

Justice and Compassion in Biblical Law

Richard H. Hiers



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Introduction

The Bible has long been a major force in the development of Western culture.¹ Yet few modern legal or biblical scholars have given more than passing attention to biblical law. In part, this lack of attention may result from the fact that much of biblical law deals with animal sacrifices, a subject commonly regarded as distasteful, misguided, irrelevant, and outmoded. Such scholars may assume that the rest of biblical law offers little worthy of their interest, either.

Proponents of Christian ethics and social ethics usually seem to be unaware of the substance of biblical law, preferring instead—if drawing on biblical insights at all—to consider only “the prophets” or the “teachings of Jesus,” and possibly other New Testament sources. Modern Jewish ethicists generally view biblical law through somewhat thick Talmudic lenses and subsequent emerging tradition. Biblical laws relating to justice and compassion are rarely noticed even by Christian and Jewish interpreters and expositors. This book does not argue that Christian ethics should abandon these other biblical sources, or that Jewish ethics should ignore or bypass later interpretive authorities. Nevertheless those “doing” both Christian and Jewish ethics might well benefit from greater familiarity with the norms or standards of justice and compassion found in biblical laws relating to the interactions of persons in society. That biblical laws often express or call for compassion may be particularly surprising and significant. Likewise, secular humanists may be startled to discover how often the concerns and values implicit in biblical laws are congruent with their own convictions and social policy agendas.

This book undertakes to examine biblical laws in order to describe and consider their substance along with the concerns and values implicit in them. It is not proposed that biblical laws, without more, can be applied

¹ This book does not attempt to trace the influence of the Bible in the development of Anglo-American law, but does occasionally cite sources relevant to that topic.

directly to contemporary interpersonal and societal issues. It is suggested, however, that biblical laws may sometimes provide a useful frame of reference for evaluating contemporary values and practices. Biblical norms have long influenced Western civilization, and may be especially important as providing an alternative model to contemporary postmodernism's moral relativism and anomie.

This study assumes that biblical tradition—including biblical laws—developed or evolved over many centuries. The relative sequence and dating of the biblical “sources” or components considered here for the most part follows the general consensus of current biblical scholarship. Thus, the so-called Ritual Decalogue (Exod. 34.17-28) is regarded as the earliest segment of biblical law, dating possibly from the 13th century BCE. The Covenant Code (Exod. chapters 20–23) is thought to have been set down or “codified” a century or so later. The Deuteronomic Code, (here identified as Deuteronomy chapters 5 and 20–25), followed, perhaps as early as 1000 BCE. The Holiness Code (Leviticus chapters 17– or 18–26) is dated around the middle of the 7th century BCE, and was supplemented or succeeded a few decades later by what is designated here the Revised Deuteronomic Code (Deuteronomy chapters 12–19, and 26). Priestly or P tradition generally, including the so-called Priestly Code, is thought to have been formulated in the 6th or 5th centuries BCE. The Priestly Code is the term used to describe the large body of laws found in Exodus, Leviticus, and Numbers that are not attributable to earlier codes.²

According to biblical tradition, all laws set out in the books of Exodus, Leviticus, Numbers, and Deuteronomy were given to, and for, the people of Israel. There, “Israel” is generally understood broadly, as referring not only to the descendants of Jacob and the subsequent tribal confederation prior to the establishment of the monarchy, *c.* 1000 BCE, but also to both the Northern and Southern Kingdoms (Israel and Judah, respectively) during the divided monarchy, as well as to the Jewish people during and after the time of the Exile, and down to the close of the biblical period in the 2nd or 1st century BCE. As presented in the Bible itself, these laws were understood to have been intended for the instruction or direction of the people of Israel, not as laws for other peoples either during the biblical period or in later times. Nevertheless, these

² For more detailed discussion of biblical literature, history, and religion, see the author's book, *Trinity Guide to the Bible with the Apocrypha* (Trinity Press Int'l, 2001).

laws may contain significant insights into the human condition, understood in terms of the kinds of relationships among persons that are mutually beneficial, and that therefore constitute the community of God's people intended by its ultimate Lawgiver.

This book examines biblical law from the perspectives of both modern biblical scholarship and current jurisprudential analysis. Modern legal concepts and terminology often serve conveniently to describe much of the character and substance of biblical law.

Part I examines a number of biblical laws that could be characterized as "civil laws." For instance, as will be seen in Chapter One, several laws and narrative traditions concern or represent what we might now understand as legal contracts. Likewise, many of the laws found in Exodus chapters 21–22, would be now classified as "tort" laws. Moreover, within these chapters, most of these laws, which are often regarded as a random assortment of unrelated laws, turn out to have been organized rather carefully, almost as if under modern tort law rubrics.

Chapter Two identifies the significant distinction between "inheritance" and "bequest," a distinction familiar in modern law, but not generally used by biblical commentators. This distinction enables greater precision in describing the ways in which biblical tradition provided for transferring property from one person to another, subsequent to, or in anticipation of the transferor's death.

Part II considers what in modern times would be classified as "criminal laws." Chapter Three describes a series of trial scenes that are part of biblical tradition—though often not recognized as such. These scenes illustrate several features of biblical law that are analyzed in subsequent chapters.

Chapter Four focuses on biblical laws and traditions calling for impartial judgment. The term "equal protection of the laws" is not found in the Bible; nevertheless it serves as a useful category for describing a considerable number of biblical legal provisions that are examined in this same chapter. Several classes of protected persons are also identified in these texts.

Chapter Five presents a detailed account of biblical laws relating to capital offenses, that is, laws, which if violated, called for applying the death penalty. Here we see some interesting parallels to modern criminal law. Translators have long, and correctly, used the term "manslaughter" to describe biblical laws in regard to negligent or unintentional homicide. Other laws can be seen as instances of culpable, reckless, or intentional homicide. Most of the capital offenses involve, either explicitly or

implicitly, the perpetrator's intent to commit the prohibited act. Intent is a basic element in nearly all types of modern criminal law.

