

A BIBLICAL MODEL FOR ANALYSIS OF ISSUES OF LAW AND PUBLIC POLICY: WITH ILLUSTRATIVE APPLICATIONS TO CONTRACTS, ANTITRUST, REMEDIES AND PUBLIC POLICY ISSUES

ROGER BERN*

TABLE CONTENTS

INTRODUCTION	104
I. THE BIBLICAL MODEL—ITS THREE COMPONENTS	110
A. <i>Requisites for Law and Justice</i>	111
B. <i>Jurisdictional Considerations</i>	116
1. Overview	116
2. The Jurisdictional Propositions	118
C. <i>The Israel Example</i>	125
D. <i>The Coordinated Use of the Model's Components</i> ..	130
II. ILLUSTRATIVE APPLICATIONS OF THE BIBLICAL MODEL	131
A. <i>In the Contracts Setting</i>	131
1. Basis for Civil Government's Enforcing Promises	132
2. Implied in Law (Fictitious) Promises	139
3. Defenses for Not Keeping Promises	144
B. <i>In the Antitrust Setting</i>	153
1. Agreements Among Competitors (Horizontal Agreements).....	154
2. Agreements Between Manufacturers and Distributors (Vertical Agreements)	157
C. <i>In the Remedies Setting</i>	159
1. Tort Damages Issues	159
2. Injunctive Relief	168
3. Attorneys' Fees.....	170

* Member of the Missouri Bar, Resource Professor, University of the Nations, B.A. and J.D. University of Missouri—Kansas City.

D. <i>In the Setting of Other Public Policy Issues</i>	173
1. Public Education	174
2. The National Endowment for the Arts.....	178
3. Tax Status of Nonprofit Orphanages.....	179
4. Social Security.....	181
5. Identifying Sexual Conduct For Which Criminal Sanctions Are Appropriate	183
6. Civil Disobedience	187
CONCLUSION.....	192

INTRODUCTION

IN LAW AND MODERN SOCIETY,¹ Roberto Unger² identifies a common and perplexing experience in modern society: "the sense of being surrounded by injustice without knowing where justice lies."³ What accounts for this sense of despair? For Unger, it is contemporary society's rejection of a Creator God and a created order operating in accordance with His divine plan.⁴

Unger notes that a "major condition for the emergence of a legal order is a widespread belief in what might loosely be called natural law."⁵ Undergirding natural law is "transcendent religiosity," the factor which he identifies as "uniquely important in the development of modern legal ideas and institutions."⁶ Elaborating on that point he states:

The core of a religion of transcendence is the belief that the world was created by a personal God according to His designs. The characteristic dichotomy of transcendent religion is that between God and the world. Because the world was made, rather than generated, it does not fully share the sacred or

1. ROBERTO M. UNGER, *LAW IN MODERN SOCIETY: TOWARD A CRITICISM OF SOCIAL THEORY* (1976).

2. Unger is acknowledged by many as the chief theoretician and inspirational leader of Critical Legal Studies. See Jeffrey C. Tuomala, *Three Essays in Jurisprudence* 15 (1989) (unpublished essay) [hereinafter Tuomala, *Essays*]. See also David A. Kaplan, *A Scholarly War of Words over Academic Freedom: When Principles Collide*, *National Law Journal*, Feb. 11, 1985, at 1. See also Benjamin Wittes, *Chronicling a Loss of Faith in the Profession*, *The Recorder*, Dec. 20, 1994, at 8.

3. UNGER, *supra* note 1, at 175.

4. *Id.* at 86, 175.

5. *Id.* at 76.

6. *Id.* at 77.

divine nature of its author. Nevertheless, the lawful universe betrays the hand of a divine lawgiver.⁷

Noting the contemporary rejection of both a Creator God and a created order which reflects regularities in nature and social life according to a divine plan, Unger asks the key questions:

What happens when the positive rules of the state lose all touch with a higher law and come to be seen as nothing more than the outcomes of a power struggle? Can the ideals of autonomy and generality in law survive the demise of the religious beliefs that presided over their birth?⁸

His response is not surprising. Both the rule of law ideal of autonomy and generality, and the stability of institutions that embodied it, are compromised.⁹

Abandonment of the view that nature and society were expressions of a sacred order, self-subsisting, and independent of the human will meant "that order could and indeed had to be devised rather than just accepted ready-made."¹⁰ However, if nothing in nature predetermined how society ought to be arranged, "*whose* will was to replace nature as the source of social order?"¹¹ Those who have power may thereby impose their will upon others, yet they can make no appeal to any higher standard than themselves to justify either the rightness of their moral choices or their imposition of them on others.¹² Even if a societal consensus prescribes the moral choices, the same inability to validate them against an independent standard persists.¹³

