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Article

**FAITH, LEARNING AND JUSTICE IN ALAN
DERSHOWITZ'S *THE GENESIS OF JUSTICE*:
TOWARD A PROPER UNDERSTANDING OF
THE RELATIONSHIP BETWEEN THE BIBLE
AND MODERN JUSTICE**

Jeffrey Brauch and Robert Woods*

I. INTRODUCTION

Dear Reader:

For stylistic and other reasons described below, we crafted this Article in the form of a memo to students in Professor Alan Dershowitz's Seminar on the Biblical Sources of Justice. Of course, we invite all readers to consider the Article – and to further the dialogue on the relationship between scripture and law begun so provocatively by Professor Dershowitz in his book.

Memorandum

To: Students of Professor Dershowitz's Seminar on the Biblical Sources of Justice, Harvard University

Cc: Alan Dershowitz, Felix Frankfurter Professor of Law, Harvard Law School

From: Jeffrey Brauch and Robert Woods

Re: THE GENESIS OF JUSTICE: TEN STORIES OF BIBLICAL INJUSTICE THAT LED TO THE TEN COMMANDMENTS, by Alan Dershowitz

Date: Fall, 2001

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We first want to commend you for undertaking the challenge to interweave your legal education with a biblical perspective. The Seminar correctly recognizes what generations of scholars have clearly demonstrated: the Bible is foundational to our modern American conceptions of law and justice.¹

We were delighted to hear Professor Dershowitz's report on the amount of interest in the Seminar when it was first offered at Harvard in the Fall of 1997: 150 students for twenty places!² The interest displayed for this class, not to mention the very existence of the Seminar itself, is consistent with what has been called the "religious revival" at American law schools that is changing the face of legal education as we know it.³ And since we were unable to attend the Seminar, we have accepted Professor Dershowitz's gracious invitation to "continue the dialogue" in this format and trust that our comments will be submitted to you so as to add to the "dialogue among generations."⁴

You may be curious why we address this Article to you, the students, instead of to Professor Dershowitz. Well, according to the text, you not only functioned as a dialectical sounding board of sorts for the final product, but also gave the Professor an opportunity to present his

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©2001 by Robert Woods, Assistant Professor of Communication at Arbor University, Spring Arbor, Michigan; B.A., University of New Mexico, 1991; J.D., Regent University, 1994; Ph.D., Communication, Regent University, 1999. When research was first started, Dr. Woods was Dean of the School of Continuing Education at Yellowstone Baptist College, Billings, Montana. He would like to show appreciation and thanks for the support he received from Yellowstone during the research.

We thank Don Alban, Jr., Michael Schutt, Craig Stern, and Rebekah Woods for their helpful comments and editorial suggestions on earlier drafts of this Article. We also thank David Dildy (Regent University) for his fine research assistance and Emily Taylor (Spring Arbor University) for her assistance in the final stages of proofreading and cite-checking.

¹ See, e.g., HAROLD BERMAN, *LAW AND REVOLUTION* (1983); RUSSELL KIRK, *THE ROOTS OF AMERICAN ORDER* (1974); CLINTON ROSSITER, *SEEDTIME OF THE REPUBLIC: THE ORIGIN OF THE AMERICAN TRADITION OF POLITICAL LIBERTY* (1953); C. GREGG SINGER, *A THEOLOGICAL INTERPRETATION OF AMERICAN HISTORY* (1964). As we describe more fully in Part IV, the legal scholars and judges who were most foundational to the development of the Anglo-American common law expressly relied on biblical passages and themes in their writings. See *infra* notes 277-92 and accompanying text; see also Calvin's Case, 77 Eng. Rep. 377 (1610); HENRICI DE BRACON, *DE LEGIBUS ET CONSUEUDINIBUS* (1990); WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* (Univ. of Chicago Press 1979).

² ALAN M. DERSHOWITZ, *THE GENESIS OF JUSTICE: TEN STORIES OF BIBLICAL INJUSTICE THAT LED TO THE TEN COMMANDMENTS AND MODERN LAW* 7 (2000).

³ Bruce Buckley, *Are Law Schools Holier Than Ever?*, *THE NATIONAL JURIST*, Nov. 1999, at 20.

⁴ DERSHOWITZ, *supra* note 2, at 20.

case to a new “jury” each semester. *THE GENESIS OF JUSTICE* thus contains the composite thoughts of some of the brightest young legal minds in the country and will most likely be used in future Seminars and related courses.⁵

More importantly, we address this to you because after reading *THE GENESIS OF JUSTICE*, we thought you were left lacking in several critical areas of understanding. First, we observed that the text lacked a solid hermeneutic, that is, an adequate set of rules for interpreting the meaning of a given biblical passage. As we discuss below in greater detail (See Part III), inconsistent hermeneutics can lead to faulty conclusions about the sources of law and justice. Second, we recognized some gaps in the Professor’s discussion of the relationship between the Bible, justice, and modern law, especially as it relates to the common law tradition. While the Professor does you a great service by pointing out the biblical origins of certain modern legal principles,⁶ more often than

⁵ We recently learned after reading Steven Aden’s review of *THE GENESIS OF JUSTICE* that Professor Dershowitz had indeed made his book assigned reading in a subsequent class as part of Week One’s reading in “Thinking About Thinking.” This class was apparently offered last Spring at Harvard. See *infra* note 77. We strongly suspect this trend will continue for future seminars and courses.

⁶ For example, the Professor accurately explains the meaning of the often misunderstood *lex talionis* of *Exodus* 21:23-25. DERSHOWITZ, *supra* note 2, at 253-54. The passage states: “[I]f there is serious injury, you are to take life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burn for burn, wound for wound, bruise for bruise.” *Ex.* 21:23-25. (New International Version). To many today, an “eye for eye, tooth for tooth” sounds cruel and harsh. But as Professor Dershowitz rightly observes, rather than justify excess and cruelty, the *lex talionis* places a significant limit on punishment. “[T]he principle itself—harsh as it sounds to the contemporary ear—constituted a major step *forward* in the eternal quest for justice, fairness, and proportionality, since it imposed strict limits on punishment.” DERSHOWITZ, *supra* note 2, at 254. Indeed, in the history of Western law, *lex talionis* has been reflected in the crucial principle of proportionality in punishment. Much of our modern Western criminal law drew heavily from principles developed in the canon law of the medieval church. See, e.g., 2 WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 53, 258-59 (photo. reprint 1971); 2 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW* 476-77 (2d ed. 1968); Francis Bowes Sayre, *Mens Rea*, 45 *Harv. L. Rev.* 974, 980, 983-84 (1932). In developing their theory of retributive justice, the canon lawyers insisted that the penalty for a crime must be appropriate and proportional to the criminal act. See *infra* notes 297-301 and accompanying text; see also BERMAN, *supra* note 1, at 183.

The Professor is similarly helpful in explaining the meaning and significance of Old Testament cities of refuge. Cities of refuge were established so that an individual who killed another by accident rather than by premeditation could be protected against revenge. See *Ex.* 21:12-14; *Deut.* 19:4-13; *Josh.* 20:1-9. As the Professor accurately notes, this is early support for the different treatment of criminal defendants based on different *mens rea* (mental states). DERSHOWITZ, *supra* note 2, at 156.

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not, he misses or misstates the big picture entirely. Lastly, we noted numerous problems with the Professor's overall approach to the integration of faith and learning, that is, the way he placed "religious doctrine side-by-side with legal text" - teaching you "both what law is and what it should be."⁷ While we support his commitment to *Fides et ratio* in principle, we do not believe that his descriptive process provided you with a sufficient framework for integrating your legal education with the Bible as a whole. Correctly understanding what the Bible says about justice can significantly impact the way you practice law.

In light of the foregoing, we have chosen to use THE GENESIS OF JUSTICE as the backdrop against which we will sketch a more biblically consistent view of the sources of modern justice. The outline for this Article is as follows. After briefly presenting an overview of some key themes and definitions of the book, we take a closer look at some basic rules of interpretation that must be applied to the Bible if we are to draw proper conclusions related to the sources of justice. In the process, we respond to several of the ten cases used by the Professor as support for his ultimate conclusion: God acted unjustly throughout the *Genesis* narrative. Here, we more precisely demonstrate how hermeneutical deficiencies can lead to erroneous conclusions relating to the biblical sources of justice. We conclude this Article by presenting what we believe to be a more sound approach to integrating law and Scripture as it relates to the book of *Genesis* and the rest of the Bible.

Fundamental to Western criminal law is the principle that an act alone is not sufficient for criminal guilt. The act must be joined to the will. BERMAN, *supra* note 1, at 189; 4 BLACKSTONE, *supra* note 1, at 20-21; JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 101 (2d ed. 1995); WAYNE LAFAVE, CRIMINAL LAW 204 (3d ed. 2000). And so the law differentiates crimes and punishments based on mental state. One who kills intentionally will be treated differently than one who kills recklessly, and both will be treated differently than one who kills accidentally, even though the result is the same in all three cases: the victim is dead. This is the rule concerning the man who kills another and flees to the city of refuge to save his life - one who kills his neighbor unintentionally, without malice or forethought.

In his COMMENTARIES ON THE LAWS OF ENGLAND, Blackstone spent a great deal of time explaining the common law's various categories of homicide based on different levels of culpability. He discussed accidental killings (noting they were excusable at common law) through use of a hypothetical situation in which a man "without any intention of hurt, unfortunately kills another: as where a man is at work with a hatchet, and the head thereof flies off and kills a stander-by." 4 BLACKSTONE, *supra* note 1, at 182. This is the exact situation referred to in *Deuteronomy* in discussing cities of refuge. *Deut.* 19:4-13. The intentional killer was to be executed, but the accidental killer was to be given refuge in one of the cities provided.

⁷ Buckley, *supra* note 3, at 20.

II. OVERVIEW OF *THE GENESIS OF JUSTICE* — KEY THEMES AND DEFINITIONS

As you know, in *THE GENESIS OF JUSTICE*, well-known defense attorney and Harvard law professor, Alan Dershowitz, takes on his greatest defense to date: the defense of humankind against God's judgment in ten biblical narratives found in *Genesis*. But to make his defense, he must eventually, in a somewhat bittersweet sense of legal and theological irony, attack or otherwise discredit the Supreme Judge, God, or Yahweh.⁸

Before introducing us to his clients and unleashing his defense, Professor Dershowitz must first construct an interpretive paradigm that lets him find multiple, equally valid, interpretations of any given biblical text.⁹ This, according to him is part divine, part human, and part literary.¹⁰ His paradigm is revealed as a mixture of legal, literary, and theological methodologies grounded in Jewish Midrash (commentary), personal experience,¹¹ and contemporary knowledge and information.¹²

With methodology in hand, he then sets to deconstruct God's dispensation of judgment in ten selected cases in *Genesis* beginning with Adam and Eve. The Book of *Genesis* is chosen as his point of focus for its broad narratives dealing with justice and injustice and its relevance to modern debates on justice.¹³ In case after case, from Adam and Eve to Abraham to Joseph, God's responses to iniquity are ultimately judged according to human standards of justice and deemed "unjust."¹⁴ Put in more familiar terms, the jury instructions presented in Part One direct the reader to judge God according to human standards of equity and fairness, of right and wrong.¹⁵ Doing so, we are told, lets us avoid

⁸ The tone of this attack is foreshadowed early on when we are told that God's actions in *Genesis* are so "off-base" that even a ten-year-old would question his idea of justice. DERSHOWITZ, *supra* note 2, at 3.

⁹ *Id.* at 9-18, 124.

¹⁰ *Id.* at 8.

¹¹ *Id.* at 1-23.

¹² *Id.* at 10; see also *infra* Part III (discussing Professor Dershowitz's method of interpretation).

¹³ *Id.* at 19-20.

¹⁴ The writers of the Bible consistently attribute holiness to God's character. Holiness means that God does not conform to a standard; He is that standard. See *Is.* 6:1-8. Thus, the very idea that it is acceptable to apply human standards to judge God is directly contradicted by the Bible's description of God as holy. See *Ex.* 15:11; *Lev.* 19:2; *Josh.* 24:19; 1 *Sam.* 2:2, 6:20; *Job* 4:17, 6:10; *Ps.* 18:30, 22:3, 30:4, 47:8, 48:1, 92:15, 99:3-5, 119:142, 145:17; *Is.* 5:16, 12:6, 29:19, 23; 43:14-15, 47:4, 49:7, 57:15; *Ezek.* 39:7; *Hos.* 11:9; *Hab.* 1:12-13. See generally R.C. SPROUL, *THE HOLINESS OF GOD* (1985); A.W. TOZER, *THE KNOWLEDGE OF THE HOLY* (1961).

¹⁵ DERSHOWITZ, *supra* note 2, at 74; see also *id.* at 32, 50, 51.

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tautological errors and fulfills our "human responsibility to define justice in human terms."¹⁶

Sensing that turning the tables like this might create a problem for some of you, the Professor acknowledges that judging God by human standards of justice is "one of the most troubling and recurring issues of theology," although we are only left to presume why it is so troubling.¹⁷ To further quell any remaining discomfort, he explains that applying human standards to God is permissible because, as the Sodom narrative suggests, "God has submitted Himself to at least some human judgment through the covenant."¹⁸

¹⁶ *Id.* at 74. This is a responsibility that is presumed, not substantiated by reference to any source. Such a proposition is contrary to the whole of Scripture that holds man up to God's standards, not vice versa. The Bible explains that because we are born into sin we can not live up to God's standards, which is a critical starting point in the Bible's unfolding narrative. See EVANGELICAL DICTIONARY OF THEOLOGY 590, 1012, 1016 (Walter A. Elwell ed., 1984); see also *infra* notes 186-211 and accompanying text (discussing sin in the context of redemptive history).

¹⁷ DERSHOWITZ, *supra* note 2, at 74. It is likely troubling for some because it was the Serpent, considered to be Satan in Christian theology, who impugns the revealed will of God by implying "unreasoning arbitrariness" by telling Eve, "Has He really said, 'You shall not eat of any tree of the Garden?'" The Serpent is asking man to be a judge of God—to become his own God. HAROLD G. STIGERS, A COMMENTARY ON GENESIS 74 (1976).

¹⁸ DERSHOWITZ, *supra* note 2, at 74. This is a conclusion not supported by the text according to most credible theologians and scholars. Finding support for this meaning requires reading something into the passage that does not appear to be there. God's "submission" to question and answer is not the same as giving Abraham permission to apply human standards to judge God's actions. THE EXPOSITOR'S BIBLE 183 (W. Robertson Nicoll ed., 1903); see also 2 FRANZ DELITZSCH, NEW COMMENTARY ON GENESIS 50-51 (Sophia Taylor trans., 1978). Such a notion is directly contrary to the teaching of the Bible as a whole. Abraham does not teach God here of His duty to do justice, but he "reasons from the nature of God, that it is impossible for Him to intend anything unjust." See JOHN CALVIN, GENESIS 489 (1975); see also STIGERS, *supra* note 17, at 172. It is Abraham who learns the lesson, not God. And it is irrelevant to the meaning whether Abraham stood before the Lord, or the Lord stood before Abraham. DEREK KIDNER, GENESIS: AN INTRODUCTION AND COMMENTARY 133 (1967). Abraham learns about God's righteousness; that His judgment is just. 2 JAMES MONTGOMERY BOICE, GENESIS: AN EXPOSITIONAL COMMENTARY 616 (1998); CLAUS WESTERMANN, GENESIS: A PRACTICAL COMMENTARY 139 (David E. Green trans., 1987). All the while Abraham retains the biblical worldview principle, or presupposition, "that it was impossible for God, who is the Judge of the world, and by nature loves equity, . . . [t]o swerve from righteousness," or to do injustice. See CALVIN, *supra* at 489. Reform Jewish interpretations of Genesis support this view of God. See, e.g., JULIAN MORGENSTERN, THE BOOK OF GENESIS: A JEWISH INTERPRETATION 38-39, 54, 134 (2d ed. 1965). This makes Abraham's question - "Shall not the Judge of all the earth do right?" - somewhat rhetorical since he already knew the answer. In this light, Abraham was attempting to protect God's honor in the minds of men, much in the same way Moses argued in *Exodus* 32:11-12. Claus Westermann demonstrates the importance of historical context in understanding this passage when he notes that this narrative makes "sense only from the perspective of an age

As the tapestry of evidence unfolds in chapter after chapter, the Professor assumes the roles of amateur theologian and philosopher. The reader is presented with a picture of two Gods: the God of the Old Testament, and the God of the New Testament. However, we never learn much about the New Testament God's understanding of justice, only that it is different.¹⁹ At times it seems even more complex, like there are two Gods at work in the Old Testament - Abraham's God and Job's God. God begins as naive and idealistic in *Genesis*. Yet, by the time we see Him with Job, He is much more confident - albeit, stilted and bitter.²⁰

In any event, according to the Professor, the God of *Genesis*, the God of the Old Testament, is not just,²¹ all-knowing,²² all-powerful,²³ perfect

in which the mutual relationship between human beings and God was determined by the concept of righteousness and justice" - righteousness and justice as understood by the original hearers in biblical times, not the understanding of these terms to contemporary ears. WESTERMANN, *supra* at 139-40.

Professor Dershowitz holds the very opposite presupposition and worldview from Abraham regarding God's nature as righteous and just, this is what enables him to draw the opposite conclusion. But given God's nature and worldview as described in the Bible, it is impossible for God to be learning from Abraham about the need for proportionality in justice.

The other common interpretation drawn from this narrative by credible theologians relates to the lesson of how God answers the persistent prayers of a righteous man for another, known as intercessory prayer. See, e.g., 2 BOICE, *supra* at 614-17; CALVIN, *supra* at 490; DELITZSCH, *supra* at 48-51; THE EXPOSITOR'S BIBLE, *supra* at 180; WESTERMANN, *supra* at 139. Theologians also agree that Sodom was intended to teach us about the certainty of God's judgment of all sin. See, e.g., 2 BOICE, *supra* at 613.

¹⁹ DERSHOWITZ, *supra* note 2, at 1, 129, 212-13.

²⁰ *Id.* at 75-77, 78-80.

²¹ The Bible states that it is impossible for God to do anything that is unfair, either to Himself or to man. See *Rev.* 15:3-4; *2 Thess.* 1:3-10; *2 Tim.* 4:8; see also *infra* note 24 (discussing the term "righteousness"). Other verses that support this proposition include: *Gen.* 18:25; *Deut.* 32:4; *1 Kings* 8:32; *2 Chron.* 19:7; *Neh.* 9:33; *Job* 4:17, 8:3, 34:10-12, 37:23; *Ps.* 7:9, 9:4-8, 11:4-7, 19:9, 33:5, 50:6, 58:11, 62:12, 67:4, 71:19, 89:14, 92:14, 94:1-2, 10, 96:13, 97:2, 103:6, 119:137; *Prov.* 11:31, 16:2, 17:3, 21:2-3, 24:12, 29:26; *Eccles.* 3:17, 12:14; *Is.* 26:7, 28:17, 30:18, 31:2, 45:21; *Jer.* 9:24, 11:20, 12:1, 32:19, 51:10; *Ezek.* 18:25, 30, 33:7-19; *Dan.* 4:37, 9:7, 14; *Zeph.* 3:5; *Mal.* 3:5, 18.

²² Also known as omniscience, which means God possesses all knowledge there is to have. See EVANGELICAL DICTIONARY OF THEOLOGY, *supra* note 16, at 454; DONALD K. MCKIM, WESTMINSTER DICTIONARY OF THEOLOGICAL TERMS 117 (1996). Nothing ever takes Him by surprise. Thus, God was not surprised by Adam and Eve's decision, Abraham or Lot's actions, and so forth. See *Job* 42:2; *Is.* 40:12-14; *Heb.* 4:13. Other verses that demonstrate God's omniscience include: *1 Sam.* 2:3, 16:7; *1 Kings* 8:39; *2 Kings* 19:27; *1 Chron.* 28:9, 29:17; *Job* 21:22, 22:13-14, 23:10, 24:1, 23, 28:10, 24, 34:21-22, 25, 36:4, 37:16; *Ps.* 33:13-15, 38:9, 44:21, 66:7, 94:9-11, 119:168, 139:1-16, 147:4-5; *Prov.* 5:21, 15:3, 24:12; *Is.* 29:15-16, 40:27-28, 45:4, 66:18; *Jer.* 5:3, 23:24; *Ezek.* 11:5; *Dan.* 2:20.

²³ According to the Bible, God is omnipotent, having more than enough strength to do the sum total of all things. *Phil.* 3:20, 21; *Ps.* 147:5; *Eph.* 3:20. His omnipotence is seen in His

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(righteous),²⁴ sovereign,²⁵ eternal,²⁶ immutable,²⁷ or loving.²⁸ Rather, He is depicted as a learning,²⁹ arbitrary and capricious,³⁰ imperfect,³¹ often

power to create. *Gen.* 1:1. It is also seen in His preservation of all things. *Heb.* 1:3. "God's ability to do all things that do not conflict with the divine will or knowledge. God's power is limited only by God's own nature and not by any external force." MCKIM, *supra* note 22 at 117; see also *Job* 42:2; *Mt.* 19:26; *Luke* 1:37. Put another way, God cannot break His promise, be unjust (since He is by nature righteous), learn anything or make mistakes (since He is omniscient), sin or commit evil (because He is good), and so forth. See *Gen.* 18:14; *Is.* 26:4.

²⁴ Righteousness, as understood in Scripture, means that it is impossible for God to do or cause anything that is wrong. See, e.g., *Deut.* 32:4; *Is.* 45:20-25; *Ps.* 111:1-3; *2 Cor.* 5:21; see also EVANGELICAL DICTIONARY OF THEOLOGY, *supra* note 16 at 456; NEW DICTIONARY OF THEOLOGY 590-92 (Sinclair B. Ferguson et al. eds., 1988); THE NEW DICTIONARY OF THEOLOGY 510, 550-53 (Joseph A. Komonchak et al. eds., 1987). This basic biblical assertion contradicts the foundation of Professor Dershowitz's argument that God was mistaken or otherwise imperfect. See, e.g., DERSHOWITZ, *supra* note 2, at 2. To adopt his own conclusion, he must deny the very presupposition he embraces in the opening pages: namely, that the Bible is a divine, inspired, holy text. *Id.* at 8. Other verses that declare God's righteousness include: *Ezra* 9:15; *Ps.* 7:9, 48:10, 50:6, 71:15, 19, 97:2, 111:3, 112:4, 116:5, 119:137, 142, 144, 145:17; *Is.* 51:8; *Jer.* 4:2, 9:24, 12:1; *Dan.* 9:7, 14; *Hos.* 14:9; *Mic.* 7:9.

