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Ancient Laws, Yet Strangely Modern: Biblical Contract and Tort Jurisprudence*

RICHARD H. HIERS**

Abstract:

People generally, and even most biblical scholars, tend to view biblical law as, at best, a random patchwork of odd and antiquated commandments and rules. The present Article demonstrates that many biblical laws can be understood to have functioned in biblical time, in ways remarkably similar to various laws characterized in modern Anglo-American jurisprudence as contract and tort law. In particular, the Article points out that the biblical tort laws found in Exodus 21:18 through 22:17 are structured along lines closely parallel to concepts found in modern tort law jurisprudence. Many of the biblical laws considered here give expression to the underlying values of concern for the worth and well being of both individuals and the community. The findings here should be of interest to both legal and biblical scholars.

Once when Jacob was cooking a stew, Esau came in from the field, and he was famished. Esau said to Jacob, "Let me eat some of that red stuff, for I am famished!" . . . Jacob said, "First sell me your birthright." Esau said, "I am about to die; of what use is a birthright to me?" Jacob said, "Swear to me first." So he swore to him, and sold his birthright to Jacob.¹

* This Article is based on a chapter by the same author in a book entitled JUSTICE AND COMPASSION IN BIBLICAL LAW (2009). Republication here is with permission of the publisher, Continuum International. The present Article includes substantial additions and other revisions.

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1. *Genesis* 25:29–25:33. Quotations from the Bible, unless otherwise noted, are from THE NEW OXFORD ANNOTATED BIBLE WITH THE APOCRYPHAL/DEUTEROCANONICAL BOOKS: NEW REVISED STANDARD VERSION (Michael D. Coogan ed., 3d ed. 2001) (1989). Occasionally quotations are from THE NEW OXFORD ANNOTATED BIBLE WITH THE APOCRYPHA: REVISED STANDARD VERSION (Herbert G. May & Bruce M. Metzger eds., 2d ed. 1977) (1965) [hereinafter NOAB-RSV]. Citations from the Revised Standard Version are identified by the abbreviation, 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.²

INTRODUCTION

Modern Western jurisprudence distinguishes between criminal and civil law. The former category relates to actions or activities that are deemed harmful to the community or (as in states like California) to “the people” generally. Criminal offenses are usually punishable by fine, imprisonment, or—if a capital offense—by execution under the authority of public officials.³ Major civil law categories include contracts and torts. Other categories of law, such as those regarding transfer of property and social legislation may also be classed as civil law. This Article examines biblical laws and narratives that represent, what in modern jurisprudence would be classified as contract laws, and then turns to biblical laws governing what now would be designated as torts.

Contract law concerns arrangements between persons or “parties” who seek to gain something from each other through an exchange of goods, services, money, or other valuables, typically referred to in modern contract jurisprudence as “consideration.”⁴ A basic feature of modern contract law is “offer and acceptance.” For a contract to be binding there must be a “meeting of the minds”; that is, the parties must agree to the terms of the contract. Such agreement may be either written or oral. When one party to such an agreement fails to perform the agreed to terms, the other party typically seeks monetary damages or some other remedy.

Tort offenses, on the other hand, are those offenses that harm individual persons or their property, whether intentionally, recklessly, or as the result of simple negligence.⁵ Such harm may then be remedied by restitution or payment of damages to the persons injured or to those whose property has been damaged. If the tortfeasor—the person who did the wrong—acted recklessly or intentionally, a court typically will award punitive or multiple damages in addition to remedial damages or restitution.

2. *Exodus 22:5* (RSV).

3. See RICHARD H. HIERS, *JUSTICE AND COMPASSION IN BIBLICAL LAW* 61–164 (2009) (discussing biblical criminal law).

4. See generally AMY HILSMAN KASTELY, DEBORAH WAIRE POST & SHARON KANG HOM, *CONTRACTING LAW* (2d ed. 2000); ARTHUR LINTON CORBIN, 1 *CORBIN ON CONTRACTS* (1952) [hereinafter CORBIN 1952]; ARTHUR LINTON CORBIN, 1 *CORBIN ON CONTRACTS* (Joseph M. Perillo ed., 1993) [hereinafter CORBIN 1993].

5. See generally PROSSER AND KEETON ON THE LAW OF TORTS (W. Page Keeton ed., 5th ed. 1984) (1941).

I. BIBLICAL CONTRACT LAWS

Provisions for contracts are found in both biblical laws and in a number of stories or narratives where the persons or parties involved negotiate and enter into contractual agreements. Laws explicitly relating to contracts will be considered first.

A. *Specific Laws*

Only a few biblical laws relate directly to contracts. All of these laws were evidently intended to protect the interests of persons who would likely be adversely affected by contractual agreements. In some instances, affected persons would include parties to the agreements who were in relatively weak bargaining positions.⁶ In others, the parties affected might be third persons whose interests might otherwise be infringed by the contracting parties.

The first eleven verses of Exodus chapter 21 relate to purchase or sales contracts.⁷ Exodus 21:1–22:6 set out “the ordinances” that governed when someone bought a Hebrew slave.⁸ These ordinances specified that such slaves were to be freed after six years of service and defined the circumstances under which a slave’s wife and children might either be or become slaves themselves, or else be freed.⁹ Chapter 21:7–21:11 sets out those conditions or requirements that were to go into effect when a man sold his daughter as a slave.¹⁰ The purchaser was obliged to treat her well, and if he did not do so, she was to go free.¹¹

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

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.¹²

The version of this law in Deuteronomy 24:10–24:13 adds a further restriction on a lender’s conduct: “When you make your neighbor a loan of

6. See KASTELY ET AL., *supra* note 4, at 632–33; see CORBIN 1993, *supra* note 4, at 13–15 (discussing how 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 positions little choice but to “agree” to adverse terms).

7. *Exodus* 21:1–21:11.

8. *Exodus* 21:1–21:6.

9. See HIERS, *supra* note 3, at 204–09.

10. *Exodus* 21:7–21:11.

11. *Id.*

12. *Exodus* 22:26–22:27 (RSV).

any sort, you shall not go into his house to fetch his pledge.”¹³ Nor were creditors to take a widow’s clothing in pledge.¹⁴ Another law provided that creditors were not to take in pledge (or as collateral) equipment that served as the basis for a debtor’s livelihood: “No one shall take a mill or an upper millstone in pledge, for that would be taking a life in pledge.”¹⁵

Both justice and compassion are implicit in Leviticus 19:13¹⁶ and Deuteronomy 24:14–24:15,¹⁷ which required employers to pay hired servants or workers the same day the servants or workers earned their pay.¹⁸ This requirement is illustrated in Jesus’ Parable of the Laborers in the Vineyard.¹⁹ In this parable, the owner of the field had his foreman pay all laborers their wages on the evening of the same day they worked.²⁰

Compassion for needy borrowers is clearly expressed in the law that barred lenders from exacting interest from “any of my people with you who is poor.”²¹ Another law grounded on compassion barred lending money with interest, or making a profit from selling food to a “brother [who] becomes poor, and cannot maintain himself.”²²

B. Contract Laws in Narrative Contexts

Several biblical narratives describe contractual agreements. In each case, there was some “consideration,” that is, something of value that one party proposed to exchange for something that the other valued.²³ Sometimes complications arose because one party engaged in deceptive practices or fraud. Also one of the parties may have failed to carry out the contractual terms, or the parties may have failed to agree as to specific

13. *Deuteronomy* 24:10 (RSV). Instead, the law continued, “You shall stand outside and the man to whom you make the loan shall bring the pledge out to you.” *Deuteronomy* 24:11 (RSV). The man making the loan was entitled to the borrower/debtor’s pledge, but this provision assured that the latter’s personal dignity and home privacy was to be respected.

