propagation of the Jewish religion, and though it is said that this is a part of our religion, yet the intent of this bequest must be taken to be in contradiction to the Christian religion, which is a part of the law of the land, which is so laid down by Lord Hale and Lord Raymond; and it undoubtedly is so, for the constitution and policy of this nation is founded thereon. As to the Act of Toleration, no new right is given by that, but only an exemption from the penal laws. The Toleration Act recites the penal laws, and then not only exempts from those penal laws, but puts the religion of the dissenters under certain regulations and tests. This renders those religions legal, which is not the case of the Jewish religion, that is not taken notice of by any law, but is barely connived at by the legislature.<sup>41</sup>

Accordingly, he declared the law invalid and applied the money to teaching Christianity. Similarly, in 1819 Lord Eldon held that no one could establish a charity for the purpose of teaching Judaism, writing, "I apprehend that it is the duty of every judge presiding in an English court of justice, when he is told that there is no difference between worshipping the Supreme Being in chapel, church, or synagogue, to recollect that Christianity is part of the law of England."<sup>42</sup>

Such pronouncements may not be all that surprising given the devel-

38. *Id.*

39. 2 R. BURN, ECCLESIASTICAL LAW 207 (9th ed. 1842).

40. 2 Swann. 487 (1754).

41. *Id.* at 490.

42. *In Re Bedford Charity*, 36 Eng. Rep. 696 (1819).

opment of English jurisprudence. As has been shown, the Church of England was the established church, and common law judges looked to Christianity and natural law as the basis for the common law. These men were active in further developing the body of English common law and were alive during many of the convulsive battles for control of the Church of England and the struggle of the king against Parliament. Given the instability they saw around them, it is not surprising that they sought to explicitly enshrine Christianity in the law of the land and punish all those who defiled or failed to support this "established religion."

#### IV. THE COLONIAL CONTEXT

Many men and women left England for the New World to escape these very same battles. With them they brought their language, their customs, and their laws. Early colonists did not immediately embrace the common law.<sup>43</sup> The Puritans of New England were particularly hostile to it.<sup>44</sup> The common law has always exhibited a remarkable assimilative power, and, therefore, once lawyers came to the colonies in greater numbers, the common law was accepted in all thirteen colonies.<sup>45</sup> The common law was modified to suit American needs. Justice Story recognized this in *Van Ness v. Pacard*<sup>46</sup> when he held that the United States has adopted only that portion of the common law applicable to our situation.

The American situation was indeed different. Since many of the settlers came specifically to escape religious persecution,<sup>47</sup> it is not surprising that some measure of religious liberty soon developed in the colonies. Many other social factors contributed to this trend, including the colonists' migration within the New World,<sup>48</sup> the emergence of new sects,<sup>49</sup> the small percentage of church members among the colonists,<sup>50</sup> the European experience of established churches,<sup>51</sup> the evangelical Great Awakening movement,<sup>52</sup> Freemasonry,<sup>53</sup> and foreign trade.<sup>54</sup>

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43. R. POUND & T. PLUCKNETT, *supra* note 21, at 307.

44. F. POLLOCK, *supra* note 19, at 57.

45. R. POUND & T. PLUCKNETT, *supra* note 21, at 307.

46. 27 U.S. (2 Pet.) 137, 144 (1829).

47. See A. STOKES & L. PFEFFER, *supra* note 2, at 3.

48. *Id.* at 21.

49. *Id.* at 21-23.

50. *Id.* at 23-24. Some scholars have claimed that fewer than one out of eight New Englanders were church members. Compare this to the YEARBOOK OF AMERICAN CHURCHES which reported that in 1962, 63.6% of the population belonged to churches.

51. See *id.* at 24-25.

52. *Id.* at 25-26.

53. *Id.* at 26-28. Freemasons in colonial America strongly opposed an established church, were nondenominational and friendly towards Jews.

54. *Id.* at 28-29.



This is not to say that full disestablishment and liberty of conscience were accomplished quickly or easily in the colonies. Many minority sects were persecuted in the early colonial period.<sup>55</sup> At the time of the adoption of the federal Constitution, virtually every state had an established church, a religious-based voting provision, religious qualifications for office, religious oaths, or taxes to support Christianity.<sup>56</sup> The first amendment was adopted to address these potential problems at the federal level.

The Constitution contains no mention of the words "God" or "Christianity." The only provision that deals with religion is the prohibition of religious tests for office.<sup>57</sup> The first amendment provides, in relevant part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."<sup>58</sup> Most scholars agree that even though contrary opinion surfaced in discussion, the general consensus among the public was that no national church should be established and that religious liberty should be guaranteed.<sup>59</sup> Most of the founders believed that questions of religion were matters of state rather than federal concerns.<sup>60</sup> Therefore, the states were not expressly proscribed from maintaining state churches. Indeed many established churches lingered on until the middle of the nineteenth century.<sup>61</sup> The 1940's, however, saw both the establishment and free exercise clauses incorporated against the states via the fourteenth amendment.<sup>62</sup> As to the establishment clause, the Supreme Court wrote the following,

The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause

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55. *See id.* at 7.

56. *See id.* at 562.