²⁵ Sovereign means divine King, chief, highest, or supreme. The idea of sovereignty assures that nothing is out of God's control and that His plans triumph. See *Ps.* 103:19; *2 Sam.* 7:28; *1 Chron.* 29:10-13; *Eph.* 1:11; *Rev.* 4:11; see also MCKIM, *supra* note 22, at 117. Sovereignty includes ownership, authority, and control. God is sovereign in foreordination, creation, revelation, redemption, and evangelism. NEW DICTIONARY OF THEOLOGY, *supra* note 24, at 654-56. Moreover, the Bible declares that "God has a plan (*Acts* 15:18) which is all-inclusive (*Eph.* 1:11), which He controls (*Ps.* 135:6), which includes but does not involve Him in evil (*Prov.* 16:4), and which ultimately is for the praise of His glory (*Eph.* 1:14)." CHARLES C. RYRIE, BASIC THEOLOGY 43 (1986). Other verses that teach God's sovereignty include: *Ex.* 9:29, 18:11; *Deut.* 4:39, 10:14, 32: 8, 39-43; *Josh.* 2:11; *1 Sam.* 2:6-8; *2 Kings* 19:15; *2 Chron.* 20:6; *Neh.* 9:6; *Job* 9:12, 12:9-10, 16-17, 25:2, 34:13, 24, 33, 41:11; *Ps.* 10:6, 22:28-29, 24:1, 29:10, 47:2-3, 7-8, 50:10-12, 59:13, 66:7, 67:4, 75:6-7, 82:1, 8, 83:18, 89:11, 93:1-2, 95:3-5, 96:10, 97:1-2, 9, 99:1, 105:7, 115:3, 16, 135:5-6, 146:10; *Eccles.* 9:1; *Is.* 40:22-23, 44:6, 45:7, 23; *Jer.* 10:10, 18:6, 27:5; *Lam.* 5:19; *Ezek.* 18:4; *Dan.* 2:20-21, 4:3, 17, 25, 35, 6:26; *Mic.* 4:7.

²⁶ By characterizing God as eternal, the Bible means that God is not bound by time. MCKIM, *supra* note 22, at 93. As such, God is omnipresent; an infinite spirit being everywhere present in the cosmos. *Ps.* 139:7-10; *Jer.* 23:23-24; see also EVANGELICAL DICTIONARY OF THEOLOGY, *supra* note 16, at 453; MCKIM *supra* note 22, at 117. The ramifications of this are significant when it comes to understanding certain biblical texts. Having always existed, God sees the past and future as clearly as the present. With this perspective, He has a better understanding as to what is best for our lives. There are certain things that occur today, or that have occurred in the past, or that will occur in the future, that are really for our own good. If we could see all three dimensions of time equally, what appears "bad" now may actually be good in light of future events. See *Is.* 44:6; *Rev.* 1:8; *1 Tim.* 1:17. Other verses in the Bible that declare God's eternal nature include the following: *Gen.* 21:33; *Ex.* 3:15; *Deut.* 32:40, 33:27; *1 Chron.* 16:36, 29:10; *Job* 36:26; *Ps.* 9:7, 33:11, 41:13, 55:19, 68:33, 90:1-2, 4, 92:8, 93:2, 102:12, 24-27, 145:13; *Prov.* 8:23, 24-25; *Is.* 40:28, 41:14, 43:13, 48:12, 57:15, 63:16; *Jer.* 10:10, 17:12; *Lam.* 5:19; *Dan.* 4:34; *Hab.* 1:12, 3:6.

²⁷ Immutability is another trait attributed to God by Scripture. It means that God never changes in His nature or attributes. *Nuun.* 23:19; *Ps.* 102:27; *Heb.* 13:8; see also THE NEW DICTIONARY OF THEOLOGY, *supra* note 24, at 510; MCKIM, *supra* note 22, at 116. This means

mistaken, yet well-intentioned, Deity who acts out of anger and revenge.³² God is not always good, and is even capable of committing sin,³³ breaking a promise,³⁴ and bringing about evil.³⁵ This opens the door for a later discussion in Chapter Thirteen of "Theodicy": why bad things happen to good people.³⁶

The Professor's characterization of God makes perfect sense in light of his overall plan of attack.³⁷ After all, for mankind to ultimately be

that He cannot be, as Professor Dershowitz suggests, a learning or developing God, because He is omniscient and omnipotent. Other verses from Scripture that support God's immutable nature include: 1 *Sam.* 15:29; *Job* 23:13; *Ps.* 33:11, 119:89-91; *Prov.* 19:21; *Eccles.* 3:14; *Is.* 31:2; *Mal.* 3:6.

²⁸ God is depicted in both the Old and New Testaments as possessing perfect, infinite love. *Rom.* 5:8, 8:37-39; 1 *John* 3:16; see also *NEW DICTIONARY OF THEOLOGY*, *supra* note 24, at 400-01. He seeks good for the object loved, contrary to Professor Dershowitz's descriptions of a vengeful, angry God. *DETSHOWITZ*, *supra* note 2, 60-68; see also *Deut.* 23:5, 33:3, 12; *Job* 7:17; *Ps.* 42:8, 63:3, 89:33, 146:8; *Prov.* 15:9; *Jer.* 31:3; *Mal.* 1:2. God detests or hates evil. *EVANGELICAL DICTIONARY OF THEOLOGY*, *supra* note 16, at 455-57.

²⁹ *DETSHOWITZ*, *supra* note 2, at 43, 65, 66, 68, 92, 120, 123, 214, 223.

³⁰ *Id.* at 64, 233.

³¹ *Id.* at 2, 67, 224.

³² *Id.* at 60, 81.

³³ *Id.* at 81.

³⁴ *Id.* at 71.

³⁵ *DETSHOWITZ*, *supra* note 2, at 66.

³⁶ "Why do bad things happen to good people, and why do good things happen to bad people?" The Professor says that these questions present a dilemma only for individuals who believe in an all-powerful, all-knowing, and just God. Nothing could be farther from the truth. In fact, it is the very belief in an all-powerful, all-knowing, and just God that makes these questions understandable. Evil does not disprove God's existence, as the Professor suggests, but His absolute perfection. See *id.* at 226. In the end it all depends on one's worldview. In any case, delving into these issues requires a depth of philosophical and theological understanding not demonstrated by the Professor in Chapter 13. For a discussion of views that affirm both God and Evil, see *NORMAN L. GEISLER & PAUL D. FEINBERG, INTRODUCTION TO PHILOSOPHY: A CHRISTIAN PERSPECTIVE* 328-35 (1980). Note that even a traditional Jewish understanding of God contradicts the Professor's argument in Chapter 13 that God brings about evil. As one Rabbi notes,

'And God saw everything that He had made, and, behold, it was very good', express the fundamental Jewish belief in the goodness and wisdom of God, . . . Judaism has always insisted that since God is a God of good, everything which He has created must be for good, and that the normal order of things is only good. Only through man's misuse of God's gifts or defiance of God's will and disregard of His purpose in life does evil come.

MORGENSTERN, *supra* note 18, at 38-39.

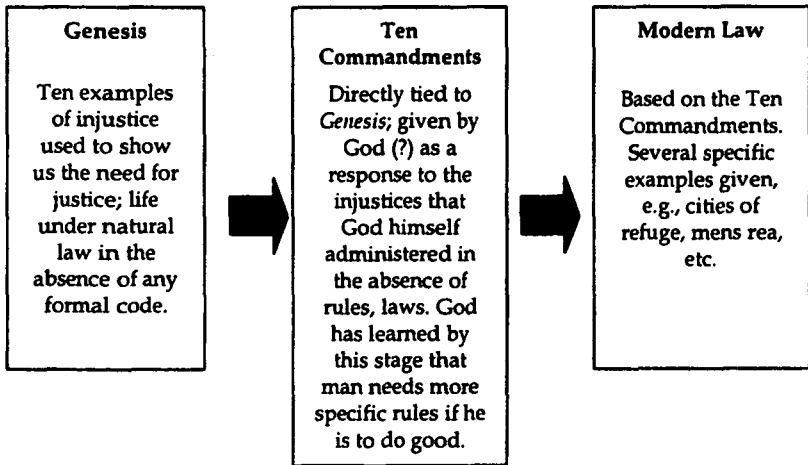
³⁷ Note here that the Professor's characterization of God gels nicely with the Gnostic's second century understanding of duality. See *LOUIS BERKHOF, THE HISTORY OF CHRISTIAN DOCTRINES* 52-53 (1986); *BRUCE L. SHELLEY, CHURCH HISTORY IN PLAIN LANGUAGE* 50-55 (2d ed. 1995). It is interesting to note that the Gnostics were prone to "allegorical excesses,"

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absolved from acting contrary to God's commands and according to his "evil inclinations"³⁸ - what the Bible calls "sin"³⁹ - Yahweh, the God of Abraham, Isaac, and Jacob, must be stripped of His omniscience and omnipotence. We must see the Creator in *Genesis* as a neophyte, as a wet-behind-the-ears, do-gooder with magical powers, whose plans do not always work out as intended. For the Professor's defense to succeed, the divine can no longer be divine; God can no longer be fully God. He must be more like man than God if jurisdiction to judge here on earth is to be established.⁴⁰

In brief, following Professor Dershowitz's analysis of the ten cases in *Genesis*, the remainder of the book speaks about how we are then to understand what these stories of injustice actually teach us about justice.⁴¹ The Bible, accordingly, uses stories of "injustice" to ultimately teach us about the *need* for justice.⁴² (See Table 1).

Table 1, Summary of THE GENESIS OF JUSTICE:



GERHARD MAIER, BIBLICAL HERMENEUTICS 69 (Robert W. Yarbrough trans., 1994), which is a favorite interpretive device used by Professor Dershowitz. See *infra* notes 77-86 and accompanying text (discussing this notion further).

³⁸ DERSHOWITZ, *supra* note 2, at 258.

³⁹ The Old Testament word for sin implies "missing the mark" or "deviating from the goal" (*Ex.* 20:29); or man's rebellion (1 *Kings* 8:50); "going astray" (1 *Sam.* 26:21); "done wickedly" (2 *Sam.* 24:17). For a New Testament discussion of sin, see *Rom.* 8:7; *Jn.* 8:46; *Mt.* 6:14; *Eph.* 2:1; 1 *Jn.* 3:12; see also DEREK WILLIAMS, NEW CONCISE BIBLE DICTIONARY 518 (1989).

⁴⁰ DERSHOWITZ, *supra* note 2, at 43 (capturing the idea that God is more human than divine). Further, the Professor's interpretation is infected with a touch of polytheism, "the gods of which were more human than divine." DELITZSCH, *supra* note 18, at 50.

"The narrative of *Genesis* is all about the evil impulses of man and the need to check them by specific rules, laws and commandments."⁴³ The God of *Genesis* first punishes man for his lawlessness in the absence of his knowledge of the law. When humankind proves that it cannot live in peace, God gets angry, vengeful, and destroys the earth, covering up His mistake. He soon comes to learn that there needs to be written laws to govern mankind, so He provides the Ten Commandments.

Professor Dershowitz likens living in the pre-Ten-Commandment era to being under the natural law which, ultimately shows the need for positive law. God learns after trial and error that for true justice to exist there must be a codified, or written law. Justice requires notification. Individuals must be informed of the consequences of their actions, instead of simply being expected to know better, or to obey commands from a Supreme Being without reason. In the absence of written law, obedience cannot and should not be expected.⁴⁴

Finally, it is important to briefly consider the Professor's definition of "justice," as set forth in the book. With so much talk of justice and injustice, one would expect that a clear-cut definition of each be set forth early on. As previously discussed, whatever justice is, it cannot be found in the nature or essence of God.

We are told by the Professor that justice must be found in a human (versus a divine or sacred), contemporary understanding of the word.⁴⁵ Interestingly, early on in Chapter One he explores the Hebrew (rabbinic) root for justice. *Mishpatim*, which we are told comes from the same Hebrew root as "justice" and "judge," refers to "laws based on reason and experience."⁴⁶ These are compared to *chukim*, which were "divine orders to be followed blindly, simply because God issued them."⁴⁷ The implication is that *mishpatim*, or laws based on reason and experience,

⁴¹ DERSHOWITZ, *supra* note 2, at 14.

⁴² *Id.* at 258.

⁴³ *Id.* at 251.

⁴⁴ The implication that man could not know right from wrong without notification contradicts the implications drawn from the image bearing nature of man. *Rom.* 1-2. In Judeo-Christian theological understanding, the image-bearing nature means, among other things, that man, as made in the image of a good, moral God has the innate ability to decipher or determine right from wrong in certain non-civil areas in the absence of written codes or direct commands. See C.S. LEWIS, *MERE CHRISTIANITY* 3 (1952); JAMES W. SIRE, *THE UNIVERSE NEXT DOOR: A BASIC WORLDVIEW CATALOG* 27 (3d ed. 1997).

⁴⁵ DERSHOWITZ, *supra* note 2, at 6, 10, 18, 74.

⁴⁶ *Id.* at 6.

⁴⁷ *Id.*

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are "justified" and hence, constitute true justice. In contrast, *chukim* are unreasoned and do not. Thus, it would be considered unjust to punish someone for something that was not based on reason (i.e., such as might be logically deduced from a pre-existing code of conduct: "How was I to know that this was wrong?!"), or personal experience (i.e., such as one's subjective feelings about what is "fair" or "just" in any given situation). Within these definitional parameters it becomes possible to eventually argue, for example, that God's punishment of Adam and Eve, and their offspring, for violating *chukim* - God's command not to eat from The Tree of Knowledge of Good and Evil - was an injustice, because it resulted from Adam and Eve's failure to obey a blind order.⁴⁸

In addition to reason and experience, fairness and proportionality play key roles in the Professor's idea of justice. He indicates "fairness" requires adequate warning, and that punishment must be proportional to the harm caused. Further, he states that "justice" is equivalent to modern notions of "equity," and "proportionality" must in some way be present for justice to exist. The evidence for proportionality is even stronger in light of his later discussion of *lex talionis*.⁴⁹ But apart from this definitional patchwork, no formal definition of justice, or injustice, is ever offered.

So, when the smoke finally clears, you are left only with reason, experience, equity, and proportionality as your guides for returning a verdict of "just" or "unjust." You never hear that justice is closely associated with righteousness in the Old Testament, as well as the New Testament,⁵⁰ or that it receives several shades of meaning as the biblical revelation unfolds and develops chronologically.⁵¹

⁴⁸ *Id.* at 32-42.

⁴⁹ *Id.* at 253. See *supra* note 6 and accompanying text (discussing the concept of *lex talionis*).

⁵⁰ THE NEW DICTIONARY OF THEOLOGY, *supra* note 24, at 549. The justice of God: "God's righteousness and uprightness whereby God governs the universe in accord with God's law as an expression of God's character. Biblically, God's justice relates to God's concern for the poor and for human obedience to God's will." MCKIM, *supra* note 22, at 116; see also EVANGELICAL DICTIONARY OF THEOLOGY, *supra* note 16, at 593; NEW DICTIONARY OF THEOLOGY, *supra* note 24, at 590-92.

⁵¹ For example, in the patriarchal age it often means conformity to an accepted standard of values, as in Jacob's honesty in keeping his contract. *Gen.* 30:33. And in *Leviticus* 19:36, the law speaks of "just" weights. Justice was also a characteristic of the Messiah reported in the Old Testament. *Is.* 9:7.

More interestingly, perhaps, you never hear that justice in the Old Testament describes God's punishment of sin,⁵² a construct that the Professor consistently minimizes.⁵³ You particularly never hear that the biblical expression of justice is rooted in an examination of the character or essence of God Himself.⁵⁴ A close reading of Scripture reveals that justice must first be understood ontologically if it is to be understood at all. By a natural transition, justice then comes to identify the moral standard by which God measures human conduct. People must "do justice" (*Gen.* 18:19), which is the outworking of true holiness and the opposite of sin (*Eccles.* 7:20).⁵⁵

Why were these shades of meaning absent from the Professor's definition of justice and his analysis of the ten cases? Why was your understanding of the biblical sources of modern justice limited in the ways described above? To address these questions, we now turn to a discussion of hermeneutics.

III. USING THE BIBLE IN LEGAL ANALYSIS: UNDERSTANDING THE HERMENEUTICS IN *THE GENESIS OF JUSTICE*

Learning to read the Bible intelligently begins with hermeneutics. Hermeneutics is "the science (principles) and art (task) by which the

⁵² From the time of the Judges, justice describes God's acts which vindicate or deliver His people. *Judg.* 5:11. This ultimately leads to the sense of justice or righteousness seen in God's undeserved pardon and acceptance of a sinner. *Ps.* 103:17. Consider also *Is.* 45:21, where God is seen as a savior because He is righteous (just). This idea is found also in *1 Jn.* 1:9. The New Testament thus sheds further light on biblical justice. It continues at the same time to use justice (righteousness) to describe God's judgment of sin. *Rom.* 3:25. The connection between the Old and New Testaments is undeniable. God's righteousness can be granted, by His grace, to the believer, whose natural righteousness is quite inadequate to please God. *Is.* 45:24, 64:6. The believer is made just by the imputed righteousness of Christ. *Phil.* 3:9.

⁵³ DERSHOWITZ, *supra* note 2, at 258.

⁵⁴ You also never read that from Moses' time in *Exodus* onward, justice distinguishes God's will and those activities that result from it. According to Scripture, God acts in ways which are always perfect and right (*Ps.* 89:14) - that is, He cannot be anything but perfect or just (*Hab.* 1:13; *Rom.* 3:8). This is something the Professor denies. In this light, God's "wrath" or "vengeance," as described by Professor Dershowitz, in the Old Testament is not a "fitful loss of temper [,] but [a] resolute disapproval; because it stems from God's holiness it is not malicious but righteous detestation." WILLIAMS, *supra* note 39, at 519.

⁵⁵ With all this said, God's people are called on to seek mutual justice in their social relationships. *Is.* 1:17; *Jer.* 22:16. From the exile on, righteousness became a synonym for giving charitable gifts. *Cf. Ps.* 112:9. Jesus' lofty ethical demands (*Mt.* 5:20, 48) were applied in his own life. *Heb.* 4:15. In the New Testament, Jesus also brought all humankind God's redemptive justice and imputed it to those who believe, thus uniting in Himself the many shades of meaning of "justice" in the context of redemptive history.

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meaning of the biblical text is determined.”⁵⁶ As you will see in the discussion that follows, critical to practicing good hermeneutics is learning how to ask the right questions of the text and understanding the nature of certain literary genres.

The hermeneutical task is far too rich and detailed for us to cover it here in a few pages. For the purposes of our review, we have assumed that you have little to no formal training in hermeneutics. With this said, our goal is to provide you with an introductory hermeneutical background for evaluating the Professor’s proposed method of biblical interpretation. To accomplish this, we will first suggest some general guidelines one must consider when approaching the Bible if good interpretation is the aim. Then, we will provide some specific guidelines for interpreting the narratives and demonstrate how they were misapplied by taking a closer look at a few of the ten cases. This foundation is essential if we are to properly evaluate the Professor’s legal and theological conclusions. Along the way, we will touch upon the most common errors in biblical interpretation reported in the literature. The serious reader is encouraged to consult other texts on basic biblical interpretation.⁵⁷

A. *How Do We Read the Bible? Beginning at the Beginning*

The “hermeneutical gap” refers to moving from what was said “then and there” in the original biblical text to the “here and now” of our own life settings. One of the challenges to our understanding the Bible is that it is an ancient book. Moses wrote the first five books of the Old Testament nearly 3400 years ago.⁵⁸ One must learn to bridge the chronological, cultural, geographical, historical, and literary divides that

⁵⁶ ROY B. ZUCK, BASIC BIBLE INTERPRETATION 19-20 (1991).

⁵⁷ See generally GERALD BRAY, BIBLICAL INTERPRETATION: PAST AND PRESENT (1996); PETER COTTARELL & MAX TURNER, LINGUISTICS AND BIBLICAL INTERPRETATION (1989); GORDON D. FEE & DOUGLAS STUART, HOW TO READ THE BIBLE FOR ALL ITS WORTH: A GUIDE TO UNDERSTANDING THE BIBLE (2d ed. 1993); IRVING L. JENSEN, INDEPENDENT BIBLE STUDY (1963); WALTER C. KAISER & MOISES SILVA, AN INTRODUCTION TO BIBLICAL HERMENEUTICS: THE SEARCH FOR MEANING (1994); WILLIAM W. KLEIN ET AL., INTRODUCTION TO BIBLICAL HERMENEUTICS (1993); MAIER, *supra* note 37; RICHARD MAYHUE, HOW TO INTERPRET THE BIBLE FOR YOURSELF (1986); GRANT R. OSBORNE, THE HERMENEUTICAL SPIRAL: A COMPREHENSIVE INTRODUCTION TO BIBLICAL INTERPRETATION (1991); ROBERT A. TRAINA, METHODICAL BIBLE STUDY (1980); ZUCK, *supra* note 56.

⁵⁸ ZUCK, *supra* note 56, at 15.

separate biblical from contemporary times. The tools for building these bridges are exegesis and application.⁵⁹

For now, know that exegesis is finding out what the text says and what it means, and that application refers to applying the original meaning or message to contemporary times. You cannot get to the latter until you first deal with the former: interpretation must precede application. Since the Professor spends nearly all his time doing interpretation, that is where we will focus our attention.

