

**A Study on
THE BIBLICAL FOUNDATIONS
OF PROCEDURAL LAW**

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INTRODUCTION

These readings are designed for law students and lawyers who desire to examine the law from a biblical perspective. The excerpted articles and scripture passages provide a starting point, and the comments and questions are designed to encourage further reflection or discussion on the basic issues. Use the book for personal study or as raw material for group discussion or bible study to explore the first principles of law and procedure.

This booklet is intended to help lawyers and future lawyers apply the scriptures to modern legal problems and theories. While God's Word provides the ultimate standard, specific answers to particular problems are sometimes elusive. This is not an excuse for Christian lawyers to ignore biblical principles; on the contrary, it should spur us on to discuss, debate, and work through solutions, as have the great thinkers of the Church through the centuries. Through the guidance and power of the Holy Spirit, we must evaluate our legal system, our calling as lawyers, and our role as ministers of justice, according to the Word of the One who has called us. I challenge you to do that as you work through these pages.

A NOTE ON THE FORMAT

The following excerpts are just that—excerpts of longer, deeper treatments of the subject at hand. These snippets are only a beginning; that is, they encourage further study and discussion, rather than providing the final word on the criminal law. While they address some key issues and provide applicable scriptural principles, they cannot provide the “whole story” from a biblical perspective. Use them as motivation for further study.

The textual material of the articles has been heavily edited and, in some cases, reorganized to highlight a particular issue. In addition, many footnotes have been omitted, and the ones that remain have been renumbered. Numbered footnotes are those that appear in the original article, and the editor’s footnotes are marked with an asterisk (*) or other symbol. Minor changes in citation form have been made for uniformity.

This booklet is excerpted from the forthcoming *Biblical Tradition and the Law Study Series: Readings on the Biblical Foundations of Procedural Law* (ICLS, Forthcoming 2002).

SUGGESTIONS FOR A 5-WEEK GROUP STUDY

If you would like to use the materials in a weekly discussion group, the material is best divided into five sessions: Week 1: Part I; Week 2: Part II.A.1; Week 3: Part II.A.2; Week 4: Part II.A.3; Week 5: Part II.B; Week 6: Part II.C.

CONTENTS

PART I – THE IMPORTANCE OF CIVIL PROCEDURE (Week 1)

PART II – PROCEDURE AND THE NATURE OF MAN

- A. Man is Created in the Image of God
 - 1. Equality Under Law (Week 2)
 - 2. Respect by the Governor for those Accused or Convicted(Week 2)
 - 3. Summary (Week 3)
 - C.S. Lewis, The Abolition of Man

- B. Man is Fallen (Week 4)
 - 1. Warnings about Rulers
 - 2. Checks and Balances
 - Madison, Federalist 51
 - 3. The Jury System
 - Blackstone on Juries

- C. Summary (Week 5)
 - The Babel Incident
 - Francis Shaffer, Genesis in Time and Space

I. THE IMPORTANCE OF CIVIL PROCEDURE*

Let's face it: Civil Procedure doesn't get much respect. The law school course on the subject is neither glamorous nor scintillating. Apart from *Hickman v. Taylor*, there aren't even cases with interesting facts! But the law of procedure is one of the most important areas from which the Christian student may develop a biblical perspective about justice. For "justice" is not simply "done;" it is in fact part of a *process*.

We will begin by examining the claim that legal process—legal "technicalities"—are not mere complexities arbitrarily built into the law to confuse law students and laymen. Rather, legal "procedure" is a collection of moral safeguards that protect the state (from God's judgment for exceeding its authority) and the people (from oppression).

Some Old Testament Procedure

Let's turn first to a basic legal procedure instituted by God for the children of Israel. "One witness is not enough to convict a man accused of any crime or offense he may have committed."¹ The clear implication is that, under

* This section is adapted from Michael P. Schutt, *What's A Nice Christian Like You Doing in a Profession Like This?*, 11 REGENT UNIV. L. REV. 137 (1998-99).