Chapter Six identifies and describes a variety of biblical laws which clearly served to provide what now would be designated as "due process" protections for the accused. As will be seen, most of these provisions evidently were intended to reduce, if not eliminate, the possibility that innocent persons might be punished. These laws established procedures calculated to assure that only those who had actually committed capital crimes were to be executed, and that punishments should not exceed the seriousness of offenses committed. Chapter Seven then suggests some comparisons between biblical and modern criminal law.

Part III examines what, in modern law school curricula, would be identified as "social legislation" or "social welfare legislation." These terms may be of relatively recent origin, but rather accurately characterize the substance of such laws. Chapters Eight and Nine analyze and classify a wide range of biblical laws that may be aptly so characterized. The concluding chapter highlights certain recurrent themes and conclusions.

In this book, the principal names used to designate the deity are "God" and "YHWH." Typically, "God" translates the Hebrew name, *Elohim*, while YHWH represents a transliteration of the tetragrammaton, the Hebrew letters often found in other biblical texts as the divine name. In traditional Judaism, this name is not to be spoken. English translations usually render it as "the LORD."

One final introductory comment. Justice and compassion are sometimes regarded as antithetical or opposites. Justice may be seen as rigid, imposing certain standards or punishments without mercy or care for the well-being of those affected; and compassion can be seen as soft-hearted, if not soft-headed, sentimental, without regard for fairness or equity. In this book it is suggested that biblical concepts of justice and compassion often may be seen as different sides of the same coin. That is, a law concerned with justice, fairness, or equity may also take account of the special needs or interests of persons affected by the situation or by application of the law. For instance, as will be seen, biblical tort laws provide that wrong-doers compensate persons they have injured unintentionally. The compensation may be not only fair or just, but also compassionate, in that those injured are to be "made whole," while those who have done the injury are then free to go about their affairs without being punished or stigmatized as bad persons. Arrangements providing for the transfer of property from deceased husbands to surviving wives, sons, or daughters protect both the interest of the deceased in caring for

survivors, and the interests of beneficiaries in continuing support. Criminal justice laws providing due process for the accused show compassion for those who, though innocent, might otherwise be punished for offenses committed by others, while at the same time, tend to increase the likelihood that the real perpetrators would be brought to justice. The community thereby would be spared the guilt of having shed innocent blood. Various social welfare laws clearly served to meet basic needs of persons in the community who, because they were unable to provide themselves with life's necessities, otherwise would experience serious hardship. These laws also assured that those who could afford to contribute did so fairly, and without undue hardship to themselves. All these laws functioned, and likely were intended to promote what was understood to be the well-being of the community of God's people.

Readers may well conclude that some of these arrangements were far from perfect. Yet nearly all represent some balance between justice and compassion. It will be suggested that occasionally biblical provisions may even compare favorably with certain contemporary laws and judicial practices.

Chapter 1

Biblical Contract Law and Biblical Tort Law

“But tell me, what wages am I to pay you—a drachma a day, and expenses for yourself as for my son? And besides, I will add to your wages if you both return safe and sound.” So they agreed to these terms.

Tobit 5:14-15 (RSV)

When a man causes a field or vineyard to be grazed over, or lets his beast loose and it feeds in another man’s field, he shall make restitution from the best in his own field and in his own vineyard.

Exodus 22:5 (RSV)

Contract law concerns arrangements between persons or “parties” who seek to gain something from each other through an exchange of goods, services, or other valuables.¹ A basic feature of modern contract law is “offer” and “acceptance.” To be binding, there must be a “meeting of the minds,” that is, the parties must agree to the contract’s terms. When one party to such an agreement fails to perform what she has agreed to do, the other party typically seeks monetary damages or some other remedy. Tort offenses, on the other hand, are those that harm individual persons or their property, whether intentionally, recklessly, or as the result of simple negligence.² Such harm then may be remedied by restitution or payment of damages to the persons injured or to those whose property has been damaged.

¹ See generally Amy Hilsman Kastely et al., *Contracting Law*, 2nd edn. (Carolina Academic Press, 2000); and the classic “hornbook,” Arthur Linton Corbin, *Corbin on Contracts*, one vol. edn. (West Pub. Co., 1952), and multi-volume revised editions.

² See generally, W. Page Keeton, gen. ed., *Prosser and Keeton on the Law of Torts* (West Pub. Co., 1984).

A. Biblical Contract Laws

Only a few biblical laws relate directly to contracts. All of these laws evidently were intended to protect the interests of persons likely to be affected adversely by contractual agreements. In some instances, affected persons would include parties to the agreements who were in relatively weak bargaining positions.³ In others, the parties affected would be third persons whose interests the contracting parties might not otherwise care about.

The first 11 verses of Exodus chapter 21 relate to purchase or sales contracts. Exodus 21:1-6 sets out “the ordinances” that were to govern when someone bought a Hebrew slave. These specify that such slaves were to be freed after 6 years of service, and define the circumstances under which a slave’s wife and children might, themselves, either be or become slaves, or else be freed.⁴ Chapter 21:7-11 sets out those conditions or requirements that were to go into effect when a man sold his daughter as a slave. The purchaser must treat her well, and if he does not do so, she is to go free.⁵

One law that clearly has to do with debtor–creditor relations of an implicitly contractual nature emphasizes God’s compassion as its basis. This is Exodus 22:25-27, which concludes:

If ever you take your neighbor’s garment in pledge, you shall restore it to him before the sun goes down; for that is his only covering, it is his mantle for his body; in what else shall he sleep? And if he cries to me, I will hear, for I am compassionate. (RSV)

The version of this law set out at Deuteronomy 24:10-13, adds a further restriction on a lender’s conduct: “[Y]ou shall not go into his house to fetch his pledge” (RSV). Similarly, creditors were not to take in pledge (or as collateral) equipment that served as the basis for a debtor’s livelihood:

³ Modern law also generally disapproves as “unconscionable” and may not enforce “adhesion contracts,” that is, contracts drafted by relatively powerful parties in circumstances that leave those in relatively weak bargaining position little choice but to “agree” to adverse terms. See Kastely et al., pp. 632–33; and Arthur Linton Corbin, *Corbin on Contracts*, multi-volume edition, revised edn., vol. 1, edited by Joseph M. Perillo (West Pub. Co., 1993), pp. 13–15.