57. U.S. CONST. art. VI, cl. 3.

58. U.S. CONST. amend. I.

59. A. STOKES & L. PFEFFER, *supra* note 2, at 91.

60. *Id.* For an excellent treatment of the adoption of the first amendment, see *id.* at 90-100.

61. *See id.* at 183.

62. *Everson v. Board of Educ.*, 330 U.S. 1, 15-16 (1947); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

against establishment of religion by law was intended to erect "a wall of separation between church and state."<sup>63</sup>

In perhaps no other area of the law are the writings of the founders, specifically Madison and Jefferson, considered more authoritative than in the area of religious freedom. Madison, the author of the highly influential "Memorial and Remonstrance" of 1785 against the Virginia House of Delegates' proposal to provide for teachers of Christianity through assessments, firmly supported the total separation of church and state.<sup>64</sup> He believed that if the state could establish Christianity to the exclusion of other religions, the state could just as easily establish one Christian denomination to the exclusion of others.<sup>65</sup> Although Madison apparently never specifically addressed the question of whether Christianity was part of American common law, he did steadfastly believe that Christianity should be allowed to flourish unfettered from any connection to worldly government or law.<sup>66</sup>

Along with Madison, Thomas Jefferson is the other great father of our religious freedom. Stating that the first amendment built "a wall of separation between Church and State,"<sup>67</sup> Jefferson consistently opposed any state connection with religion and favored a multiplicity of religious groups as necessary for progress.<sup>68</sup> Jefferson made repeated references to "natural law" in the Declaration of Independence and believed that this law recognized that men have certain inalienable rights which no law could transgress.<sup>69</sup> Consequently, Jefferson believed that Christianity was not a part of the common law.

In a letter dated 5 June 1824,<sup>70</sup> Jefferson declared that the judicial declaration that Christianity is part of the common law was a "usurpation of legislative power" which was a judicial "forgery" that consti-

63. *Everson*, 330 U.S. at 15.

64. See A. STOKES & L. PFEFFER, *supra* note 2, at 55-61.

65. *Id.* at 56.

66. *Id.* at 57.

67. The phrase appears in his 1 January 1802 reply to an address from the Danbury Baptist Association, of Connecticut, *reprinted in id.* at 53. Jefferson was the author of the seminal Virginia Bill for Establishing Religious Freedom of 1786 which provided that no one would ever be compelled to support any religion and that free exercise would be guaranteed. Although the Bill refers to "Almighty God" and the "Holy Author of our religion," Jefferson succeeded in blocking an amendment which would have inserted "Jesus Christ." He felt that by making the Bill nondominational he could ensure maximum freedom to all Virginians. Jefferson was so proud of his authorship of the Bill, a milestone, which Stokes & Pfeffer refer to as "[s]o important . . . in the history of man's struggle for religious liberty," that his authorship is noted in his epitaph. *Id.*

68. *Id.* at 58.

69. That Jefferson believed that this natural law was of divine origin can be seen in the Declaration's emphatic confession of faith - "we hold these truths to be self-evident . . . that [all men] . . . are endowed by their Creator with certain inalienable rights. . . ."

70. The letter is excerpted in I. CORNELISON, *THE RELATION TO CIVIL GOVERNMENT IN THE UNITED STATES OF AMERICA* 146 (1970).

tuted a “conspiracy between church and state.”<sup>71</sup> An Appendix to one of Jefferson’s works amplified this view.<sup>72</sup> In a rather ancient English case which questioned the extent that the ecclesiastical law was to be considered valid in a common law court, Jefferson argued that Judge Prisot mistakenly translated the Norman French to mean the law would give credence to “such laws of the church as have warrant in Holy Scripture” rather than to mean the ancient written laws of the church.<sup>73</sup> Jefferson concluded that because English ecclesiastical law derives its authority from the common law and Scripture does not, Prisot was incorrect.<sup>74</sup> Jefferson also attacked Hale, Blackstone, and Mansfield for judicially declaring Christianity to be part of the common law without ever citing any authority for the proposition. After finding no support for Hale’s statement in any medieval collection of English laws, Jefferson maintained:

[I]f therefore from the settlement of the Saxons to the introduction of Christianity among them that system of religion could not be a part of the common law, because they were not yet Christians; and if having their laws from that period to the close of the common law we are able to find among them no such act of adoption, we may safely affirm (though contradicted by all the judges and writers on earth) that Christianity neither is nor ever was a part of the common law.<sup>75</sup>

Lastly, Jefferson claimed that since Bracton, Fleta, Britton, Glanvil, and all the other great jurists who lived between the Norman Conquest and the year of Hale’s statement are silent on the subject, Hale engaged in judicial legislating.<sup>76</sup>

In *State v. Chandler*,<sup>77</sup> Chief Justice Clayton of the Delaware Supreme Court responded to Mr. Jefferson’s assertions. Initially Clayton rebuked Jefferson for denouncing Lord Mansfield as a judicial forger. He noted that Mansfield was a staunch opponent of religious persecution who had written that “there is nothing . . . more inconsistent with the rights of human nature, more contrary to the spirit and precepts of the christian religion . . . than persecution.”<sup>78</sup> Next, Clayton argued that it was Jefferson, not the common law judges, who misconstrued the ancient Norman French. Clayton interpreted Jefferson as having said that the ancient case held that the sentence of an ecclesiastical tribunal, when warranted by Scripture, “shall be credited in a

71. *Id.*

72. T. JEFFERSON, REPORTS OF CASES DETERMINED IN THE GENERAL COURT OF VIRGINIA FROM 1730-1740, AND FROM 1768-1772, at 137-42 (1829).