14. *Deuteronomy* 24:17.

15. *Deuteronomy* 24:6.

16. *Leviticus* 19:13.

17. *Deuteronomy* 24:14–24:15.

18. See *Sirach* 34:22 (“To take away a neighbor’s living is to commit murder; to deprive an employee of wages is to shed blood.”). See generally Paul B. Rasor, *Biblical Roots of Modern Consumer Credit Law*, 10 J.L. & RELIGION 157 (1993–94); Louis E. Newman, *Covenant and Contract: A Framework for the Analysis of Jewish Ethics*, 9 J.L. & RELIGION 89 (1991).

19. *Matthew* 20:1–20:16.

20. *Matthew* 20:8.

21. *Exodus* 22:25 (RSV).

22. *Leviticus* 25:35–25:37 (RSV).

23. See KASTELY ET AL., *supra* note 4, at 263; CORBIN 1952, *supra* note 4, at 160–65 (generally discussing consideration).

terms. Some examples of such situations are considered in the following paragraphs.²⁴

Perhaps the earliest account of a contract negotiation is that found in Genesis 23:3–23:16, where Abraham, whose wife Sarah had just died, undertook to purchase a burying place from his Hittite neighbors.²⁵ In particular, Abraham wished to buy a field and a cave, known as the “Cave of Machpelah,” from a man named Ephron.²⁶ The bargaining process began when Abraham offered to pay “the full price.”²⁷ Ephron countered with the seemingly magnanimous offer simply to *give* Abraham the field and the cave.²⁸ Abraham insisted on paying the full price,²⁹ after which, Ephron named the figure: “My lord, listen to me; a piece of land worth four hundred shekels of silver—what is that between you and me? Bury your dead.”³⁰ Abraham agreed, paid the rather substantial price, and “the field with the cave that was in it and all the trees that were in the field, throughout its whole area, passed to Abraham as a possession in the presence of the Hittites, in the presence of all who went in at the gate”³¹

Jacob figured prominently in three other contract accounts. The first was the story in Genesis 25:29–25:34, where Esau, faint with hunger, asked Jacob for some of the stew (“pottage”) he had boiled.³² Not one to miss a good business opportunity, Jacob offered to let Esau have some, but only if Esau first sold him his birthright.³³ Here, the “consideration” on one side is

24. See 1 Kings 5:1–5:11; 1 Kings 9:10–9:14; 2 Chronicles 2:3–2:16 (describing contractual agreements between Solomon and Hiram (or Huram), King of Tyre). These accounts report both the agreements and the “consideration” each party was to give the other. The version in 1 Kings 9:10–9:14, however, indicates that Solomon had given Hiram different consideration, namely twenty cities in Galilee, and that Hiram, having gone to look at them, found these “cities” less than he had bargained for (“What kind of cities are these that you have given me, my brother?”). It is doubtful that there were as many as twenty cities in Galilee at the time. Perhaps the “cities” turned out to be no more than dilapidated villages. Thus, perhaps, the meaning of “Cabul” in 1 Kings 9:13.

25. Genesis 23:3–23:16.

26. Genesis 23:8–23:9.

27. Genesis 23:9. See also Raymond Westbrook, *Purchase of the Cave of Machpelah*, 6 ISRAEL L. REV. 29, 29–38 (1971) (demonstrating that under ancient Near Eastern common law, it was necessary to pay the “full price” in order to acquire an inheritable estate in real property).

28. Genesis 23:11.

29. Genesis 23:13.

30. Genesis 23:15.

31. Genesis 23:16–23:18. See also Ruth 4:1–4:12. Witnesses to a prospective land transaction “at the gate” are also mentioned in this story. The scene described in the Book of Ruth also involves bargaining for a contract, complicated, however, by the laws or customs of land redemption and levirate marriage. See HIERS, *supra* note 3, at 40–43, 201–02.

32. Genesis 25:29–25:34.

33. Genesis 25:31. See also HIERS, *supra* note 3, at 47–51 (discussing the meaning of “birthright”).

the stew or porridge and on the other, it is the birthright. Esau agreed with an oral acceptance: “So he swore to him, and sold his birthright to Jacob.”³⁴ The narrator, whose sympathies were obviously with Jacob,³⁵ was not troubled by the fact that Jacob obtained Esau’s agreement under conditions that might now be considered to involve duress.³⁶ On two later occasions Jacob negotiated employment contracts with his kinsman, Laban.³⁷ Each time however, Laban engaged in deceptive or fraudulent practices to his own advantage.³⁸ Apparently, in those times there was no provision for voiding contracts on the basis of fraud or misrepresentation.³⁹

Another famous biblical scene also involved an oral contract. This was the story in Numbers about Balak, King of Moab, hiring Balaam, a professional prophet or execrator, to go and curse the menacing horde of Israelites who were about to encroach on the land of Moab.⁴⁰ Exact terms were not specified, but it was clear that Balak offered to pay Balaam a substantial fee or “honorarium” to 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.”⁴¹ After Balaam repeatedly blessed the Israelites instead of cursing them, the exasperated Balak charged Balaam, in effect, with breach of contract and refused to pay the promised “honor” or, honorarium.⁴² Balaam replied that he never had agreed to curse Israel in the first place, so there was no contract to breach.⁴³ There apparently had been no “meeting of the minds.”⁴⁴

Two contractual arrangements are mentioned in the Apocryphal Book of Tobit. The first of these involves Tobit hiring a man to accompany his son, Tobias, on a journey.⁴⁵ In that instance, the parties agreed to fairly

34. *Genesis* 25:33.

35. *See Genesis* 25:34 (“Thus Esau despised his birthright”).

36. *See KASTELEY ET AL.*, *supra* note 4, at 552; CORBIN 1952, *supra* note 4, at 320 (discussing generally the concept of duress).

37. *Genesis* 29:15–29:20, 30:25–30:34.

38. *Genesis* 29:21–29:27, 30:35–30:36.

39. *See KASTELEY ET AL.*, *supra* note 4, at 571–608; CORBIN 1952, *supra* note 4, at 10–11, 320 (providing an overview of the status of the law on misrepresentation and fraud and their consequences as to the binding effect of contracts).

40. *Numbers* 22–24; *see also* RICHARD H. HIERS, *THE TRINITY GUIDE TO THE BIBLE* 50–51 (2001).

41. *Numbers* 22:16–22:17 (RSV).

42. *Numbers* 24:10–24:11 (RSV).

43. *See Numbers* 24:12–24:13 (“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 the LORD, to do either good or bad of my own will; what the LORD says, that is what I will say’?”).

44. *Id.*

45. *Tobit* 5:3–5:15.

specific terms. Tobit addressed a man named Azariah:⁴⁶ “‘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.”⁴⁷ Later in the story, when Tobias spent the night with Raguel, a family relative, it was arranged that Tobias would marry Raguel’s daughter, Sarah.⁴⁸ This story has many points of interest, but the one to be noted here is that as part of the marriage formalities, Raguel proceeded to write a contract to which both he and his wife, Edna, set their seals.⁴⁹ Whether this contract related directly to the wedding, or to a possible dowry, or perhaps to arrangements for inheritance⁵⁰ is not indicated. Notably, both Raguel and Edna “set their seals” to the contract,⁵¹ indicating that both the father and the mother of the bride had legal status to enter into contractual agreements.⁵² While rarely used in modern times, seals are still sometimes applied to contracts.⁵³ At least one contract is described in the New Testament.

