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# The Price is Wrong: A Biblical Approach to Punitive Damages

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## COMMENT

### THE PRICE IS WRONG: A BIBLICAL APPROACH TO PUNITIVE DAMAGES

*Zachary Hurt*<sup>†</sup>

#### I. INTRODUCTION

This Comment argues for the application of a biblical legal standard to the field of punitive damages, starting with a review of the biblical foundations for law and the current state of punitive damages practice in the United States generally, and Virginia specifically. Next follows an examination of the biblical principles of justice with respect to what would today be termed civil and criminal actions. The Comment concludes with a comparison between the established biblical standards for justice and modern punitive damages practice, and a determination that punitive damages do not belong as a part of the civil plaintiff's case.

##### A. *Biblical Foundation*

Fundamental to this Comment is a set of presuppositions about God and Scripture that must be absolutely clear before any critique of modern punitive damages practice can be coherently addressed. First among these presuppositions is that God is,<sup>1</sup> and is triune,<sup>2</sup> and is the creator of the universe.<sup>3</sup> Second is that God has spoken to man not just through his creation,<sup>4</sup> but also authoritatively through Scripture.<sup>5</sup> This second assertion needs some explanation, as it might appear to some to be invalid circular reasoning. One might ask, "How can you support your assertion of Biblical

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<sup>†</sup> *Notes and Comments Editor*, LIBERTY UNIVERSITY LAW REVIEW, Volume 10. J.D. Candidate, Liberty University School of Law (2016).

1. *E.g.*, Genesis 1:1 (KJV); John 8:58 (KJV).

2. *See, e.g.*, Matthew 28:19 (KJV) ("Go ye therefore, and teach all nations, baptizing them in the name of the *Father, and of the Son, and of the Holy Ghost.*") (emphasis added); 1 John 5:7 (KJV) ("For there are three that bear record in heaven, the Father, the Word, and the holy Ghost: *and these three are one.*") (emphasis added).

3. Genesis 1 (KJV).

4. *See Romans* 1:19-20 (KJV) (stating that God's eternal power, invisible attributes, and divine nature are made clear through creation); *Id.* at 2:14 (stating that unbelievers sometimes follow God's Law simply by nature).

5. 2 *Timothy* 3:16 (KJV) ("All Scripture is given by inspiration of God, and is profitable for doctrine, for reproof, for correction, for instruction in righteousness.").

authority with a citation to the Bible?” In response, any argument must necessarily be based upon certain assumptions. Scientific hypotheses, for instance, are tested upon the assumption that natural forces remain consistent, and *all* arguments are based upon the assumption that speech has meaning, that mankind can reason, and that humans are capable of understanding. Thus, to assume—or presuppose—that God is, and that Scripture is His revealed Word, is to take no greater liberty than a scientist takes in his experiments, or the average man takes in simply striking up a conversation with his neighbor and trusting that he will be understood. These two presuppositions lead naturally to a third, which is that Scripture—as the authoritative word of the Creator—is binding upon all men, in all places, at all times; not just in a spiritual, personal sense, but in a moral, legal sense as well.

This third presupposition requires an even more extensive treatment than the second, as it is not a position fully recognized even among Christians. It is clear at the very least that God is concerned with human law and justice. A foremost example of this principle is the Ten Commandments given by God to the people of Israel at Mount Sinai.<sup>6</sup> The basic precepts set out on Moses’s tablets were further expounded in God’s direct revelation to Moses, as God set out specific legal rules with respect to all aspects of life, from building codes,<sup>7</sup> to rules governing treatment of servants,<sup>8</sup> and guidelines for remedying tortious acts.<sup>9</sup> Now it is true that these laws were originally given only to the Jews within the context of the temple system, not to the world at large. But circumstances have changed. God no longer gives His revelation through one special people—i.e. the Jews—who were located in the midst of a world almost entirely opposed to God and with demonic princes vying for apparent control over earthly affairs.<sup>10</sup> In sending Christ to earth to die, be resurrected, and to ascend to the right hand of the Father,<sup>11</sup> God has made it unequivocally clear that He rules all creation. In His last address to his disciples, Jesus stated that “all power is given unto me in heaven and in earth,”<sup>12</sup> and it was under that

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6. *Exodus* 20 (KJV).

7. *Deuteronomy* 22:8 (KJV) (“When thou buildest a new house, then thou shalt make a battlement for thy roof, that thou bring not blood upon thine house, if any man fall from thence.”).

8. *E.g.*, *Exodus* 21:2-11 (KJV).

9. *E.g.*, *Id.* at 22:1-17.

10. *See, e.g.*, *Daniel* 10:13 (KJV); *Ephesians* 6:12 (KJV).

11. *Acts* 2:33 (KJV).

12. *Matthew* 28:18 (KJV).

grant of power that the disciples were to go to all the nations and teach them the truth of Christ's kingship.<sup>13</sup> Because Christ now sits on His throne in heaven ruling all the kingdoms of the world,<sup>14</sup> every person is subject to his rule, and therefore subject to His law. This truth is not contingent upon our own or any other nation's assent to that fact. Thus, God's supreme law—as described in the Bible—applies to everyone, and any law counter to God's is invalid.<sup>15</sup>

These three principles are presumed for the argument below.<sup>16</sup> And lest this appeal to God and Scripture appear too un-academic for serious legal discussion, it is important to note that any critique of the status quo must be based either on an appeal to pragmatism—i.e. empirical proof that the current system does not achieve its man-created ends—or must otherwise be based on an appeal to transcendent moral principles which govern man independently of what man sees as appropriate or effective. Furthermore, if these foundational moral principles are sound, then a system based off of those principles will certainly be more effective in practice than an approach that originates in the genius of finite, fallen man.<sup>17</sup>

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13. *Id.* at 28:19.

14. *Revelation* 11:15 (KJV); *Id.* at 4:2-4.

15. Not all of the Old Testament law, of course, applies today, or even applied to non-Israelites at the time the law was given to Israel. Theologian John Frame helpfully points out that, "A holy nation is ruled differently from other nations. Most all of us recognize that the laws given to Israel concerning animal sacrifices, dietary laws, clothing, and grooming were not literally applicable to nations outside Israel, nor do they literally bind nations today." John M. Frame, *Toward a Theology of the State*, 51 WESTMINSTER THEOLOGICAL J. 2, 199, 202 (Fall 1989). Frame further states, however, that, "It is unlikely . . . that the special holiness of Israel invalidates all literal application of Mosaic laws and penalties today. The penalty of double restitution for theft, for example (Exodus 22:4, 7) is a matter of simple justice . . ." *Id.* at 202 (emphasis omitted).

16. The author is not alone in taking the Bible as a starting point. Frame takes an identical presuppositional approach in his *Towards a Theology of the State*. Before engaging in his main argument he makes clear that his starting points are that Scripture is "the supreme authority for all areas of human life," that "[e]verything God says in Scripture applies to us today," that "Scripture is *sufficient* as a transcript of God's will for all areas of human life," and that Old Testament law "continues to exercise authority over the [New Testament] believer." *Id.* at 200 (emphasis in original).

17. "For the Lord knoweth the way of the righteous; but the way of the ungodly shall perish." *Psalms* 1:6 (KJV).

B. *The Historical Progression of Punitive Damages*

Today, “the rise of modern mass tort litigation in the U.S. has transformed punitive damages into something of a ‘hot button’ issue.”<sup>18</sup> A casual search of any legal database yields myriad—to use the term literally—law review articles discussing this legal chimera.<sup>19</sup> But what is missing from the mass of scholarship devoted to punitive damages is a biblical approach to the topic.

The doctrine of punitive damages is no newcomer to the law. Instead, “[t]he doctrine of punitive damages has an ancient lineage. The Babylonian Hammurabi Code, Hindu Code of Manu, and the Bible all contain precursors to the modern remedy of punitive damages.”<sup>20</sup> Authors Michael Rustad and Thomas Koenig identify the source of punitive damages in the English tradition as a method of punishing and deterring abuses of wealth and power against the poor.<sup>21</sup> By the end of the eighteenth century, “[t]he aim [of exemplary damages] was to deter crude forms of self-help such as dueling and feuding.”<sup>22</sup>

Punitive damages as a purely exemplary remedy existed early on in American jurisprudence.<sup>23</sup> In the eighteenth century case of *Coryell v. Colbaugh*, for instance, the Supreme Court of Judicature of New Jersey charged the jury on punitive damages in a bastardy case. The jurors were

to give damages for *example’s* sake, to prevent such offences in [the] future; and also to allow liberal damages for the breach of a sacred promise and the great disadvantages which must follow to her through life. That in this case they were to consider not only the past injury, but every consequence in [the] future. [The Chief Justice] repeated in very strong terms his detestation of such conduct, and told the jury they were bound to no certain damages, but might give such a sum as would mark their disapprobation, and be an example to others.<sup>24</sup>

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18. Daniel M. Braun, *The Risky Interplay of Tort and Criminal Law: Punitive Damages*, 11 CARDOZO PUB. L. POL’Y & ETHICS J. 449, 449 (2013).