73. *Id.*

74. *Id.*

75. *Id.* at 140.

76. *Id.* at 141.

77. 2 Del. (2 Harr.) 553 (1837).

78. *Id.* at 558.

common law court as the decision of a competent tribunal, provided the ecclesiastical tribunal did not exceed its jurisdiction."<sup>79</sup> Clayton noted that this argument is largely irrelevant, because neither Hale, Mansfield, nor Blackstone ever cited the case as holding that Christianity is part of the common law.<sup>80</sup> Lord Hale was "an authority of himself and [was] considered as a sufficient authority for a common law principle in every case where there is no contrary authority."<sup>81</sup> Therefore, Clayton concluded that "Lord Mansfield's alleged judicial forgery stood, as the cases we have cited prove upon other and many other authorities than Mr. Jefferson appears to have ever read."<sup>82</sup>

## V. AMERICAN JUDICIAL DECISIONS

Article XI of the 1796 Treaty of Peace and Friendship between the United States and Tripoli<sup>83</sup> provided:

As the government of the United States of America is not in any sense founded on the Christian religion-as it has in itself no character of emnity against the laws, religion or tranquillity of Musselmen-and as the said states never have entered into any war or act of hostility against any Mahometan nation, it is declared by the parties, that no pretext arising from religious opinions shall ever produce an interruption of the harmony existing between the two countries.

Article VI of the federal Constitution declares that all treaties are the supreme law of the land and thereby bind all state judges. How can a state judge, acting in accordance with the Constitution, declare Christianity to be part of American common law? Many scholars have attempted to undercut the authority of the treaty by arguing that article XI was repealed by subsequent treaties with Islamic nations which omit this article.<sup>84</sup> Others argue that the provision is without binding or precedential effect, and was inserted to only mollify the Turks who feared that a Christian government would repeal the treaty. That fear is supported in the language of Lord Coke, "All infidels are, in law, . . . perpetual enemies [for the law presumes not that they will be converted, that being . . . a remote possibility], for between them, as with the [D]evils, whose subjects they be, and the Christian, there is perpetual hostility, and can be no a peace."<sup>85</sup> Virtually every American court that has confronted this issue has adopted one of these arguments.

79. *Id.* at 559.

80. *Id.* at 561.

81. *Id.* at 562.

82. *Id.* Clayton's opinion barely conceals its contempt for Jefferson's position.

83. Treaty of Peace and Friendship, Nov. 4, 1796, United States - Tripoli, 8 Stat. 154.

84. I. CORNELISON, *supra* note 70, at 164.

85. Calvin's case, 77 Eng. Rep. 377, 397 (1907). See also 2 *Corinthians* 6:15 ("And what concord hath Christ with Belial? Or what part hath he that beliveth with an infidel?").

Indeed, nearly every court which has dealt with the question of whether Christianity is part of the common law has answered in the affirmative. In *People v. Ruggles*,<sup>86</sup> the defendant was charged with common law blasphemy for publicly proclaiming that "Jesus Christ was a bastard, and his mother must be a whore."<sup>87</sup> He argued that whereas Christianity was part of the common law of England, the first amendment prevented its being part of American law. Moreover, his speech would be legally protected were he a Jew or Moslem.<sup>88</sup> Chancellor Kent, citing *Taylor's Case, R. v. Woolsten*, and Blackstone<sup>89</sup> rejected these arguments writing:

The free, equal, and undisturbed, enjoyment of religious opinion, whatever it may be, and free and decent discussions on any religious subject, is granted and secured; but to revile, with malicious and blasphemous contempt, the religion professed by almost the whole community, is an abuse of that right. Nor are we bound, by any expressions in the constitution, as some have strangely supposed, either not to punish at all, or to punish indiscriminately the like attacks upon the religion of Mahomet or of the grand Lama; and for this plain reason, that the case assumes that we are a christian people, and the morality of the country is deeply ingrafted upon christianity, and not upon the doctrines or worship of those imposters.<sup>90</sup>

Kent concluded by stating that "Christianity, in its enlarged sense, as a religion revealed and taught in the Bible, is not unknown to our law."<sup>91</sup>

During debates over the 1821 New York Constitution, this opinion was attacked as an establishment of religion and a criminalization of attendance at a Jewish or Islamic service.<sup>92</sup> Kent responded to these criticisms by arguing that Ruggles' statements:

Were indictable on the same principle as the act of wantonly going naked, or committing impure and indecent acts in the public streets. It was not because [C]hristianity was established by law, but because [C]hristianity was in fact the religion of this country, the rule of our faith and practice, and the basis of the public morals. Such blasphemy was an outrage upon public decorum, and if sanctioned by our tribunals would shock the moral sense of the country, and degrade our character as a christian people. . . . The authors of our constitution never meant to extirpate christianity. . . . Are we not a christian people? Do not ninety-nine hundredth of our fellow citizens hold the general truths of the Bible to be dear and sacred? To attack them with reibaldry and

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86. 8 Johns. 290 (N.Y. 1811).

87. *Id.*

88. *Id.* at 291-92.