⁴ See Chapter Eight, Section B.3.b.i.

⁵ See Chapter Eight, Section B.3.b.ii.

No one shall take a mill or an upper millstone in pledge, for that would be taking a life in pledge. (Deut. 24:6)

Both justice and compassion are implicit in Leviticus 19:13 and Deuteronomy 24:14-15, which require employers to pay hired servants or workers the same day they earn it.⁶ This requirement may be illustrated in Jesus' Parable of the Laborers in the Vineyard (Mt. 20:1-16). In the parable, the owner of the field has his foreman pay all laborers their wages on the evening of the same day they worked (Mt. 20:8).

Compassion for needy borrowers clearly comes to expression in the law barring lenders from exacting interest from "any of my people with you who is poor" (Exod. 22:25 RSV). Another law grounded on compassion bars lending money at interest, or making a profit from selling food to a "brother [who] becomes poor, and cannot maintain himself" (Lev. 25:35-37 RSV).

Several biblical narratives describe contractual agreements. In each case, there is some "consideration," that is, something of value that one party proposes to exchange for the other's.⁷ Sometimes complications arise because one party or the other engages in deceptive practices or fraud. Also one party or the other may fail to carry out contractual terms. Or the parties may have failed to agree as to specific terms. Some examples of such situations are considered in the following paragraphs.⁸

Jacob figures prominently in three of these accounts. The first is the story in Genesis 25:29-34, where Esau, faint with hunger, asks Jacob for some of the stew ("pottage") he had been boiling. Not one to miss a good business opportunity, Jacob offers to let Esau have some, but only if Esau first sells him his birthright.⁹ Here the "consideration" on one side is the stew or porridge; on the other, it is the birthright. Esau agrees with an oral acceptance ("So he swore to him, and sold his birthright to Jacob."). The narrator, whose sympathies obviously are with Jacob,¹⁰ was not troubled by the fact that Jacob obtained Esau's agreement under

⁶ See generally, Paul Rasor, "Biblical Roots of Modern Consumer Credit Law," *10 J. of L. & Relig.* 157 (1993-94); and Louis E. Newman, "Covenants and Contract: A Framework for the Analysis of Jewish Ethics," *9 J. of L. & Relig.* 89 (1991).

⁷ See Kastely et al., *Contract Law*, pp. 263-370; and Corbin, *Corbin on Contracts*, pp. 160-336.

⁸ See also 1 Kgs 5:1-11; 2 Chron. 2:3-16; and 1 Kgs 9:10-14, describing contractual agreements between Solomon and Hiram (or Huram), King of Tyre.

⁹ As to the meaning of "birthright" see Chapter Two, Section B.4.

¹⁰ See the biblical narrator's editorial comment: "Thus Esau despised his birthright" (Gen. 25:34).

conditions that might now be considered to have involved duress.¹¹ On two occasions, Jacob negotiated employment contracts with his kinsman, Laban (Gen. 29:15-20; 30:25-34). Each time, however, Laban engaged in deceptive or fraudulent practices, to his own advantage (Gen. 29:21-27; 30:25-36). Apparently in those times, there was no provision for voiding contracts on the basis of fraud or misrepresentation.¹²

Another famous biblical scene also involved an oral contract. This is the story in Numbers chapters 22–24 about Balak, king of Moab, hiring Balaam, a professional prophet or execrator, to come and curse the menacing horde of Israelites who seemed about to encroach on the land of Moab.¹³ Exact terms are not specified, but it is clear that Balak offered to pay Balaam a substantial fee or “honorarium” if he would undertake this task: “Let nothing hinder you from coming to me; for I will surely do you great honor, . . . and come curse this people for me” (Num. 22:17 RSV). After Balaam repeatedly blesses Israel instead of cursing them, the exasperated Balak charges Balaam, in effect, with breach of contract and refuses to pay the promised “honor” or, “honorarium” (Num. 24:10-11). Balaam replies that he never had agreed to curse Israel in the first place, so there could be no contract to breach.¹⁴ There had been no “meeting of the minds.”

Two contractual arrangements are mentioned in the Apocryphal Book of Tobit. The first of these has to do with Tobit’s undertaking to hire a man to accompany his son Tobias on a journey (Tob. 5:3-15). In this instance, the parties agree to fairly specific terms. Here Tobit addresses a man named Azarias:¹⁵

“But tell me, what wages am I to pay you—a drachma a day, and expenses for yourself as for my son? And besides, I will add to your wages if you both return safe and sound.” So they agreed to these terms. (Tob. 5:14-15 RSV)

Later in the story, when Tobias spends the night with Raguel, another relative, it is arranged that Tobias will marry Raguel’s daughter, Sarah.

¹¹ See Kastely et al., *Contract Law*, p. 552; Corbin, *Corbin on Contracts*, p. 320.

¹² See Kastely et al., *Contract Law*, pp. 571–608; Corbin, *Corbin on Contracts*, pp. 10–11, 320.

¹³ For fuller discussion of this remarkable story, see the author’s *Trinity Guide to the Bible*, pp. 50–51, and 293.