19. See *id.* at 450 for a discussion of the “quasi-criminal” nature of civil punitive damages.

20. Michael Rustad & Thomas Koenig, *The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers*, 42 AM. U. L. REV. 1269, 1285 (1993).

21. *Id.* at 1289.

22. *Id.* at 1289-90.

23. *Id.* at 1290-91.

24. 1 N.J.L. 77, 77-78 (1791) (emphasis original).

Although originally focusing on conduct of individuals, “[b]y the end of the nineteenth century . . . [the] application [of punitive damages] shifted away from powerful individuals to large corporations.”<sup>25</sup> Reflective of the British practice, “[t]he awarding of exemplary damages [in America] was one of the few effective social control devices used to patrol large powerful interests unimpeded by the criminal law.”<sup>26</sup> While the legitimacy of punitive damages was certainly a matter of debate, with critics of the theory decrying the admixture of public and private law,<sup>27</sup> “few jurisdictions repudiated the doctrine of punitive damages.”<sup>28</sup>

Today, punitive damages are alive and well, and function essentially as criminal penalties, civilly enforced.<sup>29</sup> As the Supreme Court stated in the seminal punitive damages case of *BMW of North America*, “[p]unitive damages may properly be imposed to further a State’s legitimate interests in punishing unlawful conduct and deterring its repetition.”<sup>30</sup> However, punitive damages have not always existed as a type of “quasi-criminal” punishment. John Calvin Jeffries states that:

[S]ome authorities and a few courts identify compensation for otherwise uncompensated losses as a purpose of punitive damages. In large measure, this is mere anachronism. It survives from the days when pain and suffering, mental anguish, and other intangible harms were not permissible elements of an ordinary compensatory award.<sup>31</sup>

Were this early conception of punitive damages still in force, perhaps the field would need no adjustment. But as massive punitive awards,<sup>32</sup> such as the award in *BMW*,<sup>33</sup> justified in the name of retribution and deterrence make clear, the pseudo-criminal approach to punitive damages has highly

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25. Rustad & Koenig, *supra* note 20, at 1294-95.

26. *Id.* at 1296.

27. *Id.* at 1299.

28. *Id.* at 1301.

29. Braun, *supra* note 18, at 450.

30. *BMW of N. Am. v. Gore*, 517 U.S. 559, 568 (1996) (emphasis added).

31. John Calvin Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 VA. L. REV. 139, 149-50 (1986).

32. See, e.g., *The Top Punitive Damages Awards of 2012*, CAL. PUNITIVE DAMAGES: AN EXEMPLARY BLOG (Oct. 6, 2014), <http://www.calpunitives.com/2013/01/the-top-punitive-damages-awards-of-2012.html>.

33. *BMW*, 517 U.S. at 563-65 (stating that the plaintiff was awarded \$4,000 in compensatory damages, and received \$2,000,000 in punitive damages after remittitur by the Alabama Supreme Court).

disproportionate consequences only partially remedied by the Supreme Court's interposition of constitutional protections.<sup>34</sup>

Large punitive damage awards have not gone unchallenged, even among lawyers approaching the topic from a secular viewpoint. A recent article from the Virginia Law Review addressed the problem of multiple punitive damages.<sup>35</sup> In "Surprisingly Punitive Damages," Professor Bert I. Huang identifies the problem of punitive damages being awarded to multiple plaintiffs, creating a redundant and super-punitive effect.<sup>36</sup> Professor Huang proposes as a solution a system of "concurrent damages" under which courts would ensure that any punitive damages awards would take into account prior awards stemming from the same conduct, and so be able to prevent the overly punitive redundancy.<sup>37</sup> In a 2013 article from the Missouri Law Review, attorneys Victor Schwartz and Christopher Appel advocate for a system of punitive damages that would consider comparative fault.<sup>38</sup> Another approach was advanced by professor Elliot Klayman and rabbi Seth Klayman, who note that, "[w]eaknesses in the modern application of punitive damages for tortious conduct abound,"<sup>39</sup> and seek to address the problems with punitive damages through a system pegged to provisions in the Torah.<sup>40</sup>

These are but a few of the many articles published in the last few years searching for a solution to the problem of punitive damages. Unsurprisingly, none of these commentators challenge the propriety of punitive damages as even belonging in the civil law, and only one critiques the current state of punitive damages on biblical grounds. But the voices of dissent are indicative of a real problem that exists in American civil law; a problem this Comment addresses through appeal to principles even more fundamental than economic theory.

Although the law of punitive damages is certainly vulnerable to attack on purely pragmatic grounds, the disproportionality inherent in modern

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34. See, e.g., *Coalson v. Canchola*, 754 S.E.2d 525 (Va. 2014), discussed *infra* in section VII(b), for a case affirming a jury award 17.86 times greater than the compensatory award.

35. Bert I. Huang, *Surprisingly Punitive Damages*, 100 VA. L. REV. 1027 (2014). Multiple punitive damages awards are one iteration of excessive awards in civil cases.

36. *Id.* at 1028.

37. *Id.* at 1030.

38. Victor E. Schwartz & Christopher E. Appel, *Two Wrongs Do Not Make a Right: Reconsidering the Application of Comparative Fault to Punitive Damage Awards*, 78 MS. L. REV. 133 (2013).

39. Elliot Klayman & Seth Klayman, *Punitive Damages: Toward Torah-Based Tort Reform*, 23 CARDOZO L. REV. 221, 222 (2001).

40. *Id.* at 224-25.

punitive damages practice reveals an even more fundamental flaw in a broken legal philosophy that misunderstands the purpose of the civil law. In order to discover the actual purpose of the civil law it is necessary to go to the law's origin in Scripture; for it is only when man's law aligns with God's law that we can hope to maintain logical and just categories within the law. As the Psalmist said, "The law of the Lord is perfect, converting the soul: the testimony of the Lord is sure, making wise the simple. The statutes of the Lord are right, rejoicing the heart; the commandment of the Lord is pure, enlightening the eyes."<sup>41</sup> The American Founders recognized this principle, appealing to the "Laws of Nature and of Nature's God"<sup>42</sup> to justify breaking their long association with the British Crown and Parliament. Unfortunately, that original framework of law has been largely discarded, with inequitable results in many areas of the law, not least of which is punitive damages within civil litigation.

## II. THE MODERN FRAMEWORK OF PUNITIVE DAMAGES

In order to critique American punitive damages practice, it is first necessary to clearly establish the nature of modern punitive damages by examining several of the seminal Supreme Court cases on the subject, and a recent Virginia Supreme Court case. Both the United States and Virginia supreme courts follow essentially the same line of reasoning, and so fall prey to identical problems when compared to the biblical standards of justice.

### A. *The Federal Approach*

As a matter of constitutional requirements, all state punitive damages awards are tempered by the Supreme Court's due process holdings in *BMW v. Gore* and *State Farm v. Campbell*.<sup>43</sup> But besides the minimal standards of reasonableness and three general guideposts, these cases offer little in the way of restraint against punitive jury awards far out of proportion—at least in a mathematical sense—to the actual harm done. Accordingly, the Supreme Court's constitutional requirements give juries vast leeway to decide what they think is just on a case-by-case basis. This disproportionality and arbitrariness alone surely cannot meet the biblical

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41. *Psalm* 19:7-8 (KJV).

42. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

43. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996); *State Farm Mut. Ins. Co. v. Campbell*, 538 U.S. 408 (2003).



standards for justice.<sup>44</sup> Furthermore, and more fundamentally, the very purpose and effect of punitive damages as an additional tool of the state to punish individuals for their wrongdoing are inconsonant with the principles of restitution that pervade biblical law.