89. *Id.* at 293 (citing 4 W. BLACKSTONE, COMMENTARIES 59 (blasphemy is the "contumelious reproach[es] of Christ")).

90. *Ruggles*, 8 Johns. at 295.

91. *Id.* at 297.

92. New York State Constitutional Convention of 1821, at 462.

malice, in the presence of those very believers, must, and ought to be a serious public offence. It disturbs, and annoys, and offends, and shocks, and corrupts the public taste. The common law, as applied to correct such profanity, is the application of common reason and natural justice to the security of the peace and good order of society.<sup>93</sup>

Similar views were advanced at other points during the debates. Chief Justice Spencer argued that the state should adopt an amendment rejecting the *Ruggles* decision.<sup>94</sup> Martin van Buren, a future president of the United States, supported *Ruggles* adding, however, that no religion should be established. Rufus King, a future Presidential candidate, argued that Christianity merited special protection, claiming:

While all mankind are by our constitution tolerated, and free to enjoy religious profession and worship within this state, yet the religious professions of the Pagan, the Mahometan, and the Christian, are not, in the eye of the law, of equal truth and excellence.

According to the Christian system, men pass into a future state of existence, when the deeds of their life become the subject of rewards or punishment—the moral law rests upon the truth of this doctrine, without which it has no sufficient sanction. Our laws constantly refer to this revelation, and by the oath which they prescribe, we appeal to the Supreme Being, so to deal with us hereafter, as we observe the obligation of our oaths.

The Pagan world were, and are, without the mighty influence of this principle, which is proclaimed in the Christian system—their morals were destitute of its powerful sanction, while their oaths neither awakened the hopes, nor the fears which a belief in Christianity inspires.

While the constitution tolerates the religious professions and worship of all men, it does more in behalf of the religion of the gospel—and by acknowledging, and in certain sense, incorporating its truths into the laws of the land, we are restrained from adopting the proposed amendment, whereby the Christian religion may lose the security which every other Christian nation is anxious to afford to it.<sup>95</sup>

The motion to amend the state constitution to prevent the public support of Christian worship and to overrule *Ruggles* by implication was defeated.<sup>96</sup>

Relying on the English precedents and *Ruggles*, the Pennsylvania Supreme Court upheld a blasphemy conviction in *Updegraph v. Commonwealth*.<sup>97</sup> Justice Duncan wrote that “Christianity, general Christianity is, and always has been a part of the common law of Pennsylvania . . . not Christianity with an established church . . . but

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93. *Id.* at 463.

94. *Id.* at 574.

95. *Id.* at 576.

96. *Id.*

97. 11 Serg. & Rawle 394 (Pa. 1824).

Christianity with liberty of conscience to all men."<sup>98</sup> Although "the laws and institutions of this state are built on the foundation of reverence for christianity,"<sup>99</sup> full freedom of worship is guaranteed provided that such worship does not disturb the public place by publicly villifying Christianity.<sup>100</sup>

In *Vidal v. Girard*,<sup>101</sup> the United States Supreme Court, relying upon *Updegraph*, held that Christianity was part of *Pennsylvania's* common law. The case concerned a challenge to the will of Stephen Girard who had devised substantial sums to the establishment of a college for white male orphans. The will provided that although morality should be taught, no minister or ecclesiastic should ever be present on the grounds of the college.<sup>102</sup> The will was challenged on the grounds that it was "derogatory and hostile to the Christian religion" because, by excluding ministers from the college, the will prohibited the instruction of Christianity.<sup>103</sup> Justice Story wrote that although "it is also said, and truly, that the Christian religion is a part of the common law of Pennsylvania," the guarantees of religious freedom embodied in the state constitution extends religious liberty to all sects.<sup>104</sup>

So that we are compelled to admit that although Christianity be a part of the common law of the state, yet it is so in this qualified sense, that its divine origin and truth are admitted, and therefore it is not to be maliciously and openly reviled and blasphemed against, to the annoyance of believers or the injury of the public. Such was the doctrine of the Supreme Court of Pennsylvania in *Updegraff v. The Commonwealth*, 11 Serg. and Rawle, 394.

It is unnecessary for us, however, to consider what would be the legal effect of a devise in Pennsylvania for the establishment of a school or

98. *Id.* at 400.

99. *Id.* at 403.

100. The court noted that in 1824 no free government was in existence which did not acknowledge Christianity as the religion of the country. *Id.*

*State v. Chandler*, see text accompanying note 77-82, reached the same result as *Ruggles* and *Updegraph*. After disposing of Jefferson's views, the court upheld a blasphemy conviction, holding that the court must take note of the prevailing religion of the people; were the people to embrace Islam, Islam would then become part of the common law. Were Delawareans to embrace Islam, reviling Allah would then become a crime while publicly denouncing Christ thenceforth be legal, as long as public peace were not disturbed. 2 Del. (2 Harr.) at 568 (1837). The fatal flaw in this argument is that it ignores the fact that the natural law is transcendent. If the common law codifies natural law, the law cannot be changed merely at whim or because people convert. Positive law can be changed to reflect a will but the common law cannot. If Christianity were a basis for the common law, Islam could not supplant it as a basis, although decisions not inconsistent with Islam could be made. The author believes that in the absence of public disturbance, criminalizations of blasphemy on the ground that a particular religion is part of the common law cannot be justifiably supported unless heresy itself is a civil crime.