¹⁴ See Num. 24:12-13: “And Balaam said to Balak, ‘Did I not tell your messengers whom you sent to me, “If Balak should give me his house full of silver and gold, I would not be able to go beyond the word of YHWH, to do either good or bad of my own will; what YHWH says, that is what I will say”?’”

¹⁵ As the story is told, Azarias is actually the angel, Raphael, in disguise.

This story has many points of interest, but the one noted here is that as part of the wedding formalities, Raguel proceeds to write a contract, to which both he and his wife, Edna, set their seals (Tob. 7:12-14 RSV). Whether this contract related directly to the wedding, or to possible dowry, or perhaps to arrangements for inheritance¹⁶ is not indicated. It is noteworthy that both Raguel and Edna “set their seals” to the contract, indicating that not only the father, but also the mother of the bride had legal status to enter into such contractual agreements.¹⁷ Seals are still sometimes, though rarely, applied to contracts in modern times.¹⁸

At least one contract is described in the New Testament. This is in Jesus’ “Parable of the Laborers in the Vineyard” (Mt. 20:1-16). The parable begins:

For the kingdom of heaven is like a landowner who went out early in the morning to hire laborers for his vineyard. After agreeing with the laborers for a denarius, he sent them into his vineyard. (Mt. 20:1-2)

As the day goes on, the owner hires more workers, but at the end of the day, pays each—including those who had worked only the last hour—a full denarius. The workers who had “borne the burden of the day and the scorching heat” complain that the others received the same pay. The owner then points out that they had agreed to these terms, and so have no grounds to complain: “Friends, I am doing you no wrong; did you not agree with me for a denarius?” (Mt. 20:13).

From these several accounts it seems likely that contractual arrangements were commonplace in the biblical period, even though biblical commentators rarely refer to these arrangements as instances of contract law.

Some of the offenses described in biblical tradition could be characterized in modern legal terms either as breach of contract violations or as “torts.” Modern legal scholars, noting occasional overlap between contract and tort law, sometimes refer, humorously, to “con-torts.”¹⁹ Exodus

¹⁶ See Tobit 14:12-13.

¹⁷ See also 1 Samuel 25:14-35, describing Abigail’s negotiating an agreement with David to spare the male members of her household. Here there was no formal contract, but there was a “meeting of the minds,” and at the end, David granted Abigail’s “petition” (1 Sam. 25:35).

¹⁸ See Corbin, *Corbin on Contracts*, pp. 337-44.

¹⁹ For careful discussion of the complex relation between these two categories of modern civil law, see W. Page Keeton, ed., *Prosser and Keeton on the Law of Torts* (West Pub. Co., 1984), pp. 655-76.

22:7-11 includes various instances of “breach of trust” or violation of a bailee’s responsibility to care adequately for property entrusted to him by another. Some of these laws also refer to activities that in modern law would be called embezzlement or conversion. Although these laws involve elements of contract, for instance, implicit prior agreements of one kind and another, in this chapter, these laws are considered under the rubric of tort law.

B. Biblical Tort Laws and Remedies

Biblical texts do not use the term “tort,” nor do most biblical commentators.²⁰ Nevertheless, the term may aptly describe the substance of several biblical laws. The term “tort” probably derives from the French word, *tort*, meaning “wrong.” In law, the term refers to injury to persons or damage to property. Remedies usually are in the form of restitution of that which has been taken, or compensation paid to the injured party.²¹

In Anglo American statutory and common law, torts are classified as either negligent or intentional. Intentional torts (and those resulting from reckless endangerment to others) are considered more serious than harms resulting from mere negligence.²² Intentional tort-feasors (and those found to have committed acts of reckless endangerment) sometimes are subjected to substantial damages, typically in the form of multiple or “punitive” or “exemplary” damages, payable to the victim or, if the victim is deceased, to the victim’s estate.²³ The implicit rationale for punitive damages is to discourage those who might otherwise engage in similar conduct in the future from doing so, lest others in the community be harmed. Punitive damages are sometimes considered “quasi-criminal” in that they combine both compensation for the victim and punishment for the offending tort-feasor. Modern tort law also distinguishes between tortuous conduct harmful to persons, and conduct that damages property.

²⁰ Bible dictionaries typically do not list or describe “tort” laws. Commentators sometimes refer to civil laws. See Dale Patrick, *Old Testament Law* (John Knox Press, 1985), pp. 76 and 79, identifying instances of “civil tort”; and Christopher J. H. Wright, *Old Testament Ethics for the People of God* (InterVarsity Press, 2004), pp. 283–94.

²¹ See *Black’s Law Dictionary*, 8th edn. (St. Paul: West Pub. Co., 2004), p. 1526, defining “tort” as “A civil wrong, other than breach of contract, for which a remedy may be obtained, usually in the form of damages.” For fuller discussion, see Keeton, ed., *Prosser and Keeton*, pp. 1–7.

²² See Keeton, ed., *Prosser and Keeton*, pp. 33–107.

²³ See *id.*, pp. 7–15.

One of the earliest biblical law codes was the Covenant Code, found in Exodus 20:1–23:33. This collection of laws contains an extended listing of criminal acts and penalties along with civil offenses and remedies (Exod. 21:12–22:27). Commentators often describe these laws as a hodge-podge, or at best as an only loosely organized assortment of miscellaneous provisions.²⁴ However, when modern jurisprudential concepts are applied, those laws found in Exodus 21:12 through 22:15 turn out to be clearly organized along lines that closely correspond to such concepts.