In *BMW*, the Supreme Court broke new ground by clarifying the field of punitive damages with three guideposts for determining whether an award is “grossly excessive” and, therefore, unconstitutional.<sup>45</sup> Establishing a somewhat more defined standard designed to give fair notice to potential defendants,<sup>46</sup> the *BMW* Court set out as guideposts (1) “the degree of reprehensibility of the defendant’s conduct,” (2) “the disparity between the harm or potential harm suffered by [the plaintiff] and his punitive damages award,” and (3) “the difference between [the punitive] remedy and the civil penalties authorized or imposed in [similar] cases” as the relevant factors in determining whether an award is grossly excessive.<sup>47</sup> Declining to institute a fixed standard, the Court continued its practice of avoiding a “mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case.”<sup>48</sup> Instead, each case would have to be evaluated upon its own facts, albeit now with specific reference to the *BMW* guideposts.

Seven years later in *State Farm*, the Court lent some greater degree of specificity to the constitutional requirements with the statement that, “[o]ur jurisprudence and the principles it has now established demonstrate . . . that, in practice, few awards exceeding a *single-digit ratio* between punitive and compensatory damages, to a significant degree, will satisfy due process.”<sup>49</sup> However, the Court still declined to set a hard cap for punitive damages, stating that “ratios greater than those we have previously upheld *may comport with due process* where ‘a particularly egregious act has

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44. See *infra* Part III (discussing biblical standards of justice).

45. *BMW*, 517 U.S. at 574-75. Previously, the grossly excessive standard was informed only by a much more general reasonableness standard. See, e.g., *TXO Prod. Corp. v. All. Res. Corp.*, 509 U.S. 443 (1993). In *TXO* the Court upheld a punitive damages award of \$10,000,000, 526 times greater than the \$19,000 compensatory award. *Id.* at 451.

46. *BMW*, 517 U.S. at 574 (“Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.”).

47. *Id.* at 575.

48. *Id.* at 583 (quoting *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991)); see also *TXO*, 509 U.S. at 458 (also quoting *Haslip*).

49. *State Farm Mut. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003) (emphasis added).

resulted in only a small amount of economic damages.”<sup>50</sup> Thus, the precise bounds of constitutionally allowable punitive damages remain ill-defined, and the amount of awards continues to be largely dependent upon the judgment of the jury, rather than any firmly established principles of justice.

At the root of the punitive damages problem is the judiciary’s confusion as to the respective purposes of private and public law. Unlike the clearly defined and separate nature of and response to civil harm and public crime in the Bible,<sup>51</sup> punitive damages as applied today confuse the ends of justice by creating a hybrid class of wrongs seemingly criminal in nature,<sup>52</sup> but punished by private citizens and under the minimal burdens of civil law.<sup>53</sup> As the Court stated in *BMW*, “Punitive damages may properly be imposed to further a *State’s* legitimate interests in punishing unlawful conduct and deterring its repetition.”<sup>54</sup> Despite the fact that it is the state’s interest, not the plaintiff’s, that is vindicated by an award of punitive damages,<sup>55</sup> it is the civil plaintiff who seeks damages and who receives payment not only beyond the actual harm suffered, but even beyond the malfeasance actually committed by the defendant. In *TXO*, for instance, the Court justified upholding the massively disproportionate award based partly upon its assertion that, “[i]t is appropriate to consider the magnitude of the *potential harm* that the defendant’s conduct would have caused to its intended victim if the wrongful plan had succeeded, as well as the possible harm to *other victims* that might have resulted if similar future behavior were not deterred.”<sup>56</sup> There is no basis for such a system in the biblical law.

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50. *Id.* at 425 (quoting *BMW*, 517 U.S. at 582) (emphasis added).

51. See discussion *infra*, Section III.

52. The *BMW* court, for instance, stated that, “Perhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant’s conduct. As the Court stated nearly 150 years ago, exemplary damages imposed on a defendant should reflect the enormity of his offense.” *BMW*, 517 U.S. at 575 (internal quotation marks omitted) (internal footnote omitted).

53. See *State Farm*, 538 U.S. at 417 (“Although [punitive damages] awards serve the same purposes as criminal penalties, defendants subjected to punitive damages in civil cases have not been accorded the protections applicable in a criminal proceeding); see also 2 PUNITIVE DAMAGES: LAW AND PRAC. 2d § 19:21 (2014 ed.) (“the modern trend among those courts which have directly confronted the issue appears to require proof of liability for punitive damages by evidence that is clear, satisfactory and convincing”).

54. *BMW*, 517 U.S. at 568 (emphasis added).

55. It is, after all, “presumed a plaintiff has been made whole for his injuries by compensatory damages.” *State Farm*, 538 U.S. at 419.

56. *TXO Prod. Corp. v. All. Res. Corp.*, 509 U.S. 443, 460 (1993) (second emphasis added).

B. *The Virginia Approach*

In Virginia, the state of punitive damages is no better from the standpoint of biblical principles. Although Virginia has a statutory cap on punitive awards,<sup>57</sup> the standards for determining the amount below the cap suffer from the same philosophical and judicial infirmities present in the federal system. Exemplifying this state of affairs is the recent case of *Coalson v. Canchola*. In *Coalson*, the Virginia Supreme Court reviewed the validity of punitive damages awarded in a drunk-driving case.<sup>58</sup> The two plaintiffs, Coalson and Stemke, were awarded \$5,600 and \$14,000 respectively in compensatory damages, but each was awarded \$100,000 in punitive damages.<sup>59</sup> Noting the disparity between the compensatory awards, the circuit court remitted Coalson's punitive damages to \$50,000.<sup>60</sup>

At the start of its analysis, the court clearly laid out its adherence to the criminal punishment and deterrence theory of punitive damages. The court stated that "[t]he purpose of punitive damages is to provide protection of the public, punishment to the defendant, and a warning and example to deter him and others from committing like offenses."<sup>61</sup> The court then laid out the four factors relevant to a remittitur inquiry: (1) the "reasonableness between the damages sustained and the amount of the award and the measurement of punishment required," (2) "whether the award [would] amount to a double recovery," (3) "the proportionality between the compensatory and punitive damages," and (4) "the ability of the defendant to pay."<sup>62</sup>

As discussed above, courts continue to assert the requirement of a relationship between the compensatory award and punitive damages, but in actuality the emphasis is on the defendant's reprehensibility.<sup>63</sup> In its state law analysis, the Virginia Supreme Court reversed the remittitur based on the fact that "[the defendant's] punitive damages [were] reasonably related to her actual damages and to the degree of necessary punishment, which in

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57. VA. CODE ANN. § 8.01-38.1 (capping all punitive damages awards at \$350,000).

58. *Coalson v. Canchola*, 754 S.E.2d 525 (Va. 2014).

59. *Id.* at 526.

60. *Id.*

61. *Id.* at 528 (citations omitted) (quotations omitted).

62. *Id.*

63. See, e.g., *State Farm Mut. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003) ("The most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct.") (citations omitted) (quotations omitted); *Coalson*, 754 S.E.2d at 530 (stating that "the first [*Gore*] guideline . . . is the most important of the three . . .").

this case is great.”<sup>64</sup> The court further stated that although the ratio of 1:17.86 was “high,” “given the reprehensible and dangerous nature of Canchola’s conduct, it [was] not ‘unreasonable or strikingly out of proportion,’”<sup>65</sup> and did not “shock the Court’s conscience.”<sup>66</sup>

Proceeding to the *BMW/State Farm* constitutional analysis, the Virginia Supreme Court focused on the first *BMW* guidepost—reprehensibility—and, given the egregious nature of the defendant’s conduct, the court held that, “[t]he 1:17.86 ratio in this case is not excessive, for [the defendant] had demonstrated a need for stronger medicine to cure his disrespect for the law.”<sup>67</sup> The court also relied on the third *BMW* guidepost—comparison to criminal penalties for similar conduct—to further establish the Commonwealth’s interest in deterring such behavior.<sup>68</sup> Accordingly, the court found that the unremitted punitive award passed constitutional muster.

There is no substantive difference between Virginia’s approach to punitive damages and that employed by the United States Supreme Court. Under both its state law remittitur analysis and constitutional due process analysis, the Virginia Supreme Court focused almost exclusively on the defendant and his reprehensible conduct. This approach is obviously consistent with the modern conception of punitive damages, but is by that token fundamentally opposed to biblical standards of justice.

### III. A BIBLICAL FRAMEWORK FOR PUNITIVE DAMAGES

Now that the modern framework for punitive damages has been described, it is necessary to determine what God’s law, as revealed in Scripture, has to say about civil damages, and what changes those principles require of the modern system. This section will approach the question of biblical interpretations from the perspective of particular restitutionary laws set out in the Pentateuch, from the perspective of biblical jurisdiction, and from a broad perspective of the covenantal, restorative story of the Bible as a whole which reveals as much—or more—about God’s will for his creation than do the specific provisions found in the law of Moses.