THE GENESIS OF JUSTICE is, indeed, chock-full of exegesis. Everywhere we see Professor Dershowitz offer an "interpretation," or tell us "what is meant by . . .", or "the message of this passage is . . .", or "this teaches us . . .", he is demonstrating his hermeneutic. In bringing together the Bible and law, it is important to note that he is "doing" or "practicing" theology, not strictly a legal analysis as he supposes. And while one need not be an expert theologian to perform proper hermeneutics, one does need a sound methodology if one is to understand what the Bible intended to say about a particular subject. Otherwise, one is left with eisegesis, which is reading meaning into the text, the very opposite of good biblical interpretation.⁶⁰

What, then, is 'good' interpretation of the Bible? Let us begin by suggesting what it is not. Contrary to the overall approach in THE GENESIS OF JUSTICE, the aim of good interpretation is not uniqueness or novelty.⁶¹ Instead, the aim of good interpretation is to get at the plain meaning of the text; to understand the author's intended message communicated to the hearers or readers "then and there." We tend to rely on experts at times since exegesis requires knowledge of things that most of us do not have under our academic belts: for instance, biblical

⁵⁹ Some scholars break down the hermeneutical process into three stages instead of two. For example, Roy Zuck notes that we must first observe the text to see what it says, then ask what it means, and then address the "application" question by asking how it applies to me today. *Id.* at 10. Another scholar presents observation, interpretation and application as the three basic stages. See TRAINA, *supra* note 57, at 27, 89, 201. Others, such as Walter Henrichsen, break down the second step after observation, interpretation, into two stages: interpretation and correlation, which is then followed by application. WALTER HENRICHSEN, *A LAYMAN'S GUIDE TO INTERPRETING THE BIBLE* 15 (1985). Each approach is consistent with our presentation herein of two basic steps: exegesis (observation and interpretation) and application.

⁶⁰ D.A. CARSON, *EXEGETICAL FALLACIES* 14, 18 (1984); BRUCE CORLEY ET AL., *BIBLICAL HERMENEUTICS: A COMPREHENSIVE INTRODUCTION TO INTERPRETING SCRIPTURE* 363 (1996); KAISER & SILVA, *supra* note 57, at 142, 262.

⁶¹ DERSHOWITZ, *supra* note 2, at 10-11, 124.

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languages (Hebrew, Aramaic), Jewish and Semitic culture, how to determine the original text when available manuscripts have variant readings, and so forth. But never leave behind your common sense. The test of good interpretation is that it makes good sense of the text *as a whole*, which is commonly referred to as “synthetic interpretation.”⁶²

But if plain meaning is, indeed, what good interpretation is all about, why interpret at all? Why can we not simply read, as Professor Dershowitz does in his book, and then accept his interpretations at face value? The answer is found in two places: first, in the readers themselves, and second, in the nature of Scripture – which, is at the same time both divine and human.

1. The Reader

Every reader is simultaneously an interpreter who often tends to confuse her understanding with original intent. When we read, we bring to the text all that we are - our experiences, beliefs, culture, and previous religious traditions. These comprise our worldview.⁶³ One simply cannot come without presuppositions related to the goodness of God, the “divine origin of the Bible, the superiority or inferiority of one particular religious approach to the text, or . . . the history of the Scriptures.”⁶⁴ The suggestion that Professor Dershowitz’s analysis of *Genesis* is devoid of such presuppositions - for instance, that he is not acting as a “defense lawyer” to some degree,⁶⁵ or that his worldview

⁶² MAIER, *supra* note 37, at 394.

⁶³ See generally RONALD H. NASH, *WORLDVIEWS IN CONFLICT* (1992); SIRE, *supra* note 44. Sire and others clearly demonstrate the impossibility of approaching the text without presuppositions. We all, including the Professor, bring a worldview with us to the interpretive process, that is, a unique set of presuppositions, whether true, partially true or false, about the basic makeup of the world by which we order our lives. Worldviews include metaphysical, epistemological, and axiological assumptions, assumptions about what happens when we die, and our view of history. These presuppositions comprise the filter through which Professor Dershowitz ultimately sifts *Genesis*. They guide his analysis, direct his inquiry, and set the overall tone for his cross-examination of the narrative. In the end, however, the Professor fails to make a convincing case for the veracity and value of his own interpretive filter. We never know what gives his filter the value it presumably warrants.

⁶⁴ DERSHOWITZ, *supra* note 2, at 11-13.

⁶⁵ In defending humankind against God’s judgment, the Professor comes to the text already presuming God to be unjust, among other things, and then interprets the narratives in accord with his presuppositions about the character of God and the essence of justice in the modern world. Thus, how one’s presuppositions hold up in the face of consistent hermeneutical rules and a close reading of the text according to consistent rules of interpretation is more important in the final analysis than whether one comes to the text without any presuppositions at all. Besides, you cannot come to the Scripture assuming its

does not influence his own analysis - is thus not only impossible, but unrealistic.⁶⁶ So, we are somewhat skeptical when he says, "for purposes of the [book], I am neither Jew nor Christian nor Muslim."⁶⁷

The idea that he can lay aside his Jewish presuppositions is further contradicted by his overall approach throughout the book. First, as noted earlier, he relies almost entirely on Midrash (a form of Jewish commentary)⁶⁸ and excludes any commentaries inconsistent with this tradition, usually passing them off *ad hominem* as "fundamentalist."⁶⁹ He also refers to *Genesis* as part of the Old Testament and then tells us that he is using "Old Testament" and "Jewish Bible" interchangeably, apparently "without intending any theological implications."⁷⁰

But theological implications are the inevitable and unavoidable consequence of this decision. For example, the Christian tradition considers the Old Testament to be comprised of more than just the Torah

divine origin as the Professor does and then say you have no presuppositions, or that you are approaching the Scripture on the basis of reason alone. We also agree that a "Socratic" approach, *see id.* at 12, is necessary if one is to understand the meaning of texts. However, since it is impossible to set aside one's presuppositions, we believe you can interrogate the text without leaping into "faithlessness" or "doubt." *Id.*

⁶⁶ *See, e.g.,* DAN MCCARTNEY & CHARLES CLAYTON, *LET THE READER UNDERSTAND* 13-18 (1994).

⁶⁷ DERSHOWITZ, *supra* note 2, at 9.

⁶⁸ *Id.* at 10.

⁶⁹ *Id.* at 15-16. Fundamentalism must be understood in at least three separate contexts. First, in its historical theological sense, it refers to the movement initiated in the early twentieth century by American Protestant Evangelicals that emphasized the core tenets, or "fundamentals," of orthodox Christian faith in the face of "liberal encroachment after the First World War." J.I. PACKER, "FUNDAMENTALISM" AND THE WORD OF GOD 24 (1958). *See generally* STEWART G. COLE, *THE HISTORY OF FUNDAMENTALISM* (1931). A fundamentalist then was one who identified himself or herself with certain doctrinal beliefs of the faith such as the Virgin Birth, the inerrancy of Scripture, the deity of Christ, and salvation through grace, to name only a few. *See generally* THE FUNDAMENTALS: THE FAMOUS SOURCEBOOK OF FOUNDATIONAL BIBLICAL TRUTHS (R.A. Torrey et al. eds., 1990) (note: this version has been updated by Charles L. Feinberg).

In its political or social sense, Fundamentalism refers to various reformative social measures initiated under the guise of replacing secular standards in realms of government and education with principles of the historic faith. *See* COLE, *supra* at 62. The Moral Majority in the 1980s and the Christian Coalition in the 1990s are often associated with this idea of Fundamentalism, which at times is lumped together under the label: "Christian Right."

Lastly, in its colloquial sense, Fundamentalism is associated with anti-intellectualism, extremism, and intolerance of all kinds. This is the sense in which the Professor superficially uses the term to categorize those who interpret the Bible for its original meaning and who believe that certain interpretations are simply wrong or unsupported by the text as a whole.

⁷⁰ DERSHOWITZ, *supra* note 2, at 3.

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and it considers both the Old and New Testaments to be part of the Bible. The New Testament is directly linked to Old Testament prophecy regarding the coming Messiah and is thus considered part of an unfolding revelation or redemptive history that begins in *Genesis* and continues with Christ's return in *Revelation*. If the Professor had explored traditions outside Judaism, we might have heard, for example, John Calvin's exposition of *Genesis* and justice,⁷¹ or Henrici de Bracton's explanation of the biblical sources of justice.⁷²

And what about Jesus? Not hearing from Jesus discredits the Professor's own interpretive framework and further reveals his presuppositions. Jesus was a Jewish rabbi who, according to the Professor, "excelled in the use of midrashic technique."⁷³ Why then not include his commentary? Upon closer inspection, we see that Jesus interprets the story of Lot's wife in a way that contradicts the Professor's interpretation in Chapter Five.⁷⁴ The Professor refuses to look at it because he rejects the New Testament's relationship with the Old Testament. Even under his own principles, however, he ought to have at least have looked at Jesus' interpretation as a midrash.

2. The Nature of Scripture

The other reason that we must interpret Scripture, as opposed to "just read" it, resides in the nature of Scripture itself. Scripture is at the same time both human and divine. Let us begin with the divine.

Professor Dershowitz accepts the divine nature of the Bible.⁷⁵ While some view it merely as great literature, he chooses to view it as a divine,

⁷¹ CALVIN, *supra* note 18.

⁷² See *infra* notes 214-20 and accompanying text (discussing Bracton).

⁷³ DERSHOWITZ, *supra* note 2, at 17.

⁷⁴ See *infra* notes 175-77 and accompanying text (discussing Jesus' comments about Lot's wife).

⁷⁵ For those who deny the divine nature of the text or its divine inspiration, as some of you do according to the Professor, interpretive methods have never been much of a problem. DERSHOWITZ, *supra* note 2, at 8. You simply filter the text through your own framework of personal experience and cultural relevance. However, any such interpretations and conclusions you derive, no matter how interesting and clever, cannot be said to come from or otherwise be inspired by God, but the mind and invention of you as reader. Interpretation that ignores context - history, language, culture, etcetera - is simply poor interpretation. One would not play football according to the rules of golf. Understanding the game requires the right set of rules. Nor would one expect to understand a novel after reading the first chapter. Without the proper set of guidelines, any conclusions you draw from the Bible are no more significant than any other conclusions drawn from a book written by any other author at any other time in history. For you, Scripture merely

"holy book";⁷⁶ a sacred, inspired text. But viewing it as divine carries with it certain theological and hermeneutical implications that ultimately contradict the Professor's conclusions.⁷⁷

As divine, the Bible is thus unique in that it comes to us from God Himself. As such, it is God's special revelation⁷⁸ to humankind, not merely a record of revelation. Moreover, being a divine book suggests that it has unity, which means that we should acknowledge what is referred to above as the "progress of revelation."⁷⁹

contains the words of people in history and your interpretation is ultimately limited to historical inquiry, much like the approach of Cicero, Milton, and others. You search for the historical God, the historical Jesus. When it is all said and done, however, you place your faith in axiological and epistemological premises that are no less fideistic at their foundation than the supernaturalistic presuppositions that are their alternative.

Others take this one step forward. You consider the Bible only "eternally relevant." It is God's Word, but merely a collection of propositions or principles to be obeyed, much like the sayings of Confucius. You select and choose without much thought which propositions you will obey, sort of a "metaphysical aphrodisiac." The Bible is helpful, at times instructive, but not authoritative. It does not provide a blueprint for all of life, so finding application for today is merely a philosophical or ivory tower pursuit. It has little relevance to your life and practice as an attorney.

⁷⁶ *Id.*

⁷⁷ Note that the divine nature of the Bible not only suggests unity in an exegetical sense, but that the author Himself is divine - a logical theological connection that the Professor ignores. One reviewer of *THE GENESIS OF JUSTICE* said the following about his oversight:

Dershowitz sidesteps the critical question of the Bible's divine inspiration by saying he has 'chosen to accept the assumptions of its historic participants about the divine nature of the text.' This is a curious semantic shell game in which Dershowitz presumes the Bible to be divinely authored but does not presume its author to be divine. As a result, Dershowitz's book is a house built on sand, as he flounders badly in trying to reconcile the Almighty God who appeared to Moses with the flailing, inept cosmic *paterfamilias* he derives from Genesis.

Steven H. Aden, *The God of Alan Dershowitz*, *CHRISTIANITY TODAY*, July 10, 2000 at 66 (book review).

⁷⁸ Special revelation refers to the Bible being God's special, verbal revelation to us. It is the record of the words and events that God wants us to know. *EVANGELICAL DICTIONARY OF THEOLOGY*, *supra* note 16, at 945-48; *NEW DICTIONARY OF THEOLOGY*, *supra* note 24, at 586; *THE NEW DICTIONARY OF THEOLOGY*, *supra* note 24, at 893-94. In comparison, general revelation is the knowledge that is available to all intelligent human beings. It consists of nature, history, and human nature. By examining these areas, we are capable of understanding or discovering God as a Creator who has a purpose for this world and its people. *EVANGELICAL DICTIONARY OF THEOLOGY*, *supra* note 16, at 944; *MCKIM*, *supra* note 22, at 240; *NEW DICTIONARY OF THEOLOGY*, *supra* note 24, at 585. As for human nature, this refers to the moral part of us that has the ability to distinguish right from wrong since we were created in the image of a good, moral God. Some refer to this as the "Law of Human Nature." *LEWIS*, *supra* note 44, at 3-7.

⁷⁹ As Roy Zuck explains,

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Unity means that the Bible should be read as a whole, not as a series of completely independent texts. Just as lawyers interpret a particular statutory provision by reading the statute as a whole,⁸⁰ so individual Scripture passages should be read in light of the whole of Scripture. Reading individual texts in light of the whole is especially pertinent when interpreting the Bible, a book that claims to be the word of God. If the Bible is of divine origin, then if one passage seems to contradict another, or if we hold an interpretation that does not gel with something else in Scripture, at least one of the passages is being interpreted incorrectly.⁸¹ In cases of "apparent" conflict, for example, "God's soft punishment of Cain and the Bible's high regard for life,"⁸² the conflict is just that, "apparent." Proper hermeneutics in almost all cases will help to remove the "conflict."⁸³ The synthesis principle of biblical interpretation states that the passages with the more obvious meanings should help interpret the more arcane ones.⁸⁴ Or, as the Reformers put it, *scriptura scripturam interpretatur*, or "Scripture interprets Scripture."⁸⁵

This does not mean that biblical revelation progressed in an evolutionary sense. Instead it means that in later Scriptures God added to what He had given in earlier portions. This is not to suggest that what was recorded in earlier portions of the Bible was imperfect and that the later revelations were perfect. Nor does it suggest that earlier portions were in error and the later portions were truthful. Instead it means that what may have been given as partial information was then added to later so that the revelation is more completed.

ZUCK, *supra* note 56, at 73.

⁸⁰ The principle of statutory construction is stated as follows:

Statutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.

United Sav. Ass'n v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 371 (1988) (citation omitted).

⁸¹ See, e.g., MAIER, *supra* note 37, at 188.

⁸² DERSHOWITZ, *supra* note 2, at 55.

⁸³ See *id.* For an understanding of God's anything-but-soft punishment of Cain, as well as its relationship to Adam and Eve's punishment, see 1 BOICE, *supra* note 18, at 256-61; CALVIN, *supra* note 18, at 208-15; 1 DELITZSCH, *supra* note 18, at 186-89; 1 A. DILLMANN, GENESIS: CRITICALLY AND EXEGETICALLY EXPOUNDED 191-98 (Wm. B. Stevenson trans., 1897); JOHN J. SCULLION, GENESIS: A COMMENTARY FOR STUDENTS, TEACHERS, AND PREACHERS 49-53 (1992); WESTERMANN, *supra* note 18, at 33-36.

⁸⁴ As for the clarity of Scripture, Bernard Ramm notes the Reformers' understanding of this basic biblical concept:

In his first interview with Mary, Queen of Scots, John Knox set forth the clarity of Scripture: "The word of God is plain in itself; and if there

Briefly note that by imbuing Jewish midrash with the same interpretive authority as Scripture itself, the Professor commits the error known as extra-canonical authority. In doing so, he also violates *scriptura scripturam interpretatur*. Extra-scriptural authority is perhaps the most common error people make when approaching the Bible for answers. In adopting such authority to determine the meaning of the Bible, the interpreter claims to be in possession of a special key that unlocks meaning to the Bible that is external to the historical and literary contexts and content of the Bible itself.⁸⁶ An illustration of this is when the Professor defines justice in terms of contemporary knowledge and personal experience rather than letting the Bible speak for itself in the proper historical and literary contexts.⁸⁷

The Professor is also correct when he states that the very essence or nature of Scripture demands that we treat it differently from other classic literature. He notes:

[W]hether or not one believes the Bible was written or inspired by God and redacted by humans, it cannot, in any view be read as just another collection of folktales, short stories, or historical accounts. It is a sacred text, and Scripture must be read differently from secular literature if it is to be fully appreciated.⁸⁸

This quote embodies the essence of the hermeneutical task before us. But the Professor falls short when it comes to presenting you with specific guidelines for just how it should be read differently. He says that while it is "sacred" and "holy", it does not, "of course, require a

appear any obscurity in one place, the Holy Ghost, who is never contrary to Himself, explains the same more clearly in other places: so that there can remain no doubt, but to such as obstinately remain ignorant.'

BERNARD L. RAMM, *HERMENEUTICS* 86 (1981).

⁸⁵ See also LOUIS BERKHOF, *PRINCIPLES OF BIBLICAL INTERPRETATION* 25-28 (1950); MAIER, *supra* note 37, at 182; MCCARTNEY & CLAYTON, *supra* note 66, at 162; The Concordial Lutheran, *A Catechism on the Doctrine of the Church and its Ministry*, available at <http://www.concordialutheranconf.com/c%26mcatechism.html>.

⁸⁶ FEE & STUART, *supra* note 57, at 92.

⁸⁷ This is not to say that a reader should never look outside of the biblical text itself for interpretive aids. Commentaries on the text can be extremely useful to good exegesis by describing the text's historical context and tracing the meaning of the text in light of the literary context. See *id.* at 246. Such commentaries, however, are merely aids; they do not have the authority of Scripture.

⁸⁸ DERSHOWITZ, *supra* note 2, at 8.

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literal fundamentalist approach.”⁸⁹ He even uses Pope John Paul II in support of this non-fundamentalist (non-literalist) approach. Here, we catch the first real glimpse into his hermeneutical method. At one point, he teases us with a five types of interpretive rules for the Torah.⁹⁰ In the end, however, midrash (stories that elaborate on the narrative), coupled with personal experiences,⁹¹ are preferred since literalism is “anti-intellectual fundamentalism” that leads to narrow points of view, non-critical reading, and prejudice such as racism.⁹² Midrash is also preferred since the Jewish Bible is open-textured and often ambiguous.⁹³ It is even remarked that both Jesus in the New Testament and Koran were subject to midrashic elaboration.⁹⁴

We are thus left with Jewish midrash, subjectivity, and reason as our interpretive guides. But that is not all. We are then told to add allegory to the interpretive mix. Quoting Ibn Ezra, Professor Dershowitz establishes the following rule: “If there appears something in the Torah that is intellectually impossible to accept or contrary to the evidence of our senses, then we must search for a hidden meaning.”⁹⁵ In the tradition of Hobbes and Spinoza, he embraces a modified rationalism⁹⁶ and declares that the Bible is only true if it corresponds to reason.⁹⁷ When it

⁸⁹ *Id.* at 14.

⁹⁰ They are as follows: 1) literal; 2) text-centered, rabbinic explication; 3) symbolic interpretation; 4) secret or mystical meaning; and 5) midrash, stories that elaborate on the narrative and go beyond the text, a form of extra-canonical authority. *Id.* at 16-17.

⁹¹ “I bring a lifetime of legal studies and practice coupled with a solid grounding in the Bible.” *Id.* at 11. Unique experiences as a lawyer and a teacher provide the interpretive framework for interpretation; “employing one’s own experiences to expand knowledge is, after all, a central message of Genesis.” *Id.* at 19.

⁹² *Id.* at 15-18.

⁹³ *Id.* at 16.

⁹⁴ DERSHOWITZ, *supra* note 2, at 17.

⁹⁵ *Id.* at 14-15.

⁹⁶ *Id.* at 18. As Robert Stein notes:

The influence of rationalism [in the 18th and 19th centuries] was so great that even those who believed in the inspiration of the text shifted their attention away from the author’s willed meaning and focused their attention on the subject matter of the event. Thus, what the author willed to teach by the event was lost sight of, and the event came to contain meaning in and of itself. The biblical stories as a result were treated independently of the literary context their authors gave them.

ROBERT STEIN, *PLAYING BY THE RULES: A BASIC GUIDE TO INTERPRETING THE BIBLE* 154 (1994).

⁹⁷ One Jewish publication that reviewed THE GENESIS OF JUSTICE observed that, for Professor Dershowitz, “human reason alone” is his God. Jonathan Marks, *Educating God: The Genesis of Justice: Ten Stories of Biblical Injustice That Led to the Ten Commandments and Modern Law* (book review), COMMENTARY 110 No. 2, at 77.81 (Sept. 2000). The reviewer

does not correspond, instead of rejecting it all together as the rationalists might, we simply allegorize. This approach is consistent with early Alexandrian Jewish allegorization,⁹⁸ which was an attempt by such men as Philo and Aristobulus to accept both the Old Testament and the Greek philosophers.⁹⁹

By adopting allegory as his "interpretive default," the Professor commits another common error known as allegorization.¹⁰⁰ Here, the reader ignores the clear meaning of the text, which is relegated to merely reflecting another meaning beyond the plain meaning.¹⁰¹ While a "secondary meaning" of a particular passage may at times be possible, such interpretation cannot be made of all texts and requires strict controls.¹⁰² And while the Bible, indeed, contains portions of allegory

further observed that the supremacy of reason stands in contrast to God's actions in the Bible which suggest that human reason alone "is a far from sufficient guide." *Id.*

⁹⁸ BERKHOF, *supra* note 85, at 15-16.

⁹⁹ ZUCK, *supra* note 56, at 30.

¹⁰⁰ FEE & STUART, *supra* note 57, at 91.

¹⁰¹ It is significant to note that even Ibn Ezra put limitations on the use of allegory within Jewish biblical interpretation. He notes,

Scriptural exegesis is thus a self-regulating task and must choose the method most appropriate to it. But it is also ultimately subservient to the halakhic basis of the community and must not undermine it . . . 'Lovers of reason should fully comprehend that . . . no Scriptural verse ever loses its plain-sense, even though the principal aim of Torah is to teach and instruct us in the doctrines, laws and rules derivable by hints in the plain-sense of Scripture. . . .'

FREDERICK E. GREENSPAHN, *SCRIPTURE IN THE JEWISH AND CHRISTIAN TRADITIONS: AUTHORITY, INTERPRETATION, RELEVANCE* 104 (1982).