The laws set out in Exodus 21:12–32 all relate to injuries to persons, while those found in Exodus 21:33–22:15 concern injuries or damages to property. These laws can be seen to have been organized as follows:

1. Criminal law: offenses against persons. Exodus 21:12–17.
2. Civil law: tort offenses. Exodus 21:18–22:15.
 - a. Injuries to persons. Exodus 21:18–32.
 - i. Intentional infliction of injuries. Exodus 21:18–21, 26–27.
 - ii. Negligent and reckless infliction of harm. Exodus 21:22, 28–32.
 - b. Injuries to animals belonging to others through negligent or reckless conduct. Exodus 21:33–36.
 - i. Leaving an open pit. Exodus 21:33–34.
 - ii. One man’s ox fatally injures another’s. Exodus 21:35–36.
 - c. Intentional and negligent conduct affecting property. Exodus 22:1–15.
 - i. Theft of cattle (farm animals). Exodus 22:1, 4.²⁵
 - ii. Allowing animals to graze over neighbors’ fields or crops. Exodus 22:5.
 - iii. Allowing fire to spread and damage neighbors’ crops. Exodus 22:6.
 - iv. Failing to care for property in trust or bailment. Exodus 22:7–13.
 - v. Property damaged or lost while borrowed. Exodus 22:14–15.

²⁴ See, for example, *The New Interpreters’ Bible*, vol. I (Nashville: Abingdon Press, 1994), p. 860, commenting on the Covenant Code (Exod. 20:24–23:19): “It is a miscellaneous collection. . . . It is not possible to identify a coherent structure, pattern, or order for the material.” Nevertheless, the article goes on to identify several categories of laws, though without mentioning either civil law or tort law. *The New Interpreters’ Bible*, pp. 863–66.

²⁵ Exodus 22:2–3 concerns liability, if any, for killing someone who “broke in” to steal, possibly to steal cattle. These verses do not quite fit the context, and may have been added after the tort laws in Exodus 21:18–22:15 had already been in place. See below, note 40.

It is clear that these laws were not put down in random order, but on the basis of organizing principles that, to some extent, correspond to modern legal categories.²⁶

The first set, Exodus 21:12-32, begins with a series of criminal laws, all but one²⁷ involving capital offenses.²⁸ These include intentional homicide (Exod. 21:12, 14), fatally striking one's father or mother (Exod. 21:15); kidnapping (Exod. 21:16); and cursing either parent (Exod. 21:17). The following verses then set out a number of tort laws, interspersed with occasional, somewhat related, criminal provisions.

Exodus 21:18-19 provides that if two men fight and one seriously injures the other who, afterwards survives, the man who caused the injury "shall pay for the loss of [the victim's] time, and shall have him thoroughly healed" (RSV).²⁹ These provisions evidently required payment for earnings lost while the injured man was unable to work, and for his medical expenses. The element of compassion is implicit in the fact that there is no mention of considerations such as which man started the fight, the justice of their respective arguments, or whether one acted in self-defense. This law also could have served to deter brawling, since those so involved would be on notice that they could be liable for the damages indicated if they caused serious injury to others.

The law found in Exodus 21:20-21 falls more into the category of criminal law, since it calls for punishing the offender rather than for his paying damages or making restitution. This law provides that a man is to be punished if he strikes his slave (whether male or female) and the slave dies soon afterwards. However, if the slave "survives a day or two" before dying,

²⁶ See *NOAB-RSV*, Old Testament sect., pp. 94 and 95, where the annotator correctly observes that the laws in Exod. 21:12-32 relate to "protecting human beings," while those in Exod. 21:33-22:17 deal with property. See also P. Kyle McCarter, "Exodus," in James L. Mays, Gen. ed., *Harper's Bible Commentary* (San Francisco: Harper & Row, 1988), p. 149, regarding the organizational pattern in Exodus 21:1-22:17: "The laws are grouped roughly as follows: (1) laws pertaining to slavery, requiring a seventh-year manumission of Hebrew slaves and restricting the sale of daughters (21:1-11); (2) laws of capital crimes (21:12-17), excepting unintentional homicide but including murder (21:12-14), kidnapping (21:16), and crimes against parents (21:15, 17); (3) laws pertaining to personal injuries, including injuries to slaves, inflicted by other human beings (21:18-27) and by livestock (21:28-32); (4) laws pertaining to damages to property (21:33-22:16), including livestock (21:33-36, 22:3) and real estate (22:5-6); (5) laws involving contracts (22:7-15); and (6) laws regarding the payment of the bride-price (22:16-17).

²⁷ The exception, Exodus 21:13, might well be categorized in modern law as relating to second degree murder. See Chapter Five, Section B.1.b.i.

²⁸ See Chapter Five, Section B.1.b.ii & ii.

²⁹ "Time and cure" are common remedies in modern admiralty or maritime law for injuries to seamen.

the man who struck him is not to be punished, the rationale being that the slave is “his money” (Exod. 21:21 RSV). This law probably was included here because it, like others in Exodus 21:18-32, concerns injuries to persons. Here there is no provision for compensating the victim’s relatives.

Exodus 21:22-25 describes what is to be done in a then perhaps not-too-unusual circumstance. If rowdy men are brawling, and while doing so, injure a pregnant married woman thereby causing a miscarriage but without otherwise injuring the woman, “the man” (RSV) who caused the injury was to be fined an amount set by the woman’s husband, as then determined by “the judges.” Apparently these damages would be paid for the loss of the fetus or child.³⁰ This provision can be considered an example of tort law. But if the woman is injured or dies as a result of such injury, the criminal law, known as the “*lex talionis*” is to be applied, and the perpetrator punished accordingly.³¹

Exodus 21:26-27 governs situations where a man strikes his male or female slave, causing the loss of either an eye or a tooth. In that event, he must let the slave go free as compensation for the injury. Such compensation is in the nature of a tort remedy. Even though slaves were regarded as property (Exod. 21:20-21), slave owners or masters were not entirely free to abuse them.³²

Laws applicable to another special situation are set out in Exodus 21:28-32. These say what is to be done when an ox fatally gores a person other than its owner. In cases where the owner of the ox was culpably negligent, guilty, in effect, of reckless endangerment, he was subject to the death penalty.³³ But there were two exceptions. Both refer to what now would be called tort actions. One exception was that the victim’s family could choose to accept compensation (“ransom”) instead (Exod. 21:30). Such ransom might be very substantial, possibly including punitive damages, or damages for pain and suffering of the deceased. In modern law, this provision would be seen as allowing for a civil

³⁰ This is one of two biblical texts that relate, albeit indirectly, to abortion. The only other text, which also relates only indirectly, is Ecclesiastes 6:3-5, commenting favorably on the fate of the “stillborn child.”