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64. *Coalson*, 754 S.E.2d at 529.

65. *Id.* (citation omitted).

66. *Id.*

67. *Id.* at 531.

68. *Id.*

A. *A Note on Hermeneutics*

Before delving into the biblical text, a brief note on exegetical method is necessary. As with all fundamental documents such as constitutions, charters, and, as here, religious texts, any application to modern scenarios must be based on some degree of interpretation. This is because every written work is a product of its own time, and therefore limited in uninterpreted application by antiquated vocabulary, outdated technology,<sup>69</sup> or simply changed circumstances.<sup>70</sup> As mentioned previously, this Comment assumes the veracity and authoritativeness of Scripture as a first principal upon which all the remaining premises and conclusions are built. But assuming the veracity of a text and understanding the application thereof are two very different propositions indeed.

So, in order to understand the relevance of scriptural truths penned in the ancient world by men—albeit inspired men—thinking and writing in terms of their own age, it is necessary to identify general principles of justice and morality that may be readily applied in our own historical epoch. John Frame writes of this problem in terms of “continuity” and “discontinuity” between how the law was applied in the Old Testament, and how it applies today.<sup>71</sup> He writes that,

In order to understand God’s laws, it is necessary to know something about the situations to which those laws were addressed . . . In order to understand how God’s laws apply to us today, it is necessary to compare our situation with the situations originally addressed. Only insofar as our situation is the same as the original will the law apply *literally* . . . Therefore a change in situation always leads to some change in the *application* of a law. This principle bears not only upon the application of [Old Testament] laws to [New Testament] believers. It is a general principle of language.<sup>72</sup>

Determining the continuity and discontinuity between the Old and New Testaments, then, is the principle task of the Christian jurist. For when we understand the principles of biblical justice, the question of what law should govern our society becomes not one of formulation, but application; and

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69. The U.S. Constitution, for instance, does not provide for the creation of an air force.

70. A good example of this is The Bill of Rights, which took on a whole new importance with the addition and subsequent interpretation of the Fourteenth Amendment to the constitutional landscape.

71. Frame, *supra* note 15, at 201.

72. *Id.* at 200.

application is surely the simplest, if not the most easily achieved, step in adhering faithfully to biblical law.

Some biblical principles need little interpretation. The prohibition against coveting in the Ten Commandments, for instance, uses oxen and servants (hardly the ordinary objects of modern man's desire) as examples of things not to covet,<sup>73</sup> but clearly establishes a broader and easily understood principle against covetousness and theft readily applicable today. As reverse examples, passages like Acts 10, where Peter is told to eat food previously proscribed under the Mosaic law,<sup>74</sup> or Hebrews 10, where the author of Hebrews announces the inefficacy of the sacrificial system,<sup>75</sup> clearly retire elements of the Mosaic law. With the current topic of civil damages, however, the biblical principles are not so readily applicable without interpretation. Accordingly, deriving general principles of justice with respect to damages and punishment can best be accomplished by examining many individual examples of how justice was applied in the Bible in order to identify the unstated, underlying principle guiding each specific application. These general principles, once derived, can then be applied directly to the legal and political circumstances of our own time.

#### B. *Principles of Restitution in the Pentateuch*

The five books of the Law are replete with rules governing civil conduct, such as the requirement that a person build a parapet around the top of their house,<sup>76</sup> or the proscription against unjust weights and measures.<sup>77</sup> The most helpful biblical examples, however, are those found in Exodus 22, because it is in that chapter that we are given specifics about calculating damages for breaches of civil duty:

If a man shall steal an ox, or a sheep, and kill it, or sell it; *he shall restore five oxen for an ox, and four sheep for a sheep.* If a thief be found breaking up, and be smitten that he die, there shall no blood be shed for him. If the sun be risen upon him, there shall

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73. *Exodus* 20:17 (KJV).

74. *Acts* 10 (KJV) (making clear that the old divisions between clean and unclean, Gentile and Jew, are broken down under the sacrifice and reign of Christ).

75. *Hebrews* 10:8-10 (KJV) ("Above when he said, Sacrifice and offering and burnt offerings and offering for sin thou wouldest not, neither hadst pleasure therein; which are offered by the law; Then said he, Lo, I come to do thy will, O God. He taketh away the first, that he may establish the second. By the which will we are sanctified through the offering of the body of Jesus Christ once for all.")

76. *Deuteronomy* 22:8 (KJV).

77. *Id.* at 25:13-14.

be blood shed for him; *for he should make full restitution*: if he have nothing, then he shall be sold for his theft. If the theft be certainly found in his hand alive, whether it be ox, or ass, or sheep; *he shall restore double*. If a man shall cause a field or vineyard to be eaten, and shall put in his beast, and shall feed in another man's field; of the best of his own field, and of the best of his own vineyard, *shall he make restitution*. If fire break out, and catch in thorns, so that the stacks of corn, or the standing corn, or the field, be consumed therewith; *he that kindled the fire shall surely make restitution*. If a man shall deliver unto his neighbor money or stuff to keep, and it be stolen out of the man's house; if the thief be found, let him pay double . . . *For all manner of trespass*, whether it be for ox, for ass, for sheep, for raiment, or for any manner of lost thing which another challengeth to be his, the cause of both parties shall come before the judges; and whom the judges shall condemn, *he shall pay double unto his neighbor*.<sup>78</sup>

The important lesson from this passage is that the focus of the penalty is on the person wronged, rather than on the wrongdoer. The penalty for wrongdoing is measured not in terms of the moral culpability of the tortfeasor, but in terms of the magnitude of the wrong done to the property owner. Thus, whether the wrongdoing is negligently setting a wildfire, grazing one's cows in the neighbor's field, or burglary and theft, the result is the same; the wrongdoer is to pay double what he has taken or deprived the owner of.<sup>79</sup> This result may surprise the modern jurist accustomed to tort and criminal concepts of degrees of negligence and culpability designed to make the punishment fit the crime. Indeed, the fact that mere restitution is required for the acts of burglary and theft, the same as it is for battery and negligence, raises the question of whether the criminal/civil division is even proper. Leaving that debate aside, however, it is sufficient to note that the fact that the common and sole requirement of restitution for disparate wrongs with disparate culpabilities—to use a modern term—shows that the driving force behind Old Testament civil “damages” is restorative, not punitive.<sup>80</sup>

It might be argued that the quadruple and quintuple damages in cases where a thief kills or sells stolen sheep and oxen shows that Exodus 22 has

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78. *Exodus* 22:1-7, 9 (KJV) (emphases added).

79. *Id.*; see also *id.* at 21:18-19 (mandating restitution for battery).

80. *But see* Klayman & Klayman, *supra* note 39, at 228 (classifying each Exodus 22 multiple-damage provision as punitive).

punishment as its primary goal.<sup>81</sup> However, an explanation more consistent with the restorative nature of the passage as a whole is that the reason for the greater penalty is the greater harm done to the property owner. Adam Clarke explains the increased damages through an examination of the Hebrew text, and concludes that the stolen animals in verse one are different than the animals being given as restitution, with the proper translation being, “If a man steal a bull he shall give five oxen for him.”<sup>82</sup> Clarke then says that “we may presume [that restoring five oxen for a bull] was no more than his real value, as very few *bulls* could be kept in a country destitute of *horses*, where *oxen* were so necessary to till the ground.”<sup>83</sup> Thus, under Clarke’s conclusion, a more proper reading of verse one would be that “[i]f a man shall steal *a bull*, or a sheep *or a goat*, and kill it, or sell it; he shall restore five oxen for *a bull*, and four sheep *or goats* for a sheep.”<sup>84</sup> Under this interpretation, the value of the animals given as restitution is no greater than the value of what was taken.

Several authors have written in support of a more punitive interpretation of Exodus 22. In his *Commentaries*, John Calvin focused his attention on the wrongdoer, saying that “the principle of [the civil law] is not so exact and perfect [as the criminal law]; since in [the civil law’s] enactment God has relaxed His just severity in consideration of the people’s hardness of heart.”<sup>85</sup> Calvin thus seems to view the Old Testament law as primarily a tool of God’s just retribution. Calvin disagreed with those who explained the quadruple and quintuple damages in terms of the usefulness of the animal.<sup>86</sup> Instead, he thought that

[t]hose seem to come nearer to the truth who say the audacity of the thief is punished who, when he stole the larger animal, did not fear being observed by witnesses; yet it seems to me more likely that the different sentence depended on the price of the article; for assuredly it is more reasonable that he who has done the most harm should be exposed to the greater punishment.<sup>87</sup>

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81. *Id.* at 230 (stating that “the excess damages are clearly punitive.”).