¹ *Deuteronomy* 19:15. Jesus later applies this provision to himself before the Pharisees: "In your own Law it is written that the

Mosaic law, some obviously guilty people could not be punished by the government. If a very reliable source with perfect eyesight were to witness a murder in broad daylight from a close distance, we would be quite sure that the murderer was guilty. Yet, if the murder occurred under the jurisdiction of the Mosaic procedural law, there could be no punishment by the Israelites. The obviously "guilty" person would be free. I am not suggesting that we must adopt the requirement of "two witnesses" as a universal procedural requirement (in fact, it is not a requirement in any State today). I am suggesting, however, that moral legal process is necessary to determine who can be held accountable in temporal legal systems. The "two witnesses" requirement ensured that the civil state did not execute judgment unless there was a significant degree of certainty that the party was, in fact, guilty. With this requirement, the state erred on the side of letting the guilty go unpunished, rather than overstepping its authority and punishing the innocent. This has also been a sound principle of the English and American common law. As William Blackstone wrote in 1769, "It is better that ten guilty persons escape, than that one innocent suffer."²

The state does not have the authority from God to punish all who are "guilty" of any sin. Neither does it have the biblical authority to cast so broad a net in pursuit of justice that it punishes the innocent as well as the guilty. While Christians have disagreed for centuries over where

testimony of two men is valid. I am the one who testifies for myself; my other witness is the Father, who sent me." *John* 8:17-18.

² BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, IV, 27 (1765-69)

to draw the line on the authority of the civil government, we generally agree that procedural safeguards have to be instituted, just as God provided safeguards to Israel in the form of the two witnesses requirement.³ Today, we view these safeguards as largely a matter of prudence; that is, various jurisdictions, using common sense and wisdom, adopt safeguards that they believe best protect the interests of the people. These safeguards range from guarantees of a trial by jury⁴ to complicated rules about the admissibility of certain types of evidence.⁵ Collectively, they are designed to ensure that the state does not overstep its authority in punishing its citizens, for which it is accountable to God.

When the woman who had been caught in adultery⁶ was brought to Jesus, the Pharisees told him that the "law of Moses commands that such a woman be stoned."⁷ The law actually commanded that the woman *and the man* caught in adultery be put to death.⁸ When Jesus said, "If any one of you is without sin, let him be the first to throw a stone at her,"⁹ he may have been referring to their sin of allowing the man to go free, in violation of the process required under the law. Since the process required for

³ *Deuteronomy* 19:15.

⁴ U.S. CONST. amend. VI.

⁵ *See, e.g.*, FED. R. EVID. 801-806, dealing with "hearsay."

⁶ *John* 8:3-11.

⁷ *John* 8:5.

⁸ *Leviticus* 20:10.

⁹ *John* 8:7.

stoning had been violated, no one threw a stone. Jesus did not condemn her, though she was almost certainly "guilty."

Justice without Process?

For a variety of reasons, Americans no longer place much trust in the procedural morality so important to the proper administration of justice. As the public cynicism toward the legal system grows, so does general mistrust of the results of that system. That mistrust is fueled by individual stories of unethical lawyers and gross miscarriages of justice, as the public increases its focus on the failures of the system. As a result, any remaining public regard for legal procedure is lost. Instead, the public demands "justice" without burdensome and time-consuming legal procedure, and lawyers, eager for public approval or monetary reward, abandon their role as guardians of those procedures. As lawyers fail to act with integrity in increasing numbers of cases, the system becomes more arbitrary than before, and cynicism increases.

As the church has taught for centuries, man's legal system is imperfect. The problem is that we want the "good guys" to win and the "bad guys" to get punished, so we often confuse "justice" with "right results" in every lawsuit or investigation. The danger lies in believing that the legal system can right every wrong and that lawyers and legislators need to do "whatever it takes" to make sure that bad guys are put in jail (or pay civil judgments) and only "good" people are set free. We should, at a minimum, expect some "bad" results from an imperfect

system that values protecting people from the state over punishing every potential offender.