7. *Id.* Illustrating its effect Unger notes: "Only in the modern West did a system of law develop that assigned duties and entitlements to individuals regardless of their social ranks. This law was thought to rest upon a basis of God-given natural principles from which it was nevertheless distinct by virtue of its secular character." *Id.* at 83. See also HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 181-85, 292-94 (1983). Berman, referencing Bracton and others, observes that the ideal and the reality of a state ruled by law meant that the respective heads of both ecclesiastical and secular bodies must rule "under God and the law. . . . Popes and kings made laws, but they did so as deputies of God; not they themselves but 'God is the source of all law.'" *Id.* at 293. Berman concludes, "[t]hus the concept of the rule of law was supported by the prevailing religious ideology." *Id.*

8. UNGER, *supra* note 1, at 83.

9. *Id.* at 86.

10. *Id.* at 130.

11. *Id.* at 131.

12. *Id.*

13. Unger notes that:

Unmasked as products of circumstance and tradition, conventional morality and taste have lost the appearance of inevitability; they must be measured

For Unger, this inability to validate because of the abandonment of any higher law standard is at the core of understanding why there is a "sense of being surrounded by injustice without knowing where justice lies."¹⁴ It also exposes the theoretical bankruptcy of the current legal system.

Such exposure is not new within the legal profession. For decades its effect has been evident in the transformation of first year law students from idealists to cynics. It has destroyed the idealism they entered with, which had been fostered by the belief that the law was autonomous, neutral, and based upon enduring principles, and replaced it with a calculating cynicism. However, as the understanding that there exists no standard for validation of law higher than the decision makers themselves pervades the non-elite of society, the implications for instability become more ominous. Why should the public believe the decision makers have made the right decisions, or even that they have authority to do so?

This was the very problem identified by Harvard Law School Dean Roscoe Pound in 1922, when he acknowledged:

From the time when lawgivers gave over the attempt to maintain the general security by belief that particular bodies of human law had been divinely dictated or divinely revealed or divinely sanctioned, they have had to wrestle with the

against some independent standard. Yet no standards with which to evaluate agreed upon conventions remain; even religious revelation is now regarded as an experience of the individual conscience, over which government has no say and from which it can infer nothing. At last there comes the despair of the worth of everyday tasks, a despair that may start off as an experience of the intelligentsia, but which reaches little by little into every sector of the population.

Id. at 169-170.

14. For Unger, the inability to validate against a higher law standard also makes understandable,

the puzzling coexistence of resignation and disbelief, unequal power and egalitarian conviction, that marks consciousness in liberal society. There is indeed a structure of domination. But it affects people's outlooks on society and on themselves ambiguously. It cuts away its own ground by overturning faith in the naturalness of the established hierarchy. But by the same process through which it saps its own foundations it also poisons all other moral and political beliefs. People lose confidence in their own judgments and they lose hope of discovering criteria for common judgments. All their conceptions begin to seem mere prejudices of an age, a society, or a faction, whims produced by social arrangements for which no independent justification can be found.

Id. at 175.

problem of proving to mankind that the law was something fixed and settled, whose authority was beyond question, while at the same time enabling it to make constant readjustments and occasional radical changes under the pressure of infinite and variable human desires.¹⁵

Pound's candid admission provided clear warrant for the deconstruction of the current legal system several decades later by Unger and other Critical Legal Studies theorists. The current system's abandonment of the most basic assumptions of the rule of law ideal made it an easy target to the charge that what it engaged in was mere exercise of power, not law.¹⁶

One possible response to the revelation of the theoretical bankruptcy of the current system is a "despairing acceptance of the existing order or an aimless shifting from one pattern of inequality to another."¹⁷ Another is a paradigm leap to a utopian world premised on "trust in the ultimate harmony of being and goodness in human nature as in the world as a whole," and in which there is justice without law.¹⁸ Yet another is an unapologetic return to the transcendent religiosity giving foundation to the ideals of autonomy and generality in law, and in particular to the law of nature and divine revelation found in the Holy Scriptures.¹⁹ That is the response reflected in this article.

15. ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 3 (1922).

16. UNGER, *supra* note 1, at 170-81. Critical Legal Studies' open assessment that contemporary "law" is without legitimate foundation reminds one of the candid observation of the little child in HANS CHRISTIAN ANDERSEN, THE EMPEROR'S NEW CLOTHES (1949). While all others observing the procession pretended they saw beautiful new clothes on the Emperor, lest they be thought stupid, the little boy spoke reality: "But the Emperor has nothing on at all!" *Id.* at 45. To carry the parallel a step further, perhaps the folk tale also suggests the answer to Pound's question whether the legal elite would be able to keep the rest of society convinced that contemporary "law" is fixed, settled, and its authority beyond question, when it is not. "What the child said was whispered from one to another, until everyone knew. And they all cried out together, 'HE HAS NOTHING ON AT ALL!'" *Id.* at 46-47.