82. ADAM CLARKE, I A COMMENTARY AND CRITICAL NOTES 413 (Abingdon Press 1975) (emphasis omitted).

83. *Id.* at 413-14 (emphasis in original).

84. *Id.*

85. JOHN CALVIN, III COMMENTARIES 140 (Baker Books 1999).

86. *Id.*

87. *Id.* at 142.



Thus, Calvin views the damages provisions of Exodus 22 as primarily intended for punishment, not restitution.

To take the position opposite of Calvin's, the greater damages are reminiscent of modern general damages which "involve mental or physical pain or suffering, inconvenience, the loss of gratification or intellectual or physical enjoyment, or other losses of life of lifestyle, which cannot really be measured definitively in terms of money."<sup>88</sup> This would explain why the restitution is greater for an ox that is sold or killed, instead of one who is simply taken temporarily from its master.<sup>89</sup> An ox that was trained, or at least familiar to his owner, would be easier to handle and therefore more valuable.<sup>90</sup> This would also be true in the case of sheep that would have to be herded from place to place.<sup>91</sup> There are differing interpretations as to why sheep and oxen are treated differently with regard to the amount of restitution. Philo Judaeus, for instance, ties the discrepancy to the differing benefits each animal provided to its owner.<sup>92</sup> Others have noted the ox's usefulness for agriculture as the reason for the discrepancy. Theologian R.J. Rushdoony writes that,

[I]n most cases, restitution was required, i.e., a restoration of what was taken, or its equivalent, plus an additional amount. The additional amount could be up to five fold, depending on the nature of the offense. In Exodus 22, we see that the restitution had to be, in most cases, the equivalent of double the value. However, oxen were valuable for their trained status as beasts of burden, pulling wagons, plows, etc., and they were also valued

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88. 25 C.J.S. DAMAGES § 7 (2012).

89. *Exodus* 22:1 (KJV); *Id.* at 22:4.

90. See Drew Conroy, *Advance Training Techniques for Oxen*, TILLERSINTERNATIONAL.ORG, [http://tillersinternational.org/oxen/resources\\_techguides/AdvancedTrainingTechniquesforOxenTechGuide.pdf](http://tillersinternational.org/oxen/resources_techguides/AdvancedTrainingTechniquesforOxenTechGuide.pdf) (last visited Dec. 31, 2014).

91. See *Sheep 201: A Beginner's Guide to Raising Sheep*, SHEEP 101.INFO, <http://www.sheep101.info/201/handling.html> (last visited Dec. 31, 2014).

92. PHILO JUDAEUS, *Special Laws*, in 3 THE WORKS OF PHILO JUDAEUS 358 (C.D. Yonge trans., 1855) ("For he commands that the thief shall restore four sheep and five oxen in the place of the one which he has stolen; since a sheep gives four kinds of tribute, milk, and cheese, and its fleece, and a lamb, every year: but an ox furnishes five; three of which are the same as those of the sheep—the milk, the cheese, and the offspring; but two are peculiar to itself, the ploughing of the earth, and the threshing of the corn; the first of which actions is the first step towards the sowing of the crops, and the other is the end, being for the purification of the crop after it is gathered in, in order to the more easy use of it for food.").

for their hide and meat. . . . Sheep had a high value as food, as a source of wool, and because of their reproductive potential.<sup>93</sup>

If this interpretation is correct, it reinforces the conclusion that the penalties in Exodus 22, instead of being punitive, focus primarily on putting the wronged property owner back to the place he was prior to the theft.

Concededly, any restitutionary scheme which calls for more repayment than the specific amount taken by the wrongdoer contains at least some element of punishment. Indeed, the Bible is replete with statements and examples of God's righteous judgment against wrongdoers,<sup>94</sup> and any interpretation of the biblical code which ignored this aspect of God's nature could not fully and accurately represent the principles described therein. But comparing the above-referenced restitutionary requirement for many actions which would today be considered crimes to the purely penal recourse for some other actions highlights the primacy of restitution as the core of Biblical justice.

There is a class of wrongdoings described in the Pentateuch and answered solely by punishment. This includes rebellion against parents,<sup>95</sup> fornication,<sup>96</sup> adultery,<sup>97</sup> rape,<sup>98</sup> incest,<sup>99</sup> homosexuality,<sup>100</sup> bestiality,<sup>101</sup> murder,<sup>102</sup> severe negligence,<sup>103</sup> giving over a child to Molech,<sup>104</sup> witchcraft and wizardry,<sup>105</sup> blasphemy,<sup>106</sup> Sabbath-breaking,<sup>107</sup> false prophecy,<sup>108</sup> and

93. R.J. RUSHDOONY, III *THE INTENT OF THE LAW: THE INSTITUTES OF BIBLICAL LAW* 35 (Ross House Books 1999), <http://chalcedon.edu/research/books/the-intent-of-the-law-the-institutes-of-biblical-law-vol-3/>.

94. See, e.g., *Exodus* 20:5 (KJV) (“[F]or I the Lord thy God am a jealous God, visiting the iniquity of the fathers upon the children unto the third and fourth generation of them that hate me . . . .”); *Isaiah* 1:20, 28 (KJV) (“[I]f ye refuse and rebel, ye shall be devoured with the sword: for the mouth of the Lord hath spoken it . . . . And the destruction of the transgressors and of the sinners shall be together, and they that forsake the Lord shall be consumed.”).

95. *Deuteronomy* 21:18-21 (KJV).

96. *Id.* at 22:20-21.

97. *Id.* at 22:22.

98. *Id.* at 22:25.

99. *Leviticus* 18:6-18 (KJV).

100. *Id.* at 18:22.

101. *Id.* at 18:23.

102. *Id.* at 24:17.

103. *Exodus* 21:29 (KJV) (“[I]f the ox were wont to push with his horn in time past, and it hath been testified to his owner, and he hath not kept him in, but that he hath killed a man or a woman; the ox shall be stoned, and his owner also shall be put to death.”).

104. *Leviticus* 20:2 (KJV).

105. *Id.* at 20:27.

apostasy,<sup>109</sup> all of which carried the death penalty. The most apparent difference between these *crimes* and *civil* wrongs is that there is no economic remedy to the wrong. Murder, sexual sins, and rebellion against parents did not merely create some economic conflict between neighbors. Instead, God said that by these sins—which were the sins of the wicked nations God evicted from the Promised Land—the very land was defiled.<sup>110</sup> Making right the evil which had been done was no simple matter of giving back what was taken. Instead, the land had to be cleansed of the wickedness, and the only way to do that was by cutting off the wrongdoer. Thus, a sharp distinction appears between civil wrongs which could be resolved between persons, and more fundamentally blameworthy crimes which defiled the land and could not be made right by payment of money or goods.<sup>111</sup>

There is one passage in the Bible which seems to establish a third category of wrongdoing, which is also met solely with punishment. Deuteronomy 25:1-2 says:

If there be a controversy between men, and they come unto judgment, that the judges may judge them; then they shall justify the righteous, and condemn the wicked. And it shall be, if the wicked man be worthy to be beaten, that the judge shall cause him to lie down, and to be beaten before his face, according to his fault, by a certain number.<sup>112</sup>

This is the only passage in the Books of the Law that mentions corporal punishment. All the other instances of punishment listed above required capital punishment by way of stoning. The fact that the corporal punishment is administered as a result of a controversy *between men* might seem to indicate that corporal punishment was an appropriate remedy in

106. *Id.* at 24:16.

107. *Numbers* 15:32-36 (KJV).

108. *Deuteronomy* 13:1-5 (KJV).

109. *Id.* at 17:1-5.

110. *Leviticus* at 18:24-25 (KJV).

111. This distinction is referenced in the New Testament when John says: “If any man see his brother sin a sin which is not unto death, he shall ask, and he shall give him life for them that sin not unto death. *There is a sin unto death: I do not say that he shall pray for it.*” 1 *John* 5:16 (KJV) (emphasis added). While it is not clear exactly what sin John is referencing here, it is clear that a distinction remains even after Christ between wrongs which can be made right, and those which cannot. A similar sentiment is conveyed in *Mark* 3:28-29 (KJV), when Jesus says, “Verily I say unto you, All sins shall be forgiven unto the sons of men, and blasphemies wherewith soever they shall blaspheme: But he that shall blaspheme against the Holy Ghost hath never forgiveness, but is in danger of eternal damnation.”