Lawyers as Social Planners

The profession itself has largely abandoned any commitment to process. At some point during the last century,¹⁰ legal professionals got the idea that lawyers and judges should do more than *merely* decide cases based on law, time-honored procedures, and statutes adopted by governing bodies. Instead, we reasoned, the law should be a tool to work positive social change,¹¹ and any mere technicalities that get in the way, such as hundreds of years of legal history or formal rules of process, must be

¹⁰ The movement that peddled the law as merely a social "instrument" began in earnest with the career of Oliver Wendell Holmes, Jr. With the publication of *THE COMMON LAW* (1881) and various later works by Roscoe Pound and Karl Llewellyn ("we view law as means to ends; as only means to ends," Karl N. Llewellyn, *Some Realism About Realism: Responding to Dean Pound*, 44 *HARVARD L. REV.* 1222, 1236 (1931)), the instrumentalist position took over American legal theory. During this time, the pragmatism of philosophers William James and John Dewey became deeply imbedded in the law. See ROBERT S. SUMMERS, *INSTRUMENTALISM AND AMERICAN LEGAL THEORY* (1982).

¹¹ See SUMMERS, *supra* note 10, at 42-45, 60-100. See, e.g., JOHN CHIPMAN GRAY, *THE NATURE AND SOURCES OF LAW* 94 (1921) ("The great gain in its fundamental conceptions which jurisprudence made during the last century was the recognition of the truth that the law of a state. . . is not an ideal, but something which actually exists. . . It is not that which ought to be, but that which is.").

ignored-- for the sake of the good of society.¹² Lawyers and judges were no longer the protectors of process and order in the legal system, they became its enemies-- for the "good of society." This premise-- that law is merely an instrument to reach the desired ends of any given society-- assumes that law is not a fixed system based on pre-existing truth, but is always changing in response to societal needs and goals.¹³ This theory, advanced by such luminaries as Oliver Wendell Holmes, Jr.,¹⁴ is today the prevailing legal theory in America.¹⁵

It is nothing short of professional, collective arrogance that transforms lawyers from guardians of a discernible

¹² The theories of Holmes, Pound, Llewellyn, and Gray all advocate this approach to varying degrees. *See, e.g.*, SUMMERS, *supra* note 10, at 136-175, and sources cited therein.

¹³ "The first requirement of a sound body of law is that it should correspond with the actual feelings and demands of the community, whether right or wrong." HOLMES, *supra* note 11, at 41. "To the instrumentalists, however, a legal precept can never be self-justifying. Rather, it is always necessary to inquire whether it does (or would) maximize present wants and interests by apt and defensible means." SUMMERS, *supra* note 10, at 61.

¹⁴ Summers calls Holmes "one of the most profound of the instrumentalists." SUMMERS, *supra* note 10, at 146. For a discussion of Holmes's instrumentalism and its relationship to the poor reputation of lawyers as a class, see Michael P. Schutt, *Oliver Wendell Holmes and the Decline of the American Lawyer: Social Engineering, Religion, and the Search for Professional Identity*, 30 RUTGERS L. J. 143 (1998).

¹⁵ SUMMERS, *supra* note 10, at 19-26. *See also*, ROBERT L. HAYMAN, JR. AND NANCY LEVIT, JURISPRUDENCE: CONTEMPORARY READINGS, PROBLEMS, AND NARRATIVES 11-16 (1994).

moral order to social engineers¹⁶ empowered to restructure society based on an evolving value system.

As lawyers learn to guard the system, rather than exploit it, they will demonstrate to the lay public that technicalities and procedures safeguard justice, rather than obstruct it. The result may be a fresh-- and favorable-- perspective on lawyers and the legal system.