¹⁰² It is possible for a particular text to have a fuller or deeper meaning beyond its original intent. But it depends on the text, as well as the particular genre. For example, with prophetic literature, secondary meaning is a strong possibility. But the search for secondary meaning beyond original intent requires strict controls if one is to justify the other interpretation without making the text meaningless by opening it up to limitless interpretations. The New Testament at times gives fuller meaning to certain Old Testament passages. KAISER & SILVA, *supra* note 57, at 286 (defining *sensus plenior*); MCCARTNEY & CLAYTON, *supra* note 66, at 155; STEIN, *supra* note 96, at 96-98. But it is critical to note that fuller meaning "is a function of inspiration, not illumination." FEE & STUART, *supra* note 57, at 184. Accordingly, as it relates to fuller meaning of prophetic literature:

[I]nspiration is the original motivation to record the Scripture in a certain way. Illumination is the insight to understand what the Scripture's authors wrote. We cannot rewrite or redefine Scripture by our illumination. We can only perceive a *sensus plenior* with any certainty, therefore, *after the fact*. Unless it is identified as a *sensus plenior* in the New Testament, it cannot confidently be identified as such from the Old Testament by us on our own authority.

Id.

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(e.g., Ezek. 23, or certain parts of Revelation), none of the allegories found in Scripture are simple narrative, which is the focus of the Professor's analysis.¹⁰³

Would it not have made more sense and have been more consistent with his own Jewish tradition to apply Hillel's seven rules for interpreting the Old Testament,¹⁰⁴ or the thirteen hermeneutical rules for interpreting the Pentateuch mentioned in Chapter Eleven, or Eliezer's thirty-two rules?¹⁰⁵ Given the Jewish flavor of his analysis, why discard traditional Jewish interpretive rules?¹⁰⁶ How does the Professor's interpretive approach measure up against basic rules of biblical interpretation identified by theologians and biblical scholars? The next several Parts attempt to address these questions.

In other biblical literature, there may also be meanings in a given text that the author was not aware of but still "fall within the pattern of meaning he willed." STEIN, *supra* note 96, at 39-43. These sub-meanings, however, are governed by strict interpretive guidelines related to historical and literary contexts.

¹⁰³ See *infra* notes 136-63 and accompanying text (discussing some specific rules for interpreting the narratives below).

¹⁰⁴ Jeff Sharp, *Philo's Method of Allegorical Interpretation*, 2 EAST ASIA JOURNAL OF THEOLOGY, April, 1984, at 94, 97 (citing CHARLES THEODORE FRITSCH, THE ANTI-ANTHROPOMORPHISMS OF THE GREEK PENTATEUCH 9-18 (1943)); see also BERKHOF, *supra* note 85, at 15-16; WALTER M. DUNNETT, THE INTERPRETATION OF HOLY SCRIPTURE 41-49 (1984); 4 ENCYCLOPAEDIA JUDAICA 890 (1972).

¹⁰⁵ 4 ENCYCLOPAEDIA JUDAICA, *supra* note 104, at 890.

¹⁰⁶ Historically and traditionally, a system of Jewish biblical exegesis has included the following: literal translation (*peshat*), implied meaning (*remez*), homiletic comprehension (*derash*), and mystical, allegorical meaning (*sod*). These methods may further be distinguished on the basis of their objective and subjective components. For example, *peshat* "is an objective method of obtaining the literal meaning of a passage by analysis of the language." In this literal approach, the commentator bases himself on the plain meaning of the text and on the context, which is similar to the hermeneutical approach we are presenting herein. In contrast, "*derash* is a subjective method which attempts to make the text applicable to the time of the exegete," *id.*, the very approach employed by the Professor throughout his analysis. Cf. DERSHOWITZ, *supra* note 2, at 10-11, 16-19. With *derash*, or homiletical interpretation, the "commentator strives to interweave his ideas with the text even if the simple meaning of the language and the context are at variance with his interpretation, and his interpretation is subjective." 4 ENCYCLOPAEDIA JUDAICA, *supra* note 104, at 891; cf. DERSHOWITZ, *supra* note 2, at 10-11, 16-19. Lastly, note that *sod* (allegorical meaning) and *remez* (implied meaning)—which are at the center of the Professor's interpretive paradigm alongside *midrash* - represented "the esoteric, mystical, and kabbalistic approaches" in Jewish exegesis and "were at times considered dangerous for use by the unscholarly man, who might arrive at misinterpretation and risk heresy." 4 ENCYCLOPAEDIA JUDAICA, *supra* note 104, at 890.

B. Doing Exegesis: Returning to the "Then and There"

As stated above, Professor Dershowitz correctly reminds us that even if you do not subscribe divine origin to the Bible, you cannot read it like any other piece of literature. In one sense, he is completely right. As explained above, the Bible claims to be God's special revelation to all humankind in every age that includes eternal truths and must be considered as part of a larger meta-narrative known as redemptive history. But in another sense, he is completely wrong. The Bible must in some ways, as a human book, be read like other literary works if we are to discover God's intended message for humankind.

Since God chose to speak through human words in the particular circumstances and events of history, every book in the Bible has a "historical particularity."¹⁰⁷ The meaning of each document is conditioned by the language, culture, times, and circumstances in which it was originally written.¹⁰⁸ If we are going to hear it as intended, we have to listen in ways the first readers could have understood before we attempt to apply it to current times.¹⁰⁹

The first step in good biblical interpretation is learning how to ask the right questions of the text. There are two basic categories of questions: first, questions of context (historical and literary), and second, questions of content (e.g., meaning of words, grammatical relationships, etc.). Our focus here will be on the latter.

First, historical context. Historical context differs from book to book in the Bible. It includes the specific time and culture of the book, the occasion for the book, as well as other geographical, topographical, and political factors that are relevant to the author's (and readers') setting. It includes the particular type of literature (genre), that is, whether it is psalms, proverbs, prophecies, narratives, genealogies, laws, or parables. The key is to read and study the historical books as historical narratives, and the psalms as poems.¹¹⁰

As for occasion and purpose, we need to have an idea of what was going on in Israel, for example, at the time of the Book of *Judges*, or what the occasion was that called forth the author to write *Genesis*, *Exodus*, or

¹⁰⁷ FEE & STUART, *supra* note 57, at 17.

¹⁰⁸ See, e.g., ROBERT L. CATE, *HOW TO INTERPRET THE BIBLE* 31-55 (1983).

¹⁰⁹ See, e.g., WALTER HENRICHSEN, *A LAYMAN'S GUIDE TO INTERPRETING THE BIBLE* 49-50 (1985).

¹¹⁰ See *infra* notes 136-63 and accompanying text (discussing rules for reading narratives).

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Leviticus. For those of you raised in the American West, you must be careful not to imagine the mountains surrounding Jerusalem (*Ps.* 125:2) in terms of the Rocky Mountains surrounding Bozeman, Montana. This is where we look to the experts to provide meaning consistent with the text, such as a good Bible dictionary or handbook.¹¹¹

The second type of context is literary. One can typically identify the literary context without much help from the experts. Literary context means that words only have meaning in sentences, sentences in paragraphs, paragraphs in units of thought, and so forth. Here we ask, "What's the point?," or "What is he or she trying to say to these people in this time and on this occasion?" While these questions vary from genre to genre, it is the goal of good exegesis.¹¹²

How does Professor Dershowitz's basic method for interpreting the Bible deal with context? The Professor's approach completely ignores context, a common interpretive error known as "decontextualization."¹¹³ Contrary to the rules just stated, he suggests that we cannot interpret Scripture in the context in which it was written. He suggests that "every generation has the right, indeed the duty, to interpret the Bible anew in the context of contemporary knowledge and information,"¹¹⁴ as opposed to the language and context of the original hearers. Similarly, he remarks, "Once a text is published, it belongs to us all and we may interpret it according to our own lights. The marketplace of ideas is the sole judge of the validity or usefulness of a given interpretation."¹¹⁵

But as just noted, as a human book recorded in written language, the Bible followed the grammatical meanings of the day, which included figurative language, idioms, and unusual expressions common to the

¹¹¹ Two popular handbooks include: EERDMAN'S HANDBOOK TO THE BIBLE (Alexander & Alexander eds., 1992); and HENRY H. HALLEY, HALLEY'S BIBLE HANDBOOK (1962).

¹¹² The following questions may help you as you attempt to understand the meaning of certain biblical passages:

- 1) What did the words convey in the grammar of the original readers?,
- 2) What was being conveyed by those words to the initial readers?,
- 3) How did the cultural setting influence and affect what was written?,
- 4) What is the meaning of the words in their context?,
- 5) What literary form is the material written and how does that affect what is said?, and
- 6) How do the principles of logic and normal communication affect the meaning?

ZUCK, *supra* note 56, at 66-67.

¹¹³ FEE & STUART, *supra* note 57, at 91.

¹¹⁴ ZUCK, *supra* note 56, at 10.

¹¹⁵ DERSHOWITZ, *supra* note 2, at 18.

Hebrew people. This logically implies that we need to let the Bible speak for itself on topics such as justice, instead of coming to it with preconceived notions of what justice means based on contemporary knowledge and information, or personal experience. In the latter instance, you are creating or constructing meaning, not discovering it. The Professor is correct to suggest that we have a duty to consider the Bible in light of contemporary times. But this is the task of application, not interpretation. The meaning of a text does not change because it is "locked in past history," although "its significance is always changing."¹¹⁶

Historical particularity also implies that we presume the literal sense in the text until the literature forces us to another level, whether it be allegory or metaphor. Hence, the oft-stated rule that we interpret literally unless the text is otherwise clearly figurative.¹¹⁷ This was the essence of Pope John Paul II's point in Part One. The Pope was not suggesting that we abandon "literalism" as Professor Dershowitz understands it, but that we read Scripture in light of historical and literary contexts. The Professor's failure to consider such contexts often leads him to incorrect interpretations. One example is his interpretation of the Tower of Babel, where he ultimately uses those events as parallel support for his argument that God treated Adam and Eve unjustly.¹¹⁸

¹¹⁶ STEIN, *supra* note 96, at 35.

¹¹⁷ See, e.g., BOB SMITH, *BASICS OF BIBLE INTERPRETATION* 35 (1978).

¹¹⁸ The Professor says we can identify a parallel between the story of the forbidden fruit and the Tower of Babel. Both were attempts by God, we are told, to slow down the inherent human need to increase knowledge. This is an important parallel in that it lends support to his argument that God acted unjustly in the Adam and Eve narrative - but only if his interpretation of Babel is supported by the text. According to the Professor, God saw nothing wrong with everyone speaking the same language and increasing their knowledge until they used their knowledge to "break down the barriers between man and God" by building a tower to "close the distance between the human and the divine by ascending to the heavens." DERSHOWITZ, *supra* note 2, at 44-46.

At first blush this interpretation seems rather convincing. But a closer look at the historical and literary contexts reveal it to be inaccurate. The pre-flood era was a time of long life, uniformity of language, and freer communication between God and man. The flourishing arts and industries during this time are hinted at in *Genesis* 4:20-24. In contrast, in the post-flood era, we see significant restraints imposed. For instance, there are shorter life-spans for individuals and generations, the soil requires more toil, the beasts begin to fear man, and the death penalty comes into being. *Gen.* 6:11,13. The pluralizing of human language was perhaps the culminating post-flood restraint. The event probably occurred about 300 years after the flood. In *Genesis* 10:25, we see that it was in Peleg's days that "the earth was divided." Peleg died about 340 years after the flood. CALVIN, *supra* note 18, at 324-25; DELITZSCH, *supra* note 18, at 346-47.

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The goal of interpreting the Bible is to determine the original meaning of the text: the intended meaning of the author. Rather than adhere to a slavish literalism as the Professor describes it, we merely attempt to understand Scripture in its normal sense, recognizing figures of speech like hyperbole, metaphor, and symbolism of various kinds.¹¹⁹ Unless we accept the normal or natural sense of Scripture, we have no controls in our approach to the Bible.¹²⁰ Without such controls, who is to say that David Koresh's interpretation of end-times, or Adolf Hitler's Aryan nation was not approved by God in Scripture? As E.D. Hirsch, Jr., in *VALIDITY IN INTERPRETATION*, demonstrates, a text cannot mean whatever the reader wants it to mean if it is to mean anything at all. Meaning resides in the text, not the human reader.¹²¹ Seen this way, reading the Bible in its normal sense is the direct opposite of what the Professor labels as "anti-intellectualism."¹²²

In brief, Professor Dershowitz's proposed hermeneutic contradicts the task of good textual interpretation by opening up the Bible to seemingly limitless, equally valid, interpretations of any given text. He

As Professor Dershowitz accurately notes, it was precipitated by the human plan to establish a high astral tower. But we should not assume that the builders literally believed that they could actually build a tower right up to the heavens. This is hyperbole. CALVIN, *supra* note 18, at 327. In *Genesis* 11:4, the words "may reach" do not come in the original. This verse then clearly does not relate to the actual height of the tower. In the original it says "and its top with (or in or by) the heavens," that is, a top with an astronomical planisphere, Zodiac pictures, and drawing of the constellations, much like we find in the ancient temples of Egypt. 2 BOICE, *supra* note 18, at 422-23. The tower was actually designed to hand down pre-flood traditions, the traditions God had done away with via the Flood. *Id.* at 424. Why was it wrong? Not because it tried to literally reach the heavens and break down the physical barriers between God and man, but because the builders were disobeying God's command to spread out and replenish the earth. As the builders said, "Let us make use a name! . . . Let us not be scattered abroad upon the face of the whole earth." *Id.* at 421; see also WESTERMANN, *supra* note 18, at 83. It was wrong because it was in violation of God's direct command.

¹¹⁹ As Gerhard Maier explains:

Protestant Scholasticism's interpretation of Scripture insists on the preeminence of the literal sense. As the memory of Flacius recedes, however, there was the tendency to recognize a 'spiritual sense' alongside the literal. Hollaz, e.g., endorses a 'mystical sense' which he further subdivides into allegorical, typical, and parabolical senses. But the literal sense remains the basis and primary framework.

MAIER, *supra* note 37, at 71.

¹²⁰ ZUCK, *supra* note 56, at 64.

¹²¹ See generally E.D. HIRSCH, JR., *VALIDITY IN INTERPRETATION* (1967).

¹²² Few can make this normal reading of Scripture seem as logical as R.C. SPROUL, *KNOWING SCRIPTURE* 48-49 (1977). Note that early Fundamentalists were often attacked by liberal theologians as "anti-intellectual," but in a different sense than the Professor uses the term here to denounce literalism. See, e.g., PACKER, *supra* note 69, at 31-33.

says, "'There are seventy faces to the Torah,' which means there is no one correct interpretation of a biblical narrative."¹²³ Later, in defending a colleague's interpretation of Abraham's sacrifice of Isaac, and in a way to justify his own interpretation of the event, he notes, "he [Bodoff] has the right to his interpretation, since one of the glories of the Bible is its Rorschach test quality"¹²⁴ . . . multiple points of view assure multiple interpretations."¹²⁵

Such statements identify the Professor's interpretive method as post-modernist or deconstructionist.¹²⁶ This conclusion is supported by his reference to Jacques Derrida and other deconstructionists in Part One. Under such influence, the Professor essentially argues that "Scripture . . . cannot serve as authority for theology."¹²⁷ "I do not feel bound by any particular interpretation," he says, "nor do I regard any as authoritative or dispositive."¹²⁸ What is dispositive is his own personal experiences

¹²³ DERSHOWITZ, *supra* note 2, at 9; see also *id.* at 124. It is worth noting that according to some Jews, the Professor does not fully understand the tradition in which this maxim was formulated. As Jonathan Marks notes,

As [Professor Dershowitz] correctly notes in his introduction, traditional commentators, too, have struggled with the book's conflicting messages. But because these commentators assume 'the divine nature of the text,' they devote themselves to reconciling its varied strands, invoking the classical maxim that 'there are seventy faces to the Torah.' . . . It is unfortunate that Dershowitz himself did not take this lesson to heart. For him, the traditional idea that the Torah has many 'faces' is not a humble admission that we can never be confident of possessing the truth, and must therefore try to appreciate every part of God's revelation; rather, it is a dogmatic assertion that there is no such truth, and that whole parts of the Torah may be dismissed at will. The result is an interpretation of Genesis that, even for secularists, must be disappointing for its conventionality.

MARKS, *supra* note 97, at 77-78.

¹²⁴ DERSHOWITZ, *supra* note 2, at 124.

¹²⁵ *Id.* at 129. We acknowledge that in the process of discovering the meaning of a particular passage, there may be debatable interpretations, but this comes with limitations if the Bible is to mean anything. Well-intentioned, devout Christians, for instance, have historically disagreed over eschatology (study of the "end times") and the meaning of predestination. But given what we have discussed about non-contradictions of the Bible, multiple, equally valid interpretations are not to the "Bible's glory," but a direct offense against its divine nature. It rejects its overall unity and divine authorship.

¹²⁶ See, e.g., THE ACT OF BIBLE READING 125, 133-47 (Elmer Dyck ed., 1996); A.K.M. ADAM, WHAT IS POSTMODERN BIBLICAL CRITICISM? 31-43 (Dan O. Via, Jr. ed., 1995). See generally EDGAR V. MCKNIGHT, POST-MODERN USE OF THE BIBLE: THE EMERGENCE OF READER-ORIENTED CRITICISM (1988); SIRE, *supra* note 44, at 172-90; GENÉ EDWARD VEITH, JR., POSTMODERN TIMES 51-60 (1994).

¹²⁷ DAVID H. KELSEY, THE USES OF SCRIPTURE IN RECENT THEOLOGY 1 (1975).

¹²⁸ DERSHOWITZ, *supra* note 2, at 18.

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and contemporary cultural filters. He applies a secular hermeneutic to a non-secular text.¹²⁹ His existential interpretative method,¹³⁰ or hermeneutic, where method is equal to meaning,¹³¹ thus aligns with revisionist theology wherein Scripture is "reduced to a literary construction of human attempts to understand God."¹³² Meaning, including meaning of any given biblical text, is socially constructed and dependent on the reader, who exists in the socially constructed¹³³ (virtual) place known as the "marketplace of ideas."¹³⁴ For Professor Dershowitz, wherever meaning ultimately resides, it does not reside in the text. The emphasis in the epistemological process is placed on the knower or subject, not the object.¹³⁵

C. Rules for Understanding the Narratives

As mentioned above, the key to understanding the Bible is to read each book according to the genre in which it was written. To understand the stories in *Genesis*, therefore, we must read them as historical narrative.¹³⁶ Before addressing in greater detail some of the conclusions about justice offered in *THE GENESIS OF JUSTICE*, we will add some specific rules to the general rules regarding interpretation presented above.

To begin, note that there are three levels of narratives in the Bible. The story about God, His creation, and His intervention in history is told on three levels. We may consider these three hierarchically.

¹²⁹ THE ACT OF BIBLE READING, *supra* note 126, at 125.

¹³⁰ MCKNIGHT, *supra* note 126, at 54.

¹³¹ *Id.* at 55, 58-60.

¹³² MARK R. MCMINN, *PSYCHOLOGY, THEOLOGY, AND SPIRITUALITY IN CHRISTIAN COUNSELING* 101 (1996).

¹³³ See generally PETER L. BERGER & THOMAS LUCKMANN, *THE SOCIAL CONSTRUCTION OF REALITY: A TREATISE IN THE SOCIOLOGY OF KNOWLEDGE* (1967).

¹³⁴ DERSHOWITZ, *supra* note 2, at 18; see also STEIN, *supra* note 96, at 20.

¹³⁵ This epistemological position is referred to as subjectivism. For an overview, see GEISLER & FEINBERG, *supra* note 36, at 106-10; see also THE ACT OF BIBLE READING, *supra* note 126, at 121.

¹³⁶ The Bible contains more of the genre narrative than any other literary type. Over 40 percent of the Old Testament, and about 60 percent of the New Testament is narrative. STEIN, *supra* note 96, at 151. Narratives tell us about things that happened, and their purpose is to show God working in His creation and among His people. They also provide many illustrations of other lessons important to our daily lives. KAISER & SILVA, *supra* note 57, at 69-70; MCCARTNEY & CLAYTON, *supra* note 66, at 210-11. The Professor questions the very historicity of the Biblical narratives suggesting that they may be metaphor instead of actual historical accounts. DERSHOWITZ, *supra* note 2, at 76; cf. KAISER & SILVA, *supra* note 57, at 80; MCCARTNEY & CLAYTON, *supra* note 66, at 212-13; STEIN, *supra* note 96, at 153-57.

The first level, or top level, is the meta-narrative, or larger narrative. It is the whole, universal plan of God at work in history. There are three basic Acts to this grand play: the Creation; the "Fall" of Humanity, which highlights the power of sin and the need for salvation; and, the Redemption, which is the picture of God restoring His relationship with fallen man through the Messiah.¹³⁷ Jews believe that the promised Messiah has not yet come, while Christians believe that he has already come in the person of Jesus Christ: God incarnate - in fulfillment of Old Testament prophecy.

The middle level of narrative revolves around Israel. These are narratives related to the call of Abraham; the establishment of the Abrahamic covenant; Egypt's enslavement of Israel; God's deliverance from bondage and the deliverance into Canaan (the "Promised Land"); Israel's continual rebellion (sin); God's patience, protection, and pleading with Israel to repent; the destruction of northern Israel and then Judah; and the restoration of the chosen people after the Exile.¹³⁸

The bottom level of narrative includes the individual narratives that make up the other two levels.¹³⁹ The key to remember here is that every narrative at this level is part of the greater narrative of Israel, and Israel's history plays a part of the redemptive history that is the top level.¹⁴⁰ The fullness of any individual narrative cannot be appreciated without considering its part in relation to the other two levels. An individual narrative comprised of a group of shorter narratives is referred to as a "compound narrative" (e.g., Joseph's narrative, *Gen.* 37-50).¹⁴¹

Narratives may further be understood by considering what they are not. First, they are not just stories about people who lived in ancient times. They are stories about what God did to and through His people as part of the top level narrative, known as redemptive history.¹⁴² In the end, God is the hero of every narrative, not the villain or the village idiot the Professor continually makes Him out to be.¹⁴³ This top level is the level of history completely absent from *THE GENESIS OF JUSTICE*. To translate the narratives as a whole into modern categories of justice, the Professor must demythologize Scripture and set aside redemptive

¹³⁷ CORLEY ET AL., *supra* note 60, at 264; FEE & STUART, *supra* note 57, at 79.