³¹ Exodus 21:23-25 is sometimes cited by proponents of capital punishment in support of more general application of the death penalty, as if its context, set out explicitly in Exod. 21:21-23, made no difference. The other two instances of the *lex talionis* found in biblical law likewise were to apply only in delimited contexts: Leviticus 24:19-30 (mayhem, or permanently disfiguring another), and Deuteronomy 19:16-21 (intentional, false, malicious testimony). See Chapter Five, Section B.1.b.ii.(a), and Chapter Six, Section D.2.

³² See Exodus 21:1-11, discussed above and in Chapter Eight, Section B.3.

³³ See Chapter Five, Section B.1.b.ii.(b).

“wrongful death action” in tort.³⁴ The other exception was that if the victim was a slave, the offending ox’s owner was to pay the slave’s owner 30 silver shekels, evidently as compensatory damages for loss of his property (Exod. 21:32).

Exodus 21:33–22:15 lists a series of tort offenses affecting property, along with the remedial damages appropriate in each case.³⁵ Offenses that involve simple negligence are enumerated in Exodus 21:33-35. These laws call only for restitution or compensation in kind equivalent to the value of what was lost or destroyed. Such compensation is required if a farm animal is killed by falling into someone’s open pit (Exod. 21:33-34). In this case, the pit owner keeps the dead animal. In effect, this is a sale: the pit owner buys the dead animal for the value it had when alive. In this situation, it would be foreseeable that an animal that fell into such a pit would be killed. Foreseeable risk of harm is a basic element in modern tort law. *Quid pro quo* or equal compensation is also required if a man’s cattle grazed over another’s field or vineyard,³⁶ if a man sets a fire that accidentally spreads to a neighbor’s grain field;³⁷ and if a farm animal is stolen or injured or dies while in the borrower’s (or bailee’s) possession (Exod. 22:5-6, 12, 14).

A somewhat different situation arises when one man’s ox fatally injures another’s ox (Exod. 21:35). Here the live ox is sold and the two men divide the proceeds of the sale, and also divide the dead animal. Arguably, this is less than full compensation for the man whose ox was killed. One could speculate that this arrangement may be in the nature of a “no fault” settlement, given the difficulty of determining which or whose ox “started it.” If, however, the owner of the goring ox knew of its goring propensities, and failed to fence it in, he was to pay “ox for ox,” but could keep the dead animal (Exod. 21:36). This settlement also is in the nature of a sale: the tort-feasor in effect buys the dead animal for the price of a live one. As in the case of the pit owner, there is some element of culpable negligence, because here also, it should have been foreseeable that harm would result, for an ox “that had been accustomed to gore” was likely to do so again, given opportunity.³⁸

³⁴ See Keeton, ed., *Prosser and Keeton*, pp. 940–61.

³⁵ Excepting 22:2-3, which relates to another matter. See below, note 40.

³⁶ See Keeton, ed., *Prosser and Keeton*, pp. 539–41, discussing liability and “strict liability” for damage done by trespassing livestock.

³⁷ See *id.*, pp. 543–45.

³⁸ So also in modern tort law. See *id.*, pp. 542–43.

As in some types of modern tort law, where the offense (or tort) is clearly intentional, biblical tort law required the tort-feasor to pay multiple damages. Such offenses include theft, breach of trust, and embezzlement or conversion.³⁹ Instances of intentional torts calling for multiple damages included the following: if someone steals another's ox or sheep (Exod. 22:1, 4),⁴⁰ or if a thief allegedly steals property in a neighbor's possession (Exod. 22:7), or in cases involving "breach of trust" or property found in possession of another (Exod. 22:9). The idea of multiple damages for intentional wrong-doing is illustrated in the prophet Nathan's encounter with King David as told in 2 Samuel 12:1-6. Nathan tells David a story⁴¹ about a rich man who had taken a poor man's pet lamb and then killed and served it up for dinner. David, as King, was also Chief Judge. Outraged, David declares that the rich man "shall restore the lamb fourfold because he did this thing and showed no pity" (2 Sam. 12:6 RSV).⁴² Fourfold restitution also is exemplified in the New Testament where it is said that a man named Zacchaeus voluntarily declared: "If I have defrauded anyone of anything, I restore it fourfold" (Lk. 19:8 RSV).

Exodus 22:8-15 relates to possible or suspected embezzlement or "conversion" of property held in trust or "bailment" for another. If goods or money are stolen while entrusted to a neighbor and the thief is not found, the neighbor or bailee shall "come near before God" (RSV) in order to determine whether he has taken it (Exod. 22:8). Similarly, "If a man delivers to his neighbor an ass or an ox or a sheep or any beast to keep, and it . . . is driven away, without anyone seeing it . . ." the accused may be absolved by taking "an oath by YHWH" in order to determine "whether he has not put his hand to his neighbor's property" (RSV). A man entrusted with such farm animals must take a similar oath in order to establish his innocence if the animal died, or was injured while in his possession. The animal's owner was to "accept the oath," thereby

³⁹ On the development of modern Western tort law regarding "conversion," see *id.*, pp. 88-107.