FOR FURTHER THOUGHT AND DISCUSSION

1. How much respect do we have for the technicalities of law and legal process? What evidence supports your answer?
2. Consider the following from Alexis de Tocqueville's *Democracy in America*.

Men who have made the laws their special study have drawn from their work the habits of order, a certain taste for forms, a sort of instinctive love for the regular sequence of ideas, which naturally render them strongly opposed to the revolutionary spirit and unreflective passions of democracy. . . .

Hidden at the bottom of the souls of lawyers one therefore finds a part of the tastes and habits of aristocracy. They have its instinctive penchant for order, its natural love of forms; they conceive its great disgust for the actions of the multitude and secretly scorn the government of the people. . . .

¹⁶ See, e.g., SUMMERS, *supra* note 10, at 193: "Almost uniformly the instrumentalists viewed the law as a kind of technology that social engineers used to serve goals."

What lawyers love above all things is a life of order, and the greatest guarantee of order is authority. One must not forget, moreover, that if they prize freedom, they generally place legality well above it; they fear tyranny less than arbitrariness, and provided that the legislator takes charge of taking away men's independence, they are nearly content.¹⁷

Was Toqueville commending or criticizing lawyers as a “class”? How have times changed since the 1830s? What are the “tastes and habits” of aristocracy”?

3. How are justice and procedural rules linked? Think of some examples. Is this “linkage” seen in scripture?

¹⁷ ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 242-53 (Harvey C. Mansfield & Delba Winthrop, eds. & trans. 2000) (1835). This selection is from I.2.viii, “On the Spirit of the Lawyer in the United States and How it Serves as a Counterweight to Democracy.”

II. PROCEDURE AND THE NATURE OF MAN*

The Bible teaches two crucial things about humankind: Humans are both created in God's image and fallen as a result of sin.

A. Man is Created in the Image of God

Because they are created in God's image, humans have dignity and rights that come from the creator himself and can be taken away by no person or government. This demands equality of treatment before God and under law. In addition, it requires that the governor treat all men with respect in legal process, even those who have been accused or even convicted of offenses.

1. Equality Under Law

Consider the following passages:

So God created man in his own image, in the image of God he created him; male and female he created them. Genesis 1.27

Is he not the one who says to kings, "You are worthless," and to nobles, "You are wicked," who shows no partiality to princes and does not favor the rich over the poor, for they are all the work of his hands? Job 34:17-19

* This section is adapted from Jeffrey Brauch and Robert Woods, *Faith, Learning And Justice In Alan Dershowitz's The Genesis Of Justice: Toward A Proper Understanding Of The Relationship Between The Bible And Modern Justice*, 36 VAL. U. L. REV. 1 (Fall 2001).

Then Peter began to speak, “I now realize how true it is that God does not show favoritism but accepts men from every nation who fear him and do what is right.” Acts 10:24-35.

There will be trouble and distress for every human being who does evil: first for the Jew, then for the Gentile; but glory, honor, and peace for everyone who does good: first for the Jew, then for the Gentile. For God does not show favoritism. Acts 2:9-11.

For the Lord your God is God of gods and Lord of lords, the great God, mighty and awesome, who shows no partiality and accepts no bribes. Deuteronomy 10:17.

Whoever sheds the blood of man, by man shall his blood be shed; for in the image of God has God made man. Genesis 9:6

FOR FURTHER THOUGHT AND DISCUSSION

1. In what sense are all equal before God? Is there an aspect in which we are not treated equally by God? (See Rom. 12:6) Does God show favoritism in His judgment? Why does this matter?
2. Consider Deuteronomy 1:16-17: “Hear the disputes between your brothers and judge fairly, whether the case is between brother Israelites, or between one of them and an alien. Do not show partiality in judging; hear both small and great alike.” And Leviticus 19:15: “Do not pervert justice; do not show partiality to the poor or favoritism to the great, but judge your neighbor fairly.” *Leviticus* 19:15. Does God demand that human justice systems act on the same principle of impartiality as He does? (see also II Chronicles 19:5-7; Romans 13:4). Is this an adequate basis for the principle of equal justice under law? Discuss the meaning of that phrase.