101. 43 U.S. (2 How.) 127 (1844).

102. *Id.* at 143.

103. *Id.* at 185.

104. *Id.* at 198.

college, for the propagation of Judaism, or Deism, or any other form of infidelity.<sup>105</sup>

The court then held that the will was valid, because laymen, as well as ministers, could teach Christian morals to the orphans.<sup>106</sup>

Prosecuting violations of Sunday closing laws gave rise to many of the cases which hold that Christianity is part of the common law. *City Council of Charleston v. Benjamin*,<sup>107</sup> was such a case. In *Benjamin*, a Jewish glover challenged the city's Sunday closing laws. Benjamin argued that as a Sabatarian who could not work on Sundays, he was compelled to either lose money by not working on Saturdays or violate his religious scruples which prohibit working on Saturdays. The Charleston Court emphasized that the guarantees of religious liberty in the state constitution permitted undisturbed religious observance by all South Carolinians and, therefore, the City Council could not compel a Jew to observe Sunday as the Sabbath. Judge O'Neill wrote:

It was that same glorious spirit of mercy and love, which proclaimed the birth of the Saviour, and as its consequence, "peace, good will towards men." It was that same Christianity, which sought its promulgators among the humblest of the Jews, and taught them, "love your enemies, bless them that curse you, do good to them which hate you, and pray for them which despitefully use you and persecute you." But this toleration, thus granted, is a religious toleration; it is the free exercise and enjoyment of religious profession and worship, with two provisions, one of which, that which guards against acts of licentiousness, testifies to the Christian construction, which this section should receive.<sup>108</sup>

The court maintained, notwithstanding the guarantees of religious liberty, that it could safely say that since Christianity and good morals were synonymous, blasphemy and divorce were proscribed.<sup>109</sup> However, these laws, like the Sunday closing laws, cannot be construed as

105. *Id.*

106. This case is cited for the proposition that Christianity is part of the common law of the United States. In fact, since a state law and not a federal question was presented, any decision beyond that Christianity was part of the law of Pennsylvania was extraneous. See *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842) (Story, J.) The Pennsylvania Supreme Court refused to enforce a devise for the establishment of an "Infidel Society" writing:

It is in entire consistency with this sacred guarantee of the rights of conscience and religious liberty to hold that, even if Christianity is no part of the law of the land, it is the popular religion of the country, an insult to which would be indictable as directly tending to disturb the public peace. The laws and institutions of this state are built on the foundation of reverence for Christianity. To this extent, at least, it must certainly be considered as well settled that the religion revealed in the Bible is not to be openly reviled, ridiculed or blasphemed, to the annoyance of sincere believers who compose the great mass of the good people of the Commonwealth.

*Zeisweiss v. James*, 63 Pa. 465, 471 (1870).

107. 33 S.C.L. (2 Strob.) 508 (1846).

108. *Id.* at 522.

109. *Id.* at 523.



violating any free exercise right. They are health and welfare regulations by the police for the good of the people and neither compel nor prohibit any form of worship.<sup>110</sup> Accordingly, the law was upheld.

During the 19th century, Pennsylvania courts consistently rejected religious challenges to Sunday closing laws. The courts, in language similar to that employed in the *Benjamin* opinion, stressed that although religious toleration was guaranteed, Christian institutions were entitled to special respect. Perhaps the most emphatic holding was in *Mohney v. Cook*:<sup>111</sup>

The declaration that Christianity is part of the law of the land, is a summary description of an existing and very obvious condition of our institutions. We are a Christian people, in so far as we have entered into the spirit of Christian institutions, and become imbued with the sentiments and principles of Christianity; and we cannot be imbued with them, and yet prevent them from entering into and influencing, more or less, all our social institutions, customs, and relations, as well as all our individual modes of thinking and acting. It is involved in our social nature, that even those among us who reject Christianity, cannot possibly get clear of its influence, or reject those sentiments, customs, and principles which it has spread among the people, so that, like the air we breathe, they have become the common stock of the whole country, and essential elements of its life.

It is perfectly natural, therefore, that a Christian people should have laws to protect their day of rest from desecration. Regarding it as a day necessarily and divinely set apart for rest from worldly employments, and for the enjoyment of spiritual privileges, it is simply absurd to suppose that they would leave it without any legislative protection from the disorderly and immoral. The sentiment that sustains it must find expression through those who are elected to represent the will of their constituents.<sup>112</sup>

Relying on *Ruggles* and state Constitutional debates, a New York

110. *Id.* at 527.

111. 26 Pa. 342 (1855).

112. *Id.* at 347-48. See also *Specht v. Commonwealth*, 8 Barr. 312, 325 (Pa. 1848) ("In a Christian community, where a very large majority of the people celebrate the first day of the week as their chosen period of rest from labor, it is not surprising that they should have received the legislative sanction.")

Other courts have also upheld Sunday closing legislation on the same basis:

Sunday or the Sabbath is properly and emphatically called the Lord's day, and is one amongst the first and most sacred institutions of the christian religion. This system of religion is recognized as constituting a part and parcel of the common law, and as such all the institutions growing out of it, or, in any way, connected with it, in case they shall not be found to interfere with the rights of conscience, are entitled to the most profound respect, and can rightfully claim the protection of the law making-power of the State.