This is in Jesus’ Parable of the Laborers in the Vineyard.⁵⁴ 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 a day (RSV), he sent them into his vineyard.”⁵⁵ As the day went on, the owner hired more workers, but at the end of the day, paid each—including those who had worked only the last hour, a full denarius.⁵⁶ The workers who had “borne the burden of the day and the scorching heat” complained that the others received the same pay.⁵⁷ The owner then points out that they had agreed to these terms, and therefore, they had no grounds to complain.⁵⁸ He then told one of them: “Friend, I am doing you no wrong; did you not agree with me for the usual daily wage?”⁵⁹

46. As the story is told, Azariah was actually the angel, Raphael, in disguise. *Tobit* 5:4–5:13.

47. *Tobit* 5:14–5:15 (RSV).

48. *Tobit* 6:9–7:11 (RSV).

49. *Tobit* 7:11–7:14 (RSV).

50. See *Tobit* 14:12–14:13; see also HIERS, *supra* note 3, at 25–59 (discussing inheritance of property in biblical law).

51. *Tobit* 7:11–7:14.

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

53. See CORBIN 1952, *supra* note 4, at 337–38.

54. *Matthew* 20:1–20:16.

55. *Matthew* 20:1–20:2.

56. *Matthew* 20:9–20:10.

57. *Matthew* 20:11–20:12.

58. *Matthew* 20:13.

59. *Matthew* 20:13.

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

C. *Overlap Between Contract and Tort Law*

Some of the wrongful acts described in biblical tradition can be characterized in modern legal terms either as breaches of contract or as “torts.” Modern legal scholars, noting occasional overlap between contract and tort law, sometimes humorously refer to these acts as “con-torts.”⁶⁰ Exodus 22:7–22:11 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 the tort of embezzlement or conversion. Although these laws involve elements of contract—for instance, implicit prior agreements of one kind and another⁶¹—in this Article these laws are considered under the rubric of tort law.

II. BIBLICAL TORT LAWS AND REMEDIES

Biblical texts do not use the term “tort,” nor do most biblical commentators.⁶² Nevertheless, the term may aptly characterize several biblical laws. The word “tort” probably derives from the French, *tort*, meaning “wrong.”⁶³ In law, the term refers to acts resulting in injury to persons or damage to property. Remedies are usually in the form of compensation paid to the injured party as “damages” or restitution for that which has been taken or destroyed.⁶⁴

In Anglo-American statutory and common law, torts are classified as either negligent or intentional. Intentional torts, including those resulting from reckless endangerment to others, are considered more serious than harms resulting from mere negligence.⁶⁵ Intentional tortfeasors and those found to have committed acts of reckless endangerment are sometimes

60. See generally PROSSER AND KEETON ON THE LAW OF TORTS, *supra* note 5, at 655–76 (discussing the complex relation between these two categories of modern civil law).

61. See, e.g., Exodus 22:14–22:15, discussed *infra* II.A; see also *infra* note 140 and accompanying text.

62. Bible dictionaries typically do not list or describe “tort” laws. Commentators sometimes refer to “civil laws.” See DALE PATRICK, OLD TESTAMENT LAW 76–79 (1985) (identifying instances of “civil tort”); CHRISTOPHER J. H. WRIGHT, OLD TESTAMENT ETHICS FOR THE PEOPLE OF GOD 283–94 (2004).

63. See THE CONCISE OXFORD FRENCH DICTIONARY 821 (1950) (translating *tort* as follows: “wrong, injustice, mischief, harm, injury”).

64. See BLACK’S LAW DICTIONARY 1526 (8th ed. 2004) (defining “tort” as “[a] civil wrong, other than breach of contract, for which a remedy may be obtained, usually in the form of damages”). See also PROSSER AND KEETON ON THE LAW OF TORTS, *supra* note 5, at 1–7 (discussing, in-depth, what constitutes a tort).

65. See generally PROSSER AND KEETON ON THE LAW OF TORTS, *supra* note 5, at 33–107.

subjected to additional “damages,” typically in the form of multiple, “punitive,” or “exemplary” damages, payable to the victim or, if the victim is deceased, to the victim’s estate.⁶⁶ The implicit rationale for awarding such damages is to deter people from engaging in similar, future conduct, 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 tortfeasor. Modern tort law also distinguishes between tortious conduct that is harmful to persons, and tortious conduct that damages property.

A. *The Main Collection of Biblical Tort Laws: Exodus 21:18–22:17*

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.⁶⁷ Commentators often describe these laws as a hodge-podge, or at best as a loosely organized assortment of miscellaneous provisions.⁶⁸ However, when modern jurisprudential concepts are applied, the laws found in Exodus 21:12–22:17 appear to have been organized along lines that correspond closely to contemporary legal categories.

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

1. Criminal law: offenses against persons.⁶⁹
2. Civil law: tort offenses.⁷⁰
 - a. Acts causing injuries to or death of persons.⁷¹
 - i. Intentional infliction of harm.⁷²
 - ii. Negligent and reckless infliction of harm.⁷³
 - b. Injuries to animals belonging to others through negligent or reckless conduct.⁷⁴
 - i. Leaving an open pit.⁷⁵

66. *See id.* at 7–15. *See also* DAN B. DOBBS, *THE LAW OF TORTS*, 1062–64 (2000).

67. *Exodus* 21:12–22:27.

68. *See, e.g.*, 1 *THE NEW INTERPRETERS’ BIBLE* 860–66 (1994) (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.”). *Id.* at 863–66. Nevertheless, the article goes on to identify several categories of laws, though without mentioning either civil law or tort law. *Id.*

69. *Exodus* 21:12–21:17.

70. *Exodus* 21:18–22:17.

71. *Exodus* 21:18–21:32.

72. *Exodus* 21:18–21:21, 21:26–21:27.

73. *Exodus* 21:22, 21:28–21:32.

74. *Exodus* 21:33–21:36.

75. *Exodus* 21:33–21:34.

- ii. One man's ox fatally injures another's.⁷⁶
- c. Intentional and negligent conduct affecting animals and other property.⁷⁷
 - i. Theft of cattle (farm animals).⁷⁸
 - ii. Allowing animals to graze over neighbors' fields or crops.⁷⁹
 - iii. Allowing fire to spread and damage neighbors' crops.⁸⁰
 - iv. Failing to care for property in trust or bailment.⁸¹
 - v. Property damaged or lost while borrowed.⁸²
- d. Seduction of a virgin who is not betrothed.⁸³

It is clear that these laws were not recorded in random order, but rather organized on the basis of principles that correspond to distinctions found in modern tort law classifications.⁸⁴

1. Tort Laws Relating to Injuries or the Death of Persons

The collection of laws found in Exodus 21:12–21:32 begins with a series of criminal laws all of which have to do with offenses against persons, and all but one⁸⁵ of which offenses constitute capital crimes.⁸⁶

76. *Exodus* 21:35–21:36.

77. *Exodus* 22:1–21:15.