2. Respect from the Civil Governor Toward the Accused and Convicted

“[A] Biblical assumption about man that calls for limits upon the power of human governing authorities is that man, having been created in the image of God, is worthy of respect by those who govern him. Indeed, it is because man carries God’s image that Cain, even though he deserved death for the murder of his brother Abel, was protected by God’s mark ‘lest any finding him should kill him.’”¹

a. Punishment

Consider Deuteronomy 25.1-3 (RSV):

If there is a dispute between men, and they come into court, and the judges decide between them, acquitting the innocent and condemning the guilty, then if the guilty man deserves to be beaten, the judge shall cause him to lie down and be beaten in his presence with a number of stripes in proportion to his offense. Forty stripes may be given him, but not more; lest, if one should go on to beat him with more stripes than these, your brother be degraded in your sight.

QUESTIONS

1. What issues does this passage raise regarding:
 - Punishment?
 - Civil Authority?
 - Human Beings?

¹ HERBERT W. TITUS, GOD, MAN, AND LAW: THE BIBLICAL PRINCIPLES 25 (1994).

2. How can civil authorities develop biblical guidelines of punishment in today's world? In *Trop v. Dulles* (1958), Chief Justice Warren held that "The [8th] amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." (The 8th amendment prohibits cruel and unusual punishment). Compare "evolving standards of decency" with other standards of measuring "cruel and unusual." Are human governments able to discern consistent standards of punishment for evil-doers? How?

b. Proof and Inquiry.

Deuteronomy 13:12-15:

If you hear it said about one of the towns the Lord your God is giving you to live in that wicked men have arisen among you and have led the people of their town astray, saying, "Let us go and worship other gods" (gods you have not known), then you must inquire, probe and investigate it thoroughly. And if it is true and it has been proved that this detestable thing has been done among you, you must certainly put to the sword all who live in that town. Destroy it completely, both its people and its livestock.

Deuteronomy 17:2-5:

If a man or woman living among you in one of the towns the Lord gives you is found doing evil in the eyes of the Lord your God in violation of his covenant, and contrary to my commands has worshipped other gods, bowing down to them or to the sun or the moon or the stars of the sky, and this has been brought to your attention, then you must investigate it thoroughly. If it is true and it has been proved that this detestable thing has been done in Israel, take

the man or woman who has done this evil deed to your city gate and stone that person to death.

Deuteronomy 19.15-19:

A single witness shall not rise up against a man on account of any iniquity or any sin which he has committed; on the evidence of two or three witnesses a matter shall be confirmed. If a malicious witness rises up against a man to accuse him of wrongdoing, then both the men who have the dispute shall stand before the LORD, before the priests and the judges who will be *in office* in those days.

The judges shall investigate thoroughly, and if the witness is a false witness *and* he has accused his brother falsely, then you shall do to him just as he had intended to do to his brother. Thus you shall purge the evil from among you. The rest will hear and be afraid, and will never again do such an evil thing among you.

QUESTIONS

1. What “procedural” safeguards do you see set out in the foregoing passages?
2. How is the civil authority to conduct itself in determining guilt and innocence?
3. Do these passages have anything to say to lawyers today? (Assuming that these parts of the Mosaic law do not apply today, do they teach us anything about justice, procedure, litigation, or authority?)

4. Cicero quipped, “*Summa jus, summa injuria.*” This may be translated, “Where laws are many, harm is great,” or “Where there is great right, there is great injury.” Does this saying reflect the truth about law? If so, in which translation(s)? What are the implications for moral procedural law?