112. *Deuteronomy* 25:1-2 (KJV).

civil actions. The fact that the passage refers to the subject of the beating a “wicked man,” however, is strong indication that a criminal wrong is at issue here. In Exodus 22, after enumerating a list of trespasses for which restitution is prescribed, comes this statement:

For all manner of *trespass*, whether it be for ox, for ass, for sheep, for raiment, or for any manner of lost thing which another challengeth to be his, the cause of both parties shall come before the judges; and whom the judges shall condemn, he shall pay double unto his neighbour.<sup>113</sup>

Here, the same judicial process is described in that the disputants bring their case before the judges, but the only remedy prescribed is double payment. The “condemned” party is not called “wicked,” and no corporal penalty follows from him being adjudged liable.

Accordingly, Deuteronomy 25 appears to set out the remedy for a class of wrongs not serious enough to require death, but also not the type of wrongdoing that could be settled between persons. As R.J. Rushdoony stated, corporal punishment applies to “minor offenses, not requiring restitution, where some kind of punishment is deemed necessary . . . .”<sup>114</sup> Matthew Henry writes that “[i]f the crime were not made capital by the law, then the criminal must be beaten. A great many precepts we have met with which have not any particular penalty annexed to them, the violation of most of which . . . was punished by scourging.”<sup>115</sup>

The fact that it is only a limited, enumerated number of wrongdoings—all of which share a common theme of non-economic harm—which are met with pure punishment instead of restitution highlights the primary place of restitution in God’s law. It is only in circumstances where a wrong cannot be righted between individuals that the criminal law attaches to an individual’s action. This commitment to restitution as the primary means of righting wrongs is further highlighted by a close look at biblical principles of jurisdiction, and a broader look at the overarching restitutionary themes of Scripture that reveal much about God’s intentions for how men should govern their personal and civic relationships.

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113. *Exodus* 22:9 (KJV) (emphasis added).

114. RUSHDOONY, *supra* note 93, at 53.

115. MATTHEW HENRY, I MATTHEW HENRY’S COMMENTARY ON THE WHOLE BIBLE 644 (Hendrickson Publishers 1992).

### C. A Question of Jurisdiction

Underlying the specific applications of civil and criminal law in the Old Testament is a more basic principle still; namely, that punishment is a task left to the civil magistrate, not the individual citizen. A prominent biblical commentary on the scope of the magistrate's authority is found in Romans 13, where Paul encourages the Roman Christians to "be subject unto the higher powers" who are placed in power by God in order to be a "terror" to evil works.<sup>116</sup> Paul writes that the magistrate "is the minister of God to thee for good. But if thou do that which is evil, be afraid; for *he beareth not the sword in vain: for he is the minister of God, a revenger to execute wrath upon him that doeth evil.*"<sup>117</sup> It is the magistrate's duty to bring evil men to justice, and it is the individual's duty to be subject to the magistrate "not only for wrath, but also for conscience sake,"<sup>118</sup> the Christian being bound by conscience to live in accordance with God's eternal decrees.

This same principle is evident in the Old Testament, although in a varied form. For the crimes that required punishment instead of restitution, it was not any individual who carried out vengeance, but the whole community in instances where the death penalty was required,<sup>119</sup> and at the command of a judge when corporal punishment was required.<sup>120</sup> The only instance of an individual being deputized to carry out punishment is the revenger of blood, who was a kinsman tasked with vindicating murder.<sup>121</sup> However, even this mechanism of justice was checked by the provision of cities of refuge where a murderer could flee for safety.<sup>122</sup> Once a person made it to the city, his life was dependent upon the judgment of the congregation, who was to "judge between the slayer and the revenger of blood" to determine whether the murder was accidental or premediated.<sup>123</sup> Thus, even though the revenger of blood carried out the final punishment, his power was checked by the independent judgment of the popular sovereign.

Both Paul's admonition in Romans and the provisions of the Mosaic Law make it clear that vengeance, which ultimately belongs to God,<sup>124</sup> is properly

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116. *Romans* 13:1-3 (KJV).

117. *Id.* at 13:4 (emphasis added).

118. *Id.* at 13:5.

119. *See, e.g., Deuteronomy* 13:9 (KJV).

120. *Id.* at 25:2.

121. *Numbers* 35:15-34 (KJV).

122. *Id.* at 35:15.

123. *Id.* at 35:24.

124. *Romans* 12:19 (KJV) ("[F]or it is written, Vengeance is mine; I will repay, saith the Lord.").

carried out by duly appointed magistrates, their deputies, or by the community as a whole, *not* by individuals. This jurisdictional framework makes eminent sense insofar as it recognizes fallen man's propensity to sacrifice justice for the sake of personal catharsis. Justice should be impartial, and reserving the execution of justice to third-party magistrates helps to preserve that impartiality. Civil punitive damages awards break this jurisdictional principle by deputizing citizens to carry out retribution against their fellow men in the context of harms that should be righted by restitution, not punishment.

#### D. *A Systematic Theology of Covenantal Restoration*

In reviewing the restitutionary requirements in the Pentateuch, Rushdoony states, "It is clear from [these provisions] how basic restitution and restoration are to God's law and will."<sup>125</sup> However, the specific laws contained in the Pentateuch are not the only locus of restitutionary principles in the Bible.

The entire story of Scripture is concerned with covenant and relationship. In the beginning, mankind was in perfect relationship with God, dwelling in the Garden of Eden with dominion over creation.<sup>126</sup> However, Adam's sin destroyed man's relationship with God and brought death to mankind.<sup>127</sup> This broken relationship could only be restored by payment of a proper price.<sup>128</sup> The entire Old Testament is the story of God continually working to bring His rebellious people back into relationship

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125. RUSHDOONY, *supra* note 93, at 45.

126. *Genesis* 1:26-27 (KJV) ("And God said, Let us make man in our image, after our likeness: and let them have dominion over the fish of the sea, and over the fowl of the air, and over the cattle, and over all the earth, and over every creeping thing that creepeth upon the earth. So God created man in his own image, in the image of God created he him; male and female created he them.").

127. *Romans* 5:12 (KJV).

128. *Id.* at 5:8-10.

with Himself,<sup>129</sup> with the culmination of those efforts being the person of Jesus Christ.<sup>130</sup>

This familiar story arc makes it clear that God desires a relationship between Himself and His children, and that achieving and preserving that relationship was one of the foremost goals in creating mankind perfectly in the Garden of Eden, and also after the Fall. The conclusion about God's will for the vertical relationship between God and men, however, does not automatically answer what God's will is for the horizontal relationship between men and men. The question is this: does the primacy of the restorative principle in God's relationship with mankind also apply to the interactions men have with one another? A few examples from the Old and New Testaments show that the answer to this question is a resounding "yes!" Mirroring the major story arc of the Bible—the breaking and restoration of relationship between God and man—is another arc: the breaking and restoration of relationship between man and man.

The fracture that the Fall caused—not solely between God and man, but also between man and man—was apparent from the very first children conceived in a sinful world. The saga of Cain and the murder of his shepherd brother Abel<sup>131</sup> showed clearly what would be the *status quo* between brothers and between all mankind in the post-Fall world. The typological relationship between Cain and Abel was replayed time and again throughout the Old Testament. The split between Abram and Lot<sup>132</sup> resulted in the corruption of Lot's family and the incestuous conception of Moab and Ammon,<sup>133</sup> both of whom would prove to be adversaries of Abram's descendants, the Israelites.<sup>134</sup> A similar storyline plays out between

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129. See, e.g., *Genesis* 3:15 (KJV) (giving the first promise of a savior with these words: "And I will put enmity between thee [Satan] and the woman, and between they seed and her seed; *it shall bruise thy head, and thou shalt bruise his heel.*") (emphasis added); *Isaiah* 1:23-27 (KJV) ("Therefore saith the LORD . . . I will ease me of mine adversaries, and avenge me of mine enemies: And I will turn my hand upon thee, and purely purge away thy dross, and take away all thy tin: And I will restore thy judges as at the first, and thy counsellors as at the beginning: afterward thou shalt be called, The city of righteousness, the faithful city. Zion shall be redeemed with judgment, and her converts with righteousness."); *Nehemiah* 1-13 (KJV) (bringing the Israelites back to Jerusalem after long captivity in Babylon).