78. *Exodus* 22:1, 21:4. *See also Exodus* 22:2–22:3. This passage concerns liability, if any, for killing someone who “broke in” possibly to steal cattle. The placement of these verses here is logical because they probably had to do with cattle thieves or “rustlers,” the subject of the intertwined verses, *Exodus* 22:1, 22:4. *See infra* notes 124 & 180.

79. *Exodus* 22:5.

80. *Exodus* 22:6.

81. *Exodus* 22:7–22:13.

82. *Exodus* 22:14–22:15.

83. *Exodus* 22:16–22:17. As will be discussed, *infra*, an important part of this tort is failure to pay the marriage gift.

84. *See* NOAB-RSV, *supra* note 1, at 94–95. The annotator correctly observes that the laws in *Exodus* 21:12–21:32 relate to “protecting human beings,” while those in *Exodus* 21:33–22:17 deal with damage to property. *See also* HARPER'S BIBLE COMMENTARY 149 (James L. Mays ed., 1988) (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 (21:33–15), 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)).

Id.

85. *Exodus* 21:13 (providing an exception where the offender “did not lie in wait” for the victim, “but God let him fall into his hand” (RSV)). *See also* HIERS, *supra* note 3, at 89–90 (suggesting that this exception would likely be categorized in modern law as relating to second-degree murder).

These laws include intentional homicide,⁸⁷ striking one's father or mother,⁸⁸ kidnapping,⁸⁹ and cursing either parent.⁹⁰ Likewise, the tort laws in the following verses concern acts that adversely affect persons.⁹¹

Exodus 21:18–21:19 provides that if two men fight and one seriously injures the other who then becomes incapacitated for a period of time, the man who caused the injury “shall pay for the loss of [the victim’s] time, and shall have him thoroughly healed.”⁹² These provisions evidently required payment for earnings lost while the injured man was unable to work, and also for his medical expenses. There is no mention of qualifying factors such as which man started the fight, the merits of their respective arguments, or whether one acted in self defense. The law simply stated that the man who was not incapacitated would pay the other’s damages. This law might also have been intended to deter brawling, since those so engaged would be on notice that they could be liable for the kinds of damages indicated if they caused serious injury to others.

The law found in Exodus 21:20–21:21 falls more closely into the category of criminal law because it calls for the punishment of the offender as opposed to the offender paying damages or making restitution. This law provided that a man was to be punished if he struck his slave, whether male or female, and the slave died immediately afterward.⁹³ If, however, the slave “survive[d] a day or two” before dying, the man who struck him was not to be punished, the rationale being that the slave was “his money.”⁹⁴ In either case, the slave owner was free from liability for tort damages, there being no provision for compensating the victim’s relatives. This law was probably included there because it, like others in Exodus 21:18–21:32, concerns injuries to persons.

Exodus 21:22–21:25 describes what was to be done if a brawl broke out—a circumstance that was perhaps quite common at the time. If rowdy men were brawling, and while doing so, they injured a married, pregnant

86. The entire block of laws found in *Exodus* 21:18 through 22:17, is followed by another brief set of capital laws (*Exod.* 22:18–22:20). See HIRS, *supra* note 3, at 86–126 (discussing these and other laws calling for the death penalty).

87. *Exodus* 21:12, 21:14.

88. *Exodus* 21:15.

89. *Exodus* 21:16.

90. *Exodus* 21:17. In the ancient Near East—and in some modern time cultures—cursing a person was believed to inflict serious, tangible harm. See, e.g., *Numbers* 22:6, 22:11.

91. *Exodus* 21:18–21:32.

92. Damages for lost wages and medical expenses are also available under modern tort law. See DOBBS, *supra*, note 66, at 1048–50. “Time (or ‘maintenance’) and cure” are common remedies in modern admiralty or maritime law for seamen injured in the course of employment. See GRANT GILMORE AND CHARLES J. BLACK, JR., *THE LAW OF ADMIRALTY* 281–314 (2d ed. 1975).

93. *Exodus* 21:20.

94. *Exodus* 21:21 (RSV).

woman thereby causing a miscarriage, but without committing any other harm, “the one” who caused the injury was to be fined an amount set by the woman’s husband, as then determined by “the judges.”⁹⁵ Apparently these damages were paid in compensation for the loss of the fetus or unborn child.⁹⁶ This provision can be considered a matter of tort law. However, if the woman was injured or died as a result of such injury, the criminal sanction known as the “*lex talionis*” was to be applied, and the perpetrator punished accordingly.⁹⁷

Exodus 21:26–21:27 governs situations where a man struck his male or female slave, causing the loss of either an eye or a tooth. In that event, he was required to let the slave go free as compensation for the injury.⁹⁸ Such compensation is in the nature of a tort remedy. Even though slaves were regarded as property,⁹⁹ slave owners or masters were not at liberty to abuse them.¹⁰⁰

Laws applicable to another special situation are set out in Exodus 21:28–21:32. These laws detail the legal consequence when an ox fatally gores someone other than its owner.¹⁰¹ In cases where the owner of the goring ox is culpably negligent and in effect, guilty of reckless endangerment, the owner is subject to the death penalty, with two exceptions.¹⁰² Both exceptions provide what are now called tort remedies. One exception is that the victim’s family could choose to accept compensation (“ransom”) in lieu of capital punishment.¹⁰³ Such ransom might be very substantial, possibly including some equivalent to punitive or pain and suffering damages. In modern law, this provision allows for a civil “wrongful death action” in tort.¹⁰⁴ The second exception is that if the victim was a slave, the offending ox’s owner was to pay the slave’s owner

95. *Exodus* 21:22–21:25 (RSV).

96. See HIERS, *supra* note 3, at 90–91. This is the only biblical law that relates, albeit indirectly, to abortion. The only other biblical text that also relates only indirectly to abortion is *Ecclesiastes* 6:3–6:5, commenting positively about the fate of the “stillborn child.”

97. *Lex talionis* means “law of retaliation” or punishment equivalent to the injury caused by the perpetrator. *Exodus* 21:23–21:25 is sometimes cited by proponents of capital punishment in support of generalized application of the death penalty, as if its context set out explicitly in *Exodus* 21:21–21:23 made no difference. The other two instances of the *lex talionis* found in biblical law likewise were to apply only in delimited contexts: *Leviticus* 24:19–24:20 (mayhem, or permanently disfiguring another), and *Deuteronomy* 19:16–19:21 (intentional, false, malicious testimony). See HIERS, *supra* note 3, at 146–51.

98. *Exodus* 21:26–21:27.

99. *Exodus* 21:20–21:21.

100. See *Exodus* 21:1–21:11; HIERS, *supra* note 3, at 204–11.

101. *Exodus* 21:28–21:32.

102. See HIERS, *supra* note 3, at 91–92.

103. *Exodus* 21:30.