⁴⁰ Exodus 22:2-3 says what is to be done if someone strikes, and then kills a thief "found breaking in." These verses indicate whether the person who so kills a thief is liable for homicide, a criminal offense. This law evidently was inserted between verses 1 and 4, which relate to theft, because they also refer to theft. See Chapter Five, Section B.1.b.iii. "Breaking in" here may refer entering either a house or a barn, or even possibly a farmyard, or pasture for the purpose of stealing animals of the sort referred to in verses 1 and 4.

⁴¹ Nathan tells the story, or parable, to catch the conscience of the king; the story is really about David's murder of Uriah, and taking the murdered man's wife, Bathsheba, as his own new wife (2 Sam. 12:7-9).

⁴² The Hebrew word, *rechem*, here translated as "pity" can equally well be translated as "compassion."

settling the matter (Exod. 22:10-11). But restitution was required if an animal was stolen while in the neighbor's possession (Exod. 22:12). Implicitly, the animal would not have been stolen but for the neighbor's negligence. However, if there was evidence that the farm animal had been "torn by beasts" (RSV) there was to be no need for restitution (Exod. 22:13). Also, if a borrowed or hired farm animal was injured or died while its owner was with it, restitution was not required (Exod. 22:14-15). In these cases where no restitution or compensation was called for, the reason seems to be that the person in possession of the animals at the time was presumed not to have been at fault. Interestingly, however, none of these occurrences is described in biblical tradition as "an act of God," an expression sometimes used in supposedly secular Anglo-American law with reference to unforeseeable harmful happenings or accidents.

A few tort laws are included in later biblical codes. One of these is found in the Holiness Code, and repeated twice: "He who kills a beast shall make it good" (Lev. 24:18 and 21a RSV). Here, as in several laws found in the Covenant Code, the prescribed remedy is equal compensation, whether in kind or by payment of equivalent value. This law does not distinguish between intentional and negligent killing of another's "beast."

Deuteronomy 25:1 sets out another law that may apply to civil litigation, and also, as suggested by the verses that follow (25:2-3), to criminal activity:

Suppose two persons have a dispute and enter into litigation, and the judges decide between them, declaring one to be in the right and the other to be in the wrong.

Here, what follows is punishment, rather than restitution or some other form of compensation. This text, unlike many others relating to civil actions, refers specifically to the role of "the judges."

Anglo-American law does not provide that a person in position to do so has a duty to rescue another person from imminent harm or another person's property from likely damage. Biblical law does impose such a duty with respect to animals and other property. Deuteronomy requires a person to take affirmative action to return neighbor's stray farm animals to him, and to restore lost garments, or, inclusively, "any lost thing of your brother's which he loses and you find" (Deut. 22:1-3 RSV). Deuteronomic law also requires a person to help one's neighbor lift up his fallen ass or ox. The earlier version of this law in the Covenant Code even imposed a duty to restore an enemy's stray ox or ass, and to help

him get his ass up and on its feet if the ass had foundered under its burden (Exod. 23:4-5).

Deuteronomic law also includes a safety requirement for the purpose of preventing or reducing the likelihood of foreseeable harm to persons: “When you build a new house, you shall make a parapet for your roof, that you may not bring the guilt of blood upon your house, if any one fall from it” (Deut. 22:8 RSV). It is unclear whether the parapet or railing referred here to was meant to be a temporary safeguard to prevent workmen falling during construction, or a permanent architectural safety feature.

A somewhat later law collection, known as the Priestly Code, lists various intentional torts involving inanimate property, such as “deceiving [a] neighbor in a matter of deposit or security, or through robbery” (RSV). Here the remedy is full restitution of the property in question, plus an added one-fifth (or 20 per cent) in punitive damages (Lev. 6:1-5). In addition, the perpetrator must bring a “guilt offering” to “the priest” (Lev. 6:6-7). A slightly later addition apparently was meant to provide for restitution when the person to whom the wrong had been done was no longer alive. In that case, restitution could be made to the victim’s kinsman, and if there was no kinsman, to “YHWH for the priest” (Num. 5:5-10).

All of these “tort” laws and remedies evidently were meant to allocate fairly the burdens of liability. The interests of both parties enter into the equation: those who did the wrong, and those to whom it had been done. The emphasis here is upon justice. But compassion may be implicit as well, for once damages—including punitive damages—were paid, the parties could again get on with their lives. There was no provision for humiliating, ostracizing, or exiling wrong-doers who had compensated those they had injured.

C. Biblical Contract and Tort Law, and Modern Counterparts

Biblical scholars for the most part are unfamiliar with modern Anglo-American legal concepts and categories. It is not surprising, therefore, that such concepts and categories are rarely mentioned in biblical commentaries. But it is surprising to find how closely many biblical laws approximate certain basic features of modern jurisprudence.

Biblical laws and narratives clearly indicate that in order to form a contract, both parties must agree to its terms. Typically one party (or person)

will propose terms; it is then up to the other either to agree to these terms or reject them. This pattern of offer and acceptance, constituting agreement is a standard feature of modern contract law. It is illustrated in a number of biblical narratives, most notably: Jacob's offer to sell his brother, Esau, a bowl of stew in exchange for the other's birthright (Gen. 25:29-34); Jacob's and Laban's coming to terms as to labor contracts (Gen. 29:21-30; 30:25-43); Balak's hiring Balaam to curse Israel (Num. 22-24); and Tobit's hiring a companion to accompany his son Tobias on a journey (Tob. 5:14-16). Laws governing contractual arrangements evidently were intended to prevent exploitation or mistreatment of affected persons who might not otherwise be able to defend their own interests because they lacked equal bargaining position or power. Such laws related to the rights or interests of slaves (Exod. 21:1-11); debtors (Exod. 22:25-27; Deut. 24:10-13) and day laborers (Lev. 19:13; Deut. 24:14-15).