3. Summary

If man is simply a mass of cells, without a spiritual component, what is the *best* argument that he should be treated with dignity, and that the law should not be show favoritism toward specific individuals? Consider the following from C.S. Lewis’s *The Abolition of Man*.

**From C.S. Lewis, *The Abolition of Man* 72-73
(HarperSanFrancisco 2001) (1944).**

It is in Man's power to treat himself as a mere "natural object" and his own judgements of value as raw material for scientific manipulation to alter at will. The objection to his doing so does not lie in the fact that this point of view (like one's first day in a dissecting room) is painful and shocking till we grow used to it. The pain and the shock are at most a warning and a symptom. The real objection is that if man chooses to treat himself as raw material, raw material he will be: not raw material to be manipulated, as he fondly imagined, by himself, but by mere appetite, that is, mere Nature, in the person of his dehumanized Conditioners.

We have been trying, like Lear, to have it both ways: to lay down our human prerogative and yet at the same time to retain it. It is impossible. Either we are rational spirit obliged for ever to obey the absolute values of the *Tao*[#] or else we are mere nature to be kneaded and cut into new shapes for the pleasures of masters who must, by hypothesis, have no motive but their own "natural" impulses. Only the *Tao* provides a common human law of action which can overarch rulers and ruled alike. A dogmatic belief in objective value is necessary to the very idea of a rule which is not tyranny or an obedience which is not slavery.

QUESTIONS

1. Does it matter whether the law presupposes a "truthful" view of the nature of man and the nature of law? In what areas? Why?
2. What are the prevailing presuppositions in the legal academy (or bar) about:

The nature of law?

The existence of God?

The nature of man?

The nature of the family?

[#] By "the *Tao*," Lewis means the universal principles of the Law of Nature: "It is the reality beyond all predicates It is Nature, the Way, the Road. It is the Way in which the universe goes, the Way in which things everlastingly emerge, stilly and tranquilly, into time and space. . . . This conception in all its forms, Platonic Aristotelian, Stoic, Christian, and Oriental alike, I shall henceforth refer to for brevity simply as "the *Tao*." . . . It is the doctrine of objective value, the belief that certain attitudes are really true, and others really false, to the kind of thing the universe is and the kind of things we are."

ABOLITION OF MAN at 18.

B. Man is Fallen

Scripture teaches that humankind is sinful.² This creates a powerful incentive to limit governmental power. Knowing that all people sin warns us not to put too much power in the hands of any person or government authority; not to trust the intellectual superiority or rational supremacy of human beings in matters of justice. While power must be exercised to maintain order, it must be limited under law. Lord Acton's famous warning that "power tends to corrupt and absolute power corrupts absolutely" is a biblically correct concept.

1. Warnings about Rulers

Deuteronomy 17:14-20 (NIV)

When you enter the land the Lord your God is giving you and have taken possession of it and settled in it, and you say, "Let us set a king over us like all the nations around us," be sure to appoint over you the king the Lord your God chooses. He must be from among your own brothers. Do not place a foreigner over you, one who is not a brother Israelite. The king, moreover, must not acquire great numbers of horses for himself or make the people return to Egypt to get more of them, for the Lord has told you, "You are not to go back that way again." He must not take many wives, or his heart will be led astray. He must not accumulate large amounts of silver and gold.

² See e.g. *Isaiah*, 64:6; *Romans* 3:10-18, *Ephesians* 2:1-3.

When he takes the throne of his kingdom, he is to write for himself on a scroll a copy of this law, taken from that of the priests, who are Levites. It is to be with him, and he is to read it all the days of his life so that he may learn to revere the Lord his God and follow carefully all the words of this law and these decrees and not consider himself better than his brothers and turn from the law to the right or to the left. Then he and his descendants will reign a long time over his kingdom in Israel.