104. See PROSSER AND KEETON ON THE LAW OF TORTS, *supra* note 5, at 945–46.

thirty silver shekels, evidently as compensatory damages for loss of his property.¹⁰⁵

2. *Tort Laws Relating to Injury or Damage to Animals and Other Property*

The second set of tort laws are those found in Exodus 21:33–22:15. These laws govern a series of tort offenses that affect property, and set forth the appropriate remedial damages in each case.¹⁰⁶ For the most part, these laws are placed in groupings that correspond closely to two modern Anglo-American classes of tort law: torts involving simple negligence;¹⁰⁷ and those where the tortfeasor may have acted intentionally.¹⁰⁸

Offenses that involve simple negligence are enumerated in Exodus 21:33–21:35. These laws call only for restitution or compensation in kind equivalent to the value of what was lost or destroyed. Such compensation was required if a farm animal was killed by falling into someone's open pit.¹⁰⁹ In this case, the pit owner kept the dead animal.¹¹⁰ In effect, this is a sale: the pit owner bought the dead animal for the value it had when alive. In this situation, it was foreseeable that an animal might fall into such a pit and be killed. Foreseeable risk of harm is a basic element in modern tort law. *Quid pro quo*, or equal compensation, was also required in the following situations: if a man's cattle grazed over another's field or vineyard;¹¹¹ if a man set a fire that accidentally spreads to a neighbor's grain field;¹¹² and if a farm animal was stolen, injured, or died while in the borrower's, or bailee's, possession.¹¹³ These kinds of cases are considered further below.

A somewhat different situation arose when one man's ox fatally injured another man's ox.¹¹⁴ Here the live ox was sold and the two owners divided the proceeds of the sale, and they also divided the dead animal.¹¹⁵ Arguably, this was 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 probable difficulty of determining whose ox "started it." If, however, the owner of the goring ox knew of its goring propensities, yet failed to fence it in, he was to pay "ox for ox," but could

105. *Exodus* 21:32.

106. With the exception of *Exodus* 22:2–22:3. *See infra* note 124.

107. *Exodus* 21:33–21:36.

108. *Exodus* 22:1, 22:4, 22:7–22:13, 22:16.

109. *Exodus* 21:33–21:34.

110. *Id.*

111. *See* PROSSER AND KEETON ON THE LAW OF TORTS, *supra* note 5, at 542–43 (discussing liability and "strict liability" for damage done by trespassing livestock).

112. *See id.* at 543–45.

113. *Exodus* 22:5–22:6, 22:12, 22:14.

114. *Exodus* 21:35.

115. *Id.*

keep the dead animal.¹¹⁶ This settlement also is in the nature of a sale: the tortfeasor in effect bought the dead animal for the price of a live one. As in the case of the pit owner, there was some element of culpable negligence because it also would have been foreseeable that harm could result—for an ox that had been “accustomed to gore in the past”¹¹⁷ was likely to do so again given the opportunity.¹¹⁸

Likewise, two tort laws discussed below involve culpable and, arguably, reckless negligence, and require the negligent tortfeasor to make restitution. These are found, respectively, in verses five and six of Exodus 22. The first of these governs cases where someone negligently—or perhaps intentionally—caused or allowed his cattle to graze over someone else’s field or vineyard.¹¹⁹ The fact that the required restitution was to come from “the best” in the tortfeasor’s field or vineyard suggests that the activity described in the first part of verse five was considered intentional: “causes [another’s]¹²⁰ field or vineyard to be grazed over.”¹²¹ Requiring the cattle owner to provide “the best” of his own crops as compensation may be understood as a form of punitive damages.

The other law concerned situations where fire—presumably started on a landowner’s own property—was allowed to get out of control and destroyed grain or hay on a neighbor’s field.¹²² Here, because fire can be such a serious hazard, it may be that the landowner was held to a higher standard of care and that allowing fire to spread would mark his failure to meet that standard. Some other tort laws regarding simple, yet culpable negligence, found in Exodus 22:11–22:15, are discussed below.

Exodus 22:1–22:11 includes several laws relating to property where the tortfeasor either acted, or was suspected of acting intentionally. As is the case in some types of modern tort law where the offense, or tort, is clearly intentional, biblical tort law required the tortfeasor to pay multiple damages. Such offenses included theft, breach of trust, and embezzlement or conversion.¹²³ Instances of intentional torts calling for double damages included the following: (1) if someone stole another’s ox, ass, or sheep and the animals were “found alive in the thief’s possession”;¹²⁴ (2) if a thief

116. *Exodus* 21:36.

117. *Id.*

118. See PROSSER AND KEETON ON THE LAW OF TORTS, *supra* note 5, at 542–43 (demonstrating that this concept also exists in modern tort law).

119. *Exodus* 22:5.

120. *Id.* (emphasis added). That it is someone else’s field or vineyard is implicit in the fact that the owner of the cattle was required to make restitution. Doing so would not be an issue if his cattle grazed on his own land.

121. *Exodus* 22:5.

122. *Exodus* 22:6.

123. See PROSSER AND KEETON ON THE LAW OF TORTS, *supra* note 5, at 88–90 (commenting on the development of modern Western tort law regarding “conversion”).

124. *Exodus* 22:4. See also *Exodus* 22:2–22:3 (describing what was to be done if someone fatally struck a thief “found breaking in”). These verses indicate whether the

stole money or property that had been placed in a neighbor's safekeeping;¹²⁵ or (3) in cases that involved "breach of trust" or possession of disputed property determined to belong to the other party.¹²⁶ If the stolen ox or sheep has been slaughtered or sold, quintuple or quadruple damages, respectively, were required.¹²⁷ According to Proverbs 6:30–6:31, which may have been intended as hyperbole, if a thief was caught, "he [would] pay sevenfold."¹²⁸ The idea of multiple damages for intentional wrong-doing is illustrated in the prophet Nathan's encounter with King David as described in 2 Samuel 12:1–12:6. Nathan told King David a story¹²⁹ about a rich man who had taken a poor man's pet lamb and then killed and served it for dinner.¹³⁰ King David was also Chief Judge. Outraged by this story, King David declared that the rich man should "restore the lamb fourfold, because he did this thing, and because he had no pity."¹³¹ Fourfold restitution was also exemplified in the New Testament where it was said that a man named Zacchaeus voluntarily declared that if he had "defrauded any one of anything, [he] restore[d] it fourfold."¹³²

Exodus 22:8–22:11 relates to possible or suspected instances of embezzlement or "conversion" of property held in trust or "bailment" for another. Such conduct would, again, constitute an intentional tort. Liability in each case depends upon the particular circumstances. If goods or money were stolen while entrusted to a neighbor and the thief was not found, the neighbor or bailee should have "come near to God" in order to "show whether or not" he had taken it.¹³³ Similarly, "[i]f a man deliver[ed] to his neighbor an ass or an ox or a sheep or any beast to keep, and it die[d]

person who so killed a thief was liable for homicide, a criminal offense. Under this law, the night-time thief (or burglar) assumed the risk of being killed by the property owner or his agents, and the property owner was absolved of either criminal or tort liability. This law evidently was inserted between verses 1 and 4, which relate to theft, because they also refer to theft. See HIERS, *supra* note 3, at 92. "Breaking in" here may refer to entering either a house or a barn, or even possibly a farmyard, or enclosed pasture for the purpose of stealing animals of the sort referred to in verses 1 and 4.

125. *Exodus* 22:7.

126. *Exodus* 22:9 (RSV).

127. *Exodus* 22:1. *But see, e.g., Exodus* 22:1 (RSV) (stating that if the thief was unable to make restitution or pay damages because "he ha[d] nothing," he was to be sold as a slave). Evidently stealing and killing or selling an ox or sheep was regarded as a particularly serious offense, which would be met with punitive or quasi-criminal damages or penalties.

128. *Proverbs* 6:30–6:31 (RSV).

129. 2 *Samuel* 12:1–12:4. Nathan told the story, or parable, to catch the conscience of the king: the story is really about David's murdering Uriah, and taking the murdered man's wife, Bathsheba, as his own new wife. 2 *Samuel* 12:7–12:9.