Biblical tort laws also parallel modern counterparts, both with respect to underlying concerns, values or purposes, and certain related distinctions and "elements." Such elements include a duty to care, or to avoid harming others or their property; some breach of that duty (whether intentional or negligent); and "proximate cause," that is, foreseeable harm to persons or damage to their property resulting from such breach. These elements are all present, explicitly or implicitly, in the biblical tort laws considered above. In addition, as has been seen, biblical laws set out an affirmative duty to assist others under certain circumstances. Like modern tort law, many biblical laws were intended to provide relief or compensation to persons who were injured, or whose property was damaged or destroyed as a result of other persons' conduct.

The underlying value implicit in these laws seems to have been that members of the community were entitled to bodily integrity, that is, to be free from being harmed by others; and also to be free from actions by others that resulted in loss of or damage to property. Implicitly, each member of the community had a duty of care⁴³ with respect to others and their property: to avoid acting in ways that foreseeably could injure others or damage their property. The dignity, worth, or value of each member of society was taken as given, even, though with significant qualifications, in the case of slaves.

Foreseeability is a basic element or feature of both biblical and modern tort law. That is, to be liable for wrongdoing, the person whose conduct resulted in harm should have been "reasonably" aware that his or her

⁴³ On "duty" in modern tort law, see Keeton, ed., *Prosser and Keeton*, pp. 356-59.

conduct could have harmful consequences of the sort that resulted.⁴⁴ Several laws relate to cases of simple negligence, where the consequences were not intended, but nevertheless could be foreseen: for instance, when someone leaves an open pit and a neighbor's ox or ass falls into it (Exod. 21:33-34), or when someone starts a fire that spreads into a neighbor's grain field (Exod. 22:6). In such cases, the law called for relief in the form of restitution or equivalent compensation. One distinctive biblical law requires those responsible for new construction to provide safety railings, in order to prevent or reduce the risk of foreseeable harm to others (Deut. 22:8).

Like modern tort law, biblical law treats reckless conduct and intentional wrongdoing more severely. Some instances of reckless endangerment can also be seen as criminal offenses.⁴⁵ Purposeful wrongdoing or intentional torts, such as theft, embezzlement, or breach of trust,⁴⁶ called for multiple or punitive damages, a common remedy for intentional torts in modern law.

Biblical scholars generally maintain that the laws found in the Covenant Code (Exod. 20:1–23:33) were set down at random, rather than in accordance with any recognizable pattern or structure based on content. However, when contemporary legal categories are used to describe the laws found in Exodus 21:12 through Exodus 22:15, it turns out that these laws appear to have been organized in a coherent structure after all.

The first block, Exodus 21:12-32, concerns injuries inflicted upon persons.⁴⁷ Some of these laws describe circumstances under which the wrongdoer would be subject to capital, or some other punishment, or might, instead, either be exonerated or required to pay damages, notably, the laws set out in Exodus 21:12-14 (homicide), and intentional or reckless conduct resulting in injuries to persons along with appropriate remedies (Exod. 21:18-25, 29-32). Two laws included here concern reckless endangerment (Exod. 21:22-25 and 21:29-31), and call for indeterminate compensation as well as possible criminal penalties. Other laws in this block call for capital punishment without mention of obviating or mitigating circumstances (Exod. 21:15-17).⁴⁸ Another set of laws requires slave owners to free slaves they have injured in certain ways.⁴⁹

⁴⁴ See generally *id.*, pp. 263–321.

⁴⁵ Also see Chapter Five, Section B.1.b.ii.

⁴⁶ See Exodus 22:1, 4, 9; Lev. 6:1–5.

⁴⁷ As noted above, Exodus 21:1-11 relate to sales contracts.

⁴⁸ As to these and other laws calling for the death penalty, see Part II of this book.

⁴⁹ See Chapter Eight, Section B.3.

The second block, Exodus 21:33 through 22:1, 4-15, consists of laws concerning theft of or damage to property. Chapter 22 verses 5 and 6 cover negligent damage to another's agricultural interests; verses 7 through 13 govern property held in "trust" or bailment; and verses 14 and 15 concern borrowed property. These laws provide for various remedies, typically in the form of restitution or cash. Persons who committed intentional torts were liable for multiple, that is, punitive damages (Exod. 22:1, 4, 7, and 9). As with the laws relating to injuries to persons, where circumstances indicated that the apparent wrongdoer was without fault, no restitution or damages payment was required (Exod. 22:8, 10-11, 13, and 15).⁵⁰

The fact that nearly all biblical tort laws are grouped together in Exodus 21:18 through 22:15 can be regarded as a further indication that the biblical legislators or editors themselves distinguished such laws from other legal categories. In any event, recognizing these laws as tort laws should be helpful to biblical scholars when describing the substance of biblical law, and to legal scholars when undertaking to trace similarities and possible connections between ancient Near Eastern law and contemporary jurisprudence.

This series of tort laws is followed by a set of three criminal laws describing capital offenses (Exod. 22:18-20). These, along with the other criminal offenses against persons referred to in the first block (Exod. 21:12, 14-17, as well as laws involving reckless endangerment, Exod. 21:23, 29-31) are considered in Part II of this book. Those laws in the remaining portions of the Covenant Code that can be classified as social legislation (Exod. 22:21-28; 23:1-12) are examined in Part III.⁵¹

Before turning to these topics, attention is directed in the following chapter to another type of biblical civil law. This is the matter of transferring property by inheritance, and also doing so by testation, that is by making wills or bequests to named beneficiaries. The latter form of transfer has generally been ignored by both biblical and legal scholars.

⁵⁰ Exodus 22:16-17, concerning what was to be done when "a man seduces a virgin who is not betrothed" (RSV), could be read, if seen in the context of this second block, to imply that virgin daughters were regarded as property. Alternatively, this text might be seen as a displaced segment of the series of laws about injuries to persons set out in Exod. 21:12-32.

⁵¹ The other remaining laws define various religious obligations or prohibitions: Thus Exod. 22:28-31; and 23:14-33.