*Shover v. State*, 10 Ark. 259, 263 (1850). See also *Richmond v. Moore*, 107 Ill. 429, 435 (1884) ("When the great body of the people are Christians . . . our laws and institutions must necessarily be based upon and embody the teachings of the Redeemer of mankind. It is impossible that it should be otherwise . . . [O]ur civilization and institutions are emphatically Christian . . ."); *Adams v. Gay*, 19 Utah 365 (1847).

court upheld a Sunday closing law in *Lindenmuller v. The People*.<sup>113</sup> The court held that a day of rest could be established by the legislature and that religion was not established merely because the legislature had selected the day upon which the majority of the people chose to rest for religious reasons.<sup>114</sup> Judge Allen wrote:

It would be strange that a people, christian in doctrine and worship, many of whom or whose forefathers had sought these shores for the privilege of worshipping God in simplicity and purity of faith, and who regarded religion as the basis of their civil liberty, and the foundation of their rights, should, in their zeal to secure to all the freedom of conscience which they valued so highly, solemnly repudiate and put beyond the pale of the law, the religion which was dear to them as life, and dethrone the God who, they openly and avowedly professed to believe, had been their protector and guide as a people.<sup>115</sup>

Significantly, despite the dicta claiming that Christianity is part of the common law, the courts upheld Sunday closing legislation on police power grounds. In upholding Maryland's Sunday closing law against an establishment clause challenge, the United States Supreme Court, in 1961, again recognized that the state may order stores to close on a given day and that otherwise valid legislation would not be struck down solely because it coincided with the views of a religious group.<sup>116</sup>

Several mid-nineteenth century cases which involved Sunday closing laws, provided courts with opportunities to deny that Christianity was part of the common law. In *Bloom v. Richards*,<sup>117</sup> the Ohio Supreme Court upheld the Ohio Sunday closing law on secular grounds. The Court specifically stated that the law would be invalid had it been enacted for any religious purpose.<sup>118</sup> It was insignificant that the day selected by the legislature was the day on which most people would refuse to work.<sup>119</sup> However, the court specifically held, because of the wording of the state constitutional provision "that no preference shall ever be given, by law, to any religious society or mode of worship,"<sup>120</sup> that neither "Christianity, [n]or any other system of religion, is a part of the law of the state."<sup>121</sup>

113. 33 Barb. 548 (N.Y. 1861).

114. *Id.* at 571.

115. *Id.* at 561.

116. *McGowan v. Maryland*, 366 U.S. 420 (1961). Note that the Constitution provides, "[I]f any Bill shall not be returned by the President within ten days (*Sundays excepted*) after it shall have been presented to him, the same shall be a law . . . ." U.S. CONST. art. I, § 7 (emphasis added).

117. 2 Ohio St. 387 (1863).

118. *Id.* at 391.

119. *Id.* at 392.

120. *Id.* at 390.

121. *Id.*

In *Ex Parte Newman*,<sup>122</sup> the California Supreme Court held that an enactment entitled the "Act to provide for the better observance of the Sabbath" was invalid, as discriminating in favor of one religion over the other. Chief Justice Terry's majority opinion maintained that the statute, as drafted, amounted to an establishment of religion.<sup>123</sup> Chief Justice Terry, also questioned the propriety of the legislature's mandating a uniform amount of rest, when individual physiologies may demand a greater or lesser amount of rest.<sup>124</sup> The concurring opinion of Justice Burnett contained the following significant language:

We often meet with the expression that Christianity is a part of the common law. Conceding that this is true, it is not perceived how it can influence the decision of a constitutional question. The Constitution of this State will not tolerate any discrimination or preference in favor of any religion; and, so far as the common law conflicts with this provision, it must yield to the Constitution. Our constitutional theory regards all religions, as such, equally entitled to protection, and all equally unentitled to any preference. Before the Constitution they are all equal. In so far as the principles found in all, or any one or more of the different religious systems, are considered applicable to the ends legitimately contemplated by civil constitutional government, they can be embodied in our laws and enforced. But when there is no ground or necessity upon which a principle can rest, but a religious one, then the Constitution steps in, and says that you shall not enforce it by authority of law.<sup>125</sup>

Though specifically based on the California Constitution, the thrust of Burnett's opinion is that if Christianity were ever part of the common law, it would be overruled by first amendment.

In 1872, a group of Cincinnati taxpayers sought to enjoin the city's Board of Education from enforcing its resolutions which would require that a Bible reading and appropriate singing begin each school day.<sup>126</sup> Citing *Bloom v. Richards*<sup>127</sup> and the treaty with Tripoli, the taxpayers claimed that since Christianity was not part of the law of Ohio, reading the King James version of the Bible and instructing children in religion violated the liberty of conscience guaranteed by the Constitution.<sup>128</sup> Along with other defenses, the Board argued that the treaty with Tripoli is the only late 18th century American treaty which does not recognize America's religious traditions.<sup>129</sup> Moreover, the Board argued that

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122. 18 Cal. 679 (1861), *rev'd sub nom. Ex Parte Andrews*, 18 Cal. 678 (1861).

123. *Id.* at 507.

124. *Id.* at 509.