130. *Id.*

131. 2 *Samuel* 12:6 (RSV). The Hebrew word, *rechem*, here translated as "pity" can equally well be translated as "compassion."

132. *Luke* 19:8 (RSV).

133. *Exodus* 22:8 (RSV).

or [was] hurt or [was] driven away, without anyone seeing it . . . [,]” the accused may have been absolved of suspicion by taking “an oath by the LORD” which would determine “whether he ha[d] not put his hand to his neighbor’s property.”¹³⁴ The animal’s owner was to “accept the oath,” thereby settling the matter.¹³⁵

Laws in Exodus 22:10–22:15 deal with situations where there was no question of intentional wrong-doing, and the appropriate remedy was restitution. Restitution would be required if an animal was *stolen* while in the neighbor’s possession.¹³⁶ Evidently it was assumed that the animal would not have been stolen but for the neighbor’s negligence. However, if there was evidence that the animal had been “torn by beasts” (RSV) there would be no need for restitution.¹³⁷ On the other hand, if someone *borrowed* a farm animal of any kind and the animal was injured or died, “the owner not being present,” the borrower must make “full restitution.”¹³⁸ But if the animal had been *hired* (or rented) and its owner was present with it, no restitution was required.¹³⁹ 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.¹⁴⁰ None of these occurrences is described as “an act of God,” an expression sometimes used in supposedly secular Anglo-American law, referencing unforeseeable harmful happenings or accidents.¹⁴¹

3. *Seduction of a Virgin who is not Betrothed*

Exodus 22:16–22:17, concerning what is to be done when “a man seduces a virgin who is not betrothed,”¹⁴² can be read in the context of the preceding series of tort laws to imply that virgin daughters are regarded as their father’s property. However, it is also plausible to see this as a separate tort category. The injury or tortious action described here consists of two parts: (1) sexual intercourse with the young woman—albeit with her consent—but without marrying her; and (2) failure to give the requisite marriage present. The latter, at any rate, is a property matter. The law

134. *Exodus* 22:10–22:11 (RSV).

135. *Exodus* 22:11.

136. *Exodus* 22:12.

137. *Exodus* 22:13.

138. *Exodus* 22:14 (RSV).

139. *Exodus* 22:14–22:15.

140. In cases when the farm animal had been either borrowed or hired, it seems to have been understood that if the owner came along with it, the owner was considered responsible for the animal’s well-being. Moreover, in a case where the animal had been hired, it was understood that the owner, as an implicit term of the rental contract, assumed any risk that it might be injured or die.

141. *Compare with Exodus* 21:12–21:13 (attributing one particular circumstance to God’s action), discussed *supra* note 85. See DOBBS, *supra* note 66, at 474 (discussing “acts of God” in modern tort law).

142. *Exodus* 22:16–22:17 (RSV).

accordingly provided a two-fold remedy: (1) the man was required to marry the woman; and (2) he was required to give a marriage present, unless her father disapproved of the would-be suitor,¹⁴³ in which case the ex-suitor was required to pay an equivalent sum.¹⁴⁴ Whether or not the law implied that virgin daughters were considered their father's or parents' property,¹⁴⁵ it definitely provided that men who seduced and engaged in pre-marital sexual intercourse with such daughters were required to remedy their misdeeds by making suitable property settlements, whether or not marriage subsequently took place.

None of the tort laws found in Exodus 21:18–22:17 are repeated in later laws or law codes. The biblical compilers or editors evidently regarded the laws set out here as definitive. Only a few other tort laws are to be found in later biblical codes.

B. *Other Biblical Tort Laws*

Another biblical law is found in the Holiness Code, and is repeated twice: “He who kills a beast shall make it good.”¹⁴⁶ Here, as in several laws found in the Covenant Code, the prescribed remedy was equal compensation, whether in kind or by payment of equivalent value.¹⁴⁷ This law did not distinguish between intentional and negligent killing of another's “beast.”

Deuteronomy 25:1 is another law that can be applied to both civil litigation, and also, as suggested by the verses that follow, 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.”¹⁴⁸

143. *Id.* Presumably a father's disapproval could be based either on his own reservations as to the suitor's suitability, or on his daughter's having advised her father that she did not wish to marry the man after all. Or, the young woman's mother might disapprove, and convey her feelings to her husband to act upon. See *Genesis* 27:46–28:5 (where Rebekah tells Isaac, her husband, that she does not wish their son, Jacob, to marry one of the local Hittite or Canaanite women; whereupon Isaac dutifully sends Jacob to Aram (Syria) with instructions to marry one of Rebekah's nieces instead).

144. Compare *Exodus* 22:16–22:17, with *Deuteronomy* 22:28–22:29. In the latter, it was a question of rape, not consensual intercourse. A specific sum was required in payment to the woman's father, and marriage was mandated with no expressed provision for anyone opting to bar the wedding banns. *Deuteronomy* 22:28–22:29. Moreover, the man “shall not be permitted to divorce her as long as he lives.” *Id.*

145. *Exodus* 22:16–22:17 does not specify to whom the “marriage present” or equivalent monetary payment was to be given.

146. *Leviticus* 24:18, 24:21 (RSV).

147. *Id.*

148. *Deuteronomy* 25:1–25:3.

Here, punishment,¹⁴⁹ rather than restitution or some other form of compensation, is what follows. Presumably, such punishment would have applied only in cases of criminal wrong-doing. This text, unlike most others relating to civil actions, refers specifically to the role of “the judges.”¹⁵⁰ It would seem that, if they found punishment inappropriate, the judges could have decided that the one who was “in the wrong” should have paid damages or made restitution to the one they found “to be in the right.”

Anglo-American law does not provide that a person in a position to rescue another person from imminent harm, or to rescue another person’s property from likely damage, has a legal duty to do so. Biblical law, however, does impose such a duty with respect to animals and other property. Deuteronomy requires a person to take affirmative action to return a 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”¹⁵¹ Deuteronomic law also required a person to help one’s neighbor lift up his fallen ass or ox.¹⁵² 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.¹⁵³

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.”¹⁵⁴ It is unclear whether the parapet or railing referred to here was meant to be a temporary safeguard to prevent workmen from falling during construction or a permanent architectural safety feature. Likewise, whether through negligence or with intent to harm, people were not to put “stumbling block[s]” or obstacles in the path of blind persons.¹⁵⁵ These

149. *Deuteronomy* 25:2–25:3. “If the one in the wrong deserves to be flogged, the judge shall make that person lie down and be beaten in his presence with the number of lashes proportionate to the offense. Forty lashes may be given but not more; if more lashes than these are given, your brother (RSV) will be degraded in your sight.” *Id.* The law shows concern lest even the most serious offender be beaten with more than a maximum (albeit a harsh number) of lashes, and thereby suffer undue humiliation. It is noteworthy that the offender is characterized here as the plaintiff’s “brother” (Hebrew: *’ach*, which can also mean “friend,” “relative,” or “neighbor”).

150. *Id.*; see also *Exodus* 21:22.

151. *Deuteronomy* 22:1–22:3 (RSV). “Finders keepers” did not apply if the finder knew who the owner was. See also *Leviticus* 6:3, quoted *infra* text accompanying note 158.

152. *Deuteronomy* 22:4.

153. *Exodus* 23:4–23:5.