17. UNGER, *supra* note 1, at 175.

18. *Id.* at 206-07. See also ROBERTO M. UNGER, KNOWLEDGE AND POLITICS 247 (1976). See also Jeffrey C. Tuomala, *Christ's Atonement as the Model for Civil Justice*, 38 AM. J. JURIS. 221, 244-55 (1993) [hereinafter Tuomala, *Atonement*], for a brief description of Unger's proposed new paradigm, its underlying foundation, and its relationship to neo-orthodox mysticism which projects the divinization of man. *Id.* at 250-255.

19. HERBERT W. TITUS, GOD, MAN, AND LAW: THE BIBLICAL PRINCIPLES 31-47, 100-01 (1994) [hereinafter TITUS, BIBLICAL PRINCIPLES], referencing Sir William Blackstone's COMMENTARIES ON THE LAW OF ENGLAND, and the writings of early American legal scholars, including Joseph Story and Jesse Root, and the more recent work of John C. H. Wu, FOUNTAIN OF JUSTICE: A STUDY IN THE NATURAL LAW (1955), all of which affirm the Biblical roots of the common law.

The foundation on which the Biblical Model for analysis of legal and policy issues has been built is the belief that God the Creator is the source of all law, and that He has revealed His law order to mankind through the created order²⁰ and through His written word, the Bible.²¹ Because God is Sovereign over all of creation, His law order is binding over all the globe.

Sir William Blackstone captured that point and another, when he wrote, "This law of nature, being coeval 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."²² That is why Blackstone appropriately noted that no human laws are of any validity if contrary to God's law, and that no human laws have any authority except as derived from that higher law.²³

That latter point, the binding effect of God's law at all times, is in accord with God's very character.²⁴ He does not change.²⁵ Further, His unchanging holiness²⁶ is reflected in the righteousness of His fixed law order, captured in the Hebrew word *tsedeq*,²⁷ discussed in connection with the Requisites for Law and Justice, *infra*.²⁸ Additionally, consistent with His character of absolute impartiality,²⁹ God's law order is uniform in its application, binding upon all without regard to person or situation.³⁰ The Hebrew word

20. *Romans* 1:19-20 ("[T]hat which is known about God is evident within [mankind]; for God made it evident to them. For since the creation of the world His invisible attributes, His eternal power and divine nature, have been clearly seen, being understood through what has been made, so that they are without excuse."). See also *Colossians* 1:16-17 ("For by Him all things were created, both in the heavens and on earth, visible and invisible, whether thrones or dominions or rulers or authorities — all things have been created by Him and for Him. And He is before all things, and in Him all things hold together."). (Unless otherwise indicated, all Biblical references are to the New American Standard Bible.)

21. *Deuteronomy* 30:15-20 (God's command to Israel to walk in His ways and to keep the commandments and statutes He had given them and reap the blessings of doing so); *Psalms* 147:19-20 (God states that He set forth His statutes and ordinances to Israel, now contained in the Bible, in a way that He had not done with other nations.); 2 *Timothy* 3:16 ("All Scripture is inspired by God and profitable for teaching, for reproof, for correction, for training in righteousness . . .").

22. 1 BLACKSTONE'S COMMENTARIES 41 (St. George Tucker ed., 1803).

23. *Id.*

24. *Malachi* 3:6; *James* 1:17. See also *Psalms* 119:89 and *Matthew* 5:18.

25. *Malachi* 3:6.

26. *Leviticus* 19:2; *Psalms* 108:7.

27. See *infra* notes 43, 46-48.

28. See *infra* notes 38-70 and accompanying text.

29. *Romans* 2:11 ("For there is no partiality with God.").

30. TITUS, BIBLICAL PRINCIPLES, *supra* note 19, at 62. Herbert W. Titus, God, Man, Law and Liberty 14-16 (May 1984) (unpublished essay) [hereinafter Titus, Essay on Law].

mishpat captures the idea that this law is to be administered with impartiality.³¹ Impartial administration of the law will be further addressed in the section on the Requisites for Law and Justice.³²

A more thorough discussion of the features of God's law which man's law must reflect, if it is to be law at all, appears in the writings of Herbert W. Titus on this topic,³³ and in the first two of Jeffrey C. Tuomala's Three Essays in Jurisprudence.³⁴

Two additional presuppositions fostered the propositional methodology of the Biblical Model. The first is that God is a loving God who desires that man know His law order so that man may obey and reap the blessings that flow from such obedience.³⁵ The

See also, e.g., *Deuteronomy* 10:17; *Acts* 10:34; *Romans* 2:11 (All underscoring the impartiality of God).