I Samuel 8:6-18 (NASB)

But the thing was displeasing in the sight of Samuel when they said, "Give us a king to judge us." And Samuel prayed to the LORD. The LORD said to Samuel, "Listen to the voice of the people in regard to all that they say to you, for they have not rejected you, but they have rejected Me from being king over them. Like all the deeds which they have done since the day that I brought them up from Egypt even to this day—in that they have forsaken Me and served other gods--so they are doing to you also. Now then, listen to their voice; however, you shall solemnly warn them and tell them of the procedure of the king who will reign over them."

So Samuel spoke all the words of the LORD to the people who had asked of him a king. He said, "This will be the procedure of the king who will reign over you: he will take your sons and place *them* for himself in his chariots and among his horsemen and they will run before his chariots. He will appoint for himself commanders of thousands and of fifties, and *some* to do his plowing and to reap his harvest and to make his weapons of war and

equipment for his chariots. He will also take your daughters for perfumers and cooks and bakers. He will take the best of your fields and your vineyards and your olive groves and give *them* to his servants. He will take a tenth of your seed and of your vineyards and give to his officers and to his servants. He will also take your male servants and your female servants and your best young men and your donkeys and use *them* for his work. He will take a tenth of your flocks, and you yourselves will become his servants. Then you will cry out in that day because of your king whom you have chosen for yourselves, but the LORD will not answer you in that day.”

2. Checks and Balances

James Madison, Federalist 51, “The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments,”
From the New York Packet, Friday, February 8, 1788.

To the People of the State of New York:

TO WHAT expedient, then, shall we finally resort, for maintaining in practice the necessary partition of power among the several departments, as laid down in the Constitution? The only answer that can be given is, that as all these exterior provisions are found to be inadequate, the defect must be supplied, by so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places. Without

presuming to undertake a full development of this important idea, I will hazard a few general observations, which may perhaps place it in a clearer light, and enable us to form a more correct judgment of the principles and structure of the government planned by the convention.

In order to lay a due foundation for that separate and distinct exercise of the different powers of government, which to a certain extent is admitted on all hands to be essential to the preservation of liberty, it is evident that each department should have a will of its own; and consequently should be so constituted that the members of each should have as little agency as possible in the appointment of the members of the others. . . .

[T]he great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control

the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.

This policy of supplying, by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public. We see it particularly displayed in all the subordinate distributions of power, where the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other that the private interest of every individual may be a sentinel over the public rights. These inventions of prudence cannot be less requisite in the distribution of the supreme powers of the State.

3. Blackstone, On Jury Trials

THE trial by jury, or the country, *per patriam*, is also that trial by the peers, of every Englishman, which, as the grand bulwark of his liberties, is secured to him by the great charter

THE antiquity and excellence of this trial, for the settling of the civil property, has before been explained at large. And it will hold much stronger in criminal cases; since, in times of difficulty and danger, more is to be apprehended from the violence and partiality of judges appointed by the crown, in suits between the king and the subject, than in disputes between one individual and another, to settle the metes and boundaries of private property. Our law

has therefore wisely placed this strong and two-fold barrier, of a presentment and a trial by jury, between the liberties of the people, and the prerogative of the crown. It was necessary, for preserving the admirable ballance of our constitution, to vest the executive power of the laws in the prince: and yet this power might be dangerous and destructive to that very constitution, if exerted without check or control, by justices . . . occasionally named by the crown; who might then, as in France or Turkey, imprison, dispatch, or exile any man that was obnoxious to the government, by an instant declaration, that such is their will and pleasure. But the founders of the English laws have with excellent forecast contrived, that no man should be called to answer to the king for any capital crime, unless upon the preparatory accusation of twelve or more of his fellow subjects, the grand jury: and that the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours, indifferently chosen, and superior to all suspicion. So that the liberties of England cannot but subsist, so long as this palladium remains sacred and inviolate, not only from all open attacks, (which none will be so hardy as to make) but also from all secret machinations, which may sap and undermine it; by introducing new and arbitrary methods of trial, by justices of the peace, commissioners of the revenue, and courts of conscience. And however convenient these may appear at first, (as doubtless all arbitrary powers, well executed, are the most convenient) yet let it be again remembered, that delays, and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters; that these inroads upon this

sacred bulwark of the nation are fundamentally opposite to the spirit of our constitution; and that, though begun in trifles, the precedent may gradually increase and spread, to the utter disuse of juries in questions of the most momentous concern.