154. *Deuteronomy* 22:8 (RSV).

155. *Leviticus* 19:14. Nor were they to “curse the deaf.” *Id.* It might or might not have been believed that a deaf person would be harmed physically by being cursed, but such a person undoubtedly would suffer indignity before others. Both kinds of malicious activity

laws¹⁵⁶ should be classified as civil or public safety laws, rather than as tort laws; however, both were clearly intended to protect members of the community from injuries that could result in tort claims, and both illustrate the element of “foreseeability.”¹⁵⁷

A later collection of laws, 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, or if he has oppressed his neighbor or has found what was lost and lied about it”¹⁵⁸ Here, the remedy is full restitution of the property in question together with one-fifth, or twenty percent, in punitive damages.¹⁵⁹ In addition, the perpetrator must bring a “guilt offering” to “the priest.”¹⁶⁰ A different, and possibly earlier version of the same law implies that if the victim of the tort was no longer alive, restitution should be made to the victim’s kinsman, then if there were no kinsman, the restitution, along with a sacrificial offering, must be given to the “Lord for the priest.”¹⁶¹

All of these “tort” laws and remedies were evidently meant to fairly allocate 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 on justice, but compassion may be implicit as well because once damages—including punitive damages—were paid, the parties could again get on with their lives. There was no provision for humiliating, ostracizing, jailing, or exiling wrongdoers who adequately compensated the persons they had injured.

III. BIBLICAL CONTRACT AND TORT LAW, AND MODERN JURISPRUDENTIAL 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 Bible commentaries. It is, however, surprising to find how closely many biblical laws approximate certain basic features of modern contract and tort jurisprudence. Legal scholars and lawyers seem generally unaware of these parallels.

prohibited in *Leviticus* 19:14 might have been considered “practical jokes” by persons of warped mentality. See *Proverbs* 26:18–26:19 (“Like a maniac who shoots deadly firebrands and arrows, is one who deceived his neighbor, and says ‘I am only joking!’”).

156. *Deuteronomy* 22:8; *Leviticus* 19:14. See also *Deuteronomy* 27:18 (“Cursed be he who misleads a blind man on the road.”).

157. Such laws could also be classified in modern terms as “social legislation.” See HIERS, *supra* note 3, at 165–218 (discussing biblical social legislation).

158. *Leviticus* 6:2–6:3 (RSV).

159. *Leviticus* 6:4–6:5.

160. *Leviticus* 6:6–6:7.

161. *Numbers* 5:5–5:10.

Biblical laws and narratives clearly indicate that in order to form a contract, both parties must agree to its terms. The terms normally specify the goods, services, money, or other valuables that each party undertakes to give to the other as “consideration.” Typically one party (or person) will propose terms; it is then up to the other to either agree to these terms or reject them. This pattern of offer and acceptance, constituting agreement as to the “considerations” to be exchanged, 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;¹⁶² Jacob and Laban’s agreement to terms of a labor contract—seven years of labor in exchange for marriage to each of Laban’s daughters;¹⁶³ Jacob’s subsequent agreement to work for Laban in exchange for all the spotted and striped sheep and goats in addition to the black lambs subsequently born among Laban’s flocks;¹⁶⁴ Balak’s offer to Balaam of an unspecified fee if he would go and curse Israel;¹⁶⁵ and Tobit’s hiring of a companion for a drachma a day, plus expenses and a possible bonus if he would accompany his son Tobias on an important journey.¹⁶⁶

Laws governing contractual arrangements were evidently intended to prevent exploitation or mistreatment of persons who might not otherwise be able to defend their own interests because they lacked equal bargaining position or power.¹⁶⁷ Likewise, latter-day Anglo-American law affords protection for such persons, both through constitutional and legislative enactments and by declining to enforce “contracts of adhesion,” that is, contracts where one party had little or no choice but to accept unfavorable terms. Unlike Anglo-American law, however, biblical law did not include provisions for voiding contracts on the basis of mistake, duress or fraud.

Like biblical contract laws, biblical tort laws also parallel modern counterparts with respect to certain related distinctions and “elements,” as well as underlying concerns, values, or purposes that the laws serve to effectuate. These elements appear to have included: a duty of care, or a duty to avoid harming others or their property; some breach of that duty, whether intentional or negligent; “proximate cause;” and “foreseeability.”

It would seem that in order to state a claim in tort under biblical law, the plaintiff must have been able to show that the other party had a duty of care as to the plaintiff’s interests and somehow breached that duty. For

162. *Genesis* 25:29–25:34.

163. *Genesis* 29:21–29:30.

164. *Genesis* 30:25–30:43.

165. *Numbers* 22–24.

166. *Tobit* 5:14–5:16. See also *Matthew* 20:1–20:14 (describing where, in Jesus’ parable, a landowner and workers agree to terms for a day’s labor).

167. Such laws related to the rights or interests of slaves, *Exodus* 21:1–21:11, debtors, *Exodus* 22:25–22:27, *Deuteronomy* 24:6, 24:10–24:13, day laborers, *Leviticus* 19:13, *Deuteronomy* 24:14–24:15, widows, *Deuteronomy* 24:17–24:18, and needy indigents, *Leviticus* 25:35–25:37.

instance, a landowner engaged in field-burning would owe his neighbors a duty of care to prevent fire from spreading into their adjoining fields. If such a fire did so spread, it would be treated as a breach of this duty of care. Moreover, the plaintiff must prove “proximate cause,” that is, a direct connection of some sort between the alleged tortfeasor’s acts and the resulting injury or damage to another person or his property. For instance, leaving an open pit, or failing to control a fire adjacent to another’s field, would constitute proximate cause for resulting accidents. Proximate cause is closely linked to “foreseeability.” A “reasonable, prudent person” should be able to foresee when the situation he or she has created or allowed to exist is likely to be the proximate cause of injury or damage.¹⁶⁸

Foreseeability is another basic element or feature of both biblical and modern tort law. Foreseeability requires that in order for a person to be liable for wrong-doing, the person whose conduct resulted in the harm should have been “reasonably” aware that his or her conduct could have had harmful consequences of the sort that resulted.¹⁶⁹ Several laws relate to cases of simple negligence, where the consequences were not intended, but nevertheless could be foreseen. For instance, when someone’s cattle were allowed to graze over another’s field or vineyard,¹⁷⁰ or a farmer allowed an ass or sheep to be stolen while in his safekeeping.¹⁷¹ In such cases, the law called for relief in the form of restitution or equivalent compensation. One distinctive biblical law required those responsible for new construction to provide safety railings, and another prohibited placing obstacles in the way of blind persons, in both instances in order to prevent or reduce the risk of foreseeable harm to others.¹⁷²

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 another person’s conduct. As in modern tort law, though not expressed in these typically modern terms, the purpose of remedial “damages” or restitution was to “make the other person whole.” Like modern tort law, Biblical law provided that, in certain circumstances, persons could recover damages for medical expenses and loss of income during recovery.

The underlying values implicit in these biblical laws seem to have included the belief that members of the community were entitled to bodily integrity, to be free from being harmed by others and to be free from

168. See PROSSER AND KEETON ON THE LAW OF TORTS, *supra* note 5, at 273, 274, 280–300; DOBBS, *supra* note 66, at 463–84.

169. See PROSSER AND KEETON ON THE LAW OF TORTS, *supra* note 5, at 280–81.

170. *Exodus* 22:5.