125. *Id.* at 513. See also *State v. Bott*, 31 La. Ann. 663 (1879) (Christianity is not part of the law of Louisiana because Louisiana is not a common law state).

126. *Board of Educ. of Cincinnati v. Minor*, 23 Ohio St. 211 (1872).

127. 2 Ohio St. 387 (1863).

128. *Minor*, 23 Ohio St. at 217.

129. *Id.* at 234.

cases such as *Ruggles*, *Updegraff*, *Vidal*, and *Chandler* correctly stated the relationship between Christianity and the common law.<sup>130</sup>

The court feared that the Board intended to teach doctrinal Christianity through this scheme. Judge Welsh, in perhaps the most vociferous judicial denial that Christianity is part of the common law, wrote:

We are told that [the word religion as used in the resolutions] must mean "Christian religion," because "Christianity is a part of the common law of this country," lying behind and above its constitutions. Those who make this assertion can hardly be serious, and intend the real import of their language. If Christianity is a law of the state, like every other law, it must have a sanction. Adequate penalties must be provided to enforce obedience to all its requirements and precepts. No one seriously contends for any such doctrine in this country, or, I might almost say, in this age of the world. The only foundation—rather, the only excuse—for the proposition, that Christianity is part of the law of this country, is the fact that it is a Christian country, and that its constitutions and laws are made by a Christian people. And is not the very fact that those laws do not attempt to enforce Christianity, or to place it upon exceptional or vantage ground, itself a strong evidence that they are the laws of a Christian people, and that their religion is the best and purest of religions? It is strong evidence that their religion is indeed a religion "without partiality," and therefore a religion "without hypocrisy." True Christianity asks no aid from the sword of civil authority. It began without the sword, and wherever it has taken the sword it has perished by the sword. To depend on civil authority for its enforcement is to acknowledge its own weakness, which it can never afford to do. It is able to fight its own battles. Its weapons are moral and spiritual. . . .<sup>131</sup>

Judge Welsh argued that since Christianity cannot be enforced in the courts and lacks sanctions, it is not the law of the state. Under this interpretation, it would be impossible for a court to uphold a conviction for common law blasphemy if no disturbance of the peace could be shown, since the common law cannot protect Christianity where it does not protect all other religions. In *Taylor's Case*, Judge Hale attempted to judicially enforce Christianity through a blasphemy statute. By implication, Judge Welsh rejects Hale's approach.

In 1887, the Holy Trinity Church hired a London pastor as rector and paid his passage to New York. The church was then charged with violating a federal law which prohibited anyone from hiring a foreigner and paying his passage to the United States.<sup>132</sup> The United States

130. *Id.* at 235.

131. *Id.* at 246-47. *Cf.* *State v. Hallock*, 16 Nev. 373 (1882).

132. Act of Feb. 26, 1885, ch. 164, 23 Stat. 332, *repealed by* Act of June 27, 1952, ch. 177, § 403(a)(2), 66 Stat. 279.

Supreme Court reversed the conviction,<sup>133</sup> with Justice Brewer noting that the statute had been designed to prevent large capitalists from pre-paying the passage of cheap foreign laborers. Accordingly, the statute was not intended to prohibit churches from paying the transportation of any foreign ministers it might hire. Moreover, wrote Justice Brewer, any law which accomplished that result would violate our Christian heritage.<sup>134</sup> Citing *Updegraph*, *Ruggles*, and *Vidal* the court concluded:

If we pass beyond these matters to a view of American life, as expressed by its laws, its business, its customs, and its society, we find everywhere a clear recognition of the same truth. Among other matters note the following: The form of oath universally prevailing, concluding with an appeal to the Almighty; the custom of opening sessions of all deliberative bodies and most conventions with prayer; the prefatory words of all wills, "In the name of God, amen;" the laws respecting the observance of the Sabbath, with the general cessation of all secular business, and the closing of courts, legislatures, and other similar public assemblies on that day; the churches and church organizations which abound in every city, town, and hamlet; the multitude of charitable organizations existing everywhere under Christian auspices; the gigantic missionary associations, with general support, and aiming to establish Christian missions in every quarter of the globe. These, and many other matters which might be noticed, add a volume of unofficial declarations to the mass of organic utterances that this is a Christian nation. In the face of all these, shall it be believed that a congress of the United States intended to make it a misdemeanor for a church of this country to contract for the services of a Christian minister residing in another nation?<sup>135</sup>

In 1931, the Supreme Court once again declared that "We are a Christian people."<sup>136</sup> However, by 1952, the Court would only declare that "we are a religious people."<sup>137</sup> Additionally, the House of Lords in 1917, reversing three hundred years of legal history, declared that Christianity is in fact not part of the common law.<sup>138</sup> Like many others in this area, the litigation concerned the validity of a bequest to an "anti-[C]hristian society." In an exhaustive opinion which painstakingly traced the development of Christianity as part of the common law, the Lords concluded that the bequest was valid.<sup>139</sup> Of the five opinions submitted, Lord Summer's analysis of the blasphemy cases

133. *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892).

134. *Id.* at 465.

135. *Id.*

136. *United States v. Macintosh*, 283 U.S. 605, 625 (1931).