130. *John* 3:16 (KJV) ("For God so loved the world, that he gave his only begotten Son, that whosoever believeth in him should not perish, but have everlasting life.")

131. *Genesis* 4 (KJV).

132. *Id.* at 13.

133. *Id.* at 19:31-38.

134. See *Judges* 3:12-14 (KJV) (describing Eglon, the king of Moab, conquering Israel with the aid of the Ammonites); *Id.* at 10:6-7 (describing God's deliverance of the Israelites

Jacob and Esau, who are put out of fellowship when Jacob purchases Esau's birthright and usurps Esau's blessing from Isaac, whereupon Esau looks to murder his brother.<sup>135</sup> The strife between men continued in the next generation, with Joseph's persecution at the hands of his brothers,<sup>136</sup> an enmity that would be replayed in the long conflicts between the northern Kingdom of Israel and the southern Kingdom of Judah following Rehoboam's ascension to the throne.<sup>137</sup>

Some of these conflicts reach a partial resolution in the Old Testament. The division between Abraham and Lot, for instance, was symbolically healed in the person of Ruth, a Moabitess, who married Boaz and thus became part of the genealogy of Christ.<sup>138</sup> Joseph and his brothers were reconciled to one another when Joseph forgave his brothers for their betrayal.<sup>139</sup> All this strife and division is eradicated by Christ's sacrificial work on the cross,<sup>140</sup> and so both the relationship between mankind and God, and among men, is made whole in the person of Jesus.<sup>141</sup>

Those who see a line of separation between faith and law might easily disregard the restorative principle of the Bible as applying only to personal

into the hands of the Ammonites for their idolatry with the gods of the Ammonites and Moabites).

135. *Genesis* 25:30-34; 27:27-29, 41 (KJV).

136. *Id.* at 37.

137. *1 Kings* 12:1, 16-17 (KJV).

138. *Ruth* 1:4, 4:10 (KJV); *Matthew* 1:5 (KJV).

139. *Genesis* 45:1-16 (KJV).

140. *See, e.g., Galatians* 3:28 (KJV) ("There is neither Jew nor Greek, there is neither bond nor free, there is neither male nor female: for ye are all one in Christ Jesus").

141. Though Christ's work on the cross is completed, the full effect of that work has not yet been felt. There is still much sin and strife in the world. *See generally* CNN.COM, etc. However, the point is that Christ's death and resurrection paved the way for reconciliation between God and men, and among men themselves. The endgame is that all of creation is restored to fellowship with God and man. This is the promise that Isaiah wrote of in *Isaiah* 11:6-10 (KJV):

"The wolf also shall dwell with the lamb, and the leopard shall lie down with the kid; and the calf and the young lion and the fatling together; and a little child shall lead them. And the cow and the bear shall feed; their young ones shall lie down together: and the lion shall eat straw like the ox. And the sucking child shall play on the hole of the asp, and the weaned child shall put his hand on the cockatrice' den. *They shall not hurt nor destroy in all my holy mountain: for the earth shall be full of the knowledge of the LORD, as the waters cover the sea.* And in that day there shall be a root of Jesse, which shall stand for an ensign of the people; to it shall the Gentiles seek: and his rest shall be glorious."

(emphasis added). This full reconciliation is the purpose of the God's work on earth after the Fall, and should permeate our legal system.



relationships between men. But when the truth and authority of Scripture is presupposed as the lodestone for all aspects of life, it becomes apparent that what God has revealed as His will for creation must guide not simply Sunday worship or personal choices, but the fundamental aspects of justice in any good society. Accordingly, the restorative principle described above as a fundamental aspect of God's revelation must apply to American civil law, and thus requires that our law focus on restitution and restoration of fellowship, not retribution.<sup>142</sup>

#### E. *Conclusions*

So what do the specific restitutionary and punitive provisions in the Pentateuch, the principles of jurisdiction present in Scripture, and the overarching story of the Bible as a whole tell us about how civil remedies ought to function in our society today? The specific provisions in the Pentateuch give excellent guidance as to the way God intended individuals to resolve disputes between each other. Wrongs are righted not through revenge, but through repayment. This ideal is highlighted by contrast with other wrongs for which no repayment can be made, and for which punishment had to be meted out either to cleanse the land of blood, or to allow a wrongdoer to pay for his wrong through pain and be restored to fellowship with his brethren. The jurisdictional framework in the Bible does not speak to the reasons for restitution as opposed to punishment, but instead operates as a limitation on the enthusiasm of individuals to pursue their own motives. Finally, the restorative principle of Scripture as a whole shows God's ultimate purpose for his creation, and speaks to his intention for men in their relationships with one another.

Taken together, these examples and principles show that the civil law is focused on a single purpose: restitution. Anything less than this deprives a plaintiff of his right to made whole, and anything more unjustly punishes the defendant beyond the extent of the harm he has caused.

#### IV. APPLYING THE BIBLICAL FRAMEWORK

Now that the biblical principle of restitution is firmly established, it is necessary to apply that principle to the modern system of civil damages.

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142. It appears that the restorative principle even applies with some purely criminal punishments, as evidence by the aforementioned proscription in *Deuteronomy 25* against giving more than forty lashes for a crime requiring beating. The rationale being that "if he should exceed, and beat him above these with many stripes, *then thy brother should seem vile to thee.*" *Deuteronomy 25:3* (KJV) (emphasis added). Punishment that was not capital, then, also had as its goal the restoration of the individual to fellowship with his fellow men.

This is a two-step process. First is a determination of which aspects of current practice conflict with biblical standards, and must therefore be discarded. Second is a determination of what, if anything, should replace the current function that punitive damages serve in our society as a check on malefactors such as the recidivist drunk-driver in *Coalson v. Canchola*, or the massive corporations in *BMW* and *State Farm*.

#### A. *Critiquing the Modern Approach*

Both the federal and state approach to punitive damages focus solely on punishment and deterrence in the application of civil penalties beyond special and general damages. Thus, both approaches fail to meet the biblical standards for justice.

##### 1. Federal Practice

Returning to the three excessiveness factors set out in *BMW*,<sup>143</sup> each fails to align with the restitutionary goals required by the principles of biblical justice discussed above, and so the whole punitive damages system represented by that test is rendered unworkable for a biblically just society.

The first factor, the degree of reprehensibility of the defendant's conduct, has the most obviously punitive purpose of the three, as it focuses solely upon the defendant's conduct.<sup>144</sup> As discussed in Section II above, the requirement of restitution did not change between thievery, negligently setting a fire, or even battery. Thus, when it comes to civil damages, the reprehensibility of a person's conduct, or the degree to which the state might wish to deter a certain type of negligence, is not a proper consideration.

The second factor, the disparity between the harm or potential harm suffered by the plaintiff and his punitive damages award, at first blush appears to contain a strong restitutionary and proportionality element. However, because the factor focuses solely on *punitive* damages in excess of any compensatory damages already awarded to make the plaintiff whole,<sup>145</sup> the second factor in actuality has no restitutionary purpose. The restitutionary principle halts payment at an amount sufficient to make good the breach. Anything further upsets the restorative principle not solely as a matter of mathematics, but also as a matter of the realities of human relationships. Much like the prohibition against punishing a wrongdoer

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143. *Supra* pp. 9-10.

144. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996) (stating that "exemplary damages imposed on a defendant should reflect the 'enormity of his offense.'").

145. *Id.* at 580.

with more than forty lashes, limiting civil recovery to restitution allows the litigants to make right with one another. With punitive damages, however, one party may make off like a king, while the other is left destitute. This is hardly a situation conducive to bringing men back into fellowship with one another.

The third factor, the difference between the punitive remedy and the civil penalties authorized or imposed in similar cases, is a public policy consideration important only in determining whether the punitive damages award aligns with a particular state's legislative judgment.<sup>146</sup> Under a restitutionary as opposed to punitory theory of civil justice, the state's interest in a civil suit between private citizens is non-existent. The only concern is that the wrong *between the parties* be set right. A state's regulatory measures of a particular activity—even if legitimate in their own right—have no bearing on whether a civil plaintiff is made whole. Accordingly, this third factor also fails to further the restitutionary goal of biblical justice.

Were the three *BMW* factors intended only to ensure that plaintiffs achieve full restitution on the harm done to them, the excessiveness analysis would accord with the biblical approach. But because the factors are merely a partial check on a damages system that is by its very nature excessive, the *BMW* analysis is invalid as a method of apportioning civil damages.