FOR FURTHER THOUGHT AND DISCUSSION

1. How does a biblical view of human nature inform the various passages in this section? What are the various solutions to the problem of fallen man? Are there others? Are these adequate? Biblical? Why or why not?

2. What role does civil “procedure” have in protecting individuals from the powerful or evil or misguided ruler? From other citizens?

C. Summary: The Babel Incident.

Genesis 11:1-9

Now the whole world had one language and a common speech. As men moved eastward, they found a plain in Shinar and settled there.

They said to each other, "Come, let's make bricks and bake them thoroughly." They used brick instead of stone, and tar for mortar. Then they said, "Come, let us build ourselves a city, with a tower that reaches to the heavens, so that we may make a name for ourselves and not be scattered over the face of the whole earth."

But the Lord came down to see the city and the tower that the men were building. The Lord said "If as one people speaking the same language they have begun to do this, then nothing they plan to do will be impossible for them. Come, let us go down and confuse their language so they will not understand each other."

So the Lord scattered them from there over all the earth, and they stopped building the city. That is why it was called Babel--because there the Lord confused the language of the whole world. From there the Lord scattered them over the face of the whole earth.

From Francis Schaffer, GENESIS IN TIME AND SPACE³

The basic confusion among people is expressly stated to be language—not the color of skin, not race, not nation. Language is the key to the divisions of the peoples of the world.

The Bible indicates here, as it does constantly in the early chapters of Genesis, that all the divisions of the whole world are a result of sin and righteous judgment of God. Men said, “Let us make a name for ourselves lest we be scattered.” This was an attempt to make a unity on their own basis. But “the LORD scattered them abroad from there upon the face of all the earth” (v. 8). And this He did on the basis of their own speech.

Thus another division has emerged—not just one between man and God, man and himself, man and man, man and nature, and nature and nature, but also between the men of the earth in their nations with implications that reach out into racial and cultural divisions, linked to linguistic differences. And all of them are rooted in the same source—the sin of man. Here at the tower, and always, man seeks to be autonomous.

The word *Babel* is interesting because it is given two different meanings. Genesis 11:9 says: “Therefore is the name of it called Babel, because the Lord did there confound the language of all the earth.” In Hebrew the

³ Francis Schaffer, 2 THE COMPLETE WORKS OF FRANCIS SCHAFFER 108-09 (Crossway Books 1982) (1972).

word *Babel* means “confusion.” The Babylonians themselves used the word to mean “the gate of God.” So the Babylonians said, “We are the gate of God,” and God said, “No, you are confusion.” Throughout scripture, right up to the book of Revelation, the concept of Babylon stands crucial, Babylon saying, “We are the gate of God,” and the Bible answering, “No, this is the place where the basic confusion of language occurred. You are confusion.” Our own word Babylon is simply the word *Babel* with a Greek ending.

FOR FURTHER THOUGHT AND DISCUSSION

1. Whom should we trust to protect human liberty? How can we work to discern biblical principles and apply them in a system filled with conflicting truth claims?

2. Is it “just” to bar a claim on the ground that the statute of limitations has run? Why or why not? In addition, consider whether the following “safeguards” are morally sound:
 - Hearsay Exceptions to the admissibility of evidence;
 - The Exclusionary Rule;
 - Attorney-Client Privilege;
 - 5th Amendment Privilege Against Self-Incrimination;
 - Automatic Appeal in Death Penalty Cases;
 - Protection against Double Jeopardy.