¹³⁸ CORLEY ET AL., *supra* note 60, at 264; FEE & STUART, *supra* note 57, at 79.

¹³⁹ ELLIOTT E. JOHNSON, *EXPOSITORY HERMENEUTICS: AN INTRODUCTION* 170-71 (1990).

¹⁴⁰ STEIN, *supra* note 96, at 157-58.

¹⁴¹ FEE & STUART, *supra* note 57, at 80.

¹⁴² See *infra* Part III.D.4 (discussing redemptive history).

¹⁴³ DUNNETT, *supra* note 104, at 162.

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history.¹⁴⁴ The Professor refers to the middle level of narrative on occasion, but ignores the connection between the individual narratives and the overarching narrative.

Second, Old Testament narratives are not merely allegories to be interpreted at the whim of the reader. We have already discussed allegory above, so we will not spend much time on it here. Simply note that the mere fact that something in the narrative is difficult to understand does not mean, by default, that it is allegorical. We are not always told all that God may have done in a particular situation, or even how or why He did it. Assuming that we must have all the answers in every instance means that we, at times, end up reading into stories things that simply are not there. Narratives may teach either explicitly (by clearly stating something) or implicitly (by clearly implying something without actually stating it), which does not mean "hidden" or "secret."¹⁴⁵ The Professor's entire defense depends on his use of allegory, or what he sometimes confuses as "metaphor," to interpret the narratives.¹⁴⁶

Third, as just noted, Old Testament narratives do not always teach directly.¹⁴⁷ We are not always told at the end of a narrative whether what happened was good or bad. Thus, we cannot conclude, as the Professor directs, that the "author intended to praise Tamar for her resourcefulness."¹⁴⁸ Neither can we say that silence means "ambivalence" or "praise" for Jacob's deception.¹⁴⁹ The narratives often teach what is taught directly elsewhere, which represents an implicit type of teaching.¹⁵⁰ For example, in the story of Abraham sleeping with his wife's servant in order to produce an heir (*Gen.* 16), you will not find a statement that says "Abraham was wrong in committing adultery." The reader is expected to know that it is wrong because it is already taught explicitly elsewhere (*Ex.* 20:14).

¹⁴⁴ See KAISER & SILVA, *supra* note 57, at 284 (defining demythologization).

¹⁴⁵ FEE & STUART, *supra* note 57, at 90.

¹⁴⁶ The relevant quote reads: "The Book of Genesis can be read as a metaphor reflecting the stages most legal systems experience on the rocky road from lawlessness to law-abidingness." DERSHOWITZ, *supra* note 2, at 203; *see also id.* at 126.

¹⁴⁷ KAISER & SILVA, *supra* note 57, at 69-70.

¹⁴⁸ DERSHOWITZ, *supra* note 2, at 174.

¹⁴⁹ *Id.* at 175.

¹⁵⁰ ZUCK, *supra* note 56, at 289.

Also, each narrative does not necessarily have a direct (legal) lesson, moral, or spiritual truth all its own.¹⁵¹ Narratives are descriptive in that they record what happened, not necessarily what should have happened or what ought to happen every time, i.e., "prescriptive" or "normative."¹⁵² The fact that bad actions occur in the Bible does not mean God endorses the particular actions or actor as "just." As the Professor correctly observes, most Old Testament characters are far from perfect. What they do in narratives is not necessarily a good example for us to follow. Thus, we are not supposed to use as a model for justice "Jacob's tactical reproach" or the "brothers' murderous vengeance."¹⁵³ And the fact that Lot's daughters are not punished for their incest is not a message from God that "the perpetuation of life is more important than the rules of sexual propriety," or that a situational ethic is favored "at least when sex is involved."¹⁵⁴ Such conclusions would contradict other passages of Scripture where such immorality is directly contradicted.¹⁵⁵ This is where considering the whole of Scripture helps one to avoid obvious mistakes in interpretation. As a rule, "unless Scripture tells us we must do something, what is only narrated or described does not function in a normative way - unless it can be demonstrated in other grounds that the author intended it to function in this way."¹⁵⁶

Additionally, finding a moral in each narrative usually means the interpreter is committing the common error of "moralizing." Some readers treat every event or statement independently, as if each has a special message for the reader. This ultimately destroys the Bible's unity.¹⁵⁷ The Professor does this in nearly every narrative in his book when it comes to drawing conclusions about the biblical sources of justice.¹⁵⁸ For instance, we are told that Abraham's narrative teaches "us to seek an appropriate balance between advocating for strangers and advocating for our own families,"¹⁵⁹ and that the message of the

¹⁵¹ KAISER & SILVA, *supra* note 57, at 70.

¹⁵² DUNNETT, *supra* note 104, at 162.

¹⁵³ DERSHOWITZ, *supra* note 2, at 150.

¹⁵⁴ *Id.* at 98-99.

¹⁵⁵ See *infra* notes 178-85 and accompanying text "discussing "Adam and Eve: Victims or Violators").

¹⁵⁶ FEE & STUART, *supra* note 57, at 106. Furthermore, "if it can be shown that the purpose of a given narrative is to establish precedent, then such precedent should be regarded as normative." *Id.* at 108.

¹⁵⁷ FEE & STUART, *supra* note 57, at 92; KAISER & SILVA, *supra* note 57, at 70.

¹⁵⁸ DERSHOWITZ, *supra* note 2, at 155.

¹⁵⁹ *Id.* at 128.

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narrative involving Dina “is that right and wrong are a matter of *status* rather than *actions*.”¹⁶⁰ Further, we are told that “the story of a [sic] Jacob is a lesson about the symmetry of justice even in the absence of formal law,”¹⁶¹ and that Joseph’s narrative warns us against confronting authority directly.¹⁶² But even in long narratives, all the parts may work together to impress a single major point, like Joseph’s narrative.¹⁶³ In this sense, narratives are analogous to parables.

In short, narratives are not written to answer all our theological questions. They have particular, specific, limited purposes and deal with certain issues, while leaving others, like justice, to be dealt with elsewhere in other ways.

D. A Closer Look at the Cases: Abraham, Lot, The Flood, Adam and Eve

As a prelude to our discussion of descriptive and prescriptive biblical integration (See Part IV), we would now like to address in slightly greater detail several of the cases presented by Professor Dershowitz as evidence of God’s injustice. We offer them to show how poor interpretive guidelines lead to poor, often bizarre, conclusions not supported by the biblical text. We have selected the following four cases because of their familiarity with most audiences and their tendency toward misinterpretation.¹⁶⁴

1. Abraham and Isaac – Fear or Faith?

The Professor concludes that God treated Abraham “unjustly” when he tested Abraham to see whether Abraham was willing to sacrifice his son Isaac. He criticizes God, in part, claiming that the test was designed simply to see whether God could intimidate Abraham through fear. He discusses *Genesis 22:12* (“[N]ow I know that you fear God, because you have not withheld from me your son, your only son”) and concludes, “but what kind of a moral test is that? Acceding to an immoral command out of fear does not show much courage or virtue.”¹⁶⁵

¹⁶⁰ *Id.* at 154.

¹⁶¹ *Id.* at 145.

¹⁶² *Id.* at 191.

¹⁶³ FEE & STUART, *supra* note 57, at 85-86.

¹⁶⁴ We extend to you an invitation, like the one the Professor extended us, to continue the dialogue on these and other cases via e-mail. You may continue the dialogue with us through email at: jeffbra@regent.edu, or rwoods@arbor.edu.

¹⁶⁵ DERSHOWITZ, *supra* note 2, at 109.

The Professor latches onto the word "fear" (or "awe" in the translation he uses)¹⁶⁶ and concludes that it reveals moral failure: a lack of character. Yet because he limits his focus to *Genesis* and external midrash on *Genesis*, he not only decontextualizes the text, but commits another common error known as "selectivity" by failing to examine other significant internal evidence about the meaning of the fear of God and God's test of Abraham.¹⁶⁷ In this, the Professor violates not only proper hermeneutical principles but also the legal principle noted earlier, of which he is undoubtedly very familiar: in reading a text, one must interpret the text as a whole and not just look at one part in isolation. This principle is most commonly stated in the context of statutory interpretation.¹⁶⁸ If he would read Scripture as a whole, he might see that God's test was designed *precisely* to test Abraham's character.

The fear of God is a concept that permeates Scripture. One who fears God is not pictured as lacking in character or cowering in terror; instead, the person is one of great character and virtue. *Proverbs* 8:13, for example, states that "To fear the LORD is to hate evil." Commenting on this idea, the JEWISH ENCYCLOPEDIA states, "Fear of God implies hatred of evil and wrong, and makes for righteousness and peace."¹⁶⁹ *Job* 28:28 equates fear of God and wisdom: "The fear of the Lord - that is wisdom."¹⁷⁰ Again, the JEWISH ENCYCLOPEDIA is helpful. "There exists an intimate relation between the fear of God and wisdom. The wise man knows how to value, while the fool despises, the fear of God."¹⁷¹ Throughout, Scripture unites the fear of God with righteous actions, attitudes, and attributes.¹⁷² "The Old Testament repeatedly associates

¹⁶⁶ *Id.*

¹⁶⁷ Selectivity is very similar to decontextualizing. Here, one chooses specific words and phrases to concentrate on, ignoring the others, as well as the overall theme of the passage. It does not balance the parts and the whole. It ignores some of the parts and the whole entirely. FEE & STUART, *supra* note 57, at 91.

¹⁶⁸ See *supra* note 80 and accompanying text.

¹⁶⁹ 5 ISDORE SINGER, THE JEWISH ENCYCLOPEDIA 354 (1903).

¹⁷⁰ *Job* 28:28.

¹⁷¹ SINGER, *supra* note 169, at 354. See *Prov.* 1:7 ("The fear of the LORD is the beginning of knowledge, but fools despise wisdom and discipline.").

¹⁷² See *Job* 1:8 ("Job was a blameless and upright man, fearing God and turning away from evil."); *Prov.* 22:4 ("Humility and the fear of the LORD bring wealth and honor and life"); 2 *Chron.* 19:9 (Jehoshaphat, when appointing judges, charged them: "Thus you shall do in the fear of the Lord, faithfully and wholeheartedly."); *Jer.* 44:10 (fear of God linked to contriteness); *Ps.* 33:18 (fear of God linked to hope); *Is.* 11:2, 3 (fear of God linked to understanding).

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the fear of God with the complex of faith, trust, love, and communion."¹⁷³

Note also that Professor Dershowitz fails to examine a later text from the New Testament that specifically interprets this *Genesis* text. The relevant text from *Hebrews* 11:17-19 states:

By faith Abraham, when God tested him, offered Isaac as a sacrifice. He who had received the promises was about to sacrifice his one and only son, even though God had said to him, 'it is through Isaac that your offspring will be reckoned.' Abraham reasoned that God could raise the dead, and figuratively speaking, he did receive Isaac back from death.

This text demonstrates Abraham's faith - one of the great virtues/character traits celebrated in Scripture¹⁷⁴ - not a pitiful compliance in fear of an unjust command as the Professor suggests. Indeed, the text makes clear his faith was that God would not deprive Isaac of life. Abraham was convinced that God would fulfill His word to raise Isaac and make Abraham the father of many offspring: even if it meant actually immediately raising Isaac from the dead. Thus, the Professor's conclusion that the test did not measure virtue is off base.

2. Lot's Wife—Motherly Instinct or Suffering the Consequences of Willful Disobedience?

The Professor's conclusion that God unjustly punished Lot's wife - when, as she was fleeing Sodom, she turned to look back towards Sodom and was then turned into a pillar of salt - appears to be unsupported by the text. Again, applying a superficial reading of the text in the context of postmodern rules of interpretation, Professor Dershowitz rhetorically asks: "Does her entirely understandable need to glance backward at the family she left behind warrant so severe a punishment?"¹⁷⁵

The Professor again misses internal interpretive evidence that might shed light on the admittedly sketchy account of Lot's wife. This requires

¹⁷³ 2 GEORGE BUTTRICK, *THE INTERPRETER'S DICTIONARY OF THE BIBLE* 258 (1962).

¹⁷⁴ See, e.g., *Gen.* 15:6; *Hab.* 2:4; 2 *Chron.* 20:20; *Heb.* 11; 1 *Cor.* 13:13.

¹⁷⁵ DERSHOWITZ, *supra* note 2, at 100. Note that there is no textual evidence that Lot's wife was thinking about her family. More likely, her looking back was a longing for and identification with the wicked life of the city for which it was being punished. It revealed her heart. Her heart was with Sodom; not with God.

him to go outside of the text of *Genesis* to the whole of Scripture and adopt consistent hermeneutical rules.

In *Luke 17:32-33*, Jesus discussed how his followers should act when the Kingdom of God would be revealed. He warned his followers not to try and preserve their earthly possessions, but instead to look to him. "Remember Lot's wife! Whoever tries to keep his life will lose it, and who ever loses his life will preserve it."¹⁷⁶ In saying this, Jesus continued a theme that he discussed often with his followers - the need for wholehearted devotion to God rather than a clinging to the things of the world. In his celebrated Sermon on the Mount, Jesus stated, for example:

Do not store up for yourselves treasures on earth, where moth and rust destroy, and where thieves break in and steal. But store up for yourselves treasures in Heaven, where moth and rust do not destroy, and where thieves do not break in and steal. For where your treasure is, there your heart will be also. The eye is the lamp of the body. If your eyes are good, your whole body will be full of light. But if your eyes are bad, your whole body will be full of darkness. If then the light within you is darkness, how great is that darkness! No one can serve two masters. Either he will hate the one and love the other, or he will be devoted to the one and despise the other. You cannot serve both God and Money.¹⁷⁷

This text supports the conclusion that Lot's wife was not punished for a perfectly natural maternal instinct. Here, we see Scripture helping to interpret Scripture, which is consistent with the "synthesis principle" presented earlier. Lot's wife was punished because she longed for the things of the world (the things for which Sodom was being destroyed) rather than the things of God. She suffered the consequences of her disobedience. She was clearly warned - there were no ambiguities here. Of course, as a non-Messianic Jew, Dershowitz would not take Jesus' words as mandatory authority. But as noted earlier, he certainly should consider them as a midrash by his own rules of interpretation. These are, after all, the words of the most influential rabbi the world has ever seen, by anyone's standards.

¹⁷⁶ *Lk. 17:32-33.*

¹⁷⁷ *Mt. 6:19-24.*

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3. Adam and Eve – Victims or Violators?

Still another example of Professor Dershowitz's interpretive problems is found in his account of the sin of Adam and Eve from *Genesis* 3. As God reveals to Adam and Eve the consequences of their sin, He tells Eve: "I will greatly increase your pains in child bearing; with pain you will give birth to children. Your desire will be for your husband and he will rule over you."¹⁷⁸ Dershowitz quotes the last sentence of this passage and then - with no textual, midrashic, or any other support - concludes: "Here we find the origin of the infamous double standard regarding sex: Women must be monogamous towards their husbands, but husbands are free to direct their lust at other unmarried women: that is, women who do not 'belong' to other men."¹⁷⁹

This is a bizarre conclusion. Not only does it have no textual support, it again flies in the face of the teachings of Scripture as a whole from the perspective of both Christian and Jewish interpretive traditions. In the Decalogue, God commands - both men and women - "You shall not commit adultery."¹⁸⁰ The Mosaic law is filled with demands for sexual purity for both men and women.¹⁸¹ Later, the prophets condemned the people of Israel (again, both men and women) for their sexual impurity. In a particularly telling passage, God speaks to the Israelite men about the lust that Dershowitz insists they were "free to direct . . . at other unmarried women."¹⁸² It reads:

I will not punish your daughters when they turn to prostitution, nor your daughters-in-law when they commit adultery, because the men themselves consort with harlots and sacrifice with shrine prostitutes - a people without understanding will come to ruin!¹⁸³

There is no double standard in the eyes of God.¹⁸⁴ Again, Professor Dershowitz's analysis reveals that the failure to look at Scripture as a

¹⁷⁸ *Gen.* 3:16.

¹⁷⁹ DERSHOWITZ, *supra* note 2, at 34.

¹⁸⁰ *Ex.* 20:14.

¹⁸¹ *See, e.g., Lev.* 18:6-23, 20:10-20; *Deut.* 5:18, 27:20-23.

¹⁸² DERSHOWITZ, *supra* note 2, at 34.

¹⁸³ *Hos.* 4:14.

¹⁸⁴ Jonathan Marks, a reviewer for the *Commentary*, a Jewish publication, agrees with us that the Professor's conclusion about the Bible's support of misogyny (hatred of women) is suspect, to say the least. He believes that the Professor's interpretation of the narratives involving Eve, Tamar, and Dina, for example, does a disservice to a "close reading" of *Genesis* and ultimately aligns with "modern liberal and feminist orthodoxy." He further

whole can lead one to unsubstantiated conclusions regarding the sources of justice.¹⁸⁵

4. The Flood – Overreaction or Part of Redemptive History?

The assertion that God acted “unjustly” in destroying the world with a flood in response to the evil of the times is another interpretation not supported by the text.¹⁸⁶ Professor Dershowitz makes his conclusion plain from the very title of Chapter Three: “God Overreacts - and Floods the Earth.” He describes a God who underreacted to Adam and Eve’s sin (despite threatening death for eating the forbidden fruit he let them off the hook) and then lurched to the other extreme by overreacting to general sin of the world described in *Genesis 6*: “Like most rulers who are soft on crime and unhappy with the results, God overreacted and swung the pendulum in the opposite direction.”¹⁸⁷ Dershowitz describes God’s action as a “fit of pique.”¹⁸⁸ The Professor criticizes God for

affirms that the Professor ignores or otherwise misunderstands “the Jewish tradition’s view of the relationship between men and women.” MARKS, *supra* note 97 at 78, 81.

¹⁸⁵ Another example in Chapter One is where the Professor accuses God of “whimpering out” by backing down from his threat to immediately kill Adam and Eve if they eat from the Tree of Life. We are also told that Adam and Eve understood this to be an immediate, physical death. Cf. CALVIN, *supra* note 18, at 149. We are further told that it was “unjust” for God to punish all women and all men for generations to come for the transgressions of Adam and Eve. To be just, God should have limited his punishment to the specific persons involved. DERSHOWITZ, *supra* note 2, at 30-32.

An application of consistent hermeneutical principles as described throughout this Part reveals that the immediate death referred to here is a spiritual one with physical consequences. We suggest that it refers to the immediate defacing, marring, or distortion of the image of God in man; the separation of the elements of humankind’s nature. We submit, consistent with the whole of Scripture, that it refers to man’s eternal separation from God, alienation from communion with the Creator. CALVIN, *supra* note 18, at 139; 1 DILLMANN, *supra* note 83, at 152-55; DELITZSCH, *supra* note 18, at 155-56; STIGERS, *supra* note 17, at 75. It also refers to the physical death introduced as the penalty (or consequence) of sin (*Gen. 2:17; 3:19*), which was not immediate in the case of Adam and Eve. *Romans 6:23* in the New Testament confirms this by noting that the wages of sin is death.

But the Professor refuses to acknowledge “sin” in his biblical worldview, and like so many before him make it anemic by passing it off as “evil inclinations.” DERSHOWITZ, *supra* note 2, at 258. His literal reading of death ignores proper historical and literary contexts. To properly understand this death as something more than just immediate physical death, one must first acknowledge the consequences of sin and its place in redemptive history of the Bible, the top level of narrative noted above. See *infra* Part III.D.4 (discussing the redemptive history in the case: “The Flood – Overreaction or Redemptive History?”). Without this context, without the biblical understanding of sin, the words can be made to mean whatever the reader wants them to mean.

¹⁸⁶ “The Lord saw how great man’s wickedness on the earth had become, and that every inclination of the thoughts of his heart was only evil all the time.” *Gen. 6:5*.

¹⁸⁷ DERSHOWITZ, *supra* note 2, at 62; see also *id.* at 63, 83, 206, 210.

¹⁸⁸ *Id.* at 63.

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having “lashed out . . . promiscuously”¹⁸⁹ and insists that God later acknowledged “the profanity of His bringing the flood, which did ‘sweep’ away many righteous along with the wicked.”¹⁹⁰

On this issue, Professor Dershowitz does not simply make an isolated comment as he does with the alleged double standard on sex. This argument affects the whole book; it is crucial to his main theme. As he describes fully in Chapter Eleven, *Genesis* tells us a story about justice: “The book of *Genesis* can be read as a metaphor reflecting the stages most legal systems experience on the rocky road from lawlessness to law-abidingness.”¹⁹¹ The Professor believes that in the beginning of *Genesis* everyone acts inconsistently and unpredictably - including God. God is learning how to act justly. As God makes mistakes and commits injustice (underpunishing Adam and Eve; overpunishing the world with a flood; overpunishing Lot’s wife and the cities of Sodom and Gomorrah), God learns from His mistakes.¹⁹² He learns that law cannot be *ad hoc*. God learns instead that He must rule by an agreed upon code with safeguards against arbitrariness. For Professor Dershowitz, this explains the emergence of the Ten Commandments and the Mosaic law based on written standards. Indeed, he entitles his book: “THE GENESIS OF JUSTICE: TEN STORIES OF BIBLICAL INJUSTICE THAT LED TO THE TEN COMMANDMENTS AND MODERN LAW.” As Dershowitz puts it: “We see the Genesis of justice in the injustice of *Genesis*.”¹⁹³

It is a compelling story. But it is the wrong story. Again, failing to take a proper hermeneutical approach, the Professor looks at isolated texts and quickly arrives at superficial conclusions. He falsely combines individual narratives to arrive at his thesis. And at the heart of his error is the failure to understand the gravity of sin as portrayed in the Bible.¹⁹⁴ As noted earlier, he grossly underestimates it; he sterilizes it by “redefining” it as “evil inclinations.”¹⁹⁵ In a very telling passage,

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 83.

¹⁹¹ *Id.* at 203.

¹⁹² *Id.* at 206.

¹⁹³ DERSHOWITZ, *supra* note 2, at 198.