171. *Exodus* 22:10–22:12.

172. *Deuteronomy* 22:8; *Leviticus* 19:14.

actions by others resulting in loss of or damage to their property. Implicitly, each member of the community had a duty of care,¹⁷³ namely, to avoid acting in ways that could foreseeably injure others or damage their property. The dignity, worth, or value of each member of society was taken as a given, though sometimes with significant qualifications, as in the case of slaves. These values or norms may also be implicit in modern Anglo-American law where, however, they are rarely articulated. Instead, legal commentators prefer to refer to various amorphous “rights” that are presumed to be inherent, somehow, in individuals.¹⁷⁴

Like modern tort law, biblical law treats reckless conduct and intentional wrong-doing more severely than in cases of simple negligence. For instance, the law of *lex talionis* called for punishment when a married, pregnant woman was injured by brawling males, and there was a law calling for capital punishment when the owner of an ox with a history of goring was allowed to run loose and kill someone. Those who engage in reckless endangerment could be subjected to severe, in effect, even criminal penalties.¹⁷⁵ Purposeful wrongdoing or intentional torts, such as theft, embezzlement, or breach of trust,¹⁷⁶ called for multiple or punitive damages, which are common modern law remedies for intentional torts.

Biblical scholars generally assume that the laws found in the Covenant Code¹⁷⁷ were set down at random, rather than in accordance with any recognizable pattern or structure based on content. When, however, contemporary legal categories are used to describe the laws found in Exodus 21:1–22:17, it turns out that these laws appear to have been organized in a coherent structure after all. The concluding paragraphs that follow review this structure and show how it parallels—though of course it was not based upon—modern Anglo-American jurisprudence.

All of the laws found in Exodus 21:1–21:32 have to do with the interests of persons. The first eleven verses,¹⁷⁸ which constitute contract

173. See PROSSER AND KEETON ON THE LAW OF TORTS, *supra* note 5, at 356–59 (discussing the foundation of “duty” in modern tort law).

174. See Max L. Stackhouse, *Reflections on “Universal Absolutes,”* 14 J.L. & RELIGION 97, 98–99 (1999–2000). Stackhouse wrote in appreciation of Michael J. Perry’s book, *The Idea of Human Rights: Four Inquiries*, where Perry argued—contrary to the ideology of secular rationalists and postmodernist pundits—that a coherent case for human rights can be made only on religious grounds. *Id.* Stackhouse wrote:

[Perry] challenges those who wish to [contend] that religion is not helpful or convincing, especially against the argument of secular thinkers such as the neo-Kantian Jurgen Habermas, the neo-Pragmatist Richard Rorty, the neo-Liberal Ronald Dworkin, and the neo-Classicist, Martha Nussbaum, all of whom say that they want to support human rights, but cannot supply a good reason for doing so.

Id.

175. *Exodus* 21:22–21:25, 21:28–21:31; see also HIERS, *supra* note 3, at 90–92.

176. See *Exodus* 22:1, 22:4, 22:7, 22:9; *Leviticus* 6:1–6:5; *Numbers* 5:5–5:10.

177. *Exodus* 20:1–23:33.

178. *Exodus* 21:1–21:11.

laws, provide protection for slaves, particularly for their marital rights or concerns. Likewise, the next set of laws in Exodus 21:12–21:17, which can be classified as criminal laws, relate to the interests of persons affected by the proscribed types of activity. The laws in Exodus 21:18–21:32 are mainly tort laws, again relating to the interests of persons, here those who might suffer injury or death as a result of negligent, reckless, or intentional actions on the part of others.

Some of these tort laws are accompanied by provisions calling for punishing offenders when, depending on various contingencies, other persons are seriously injured or die as the result of their tortious acts. Although punishment is in the nature of a criminal penalty, rather than a tort remedy, these punishments were intended to apply if the consequences of the tortfeasors' actions crossed into the realm of criminal conduct. Thus, if a man struck his slave and the slave died immediately, the slave owner was to be punished—presumably at the discretion of the judges.¹⁷⁹ But if the slave survives, even if only for a day or two, the slave-owner was relieved of criminal, and probably also civil liability.¹⁸⁰ Two kinds of situations involved heightened penalties for reckless endangerment of others. Thus, if brawling men injured a married, pregnant woman, the man responsible, was subject to criminal penalties under the *lex talionis*, or law of retaliation in kind. In the other situation, if an owner failed to keep an ox that had been “accustomed to gore in the past” under adequate restraint after due warning, and the ox then killed someone, the owner was subject to the death penalty, unless the family of the deceased was willing to accept compensation, a tort remedy, instead.¹⁸¹ The other laws in Exodus 21:18–21:32 are also all in the nature of tort provisions relating to persons.

The section that follows, Exodus 21:33–22:1, 22:4–22:15, consists of tort laws concerning injury, damage to, or theft of animals and other property. Exodus 22:5–22:6 covers negligent damage to another's agricultural interests; Exodus 22:7–22:13 governs property held in “trust” or bailment; and Exodus 22:14–22:15 concerns borrowed property. These laws provide for various remedies, typically in the form of restitution or cash. On the other hand, as with modern law, persons who committed intentional torts such as theft or embezzlement, were liable for multiple, that is punitive, damages.¹⁸² Again, as in modern jurisprudence, where

179. *Exodus* 21:20. See reference to judges in *Exodus* 21:22. The nature of the punishment options is not specified.

180. *Exodus* 21:21. See also *Exodus* 22:2–22:3, considered above, as to killing cattle (or other) thieves “found breaking in.” Here it is said that if the thief is killed at night, the property owner is not held liable; but if he (or his agents) kill the thief in daylight, there is “bloodguilt” for doing so. *Exodus* 22:3. Here, too, the nature of any punishment is unspecified. The implication is that under daylight conditions, the landowner or his agents should be able to overpower or apprehend the thief without having to kill him.

181. *Exodus* 21:28–21:31.

182. *Exodus* 22:1, 22:4, 22:7, 22:9.

circumstances indicated that the apparent wrong-doer was without fault, no restitution or damages payment was required.¹⁸³ Likewise, another law provides, in effect, for a “no fault settlement” where an ox with no history of goring kills another’s ox.¹⁸⁴ Unlike modern tort jurisprudence, biblical law does not make provision for comparative fault remedies where both parties may have been partially negligent.

The entire block of tort laws found in Exodus 21:18–22:17 is clearly set apart from the capital laws immediately preceding it in Exodus 21:12–21:17 and from those following immediately afterwards at Exodus 22:18–22:20. The fact that nearly all biblical tort laws are grouped together in Exodus 21:18–22:17 can be regarded as a further indication that the biblical legislators or editors themselves distinguished such laws from other legal categories.

It is often said that biblical law fails to distinguish between criminal and civil law. The present study, however, finds not only consistent distinctions between civil and criminal law; it also finds that both contract and tort laws are well-established, separate categories in biblical jurisprudence. Characterizing those biblical laws that functioned in biblical times as what we now call contract and tort laws should be helpful both to biblical scholars who describe the substance of biblical law, as well as to legal scholars who attempt to trace similarities and possible connections between biblical and other ancient Near Eastern law, and contemporary jurisprudence. In any event, it is now clear that such biblical laws as those considered here are not nearly so arcane and alien to modern thought as has been commonly supposed.

183. *Exodus* 22:8, 22:10–22:11, 22:13, 22:15.

184. *Exodus* 21:35.