137. *Zorach v. Clauson*, 343 U.S. 306, 313 (1952). *But see* *Snively v. Booth*, 36 Del. 378, 388, 170 A. 649, 653 (1935). (The "Christian religion . . . is part of our common law"); *Commonwealth v. American Baseball Club*, 290 Pa. 136, 138, 138 A. 497, 499 (1927) ("Christianity is part of the common law of Pennsylvania, and its people are Christian people").

138. *Bowman v. Secular Soc'y*, [1916-17] 1 All E.R. 1 (1917).

139. *Id.* at 32.

correctly concluded that had the judges been concerned with civil disorder instead of extirpating heresy, they would have realized that "to insult a Jew's religion is not less likely to provoke a fight than to insult an Episcopalian's", and on the other hand, the publication of a dull volume of blasphemies may well provoke nothing worse than throwing it into the fire."<sup>140</sup> The essence of his lengthy opinion is captured in the following:

My Lords, with all respect for the great names of the lawyers who have used it, the phrase 'Christianity is part of the law of England' is really not law; it is rhetoric, as truly so as was Erskine's peroration when prosecuting Williams: 'No man can be expected to be faithful to the authority of man, who revolts against the Government of God.' One asks what part of our law may Christianity be, and what part of Christianity may it be that is part of our law? Best, C.J. once said in *Bird v. Holbrook*, (1828) 4 Bing. 628, 641, 130 Eng. Rep. (Reprint) 911, (a case of injury by setting a spring-gun): 'There is no act which Christianity forbids that the law will not reach: if it were otherwise, Christianity would not be, as it has always been held to be, part of the law of England'; but this was rhetoric too. Spring-guns, indeed, were got rid of, not by Christianity, but by Act of Parliament. 'Thou shalt not steal' is part of our law. 'Thou shalt not commit adultery' is part of our law, but another part, 'Thou shalt love thy neighbor as thyself,' is not part of our law at all. Christianity has tolerated chattel slavery; not so the present law of England. Ours is, and always has been, a Christian State. The English family is built on Christian ideas, and if the national religion is not Christian there is none. English law may well be called a Christian law, but we apply many of its rules and most of its principles, with equal justice and equally good government, in heathen communities, and its sanction, even in courts of conscience, are material and not spiritual.<sup>141</sup>

Over the years, many publicists have supported a doctrine which would make Christianity part of American common law. Daniel Webster proclaimed that "general, tolerant Christianity, is the law of the land."<sup>142</sup> Cooley took a more restricted view, writing that:

Christianity is not a part of the law of the land in any sense which entitles the courts to take notice of and base their judgments upon it, except so far as they can find that its precepts and principles have been incorporated in and made a component part of the positive law of the state.<sup>143</sup>

However, others have denied that Christianity is part of the common law. Writing in 1902, Arthur W. Barber posited an Austinian approach. He maintained that unless the courts could enforce the

140. *Id.* at 28.

141. *Id.* at 30, 31.

142. Barber, *Christianity and the Common Law*, 14 THE GREEN BAG 267 (1902).

143. T. COOLEY, CONSTITUTIONAL LIMITATIONS 670 (22d ed. 1871).

precepts of Christianity, Christianity would be "a law without a sanction, and become an absurdity in logic as well as a nullity in fact."<sup>144</sup> Since Christianity is a religion, it must be enforced by moral and spiritual persuasion, not by legal authority. Although our institutions have demonstrably benefited from Scriptural teachings,<sup>145</sup> the "fact that the society is Christian in its faith and sympathies is important only as determining the form and spirit of those laws."<sup>146</sup>

## VI. CONCLUSION

The doctrine that Christianity is part of the common law originated in an England that had an established church and did not emphasize religious liberty. Although dispute surrounds the earliest opinion which cites the doctrine for a blasphemy conviction, some emanations from the doctrine may not be entirely without merit in the English jurisprudential system. The common law is a system wherein judges use reason to ascertain the principles which, in the absence of statutes, should govern human behavior. The common law tradition is meshed with natural law; a universal law applicable to all men in all situations.<sup>147</sup> It is this common law judges derive by the use of reason. Since the early English judges were clerics, it is not surprising that they appealed to Christianity as the *ratio decidendi*. Moreover, the establishment of the Church of England, with the sovereign at its head, further entangled the legal system and religion.

The establishment of a state supported church in the United States was expressly prohibited by the first amendment and no doubt spared us from the religious strife which tormented the English. However, although the first amendment absolutely prohibits the state from directly or indirectly punishing someone for a violation of a religious creed, the Constitution does not require the legal nor political system to renounce those principles of Judaeo-Christian ethics and morality that we have cherished for three centuries. The American courts which have held that Christianity is part of the common law were proclaiming that our institutions are indeed based upon those principles. The bulk of the case law in this area derives from a now discredited school of thought which tolerated, to the exclusion of all other faiths, an extensive entanglement between the state and the Christian religion. Nevertheless, these cases represent an attempt to recognize the moral content of our laws. While this author does not propose a revival of these precedents, there are certain timeless, transcendent moral and ethical precepts that

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144. Barber, *supra* note 142, at 267-68.

145. *Id.* at 270.

146. *Id.* at 273.

147. ARISTOTLE, NICHOMACHEAN ETHICS 141 (M. Ostwald trans. & ed. 1962).

undergird our law. Since we derive the moral force of our law from these precepts, we should be willing to recognize their contribution to our freedom.