¹⁹⁴ Note that not all Jewish interpretations of *Genesis* take for granted the consequences of sin. See, e.g., MORGENSTERN, *supra* note 18, at 54-57.

¹⁹⁵ Redefinition is another common hermeneutical error. It occurs when the plain meaning says something that one does not want to hear. Instead of receiving the admonition, one simply redefines it to mean something else, usually something more positive or consistent with existing frameworks of knowledge. The word(s) in question are defined broadly enough or in vague enough terms to no longer be a threat. FEE & STUART, *supra* note 57, at 91-92.

Professor Dershowitz judges God's actions in flooding the world by saying: "God could at least have tried something more *humane* before he lashed out so promiscuously."¹⁹⁶ Applying a human standard, the Professor excuses sin and claims that God should have been more understanding.¹⁹⁷

Downplaying and excusing sin, of course, is a universal human problem; it is nothing new. Professor Dershowitz provides several outstanding examples in his book. Sin is due to the bad influence of others (Adam); ignorance (Cain); difficult circumstances (Tamar); and, "just" provocation (Dinah's brothers). Here is blame-shifting at its finest, a classic tactic for any defense lawyer. Each, however, underestimates the gravity of sin and denies any individual responsibility for it. Each takes a human perspective and fails to see sin from a biblical perspective. This is precisely Professor Dershowitz's error.

We agree with the Professor when he says that *Genesis* tells a story. But a consistent reading of Scripture indicates that it is the story of sin - its severity and the length to which God will go to bring redemption, or restore His relationship with humankind. This is the top level of narrative, the meta-narrative, which the Professor ignores completely. Truthfully, *Genesis* is only the beginning of the story. The story unfolds throughout the rest of the Old Testament. In fact, the only way to make sense of *Genesis*, and the history of God's chosen people, is through this story of sin and redemption, what is commonly referred to as redemptive history.

The story of redemptive history begins in a sinless creation with God and man (created in God's image) in unbroken communion. Of course, Adam and Eve's disobedience changes that. It brings corruption, judgment, and death into the world.¹⁹⁸ Even then, as God pronounces judgment, He gives words of hope for ultimate redemption. In *Genesis* 3:15, God tells the serpent (Satan): "And I will put enmity between you and the woman, between your offspring and hers, he will crush your head, and you will strike his heel."¹⁹⁹ Satan would continue to strike - to tempt and torment - but his head would ultimately be crushed. The same promise of ultimate redemption is seen in the call of Abraham. There, God enters into a covenant with Abraham in which He promises

¹⁹⁶ DERSHOWITZ, *supra* note 2, at 63 (emphasis added).

¹⁹⁷ *Id.* at 63-64.

¹⁹⁸ See *supra* note 185 (discussing spiritual versus physical death).

¹⁹⁹ *Gen.* 3:15.

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to bless Abraham, his descendents, and ultimately all peoples on the earth. He chose to work through a redeemed people, "first of all an actual nation, and then, out of them, a vast multinational community of His own people."²⁰⁰

The story continues in *Exodus*. First, God literally redeems His people, the Israelites, from Egypt, and then He enters into a covenant with them. Through His law, God seeks to mold the nation into a holy community that reflects His character. God is not learning about justice, but setting Himself up as *the* standard for justice. He also institutes the sacrificial system as a way for the people to confess and seek atonement for their sins. God has not now decided that sin is less serious than He originally thought, having learned from His mistakes. In establishing the law, God unambiguously promises blessing for obedience, but gives a grave, clear warning of the harsh consequences of disobedience.²⁰¹

God's view of sin has not changed. The nation (or the vast majority of its citizens) did turn from God and did not carefully follow His commands and decrees. As a result, the nation was exiled and faced devastation and death. God graciously warned the people. He sent prophets like Isaiah and Jeremiah to call the nation to repentance so it could avoid the coming judgment.²⁰² And through their words, God again emphasized the true nature of sin.

²⁰⁰ CHRISTOPHER J.H. WRIGHT, *WALKING IN THE WAYS OF THE LORD: THE ETHICAL AUTHORITY OF THE OLD TESTAMENT* 17 (1995).

²⁰¹ As stated in *Deuteronomy*:

However, if you do not obey the LORD your God and do not carefully follow all his commands and decrees I am giving you today, all these curses will come upon you and over take you: You will be cursed in the city and cursed in the country. Your basket and your kneading trough will be cursed. The fruit of your womb will be cursed, and the crops of your land, and the calves of your herds and the lambs of your flocks. You will be cursed when you come in and when you go out. The LORD will send on you curses, confusion and rebuke and everything you put your hand to, until you are destroyed and come to sudden ruin because of the evil you have done in forsaking him. The LORD will plague you with diseases until he has destroyed you from the land you are entering to possess.

Deut. 28:15-21

²⁰² The Prophet Isaiah personally experienced this in a powerful way. In Chapter Six of his prophetic book, he relays that he had a vision of God. God was "seated on a throne, high and exalted, and the train of his robe filled the temple." *Is.* 6:1. Seraphs chanted "Holy, holy, holy is the LORD Almighty; the whole earth is full of his glory." *Is.* 6:3. Isaiah's reaction was not "Wow," it was "Woe." "'Woe to me!' I cried. 'I am ruined! For I am a man of unclean lips, and I live among a people of unclean lips, and my eyes have seen the

The prophets' words did not only proclaim judgment and devastation. Like the words of God in *Genesis 3:15*, they offered hope as well. Based on the biblical teachings of the prophets, the promise was given of a Messiah, who would rescue the people and save them from their sins. A contemporary of Isaiah's, Micah told of a king who would come from Bethlehem and "be ruler over Israel."²⁰³ "He will stand and shepherd his flock in the strength of the LORD, and the majesty of the name of the LORD his God. And they will live securely, for then his greatness will reach to the ends of the earth. And he will be their peace."²⁰⁴ Isaiah, too, speaks of this One who would reign "on David's throne and over his kingdom, establishing and upholding it with justice and righteousness from that time on and forever."²⁰⁵ But there was to be something very unique about this ruler. While He is described as a triumphant King, He is also portrayed as a suffering servant - one who would not only rule in righteousness, but who would personally atone for the sins of His people.²⁰⁶

For most Jews, the prophets are the last revelatory word, and they are still waiting for the Messiah and for the redemption He will bring. But in the New Testament, the story of redemption continues. It shares the Old Testament's view of God's holiness and the severity of sin. Paul, a

King, the LORD Almighty." *Is. 6:5*. In one brief moment, Isaiah glimpsed God's perfect holiness and how far short he - though, arguably one of the most righteous men of his time - fell. He suddenly realized how great his sin was when judged by God's standards.

Isaiah would later write: "All of us have become like one who is unclean, and all our righteous acts are like filthy rags, we all shrivel up like a leaf, and like the wind our sin sweeps us away." *Is. 64:6*. Isaiah and his fellow prophets taught that even our best acts fail in the light of the purity and holiness of God. They declared the standard of righteousness and called the people to repentance. Most ignored this call and God brought about the judgment He promised. The ten northern tribes of Israel were taken into exile by Assyria in approximately 772 B.C. The two southern tribes were taken into exile by Babylon about 130 years later.

²⁰³ *Mic. 5:2*.

²⁰⁴ *Mic. 5:4-5*.

²⁰⁵ *Is. 9:7*.

²⁰⁶ The Book of *Isaiah* stated:

He was despised and rejected by men, a man of sorrows, and familiar with suffering. Like one from whom men hide their faces he was despised, and we esteemed him not. Surely he took up our infirmities and carried our sorrows, yet we considered him stricken by God, smitten by him, and afflicted. But he was pierced for our transgressions, he was crushed for our iniquities; the punishment that brought us peace was upon him, and by his wounds we are healed. We all, like sheep, have gone astray, each of us has turned to his own way; and the LORD has laid on him the iniquity of us all.

Is. 53:3-6.

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Jewish convert, missionary, and apostle of the first century Christian Church, told the Church in Rome that "all have sinned and fall short of the glory of God."²⁰⁷ The righteous character and glory of God is the standard to meet. It is not the more "humane" standard of Professor Dershowitz or any of the characters he describes in his book. And again, the prescribed punishment - just as in *Genesis* - is severe. "The wages of sin is death."²⁰⁸

According to the New Testament, it is into this seemingly hopeless world that God intervened to bring true redemption. The Christian tradition believes that God sent His Messiah, Jesus, a baby born in Bethlehem, as the prophet Micah foretold. He established a spiritual kingdom²⁰⁹ that will be fully consummated in the Last Day. But it is the way he did so that is most remarkable - a way that again reveals the true nature of sin and the justice of God's punishment of sin. The New Testament teaches that while Jesus was the son of Mary and had a human nature, he was also the incarnation of God Himself. He stepped out of the realm of eternity and took on limitations of time and space. He lived as a man and died a criminal death. The New Testament teaches that Jesus took the world's sins on himself and vicariously suffered the punishment that the world deserved. In theological terms, as Isaiah predicted he would, the Messiah died a substitutionary death as a punishment and payment for man's sins. "God made him who had no sin to be sin for us, so that in him we might become the righteousness of God."²¹⁰ Sin was so severe, and the punishment so terrible, that God gave His own son to pay sin's penalty. Jesus Christ, God incarnate, died for the sins of man.

While this is the climax of the story, it is not the end. While Jesus Christ brought victory over the effects of the fall of humankind in the Garden of Eden, the New Testament teaches that the complete fulfillment of this will be accomplished only at his return, when there

²⁰⁷ *Rom.* 3:23.

²⁰⁸ *Rom.* 6:23.

²⁰⁹ See *Jn.* 18:36 ("My Kingdom is not of this world."); *Lk.* 17:20-21 ("The Kingdom of God does not come with your careful observation, nor will people say, 'Here it is,' . . . because the Kingdom of God is within you.").

²¹⁰ 2 *Cor.* 5:21; see also 1 *Pet.* 2:24 ("He himself bore our sins in his body on the tree, so that we might die to sins and live for righteousness; by his wounds you have been healed."); 1 *Pet.* 1:18-19 ("For you know that it was not with perishable things such as silver or gold that you were redeemed from the empty way of life handed down to you from your forefathers, but with the precious blood of Christ, a lamb without blemish or defect."); *Is.* 53:5 ("But he was pierced for our transgressions, he was crushed for our iniquities; the punishment that brought us peace was upon him, and by his wounds we are healed.").

will be a restoration and redemption of all of creation. At that point, we will have come full circle to the world of sinless communion between humans and God pictured in *Genesis*. This is the crux of redemptive history.

What are the implications of this history for Professor Dershowitz's book? Redemptive history (seen only by reading Scripture as a whole and by applying consistent hermeneutic principles) reveals that sin is much more serious than the Professor leads you to believe. God judges sin severely, and has always judged sin severely - in both the Old and New Testaments - because it deserves to be judged severely. It took the life of Jesus Christ, declared by the New Testament to be the incarnate Son of God Himself, to pay the penalty that sin demanded. God has not changed His view of sin as He has felt this way all along. God has always set His holy character as the standard throughout history. It does not change, nor does He change.²¹¹

Professor Dershowitz's vision of a God who does not act humanely and overreacts to sin, and who later changes His standards and modifies His behavior, is thus totally inconsistent with the Bible's depiction of God, as well as redemptive history. But the Professor's presuppositions prevent him from interpreting *Genesis* in the whole context of Scripture. As such, the Judeo-Christian answers to many of his probes are ignored, or otherwise dismissed as acts of "fundamentalism." Left without the proper tools for understanding - historical and literary context, generic criticism, and the like - he has only allegory to fall back on. Allegory eventually lets him make use of the text in whatever way he wants. One leaves his book with a sense that God is dead, having been deconstructed beyond recognition. And if "God is dead," as Dostoevsky said in *THE BROTHERS KARAMAZOV*, then "everything is lawful" indeed.

IV. DESCRIPTIVE AND PRESCRIPTIVE INTEGRATION: A CLOSER LOOK AT THE RELATIONSHIP BETWEEN THE BIBLE AND MODERN JUSTICE

Now that a proper interpretive background has been presented and we have examined some of the specific cases and demonstrated what not to do when looking to the Bible for answers, it is time to take a closer look at what the Bible itself has to say about the relationship between God, law, and justice.

²¹¹ See *supra* note 27 (regarding God's immutable nature).

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Perhaps the most valuable thing about Professor Dershowitz's book is its recognition that the integration of Scripture and law is a fruitful endeavor. We share his view that the Bible can teach us about law and justice, although every narrative is not necessarily a "teaching tool" for justice. If properly approached through consistent hermeneutical principles such as those described above in Part III, the Bible and its teaching on law and justice can be used both descriptively and normatively.

Descriptively, Scripture helps us understand the ways in which the Bible's concepts of justice have influenced our own system of justice. The Professor's book is such a use of Scripture. He examines specific passages in *Genesis* as a way of explaining why we have the legal rules and institutions we do today. Normatively, Scripture helps us to critique existing legal rules and institutions and to guide us as to the kinds of rules and institutions we should have. In short, biblical concepts of justice can help us understand both what the law is and what the law ought to be.

Throughout the remainder of this Article, we provide examples of both descriptive and normative integration in the context of consistent hermeneutical principles to demonstrate just how fruitful this inquiry can be.²¹²

1. Descriptive Integration

To illustrate the descriptive use of Scripture, we turn to the development of the rule of law in the Anglo-American common law.

²¹² For more examples of biblical integration in law see JOHN WITTE, JR., FROM SACRAMENT TO CONTRACT: MARRIAGE, RELIGION, AND LAW IN THE WESTERN TRADITION (1997); Douglas H. Cook, *Negligence or Strict Liability? A Study in Biblical Tort Law*, 13 WHITTIER L. REV. 1 (1992); Saul Levmore, *Rethinking Comparative Law: Variety and Uniformity in Ancient and Modern Tort Law*, 61 TUL. L. REV. 235 (1986); C. Scott Pryor, *Mission Possible: A Paradigm for Analysis of Contractual Impossibility at Regent University*, 74 ST. JOHN'S L. REV. 691 (2000); Michael P. Schutt, *Oliver Wendell Holmes and the Decline of the American Lawyer: Social Engineering, Religion, and the Search for Professional Identity*, 30 RUTGERS L.J. 143 (1998); David M. Smolin, *A House Divided? Anabaptist and Lutheran Perspectives on the Sword*, 47 J. LEGAL EDUC. 28 (1997); Craig A. Stern, *Crime, Moral Luck and the Sermon on the Mount*, 48 CATH. U. L. REV. 801 (1999); Jeffrey C. Tuomala, *Christ's Atonement as the Model for Civil Justice*, 38 AM. J. JURIS. 221 (1993). These are just a sample of some of the works in this area. For a more complete listing, contact the Center for Christian Legal Studies for Professor Michael Schutt's "Annotated Select Biblical Integration Bibliography for Law Students." Center for Christian Legal Studies; Associate Professor Michael P. Schutt; Regent University School of Law; 1000 Regent University Drive; Virginia Beach, VA 23464; (757) 226-4524; michsch@regent.edu.

The common law is filled with examples of legal rules and institutions heavily influenced by expressly biblical concepts of justice.²¹³ This is no accident. The common law's greatest judges and scholars expressly grounded their legal analysis in biblical thinking. They believed that there was a higher law to which common law rules must conform. This was true at each stage of the common law's development from the 1200s to 1700s.

The common law's greatest formative period was between 1154 and 1307.²¹⁴ The greatest architect of this period was Henrici de Bracton. Bracton lived in the thirteenth century, dying in 1268. He was a Justice-in-Eyre,²¹⁵ as well as a justice of the King's Bench.²¹⁶ He is most remembered for his treatise on the common law published in the 1250s: *De Legibus et Consuetudinibus Angliae* (the Laws and Customs of England).²¹⁷ Bracton's work, referred to as "the flower and the crown of English jurisprudence,"²¹⁸ was published during a crucial time at the very beginning of the systemization of the common law. More than anyone else, Bracton gave the common law its form and system. His work influenced the development of the common law for hundreds of years.

In his treatise, Bracton made clear the common law's understanding of the source and nature of justice. He defined law as "a rightful warrant, enjoining what is honest, forbidding the contrary."²¹⁹ To Bracton, law cannot be separated from justice; the two are completely intertwined. And justice is to be understood by reference to the character of God: "Also God is the author of justice, for justice is in the Creator, and accordingly right and law have the same signification."²²⁰

²¹³ As John Wu noted, "[f]rom the standpoint of its underlying philosophy, we may say that its [the common law's] idea of justice is mainly derived from the Christian ideology, which insists upon the dignity and equality of men." JOHN C. H. WU, *FOUNTAIN OF JUSTICE* 58 (1971).

²¹⁴ ARTHUR HOGUE, *ORIGINS OF THE COMMON LAW* xiii (1985).

²¹⁵ A Justice in Eyre was an itinerant judge who traveled on a circuit throughout English counties to hear royal pleas. *Id.* at 154-58.

²¹⁶ *Id.* at 159.

²¹⁷ *Id.*

²¹⁸ THEODORE F.T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 258 (1956).

²¹⁹ BRACTON, *supra* note 1, at 13.

²²⁰ *Id.* Bracton also wrote that "justice is the disposal of God, which orders rightly and disposes rightfully in all things." *Id.* Bracton's measurement of justice by a standard external to humankind, the character and will of God, stands in stark contrast to the Professor's conception of justice based on human reason, experience, and notions of fair play and equity. See *supra* notes 45-55 and accompanying text.

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Thus, for Bracton and the early common law, law was not simply any warrant or command that the government enacts. It must be a *rightful* warrant. Its contents must conform to a higher law of justice.

The same view was still at the heart of the common law over three hundred years later, when its chief spokesman was Sir Edward Coke. Coke had one of the great resumes of all time. He was, variously, the Solicitor General, Speaker of the House of Commons, Attorney General, and Chief Justice of both the King's Bench and Common Pleas.²²¹ It was as Chief Justice of Common Pleas that Coke wrote the 1610 decision in *Calvin's Case*.²²² The case involved a claim by Calvin that Richard and Nicholas Smith had wrongly dispossessed him from land that he had a right to occupy. One of their defenses was that Calvin, who was born in Scotland, was an alien and unable to bring an action regarding real property within England. A key issue underlying this defense was whether Calvin owed *ligeance* (true and faithful obedience of a subject to his sovereign) to the King of England.

Coke turned to higher law - what he calls "the law of nature"²²³ - to find that Calvin did owe *ligeance* and to reject the defense: "Seeing then that faith, obedience, and ligeance are due by the law of nature, it followeth that the same cannot be changed or taken away."²²⁴ Thus, three hundred years after Bracton, and after the Reformation wrought huge changes in England, the common law still expressly looked to a higher law. Here, the higher law formed the rule of a decision in an actual case.

The same higher law thinking still governed the common law at its maturity in the time of William Blackstone in the eighteenth century. Like Bracton and Coke, Blackstone was a justice of the King's Bench. He was also a professor of law at Oxford University. He was most renowned for his four-volume work: COMMENTARIES ON THE LAWS OF ENGLAND, the most significant statement of the common law since

²²¹ PLUCKNETT, *supra* note 218, at 242-44. Coke was also a great reporter of judicial decisions. Coke, "the most famous of all the reporters, covers the years 1572 to 1616, and was so highly considered by the profession that his work is cited simply as *The Reports*." *Id.* at 280.

²²² See *Calvin's Case*, 77 Eng. Rep. 377 (1610).

²²³ "[T]he eternal law of the Creator, infused into the heart of the creature at the time of his creation." *Id.* at 392.

²²⁴ *Id.*

Bracton's, over five hundred years earlier.²²⁵ Blackstone's genius was not in his original thought; instead, his brilliance lay in categorizing and explaining the law as it already existed.²²⁶ He had a gift for taking very complex topics and making them accessible. His work is a brilliant summary and defense of the common law.

Blackstone, too, expressly grounded the common law in higher law thinking. Like Coke, Blackstone wrote of the law of nature, which he described as "the will of [man's] maker."²²⁷ The key to Blackstone was that all human laws must conform to this law:

This law of nature, being co-eval with mankind and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe, in all countries, and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original.²²⁸

To Blackstone, too, the content of human law matters. As with Bracton over five centuries earlier, if human law contradicted eternal principles of justice - the law of God - it was not law at all. Blackstone argued that to understand this law of nature, Scripture was key. It was "the law of nature, expressly declared so to be by God himself."²²⁹

²²⁵ Although the COMMENTARIES were popular in England, they were most influential in the United States. They were the chief source of knowledge of English common law in America's first century. Until the Civil War, Americans who studied the law learned it from Blackstone. He is fundamental to America's legal development. See Douglas H. Cook, *Sir William Blackstone: A Life and Legacy Set Apart for God's Work*, 13 REGENT U. L. REV. 169, 176-77 (2000).

²²⁶ *Id.* at 174; see also Stanley Katz, *Introduction to WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND* at v (1979).

²²⁷ Blackstone further described the law of nature in this way: "For as God, when he created matter and endued it with a principle of mobility, established certain rules for the perpetual direction of that motion; so, when he created man and endued him with free-will to conduct himself in all parts of life, he laid down certain immutable laws of human nature, whereby that freewill is in some degree regulated and restrained, and gave him also the faculty of reason to discover the purport of those laws." 1 BLACKSTONE, *supra* note 1, at 39.

²²⁸ *Id.* at 41.

²²⁹ *Id.* at 42. While Blackstone believed that we can understand a portion of the law of nature through reason, Scripture is crucial because man's "reason is corrupt, and his understanding full of ignorance and error." *Id.* at 41.

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It is within this framework that the common law developed a deep commitment to the rule of law and a remarkable protection for individual liberties. We believe that this was no accident. Indeed, it was because of this framework - this commitment to eternal biblical concepts of justice - that the common law so diligently developed and protected these principles.