## 2. Virginia Practice

The remittitur analysis employed by the Virginia Supreme Court in *Coalson* also fails under the biblical standards of restitution, at least as it is applied to a punitive damages award. The fact that the court reinstated Coalson's \$100,000 punitive award—matching that of her co-plaintiff Stemke, even though her compensatory damages were only 40% of Stemke's—alone highlights the purely punitive nature of the award, and the complete break between awarding damages and a purpose of making the plaintiff whole. Indeed, the Virginia court explicitly held that “[t]he circuit court's consideration of Coalson's and Stemke's relative ratios of compensatory damages to punitive damages as a basis for granting remittitur was error.”<sup>147</sup> Furthermore, the court's *de novo* application of the four factor remittitur test,<sup>148</sup> like their constitutional *BMW* analysis, did nothing to rectify the improper purpose of the award.

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146. *Id.* at 583.

147. *Coalson v. Canchola*, 754 S.E.2d 525, 529 (Va. 2014).

148. The underlying standard in a remittitur analysis is whether the award is “so excessive that it shocks the conscience . . .” *Id.* at 528.

In analyzing the first remittitur factor—the reasonableness between the damages sustained and the amount of the award and the measurement of punishment required—the court recited the egregiousness of defendant Canchola’s behavior in driving drunk, in driving with a license revoked for previous instances of intoxicated driving, and for engaging in deceptive behavior towards a police officer.<sup>149</sup>

The court treated the next three factors together. With respect to the second factor, whether the award would amount to a double recovery, the court stated dismissively that “[g]iven the clear determination of the basis for each award and the ample evidence supporting each award, our independent review of the record does not suggest double recovery in this case.”<sup>150</sup> As to the third factor, the proportionality between the compensatory and punitive damages, the court merely reasserted that the ratio between the compensatory and punitive awards “is high, but given the reprehensible and dangerous nature of Canchola’s conduct, it is not unreasonable or strikingly out of proportion.”<sup>151</sup> The court did not examine the fourth factor, the ability of the defendant to pay, because Canchola did not raise that issue.<sup>152</sup>

As with the *BMW* analysis, the application of the restorative principle is simple. The Virginia court’s guiding purpose was clearly the infliction of punishment on the defendant for his tortious acts, an improper purpose under the biblical standards for civil justice. The fact that Canchola’s behavior was particularly egregious does not change the analysis. Biblical restitution requires of the civil defendant only what is necessary to make the plaintiff whole, whether the harm resulted from ordinary negligence,<sup>153</sup> gross negligence,<sup>154</sup> or even intentional wrongdoing.<sup>155</sup>

Because the modern approach to punitive damages—whether under the constitutional analysis of *BMW* or a state law remittitur analysis<sup>156</sup>—leaves behind any consideration of restitution, or restoration of fellowship

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149. *Id.* at 529.

150. *Id.* (citation omitted).

151. *Id.* (citation omitted).

152. *Id.*

153. *E.g.*, *Exodus* 22:5 (KJV) (establishing restitution for allowing an ox to graze in another man’s field).

154. *E.g.*, *id.* at 22:6 (establishing restitution for allowing a fire to break out).

155. *E.g.*, *id.* at 22:1 (establishing restitution for theft); *id.* at 21:18-19 (establishing restitution for battery).

156. Virginia’s statutory cap on damages does nothing to reintroduce restitution into the equation, and is therefore an insufficient fix for the fundamentally unbiblical approach to punitive damages taken by the Commonwealth. *See* VA. CODE ANN. § 8.01-38.1.

between persons, it fails the biblical goals of justice. Accordingly, punitive damages must be discarded as a part of the plaintiff's case.

*B. Supplying a Biblical Alternative*

It is a simple enough undertaking to baldly state that punitive damages should be excised from civil litigation as a matter of principle, but such a step raises valid concerns over the lost regulatory value punitive damages have in checking not simply naughty *individuals* like in *Coalson*, but also in deterring large-scale malfeasance by massive corporations such as State Farm and BMW. One might argue that although punitive damages may be inconsonant with biblical standards of justice, they achieve a necessary and proper purpose in punishing corporate evildoing. A just result, however, is in reality only as just as the process used to obtain that result.<sup>157</sup> Thus, while punitive damages may indeed be a convenient method of punishing corporations and individuals for their evildoing, the fact that punitive damages do not belong in civil litigation preempts their use in this manner as a matter of biblical principle.

Concluding that punitive damages should not be used to check wrongdoing does not leave the public at the mercy of megalithic corporations who can better afford to pay settlements than to change their business practices. The answer is instead that the civil magistrate must fulfill his duty to “execute wrath upon him that doeth evil.”<sup>158</sup> When a company like State Farm makes a business of defrauding its customers, real wrongdoing is present that may—indeed must—be punished by the civil magistrate. Thus, instead of delegating punitory power to individual citizens, the civil authorities must exercise their function in punishing the evildoers—i.e., those persons responsible for the company's actions. In this way, the biblical jurisdictional framework would be preserved, and the root of the problem would be directly attacked, instead of the pocketbooks of corporate shareholders.

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157. The American legal tradition has long adhered to the belief that the ends do not justify the means. This principle is apparent throughout the Constitution and the Supreme Court's constitutional jurisprudence, enshrined as it is in the 5th and 14th Amendment guarantees to due process, and in the exclusionary rule of the 4th Amendment which prevents even the most blameworthy individuals from being punished when the evidence against them was obtained improperly. See, e.g., *Katz v. U.S.*, 389 U.S. 347 (1967) (overturning federal conviction because evidence obtained improperly).

158. *Romans* 13:4 (KJV).

## V. CONCLUSION

At the very beginning of Isaiah, a book about the apostasy of Israel and the great judgments that would follow from their disobedience, God scoffs at Israel's false holiness, asking rhetorically, "To what purpose is the multitude of your sacrifices unto me?"<sup>159</sup> The answer, of course, is that vain offerings are of no purpose. God is not pleased with a phony piety. Instead, God wishes that his people sacrifice their pride in favor of righteousness. We are to "[l]earn to do well; seek judgment, relieve the oppressed, judge the fatherless, plead for the widow."<sup>160</sup> And this command is not just to Israel, for Isaiah's prophecy says, "Hear the word of the Lord, ye rulers of Sodom; give ear unto the law of our God, ye people of Gomorrah."<sup>161</sup> All the nations of the world are promised blessing if only they will adhere to God's Word.

But to those who will not heed God's word is promised sure and terrible judgment. At Mount Sinai, God said that He is "a jealous God, visiting the iniquity of the fathers upon the children unto the third and fourth generation of them that hate me . . ."<sup>162</sup> In Isaiah 1, God says,

[I]f ye refuse and rebel, ye shall be devoured with the sword: for the mouth of the Lord hath spoken it. How is the faithful city become an harlot! It *was full of judgment; righteousness lodged in it*; but now murderers. . . . Therefore saith the Lord, the Lord of hosts, the mighty One of Israel, Ah, I will ease me of mine adversaries, and avenge me of mine enemies: And I will turn my hand upon thee, and purely purge away thy dross, and take away all thy tin: And *I will restore thy judges as at the first*, and thy counsellors as at the beginning: *afterward* thou shalt be called, The city of righteousness, the faithful city.<sup>163</sup>

Those who abandon God's law will find themselves in the uncomfortable position of being purified by God's wrath that they may be returned to a state of conformity with his Word.

The message is clear. Obey God and prosper. Disobey Him and be judged. Thus, it must be our firm intention to conform every part of life to God's will; religiously, politically, and legally. It is not sufficient to swear

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159. *Isaiah* 1:11 (KJV).

160. *Id.* at 1:17.

161. *Id.* at 1:10.

162. *Exodus* 20:5 (KJV) (emphasis added).

163. *Isaiah* 1:20-21, 23-26 (KJV) (emphasis added).

fealty to so-called “traditional values,” or to invoke the names of the Founders, the Greatest Generation, or any other false standards of justice and morality. God brooks no competition. We must make Scripture our highest law, God our highest judge, and Christ our only King. Such an understanding leaves no area of life untouched, and no area of the law uninformed. Accordingly, no aspect of our legal system, even something so seemingly marginal in importance as punitive damages, can stand outside of the biblical framework and still be considered a true representation of God’s law. Applying consistent biblical principles of justice to the area of punitive damages results in discarding the man-made approach to justice, and returning to the restorative ethic God so clearly demonstrates throughout His Word.