Before proceeding further, we should stop to define the rule of law. The rule of law proclaims that law, and not individual rulers, is the ultimate authority in a state. The principle places significant limits on government officials. It requires them to rule by law (not arbitrarily) and under law (they are subject to the law, just as the citizens they govern are subject to the law).²³⁰ To see the connection between biblical teaching and these concepts, we will first look at the theological basis of the rule of law and then see how this theology has affected the development of the common law.

a. Biblical Foundation for the Rule of Law

Two key biblical principles or themes provide strong support for the rule of law. Both pervade Scripture and are not based merely on a single text. The first is the nature or essence of humankind. The second is the nature of authority delegated by God to civil government.

i. Nature of Humankind

As discussed earlier in the context of redemptive history,²³¹ the Bible teaches two crucial things about humankind. Humans are both created in God's image and are fallen as a result of sin. Being created in God's image is most significant, especially as it relates to law and justice. Humans have dignity and rights that come from the Creator Himself, which can be taken away by no person or government. This demands an equality of treatment before God and under law. As stated in *Job* 34:19, God "shows no partiality to princes and does not favor the rich over the poor, for they are all the work of his hands[.]"²³²

The Bible thus teaches that all persons should be treated equally by other persons and under the law. In the Bible, God demands that human

²³⁰ BERMAN, *supra* note 1, at 292-94.

²³¹ See *supra* Part III.D.4.

²³² *Job* 34:17-19; see also *Deut.* 10:17; *Acts* 10:34; *Rom.* 2:11.

justice systems act on the same principle of impartiality as He does.²³³ In *Deuteronomy* 1:16-17, for example, Moses charged Israel's judges as follows: "Hear the disputes between your brothers and judge fairly, whether the case is between brother Israelites or between one of them and an alien. Do not show partiality in judging; hear both small and great alike."²³⁴

Deuteronomy 25:1-3 provides a great example of how this commitment to dignity and equality of all people created in God's image - men and women alike - requires special procedural protections in the justice system. There, speaking of the punishment of a man found guilty, Moses warns:

When men have a dispute, they are to take it to court and the judges will decide the case, acquitting the innocent and condemning the guilty. If the guilty man deserves to be beaten, the judge shall make him lie down and have him flogged in his presence with the number of lashes his crime deserves, but he must not give him more than forty lashes. If he is flogged more than that, your brother will be degraded in your eyes.²³⁵

Thus, specific and concrete limitations were put on government officials in order to avoid degrading a person created in God's image.

Of course, Scripture also teaches that humankind has sinned,²³⁶ an element of the biblical worldview we have shown largely to be missing from the Professor's interpretation. This, too, affects the rule of law. It creates a powerful incentive to place limits on governmental power. Knowing that all people sin warns us not to put too much power in the hands of any person or government authority; not to trust the intellectual superiority or rational supremacy of human beings in matters of justice. While power must be exercised to maintain order, it must be limited under law. Lord Acton's famous warning that "power tends to corrupt

²³³ This is the very opposite from what the Professor tells us the Bible teaches. See, e.g., DERSHOWITZ, *supra* note 2, at 34-37, 100-01, 168, 172.

²³⁴ *Deut.* 1:16-17. The Mosaic law likewise required: "Do not pervert justice; do not show partiality to the poor or favoritism to the great, but judge your neighbor fairly." *Lev.* 19:15; see also 2 *Chron.* 19:5-7.

²³⁵ *Deut.* 25:1-3.

²³⁶ See, e.g., *Is.* 64:4-6; *Rom.* 3:10-18; *Eph.* 2:1-3.

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and absolute power corrupts absolutely"²³⁷ is a biblically correct concept. As we will see, frequent attempts were made as the common law developed to place limits on government authority to avoid the tendency toward corruption of power inherent in our human natures.

ii. Nature of Government Authority

The second key biblical principle underlying the rule of law and the protection of individual liberties is this: Not only do we have an incentive to place limits on the power of government officials, the Bible, in fact, teaches that only limited authority has been delegated to them in the first place. The Bible consistently maintains that all officials rule under the Kingship of God and can be removed by Him at any time.²³⁸ The New Testament is even more explicit in its teachings on the authority given by God to human rulers. Perhaps the clearest description is found in *Romans* 13:1-5:

Everyone must submit himself to the governing authorities, for there is no authority except that which God has established. The authorities that exist have

²³⁷ THE OXFORD DICTIONARY OF QUOTATIONS 1 (Angela Partington ed., Oxford Univ. Press 1992).

²³⁸ Speaking of God, Isaiah states:

He sits enthroned above the circle of the earth, and its people are like grasshoppers. He stretches out the heavens like a canopy, and spreads them out like a tent to live in. He brings princes to naught and reduces the rulers of this world to nothing. No sooner are they planted, no sooner are they sown, no sooner do they take root in the ground, then he blows on them and they wither, and a whirlwind sweeps them away like chaff.

Is. 40:22-24.

In *Daniel* 4, we see this principle played out. King Nebuchadnezzar of Babylon, filled with pride about the kingdom he created, declares: "Is not this the great Babylon I have built as the royal residence, by my mighty power and for the glory of my majesty?" *Dan.* 4:29. God rendered Nebuchadnezzar insane for seven years until he came to realize that his rule was not absolute. He ruled at the pleasure of a higher king:

At the end of that time, I, Nebuchadnezzar, raised my eyes toward heaven, and my sanity was restored. Then I praised the Most High; I honored and glorified him who lives forever. His dominion is an eternal dominion; his kingdom endures from generation to generation. All the peoples of the earth are regarded as nothing. He does as he pleases with the powers of heaven and the peoples of the earth. No one can hold back his hand or say to him: "What have you done?"

Dan. 4:34-35.

A chapter later, Babylon's ruler, Belshazzar, failed to heed his grandfather's warning. He, too, set himself up above all rulers and authorities. As a result, God brought an end to the great Babylonian Empire and gave it to the Medes and Persians. *Dan.* 5:30-31.

been established by God. Consequently, he who rebels against the authority is rebelling against what God has instituted, and those who do so will bring judgment on themselves. For rulers hold no terror for those who do right, but for those who do wrong. Do you want to be free from fear of the one in authority? Then do what is right and he will commend you. For he is God's servant to do you good. But if you do wrong, be afraid, for he does not bear the sword for nothing. He is God's servant, an agent of wrath to bring punishment on the wrongdoer. Therefore, it is necessary to submit to the authorities, not only because of possible punishment, but also because of conscience.

Accordingly, no human being has inherent power to rule over another. Civil magistrates have only the authority delegated by God. And that authority is limited. Notice the emphasis on the fact that a civil magistrate, rather than being an absolute ruler, is God's "servant."²³⁹ He rules for God and under God.

Jesus, too, taught that human governments did not have complete authority over all matters when he stated, in response to a question about paying taxes, "give to Caesar what is Caesar's, and to God what is God's."²⁴⁰ Some things simply are not in Caesar's sphere.²⁴¹

b. Historical Development of the Rule of Law and Individual Liberties

Have the principles regarding the nature of humankind and the authority delegated to civil government mattered? Absolutely. They are in evidence from the very beginning of the common law and Anglo-American constitutional law.

Perhaps the most famous - and most influential - statement on the rule of law in English history is the following from Henrici de Bracton: "But the king himself ought not to be subject to man, but subject to God

²³⁹ *Rom.* 13:4.

²⁴⁰ *Mt.* 22:21.

²⁴¹ Historically in Western law, this principle has been seen in limitation on temporal authorities over spiritual matters. This limitation was seen powerfully in the era after the Gregorian Reform of 1075-1122, when the Church declared itself independent from temporal control. See generally BERMAN, *supra* note 1. The principle was further displayed in the common law's hesitancy to take jurisdiction over matters of faith. See, e.g., 1 BLACKSTONE, *supra* note 1, at 45. It continues to be adhered to today in the restriction on civil governments over issues of belief and morality. BERMAN, *supra* note 1, at 269.

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and to the law, for the law makes the king.”²⁴² The statement reflected a fundamental principle of English law throughout the history of the common law and was continually referenced by scholars and jurists as the common law developed. The king is not the law, nor is he superior to the law. Like his subjects, he is under the law.

To Bracton, this principle was theologically based. He described the king’s role further as follows:

Let the king, then, attribute to the law what the law attributes to him, namely dominion and power, for there is no king where the will and not the law has dominion; and that he ought to be under the law, since he is the vicar of God, appears evidently after the likeness of Jesus Christ, whose place he fills on earth; for the true mercy of God, when many things were at his command to restore the human race in an ineffable manner, chose this way in preference to all others, as if to destroy the work of the devil he should use not the vigor of his power, but the reason of his justice, and so he was willing to be under the law, that he might redeem those who were under the law, for he was not willing to use his strength, but his reason and judgment.²⁴³

Thus, the king is not only under the law, but under God. He does not have unlimited authority. The king acts on behalf of God as the representative or vicar. He must act as Jesus did, not through pure power, but submitting himself to law, being under the law, and ruling according to justice.

There was historical precedent for Bracton’s assertion. The second decade of the thirteenth century had seen the rule of law enforced on a king who sought to rule through whim and power: King John. John was not a loveable man. In 1208, he defied both the Church and his barons

²⁴² BRACTON, *supra* note 1, at 39. As late as 1760, William Blackstone still quoted this principle of English law. To support the conclusion that the principal duty of the King is “to govern his people according to law” and that “this is not only consonant to the principles of nature, of liberty, of reason, and of society, but has always been esteemed an express part of the common law of England, even when prerogative was at the highest.” 1 BLACKSTONE, *supra* note 1, at 226-27; see also PLUCKNETT, *supra* note 218, at 243 (describing Sir Edward Coke’s reliance on Bracton in the 1600s).

²⁴³ 1 BLACKSTONE, *supra* note 1, at 39, 41.

through excess, arrogance, and raw power.²⁴⁴ He provoked the Church into placing an inderdict on England.²⁴⁵ He provoked the barons continually and sought money from them to support the expensive wars that formed the basis of his aggressive foreign policy.²⁴⁶

In 1215, at Runnymede, English barons, led by the Archbishop of Canterbury, Stephen Langton, forced John to sign the *Magna Carta*. Many of the *Magna Carta's* provisions required the king to end arbitrary royal actions that were very time and culture specific. He agreed, for instance, to not steal the corn, wood, carts, and horses of his nobles.²⁴⁷ But John also agreed to some broad provisions that formed the basis for due process and the rule of law. Most influential was paragraph thirty-nine: "No free man shall be taken, or imprisoned, or disseized, or outlawed, or exiled, or in any way harmed – nor will we go upon or send upon him - save by the lawful judgment of his peers or by the law of the land."²⁴⁸

Thus, the king agreed to rule according to law. He, too, was bound by the law of the land, the common law. In the following centuries, kings would chafe at this notion, but the rule of law - and the *Magna Carta* itself - was regularly reaffirmed.²⁴⁹

The era that most challenged royal commitment to due process and the rule of law was the seventeenth century. This was the era of the Stuart kings who followed the very powerful Tudor monarchs (including Henry VIII and Elizabeth I) to the throne. The Stuarts, like many European monarchs of that era, believed in the divine right of kings.²⁵⁰

²⁴⁴ 1 WINSTON CHURCHILL, *THE BIRTH OF BRITAIN: A HISTORY OF THE ENGLISH SPEAKING PEOPLES*, 247-52 (1962); 4 WILL DURANT, *THE STORY OF CIVILIZATION: THE AGE OF FAITH* 674-75 (1950).

²⁴⁵ W.L. WARREN, *KING JOHN* 163-68 (1961).

²⁴⁶ DURANT, *supra* note 244, at 675; WARREN, *supra* note 245, at 179-84.

²⁴⁷ *MAGNA CARTA* paras. 28, 30, 31, 35.

²⁴⁸ *Id.* at para. 39. Also influential is paragraph 40 which states: "To none will we sell, to none deny or delay, right or justice." *Id.* at para. 40.

²⁴⁹ *Id.* at para. 40; *see also* PLUCKNETT, *supra* note 218, at 23.

²⁵⁰ James I, for example, declared:

The state of monarchy is the supremest thing upon earth; for kings are not only God's lieutenants upon earth, and sit upon God's throne, but even by God himself they are called gods God hath power to create or destroy, make or unmake at his pleasure . . . , and to God are both soul and body due. And the like power have kings: they make and unmake their subjects, they have power of raising and casting

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In the 1620s there were constant battles between James I (later, his son Charles I) and Parliament over the king's ability to raise money without Parliament's approval and over other arbitrary royal actions such as the quartering of troops by force in the homes of free Englishmen.²⁵¹ In response, in 1628, Parliament drew up the Petition of Right which called on the king to uphold four key principles: first, no taxation without parliamentary consent; second, no imprisonment without cause; third, no forced billeting of soldiers; and fourth, no martial law in a time of peace.²⁵² One of the drafters of the Petition of Right was Sir Edward Coke, former Chief Justice of the Courts of Common Pleas and King's Bench.²⁵³

Despite acceding to the Petition of Right, Charles eventually had enough and dismissed Parliament. He ruled for eleven years without Parliament. When he called Parliament back in 1640, the stage was set for civil war, a war in which Parliament triumphed and Charles I lost his head for treason against his own people. Fueling the revolution was the rejection of the divine right of kings and arbitrary rule. Parliament had triumphed by insisting that no one was above the law.

This was not simply a political argument; it was at its heart a theological argument. Leading the parliamentary opposition to royal abuses of power all throughout the seventeenth century were the Puritans, Protestants who believed that the Reformation should be brought to full completion in England, ridding the Church of England of rituals and ceremonies not found in Scripture and calling the king to rule according to the law of God. A key tenet of Puritan theology was the notion of total depravity of humankind. Puritans believed that by nature, humankind was fallen and that every part of human beings' will, reason, and emotion were affected. They feared plenary authority in the hands of the king or any political ruler and demanded limited government authority and an end to arbitrary actions.²⁵⁴ The Puritans'

down, of life and of death, judges over all their subjects and in all causes and yet accountable to none but God only.

MILTON VIORST, *THE GREAT DOCUMENTS OF WESTERN CIVILIZATION* 117-18 (1965).

²⁵¹ *Id.* at 119.

²⁵² *Id.*

²⁵³ Other drafters were Sir John Eliot and Mr. John Pym. LACEY BALDWIN SMITH, *THIS REALM OF ENGLAND: 1399-1688* 221 (4th ed. 1983).

²⁵⁴ See EDMUND S. MORGAN, *THE PURITAN DILEMMA* 18-19, 28-30 (1958); VIORST, *supra* note 250, at 119-22; Harold Berman, *The Religious Sources of General Contract Law: An Historical Perspective*, 4 *J.L. & RELIGION*, 118-20.

commitment to the rule of law was based on the biblical teaching of the nature of humankind as described above.

The theological underpinnings of the revolution were well-stated by Puritan minister Samuel Rutherford. In 1644, Rutherford wrote *LEX, REX OR THE LAW AND THE PRINCE* as a treatise to combat support for the divine right of kings. Throughout the book, Rutherford made theological arguments for limitation of government authority and the rule of law. In addition to humankind's nature, he emphasized the limited delegation of authority by God to human rulers. At the very beginning of his treatise, he turned to *Romans 13* to argue that all government power came from God: "That power of government in general must be from God," and "[a]ll civil power is immediately from God in its root" ²⁵⁵ Rutherford insisted that this delegation was a limited one: "God hath given no absolute and unlimited power to a king above the law" ²⁵⁶ He raised several arguments supporting this conclusion, constantly referring to both Old Testament and New Testament Scripture. ²⁵⁷ He concluded that:

All royal power, whereby a king is a king and different from a private man, armed with no power of the sword, is from God. But absolute power to tyrannise over the people and to destroy them is not a power from God; therefore there is not any such royal power absolute. The proposition is evident, because that God who maketh kings and disposeth of crowns, (*Proverbs 8:15, 16; 2 Samuel 12:7; Daniel 4:32,*) must also create and give that royal and official power by which a king is a king. ²⁵⁸

Fueled by this theology, the Puritans ran the government, first through Parliament and later through Oliver Cromwell's Protectorate, until 1660. While monarchy was ultimately restored, the proposition was never again seriously challenged that the king must rule under law and was limited by the authority of Parliament. The theory of the divine right of kings was dead in England. In 1689, after the Glorious Revolution brought a final end to the revolutionary period, Parliament conditioned its offer of the crown to William and Mary on their

²⁵⁵ SAMUEL RUTHERFORD, *LEX, REX OR THE LAW AND THE PRINCE* 1 (1644).

²⁵⁶ *Id.* at 101.

²⁵⁷ See, e.g., *id.* at 1-9, 99-106.

²⁵⁸ *Id.* at 102.

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acceptance of the Declaration of Rights, which again codified the rule of law, and specific liberties were protected as a result.²⁵⁹

Throughout the history of the common law, commitment to the rule of law led to the protection of many individual liberties. The common law came to provide the following liberties that we take for granted in the United States today: the presumption of innocence, the privilege against self-incrimination, the principle that no one may be imprisoned without a warrant, the right to a speedy trial, and the right to trial by jury, to name a few.²⁶⁰ Note that Professor Dershowitz too recognizes that many of the same rights and privileges can be tied to the Old Testament, although he attributes their source to one or two individual narratives, rather than theological conclusions arising out of proper hermeneutics, as applied to those narratives.²⁶¹ As Russell Kirk summarized in *THE ROOTS OF AMERICAN ORDER*, "the 'private law' called 'common law' secures the private person against arbitrary actions by the possessors of power."²⁶²

Again, these protections against arbitrary actions are rooted in biblical theology. Regarding rights in general, Blackstone insisted that inalienable rights come from God and cannot be taken away by government or any authority:

²⁵⁹ The Declaration protected the freedom of speech, the right to trial by jury, and barred excessive bail and fines and cruel and unusual punishments, as well as providing other constitutional protections.

By the end of the century, the great spokesman for limited royal authority and the protection of the rule of law and individual liberties was John Locke. His views, too, were theologically based. In his *Second Treatise of Government*, published in 1689, Locke affirmed that under the law of nature, all men are equal and not subordinate to any man and are entitled to the protection of life, liberty, health and possessions. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 311 (1960). As Professor Richard Epstein has noted, Locke brought together both key theological principles for the rule of law in his work. First, Locke understood the nature of man and realized that mankind cannot live in a state of nature but must have civil society for protection from sinful men. RICHARD EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 9 (1985). But second, he argued that the authority delegated to government officials in that civil society is and must be limited. *Id.* at 9-10. He rejected Hobbes' notion that to escape a life that is "solitary, poor, nasty, brutish and short" people must surrender all rights to a dictator who would at least keep order. Instead, he defended the limited delegation of authority. A principal basis for this is that "individual natural rights, including rights to obtain and hold property, are not derived from the sovereign but are the common gift of mankind" by God. *Id.* at 9.

²⁶⁰ KIRK, *supra* note 1, at 186-87.

²⁶¹ DERSHOWITZ, *supra* note 2, at 195, 254-57.

²⁶² KIRK, *supra* note 1, at 187.

Those rights, then, which God and nature have established, and are therefore called natural rights, such as our life and liberty, need not the aid of human laws to be more effectually invested in every man than they are; neither do they receive any additional strength when declared by the municipal laws to be inviolable.²⁶³

In support of one particular right protected at common law, trial by jury, Blackstone mounted a passionate defense. He called the jury trial "the most transcendent privilege which any subject can enjoy, or wish for" and "the best preservative of English liberty."²⁶⁴ He based this view on a biblical view of the nature of humankind. He was convinced that without juries, humankind's sinful nature would produce partiality in the criminal justice system. He maintained that if the administration of justice were "entirely entrusted to the magistracy, a select body of men, and those generally selected by the prince or such as enjoy the highest offices in the state, their decisions, in spite of their own natural integrity, will have frequently an involuntary bias towards those of their own rank and dignity: it is not to be expected from human nature, that *the few* should be always attentive to the interests and good of *the many*."²⁶⁵

This dedication to the rule of law and the protection of individual liberties was also embraced at the founding of the United States. The Declaration of Independence, for example, espouses the same principles of a limited delegation of authority and the need for limits on arbitrary actions that were espoused in seventeenth century England and in the works of Locke and Blackstone. Jefferson, like Locke and Blackstone before him, rooted his opposition to the arbitrary actions of the king in the limited delegation of authority by God. To Jefferson, rights were not given by the state, they were given by God: "We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness"²⁶⁶

In the Constitution, the Framers took great pains not to consolidate power in the hands of any single official or department. Concepts like the separation of powers and federalism were seen as ways to protect against arbitrary exercises of power - and necessary to protect God-given

²⁶³ 1 BLACKSTONE, *supra* note 1, at 54.

²⁶⁴ 3 BLACKSTONE, *supra* note 1, at 379, 381.

²⁶⁵ *Id.* at 379.

²⁶⁶ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

rights to which all are equally entitled by virtue of their birth as humans made in God's image.²⁶⁷

All of this is to say that commitment to the rule of law and the protection of individual liberties in Anglo-American law is no accident. From the thirteenth century to the time of Blackstone and the founding of the United States, these concepts were developed within a biblical framework, a biblical worldview. It was a framework that rejected absolute authority for two reasons. First, God did not grant sovereigns absolute authority. God's delegation was limited - and human rulers were to rule under law and in accord with justice. Second, absolute authority is inconsistent with humankind's nature. Human beings are created with dignity and equality and no ruler is given the right to rule over another based on whim or power. Further, humankind's sinfulness demands that limits be placed on authority. Checks and balances, along with other specific limitations on power, are mechanisms to keep sinful rulers from abusing their power. To consider the development of the rule of law and individual liberties in Anglo-American law without considering their biblical foundation is to miss a rich and vital understanding. And this is precisely why the Professor does each of us such a great service by promoting descriptive biblical integration.

2. Normative Integration

But descriptive analysis does not nearly exhaust the relevance of the Bible to law and justice. Equally fruitful is to consider the Bible's normative implications. It can explain not only what the law is, but also what it ought to be. It is this idea that in a large part explains the emergence of law schools like Regent University, Ave Maria, and others

²⁶⁷ The Constitution's principal drafter, James Madison, made this plain as he argued for ratification of the Constitution in *FEDERALIST* 51. Madison insisted:

Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to controul the abuses of government. But what is government itself but the greatest of all reflections of human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controuls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to controul the governed; and in the next place, oblige it to controul itself.

The *FEDERALIST* No. 51 at 262 (James Madison).

that overtly integrate biblical principles of law and justice in the classroom.²⁶⁸

To see the power of normative biblical integration, consider the proper goal for punishment under the criminal law. There has been long debate over why we punish criminals. The answer to this question has a dramatic effect on the type, severity, and focus of punishment in the criminal justice system. Many answers have been proposed, including the promotion of the safety of society, rehabilitation of the offender, deterrence of future crime, and retribution. The various proposed goals generally can be broken into two main groups: those that are utilitarian and those that are retributive.

Utilitarian goals focus on the future.²⁶⁹ A proper punishment is one that maximizes the net happiness of society.²⁷⁰ A utilitarian accepts the cost inflicted by punishment so long as it reduces the cost from crime that would otherwise occur.²⁷¹ The reduction of cost could come in the form of rehabilitation of the offender so that he or she does not commit crime again, or deterrence so that both offender and others in society are induced to abide by law and hindered from committing future crimes.²⁷²

²⁶⁸ See Buckley, *supra* note 3, at 20-21.

²⁶⁹ The future focus of a utilitarian-based penal system is defended by Judge Richard Nygaard of the Third Circuit Court of Appeals:

Retribution, vengeance lives wholly in the past. It has no future. It is an expression of society's anger and a revulsion from the past in spite of the future. There is, however, nothing so futile as regret. I suggest that our system cannot really call itself enlightened or productive unless all sentences take a view towards the future, towards change, towards correction.

Richard Nygaard, *The Myth of Punishment*, 5 REGENT U. L. REV. 6 n.20 (1995).

He also argues that:

[r]etribution only provides a fertile bed for the malignant growth of hatred. The public has said that the sinner must suffer, but an odious punishment imposed upon a person who has committed a vile act, while cathartic to a victimized society, has short lived effects. A sentencing system must answer real needs, and not pander to the immediate passions of society.

Id. at 6 n.19.

²⁷⁰ JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 170 (1948).

²⁷¹ DRESSLER, *supra* note 6, at 9.

²⁷² Blackstone listed three types of deterrence in his *Commentaries on the Laws of England*: "Either by the amendment of the offender himself;" "or, by deterring others by the dread of his example from offending in the like way;" "or, lastly, by depriving the party injuring of the power to do future mischief; which is effected by either putting him to death, or

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By contrast, a retributive penal system focuses on the past. It declares that a key concept of justice is the notion of desert. A punishment is justified when it is deserved.²⁷³ Further, the severity of the penalty is based on the severity of the offense. It must be proportional.²⁷⁴

This utilitarian versus retributive debate has long raged.²⁷⁵ Does the Bible provide guidance here? We believe it does. A proper reading of Scripture using consistent hermeneutics suggests that the retributive system best models the concept of justice taught and demonstrated in Scripture throughout the whole of redemptive history.

We start, as Professor Dershowitz does, in *Genesis*. As noted earlier, a key principle from creation is that humankind is made unique in the image of God.²⁷⁶ This dignity is critical to the passages that discuss justice, and particularly just punishments.

The next key event in redemptive history is the "Fall" (sin and rebellion) of humankind and God's response. After God destroyed the world with a flood, He entered into a covenant with Noah. In that covenant, God reveals something about the nature of justice as He instructs Noah and his family on how to deal with the crime of murder. In *Genesis* 9:5-6, God warns:

And for your life blood I will surely demand an accounting. I will demand an accounting from every animal. And from each man, too, I will demand an accounting for the life of his fellow man. "Whoever sheds the blood of man, by man shall his blood be shed; for in the image of God has God made man."²⁷⁷

condemning him to perpetual confinement, slavery, or exile." 4 BLACKSTONE, *supra* note 1, at 11-12.

²⁷³ DRESSLER, *supra* note 6, at 11.

²⁷⁴ *Id.* at 40. Note that the Professor agrees that justice must be proportional, but he attributes this principle to "human standards" of justice and then evaluates God's actions as "unfair" in light of this standard. DERSHOWITZ, *supra* note 2, at 32. He again misses the fundamental teaching of Scripture showing this principle to be based on divine standards of justice.

²⁷⁵ Consider, for example, the retributive perspective of Immanuel Kant and the utilitarian perspective of Jeremy Bentham. See, e.g., BENTHAM, *supra* note 270, at 170, 178; see also THE PHILOSOPHY OF IMMANUEL KANT 149 (Lewis White Beck ed., 1976).

²⁷⁶ *Gen.* 1:26-27.

²⁷⁷ *Gen.* 9:5-6.

In this early instruction on criminal justice, God introduces the concept of desert. If a human being takes another human being's life - i.e., destroys an image-bearer of God - he must bear a proportional punishment as just vengeance: his life too must be shed. There is no hint that this is done with a utilitarian eye to some future good. Instead, punishment is deserved because of the severity of what he has done.

It is not only in this very early Noahide code that we see the concept of desert at the heart of justice. It is also pervasive in the justice system established by God for Israel. In fact, Professor Dershowitz notes two excellent examples in his book. One is the *lex talionis* from *Exodus* 21:23-25. The concept of desert is at the heart of the "eye for an eye" formulation. Lawbreakers were to be punished for their wrongdoing, and the amount was to be proportional to the severity of the offense.²⁷⁸

The concept of desert is also illustrated by the Mosaic cities of refuge. Passages such as *Exodus* 21:12-14 and *Deuteronomy* 19:4-13 explain that the proper treatment of a killer depended on the level of culpability. Intentional killers were to be put to death, as in the Noahide code. However, accidental killers were not put to death. Because they did not "deserve" death, they were allowed to flee to one of the cities.²⁷⁹

An interesting passage from later in the Pentateuch confirms the observation that Israel's notion of justice was primarily retributive. In *Numbers* 35:33-34, God instructs Moses:

Do not pollute the land where you are. Bloodshed pollutes the land, and atonement cannot be made for the land on which blood has been shed, except by the blood of the one who shed it. Do not defile the land where you live and where I dwell, for I, the LORD, dwell among the Israelites.²⁸⁰

Bloodshed demanded retribution. Wholly apart from deterrence of future bloodshed or rehabilitation of those shedding blood, the past bloodshed had to be dealt with, meaning it had to be "atoned for." The crime resulted in a pollution of the land that had to be removed by the punishment of the wrongdoer.

²⁷⁸ See also *Deut.* 25:1-3 (where one adjudged guilty was to be flogged "with the number of lashes his crime deserves.").

²⁷⁹ See Craig A. Stern, *Torah and Murder: The Cities of Refuge and Anglo-American Law*, 35 VAL. U. L. REV. 461 (2001) (discussing the biblical teaching on the cities of refuge).

²⁸⁰ *Num.* 35:33-34.

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The Hebrew verb for atonement, *kaphar*, has a root meaning of "to cover over."²⁸¹ The related noun "is mainly used of the ransom price that 'covers' an offense - not by sweeping it out of sight, but by making it an equivalent payment so that the offense has been actually and exactly paid for."²⁸² The NEW INTERNATIONAL DICTIONARY OF THE BIBLE explains the system of atonement that characterized Israel's justice system (civil and religious): "[T]he means of atonement - the actual price paid as equivalent to the sin committed - was the sacrificial blood, the life laid down in death."²⁸³ The Old Testament sacrificial system was built on this concept. An animal was sacrificed - blood was shed - to atone for sins committed. Satisfaction was made to God for violation of His law. In a civil context, wrongdoers suffered a penalty and were made to pay restitution to satisfy the law and their victims.²⁸⁴

That biblical justice is built on retributive principles is also clear from the writings of the prophetic era of Israel's history. Punishments brought on Israel for failure to abide by the law were viewed as "just desert" for disobedience to the covenant. *Psalms* 106 provides an excellent example of this view. There, the writer explains judgments suffered by the people of Israel as follows:

They shed innocent blood, the blood of their sons and daughters, whom they sacrificed to the idols of Canaan, and the land was desecrated by their blood. They defiled themselves by what they did; by their deeds they prostituted themselves. Therefore the LORD was angry with his people and abhorred his inheritance. He handed them over to the nations, and their foes ruled over them. Their enemies oppressed them and subjected them to their power.²⁸⁵

²⁸¹ NEW INTERNATIONAL DICTIONARY OF THE BIBLE 108 (J. D. Douglas & Merrill C. Tenney eds., 1987).

²⁸² *Id.*; see, e.g., *Ex.* 30:12; *Ps.* 49:7; *Is.* 43:3.

²⁸³ NEW INTERNATIONAL DICTIONARY OF THE BIBLE, *supra* note 281, at 109. THE NEW COMPACT BIBLE DICTIONARY defines atonement as: "to (cover, cancel,) satisfactory reparation for an offense or injury; that which produces reconciliation. *Ex.* 30:16. In the Bible it means the covering of man's sins through the shedding of blood." THE NEW COMPACT BIBLE DICTIONARY 63 (T. Alton Bryant ed., 1979).

²⁸⁴ See, e.g., *Ex.* 21:18-22:15.

²⁸⁵ *Ps.* 106:38-42; see also *Jer.* 16:10-13; *Amos* 1, 2:6-16; *Nahum* 3.

Note that the judgment was necessary because, in language very similar to that of *Numbers*, "the land was desecrated by their blood."²⁸⁶ The nature of justice demanded that the past be dealt with.

Very similar is the account of God's judgment given after Judah's²⁸⁷ return to the land after the exile in Babylon. In *Nehemiah* 9, the people confessed their sins and renewed the covenant with God. As part of the renewal ceremony, the Levites gave this report of their past and of the justice of God:

You warned them to return to your law, but they became arrogant and disobeyed your commands. They sinned against your ordinances, by which a man will live if he obeys him. Stubbornly they turn their backs on you, became stiff necked and refused to listen. For many years you were patient with them. By your Spirit you admonished them through your prophets. Yet they paid no attention, so you handed them over to the neighboring peoples. But in your great mercy you did not put an end to them or abandon them, for you are a gracious and merciful God.²⁸⁸

The Levites then proclaimed that all of this was simply an exercise of divine justice: "In all that has happened to us, you have been just; you have acted faithfully, while we did wrong."²⁸⁹ So we see that Scripture explains the punishments brought on Israel - especially the exile - as just desert for disobeying the covenant.²⁹⁰ The retributive punishment was necessary in the eyes of a just God. Thus, throughout Israel's history, as God unfolded His redemptive plan, He revealed the nature of justice - a retributive justice that demanded punishment as atonement for sins and crimes.

²⁸⁶ *Ps.* 106:38.

²⁸⁷ Scripture speaks of Judah as the southern tribes of Israel (Judah and Benjamin, along with Levi); the northern ten tribes separated from the rest of the nation under the leadership of Jeroboam I (931-910 B.C.) and were exiled to Assyria in approximately 722 B.C. NEW INTERNATIONAL DICTIONARY OF THE BIBLE, *supra* note 281, at 482; see also LEON WOOD, A SURVEY OF ISRAEL'S HISTORY 303-04, 333 (1970).

²⁸⁸ *Neh.* 9:29-31.

²⁸⁹ *Neh.* 9:33.

²⁹⁰ Here again redemptive history teaches lessons very different from those drawn by the Professor in his reading of Scripture. While Scripture is replete with accounts of man being unfaithful to the covenant, the Professor instead focuses on claimed violations by God as well as use of the covenantal relationship to justify criticism of God. See, e.g., DERSHOWITZ, *supra* note 2, at 6, 71-73, 78.

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It is in the New Testament, though, where we see the ultimate atonement for sins - the death of Jesus Christ, the Messiah and Son of God, who died to atone for the sins of the world. The New Testament confirms the Old Testament teaching that humankind is fallen. It recognizes that all humans have sinned and fallen short of God's standards of righteousness.²⁹¹ It also sets out the just desert for this unrighteousness: "The wages of sin is death."²⁹² One might think that a merciful God would respond to this hopeless state by simply forgiving all sins and absolving all sinners. But, according to Scripture, He did not. What He did instead reveals the true nature of justice.

God sent a substitute - His own son - to pay the penalty of death that was to fall on humankind. *Romans 3:25-26* describes it well:

God presented him as a sacrifice of atonement, through faith in his blood. He did this to demonstrate His justice, because in His forbearance He had left the sins committed beforehand unpunished - He did it to demonstrate His justice at the present time, so as to be just and the one who justifies those who have faith in Jesus.²⁹³

This sacrifice was the only way God could be both just and a justifier of sinners. He had to punish sin. As we have demonstrated throughout, Scripture teaches that justice is not simply an act of God's will, it is part of His very nature.²⁹⁴ His holy character demanded that punishment be paid. But, according to Scripture, because the penalty was paid, "those who have faith in Jesus" are justified, their sins covered and taken away. This is the climax of the story of redemption, the Son of God giving his own life to save sinners.

As Isaiah the prophet had described some seven centuries before Jesus, "He was pierced for our transgressions, he was crushed for our iniquities; the punishment that brought us peace was upon him, and by his wounds we are healed."²⁹⁵ This was a full atonement. It was

²⁹¹ "For all have sinned and fall short of the glory of God." *Rom. 3:23*; see also *Eph. 2:1-3*; *Rom. 3:10-18*; *Gal. 3:22*.

²⁹² *Rom. 6:23*; see also *Gal. 6:7-8*; *Heb. 9:23*; *James 1:15*.

²⁹³ *Rom. 3:25-26*.

²⁹⁴ See *Deut. 32:4*; *Ps. 92:15*; *Mt. 5:48*; *Rev. 4:8*.

²⁹⁵ *Is. 53:5*

punishment, but it was also a payment that satisfied God, the victim.²⁹⁶ The consistent teaching of Scripture from *Genesis*, and the initial need for redemption through its perfect accomplishment in Jesus, is that justice, in its very nature, is retributive.²⁹⁷

So what does this say to modern society or to us as attorneys? A normative use of Scripture would suggest that based on the Bible's teaching of what justice is, we should adopt a retributive model of justice.²⁹⁸ It would also suggest that we incorporate satisfaction of the victims of crime through a scheme of restitution.²⁹⁹

The idea of turning to biblical analysis to support a retributive system of justice is not new. In fact, medieval canon lawyers looked to the atonement of Christ as a model of justice in the development of their system of criminal law. As legal historian Harold Berman describes in his award-winning book, *LAW AND REVOLUTION*, canon lawyers developed a retributive system of justice in canon law based largely on the theological teachings of St. Anselm about the atonement. Anselm's position was that: "God in his mercy cannot forgive man's sin freely, as a matter of grace, . . . [because] this would leave a disturbance of the order of the universe, caused by sin, uncorrected, and that an uncorrected disorder would constitute a deficiency in justice. The just

²⁹⁶ This act of atonement is described in various passages. Each emphasizes the penalty and satisfaction made to the victim, for example:

For you know that it was not with perishable things such as silver or gold that you were redeemed from the empty way of life handed down to you from your forefathers, but with the precious blood of Christ, a lamb without blemish or defect.

1 *Pet.* 1:18-19.

²⁹⁷ For an excellent discussion of the atonement of Jesus Christ as a model of retributive justice, see Jeffrey C. Tuomala, *Christ's Atonement as the Model for Civil Justice*, 38 *AM. J. JURIS.* 221 (1993); Jeffrey C. Tuomala, *The Value of Punishment: A Response to Judge Richard L. Nygaard*, 5 *REGENT U. L. REV.* 13 (1995).

²⁹⁸ Scripture, in fact, calls for human justice systems to reflect the justice of God. In the Old Testament, King Jehoshaphat commissioned new judges by warning them that they were judging for God and should apply godly standards of justice. He told them:

[C]onsider carefully what you do, because you are not judging for man but for the Lord, who is with you whenever you give a verdict. Now let the fear of the Lord be upon you. Judge carefully, for with the Lord our God there is no injustice or partiality or bribery.

2 *Chron.* 19:6-7.

In the New Testament, Paul the Apostle writes that God has established all civil authorities and has commissioned them to be his "agent[s] of wrath to bring punishment on the wrongdoer." *Rom.* 13:4. They "bear the sword" of retribution. *Id.*

²⁹⁹ See Charles Colson & Daniel Benson, *Restitution as an Alternative to Imprisonment*, 11 *DET. C. L. REV.* 523, 527-28, 552-55 (1980).

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order of the universe, the *iustitia* or righteousness of God, requires that the price be paid."³⁰⁰ The law grew out of this theology:

The Western law of crimes emerged from a belief that justice in and of itself, justice *an sich*, requires that a violation of a law be paid for by a penalty, and that the penalty should be appropriate to the violation. The system of various prices to be paid for various violations - which exists in all societies - was thought to justify itself; it was justice - it was the very justice of God.³⁰¹

Does all this mean that it is improper to consider the future consequences of punishment? Does Scripture rule out deterrence and rehabilitation as legitimate goals? No. Consider the regime of *Exodus* 22:1-4. These provisions of the Mosaic law set forth two different punishments for the same act: stealing an ox or sheep. *Exodus* 22:1 states: "If a man steals an ox or a sheep and slaughters it or sells it, he must pay back five head of cattle for the ox and four sheep for the sheep."³⁰² *Exodus* 22:4 offers a reduced punishment: "If the stolen animal is found alive in his possession - whether ox or donkey or sheep - he must pay back double."³⁰³ What explains the different punishment? The condition of the stolen animal. If the animal is dead or sold, the punishment is more severe. If the animal is still alive, and can be returned to its rightful owner, the punishment is reduced in half. Why? It appears to be desert that yields what is known as "marginal deterrence."³⁰⁴ If someone has stolen an animal, the law deters the thief from taking the next step of making the theft irremediable, by threatening a much more severe punishment for sale or slaughter.³⁰⁵

It should be noted, though, that this example of deterrence fits within the Mosaic law's overall regime of retribution - penalties must be paid, and must be paid as satisfaction to the victim, to deal with the past. Deterrence should be considered. But biblical teachings on justice, however, do not allow for the adoption of a model that is based on

³⁰⁰ BERMAN, *supra* note 1, at 179.

³⁰¹ *Id.* at 194.

³⁰² *Ex.* 22:1.

³⁰³ *Ex.* 22:4.

³⁰⁴ See RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 208 (1986).

³⁰⁵ It is for the same reason that Richard Posner in his *ECONOMIC ANALYSIS OF LAW* argues that the law must impose a higher penalty for murder than for robbery. If the penalties were identical, "it" would increase the probability that; if a robbery were committed, someone would be murdered in the course of it." *Id.*

deterrence alone; one that rejects all principles of retribution. The great writer C.S. Lewis made an impassioned argument against the injustice of what he called the "Humanitarian theory" of justice in his essay "GOD IN THE DOCK."³⁰⁶ The Humanitarian theory was based on the premise that retribution is cruel - by human standards - and that an enlightened, humane system must either pursue deterrence of future crime or rehabilitation of the criminal or both.³⁰⁷ Lewis insisted that, by excluding the concept of desert, the Humanitarian theory abandoned justice itself:

[T]he concept of Desert is the only connecting link between punishment and justice. It is only as deserved or undeserved that a sentence can be just or unjust. I do not here contend that the question 'Is it deserved?' is the only one we can reasonably ask about a punishment. We may very properly ask whether it is likely to deter others and reform the criminal. But neither of these two last questions is a question about justice. There is no sense in talking about a 'just deterrent' or a 'just cure.' We demand of a deterrent not whether it is just, but whether it will deter. We demand of a cure not whether it is just, but whether it succeeds. Thus, when we cease to consider what the criminal deserves and consider only what will cure him or deter others, we have tacitly removed him from the sphere of justice altogether; instead of a person, a subject of rights, we now have a mere object, a patient, a 'case.'³⁰⁸

Notice how Lewis' concern is tied to the biblical concept of humankind's nature. The fact that human beings are created in God's image means that they are not merely patients to be cured or objects to be deterred. To Lewis, rather than being cruel, the retributive model promotes the dignity of human beings. "[T]o be punished, however severely, because we have deserved it, because we 'ought to have known better', is to be treated as a human person made in God's image."³⁰⁹

³⁰⁶ C.S. LEWIS, *GOD IN THE DOCK* 287 (Walter Hopper ed., 1970).

³⁰⁷ Note that this is identical to the approach the Professor takes when he criticizes God for not acting more "humane" by substituting fleeting human notions for eternal principles of justice. DERSHOWITZ, *supra* note 2, at 63. And just as proponents of the "Humanitarian theory" did, the Professor ends up missing true justice altogether.

³⁰⁸ LEWIS, *supra* note 306, at 288.

³⁰⁹ *Id.* at 292. Lewis further argues that the Humanitarian theory, if separated from desert, has the potential for great cruelty. If deterrence is the sole goal, "it is not absolutely necessary that the man we punish should even have committed the crime. The deterrent

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Professor Dershowitz mentions the “image-bearing” nature only once in the entire book, but never makes the connection between the image of God and justice as described above.

True justice in punishing offenders is based on the principle of just desert. Here is an example of where solid biblical thinking can bring proper answers about what the law should be. Professor Dershowitz is right in that Scripture makes moral claims. Its teachings are relevant and useful in this and many other issues. If done well, the integration of Scripture and law can give great guidance in a world lurching from one legal theory to another. It points us to truths that cut across all times and all cultures. As with descriptive integration, normative biblical integration is a fruitful inquiry that demands pursuit.

V. CONCLUSION

Our understanding of justice does not arise out of a vacuum. Good lawyers know that to really understand legal rules and institutions, they must know the background and history of those rules and institutions. Professor Dershowitz does us a great service by reminding us how many biblical passages and themes have influenced modern conceptions of justice. *THE GENESIS OF JUSTICE* reveals the usefulness of integrating biblical and legal principles.

But it also reveals the potential dangers of that integration. To do it properly, we must approach the Bible - as we do any text - with an adequate set of interpretive rules, like those discussed above. This approach, rather than squelching interpretive possibilities, opens up a world of possibilities. Suddenly, we have the possibility of finding answers. We are not left in the Professor’s post-modern world where every answer is as good as any other - or, more accurately, where no answer is any better than any other. Instead, we can draw historically and theologically true conclusions about what justice is. And that, in turn, gives us both a better understanding of the origin of existing legal rules and institutions and concrete guidance about what legal rules and institutions we should have.

We encourage you to make your reading of *THE GENESIS OF JUSTICE*, the beginning, not the end, of your study of the integration of biblical

effect demands that the public should draw the moral, ‘If we do such an act we shall suffer like that man.’ The punishment of a man actually guilty whom the public think innocent will not have the desired effect; the punishment of a man actually innocent will, provided the people think him guilty.” *Id.* at 291.

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and legal principles. Further study will make you better law students, lawyers, and scholars. We also encourage you, as did the professor, to pass on to him and us the conclusions of that study.