31. See *infra* notes 44, 49-53.

32. See *infra* notes 38-70 and accompanying text.

33. TITUS, BIBLICAL PRINCIPLES, *supra* note 19, at 1-63; Titus, Essay on Law, *supra* note 30.

34. Tuomala, Essays, *supra* note 2, at 1-21.

35. In the Pentateuch it is written:

Now this is the commandment, the statutes and the judgments which the Lord your God has commanded me to teach you, that you might do them in the land where you are going over to possess it, so that you and your son and your grandson might fear the Lord your God, to keep all His statutes and His commandments, which I command you, all the days of your life, *and that your days may be prolonged* And you shall do what is right and good in the sight of the Lord, *that it may be well with you* and that you may go in and possess the good land which the Lord swore to give your fathers [Then you shall say to your son] the Lord commanded us to observe all these statutes, to fear the Lord our God *for our good always and for our survival, as it is today. And it will be righteousness for us* if we are careful to observe all this commandment before the Lord our God, just as He commanded us.

Deuteronomy 6:1-2, 18, 24-25 (emphasis added); see also *Deuteronomy* 30:15-20:

See, I have set before you today *life and prosperity*, and death and adversity, in that I command you today to love the Lord your God, to walk in His ways and to keep His commandments and His statutes and His judgments, *that you may live and multiply, and that the Lord your God may bless you in the land where you are entering to possess it.* But if your heart turns away and you will not obey, but are drawn away and worship other gods and serve them, I declare to you today that you shall surely perish. You shall not prolong your days in the land I have *set before you life and death, the blessing and the curse.* So *choose life* in order that you may live, you and your descendants, by loving the Lord your God, by obeying His voice, and by holding fast to Him; *for this is your life and the length of your days*, that you may live in the land which the Lord swore to your fathers

Id. (emphasis added)); See also *1 Timothy* 2:2 (The Apostle Paul admonishes believers to

second follows from it, namely, that the revelation of God's law order in the Bible will be straightforward and understandable to those who seek to receive it.³⁶

The methodology of the Model's framework for analysis should not detract from the truth that "[a]ll Scripture is inspired by God and profitable for teaching, for reproof, for correction, [and] for training in righteousness."³⁷ Therefore it should not be seen as a shortcut which eliminates the need to search the Scripture with all diligence, but rather as a vehicle providing a perspective which should assist that endeavor.

One further point should be noted at the outset. The Model presented here has undergone modifications and refinements over the past several years. Those changes have been prompted by thoughtful critiques from colleagues and students, and by an increased understanding of Biblical principles. What follows, then, is the presentation and application of the most precise and comprehensive version of the Model to date. Because I consider the Model to be ever under review for further modifications and refinements as greater insight into God's word indicates appropriate, it may not be the last. I certainly welcome comments and suggestions in this regard and encourage participation by others in developing the very best Biblical framework for analyzing issues of law and public policy.

I. THE BIBLICAL MODEL — ITS THREE COMPONENTS

Encompassed within the Biblical Model are three components. The first, Requisites for Law and Justice, is foundational to the Model. It sets forth Biblical requisites for substantive law and for its proper administration. It reflects aspects of God's character and

"pray for kings and all who are in authority, in order that we may lead a tranquil and quiet life in all godliness and dignity." The implication is clear that for Gentile nations as well, when Civil Government and others in authority operate in accord with God's principles, blessings correspondingly flow.).

36. *Proverbs* 8:8-9 (True Wisdom proclaims that "All the utterances of my mouth are in righteousness; There is nothing crooked or perverted in them. They are all straightforward to him who understands, And right to those who find knowledge."). See also *Proverbs* 9:10 ("The fear of the Lord is the beginning of wisdom, And the knowledge of the Holy One is understanding."). Those verses, coupled with the understanding that God desires that man know His law order, indicate that it will be understandable to all who diligently seek to know it, and is not limited to some elite group of Bible scholars.

37. 2 *Timothy* 3:16. See, e.g., Tuomala, *Atonement*, *supra* note 18, which, as its title indicates, draws principles from Christ's atonement that inform the appropriate operation of civil justice in contemporary society.

sovereignty which are manifested in the perfection of both His law and His administration of justice. Put very simply, at the level of human beings and institutions, only if these requisites are reflected in law and in its administration can there be any hope of achieving justice.

One of the requisites identified in the first component is jurisdiction—the authority to act. Because of the multiplicity of jurisdictions God has established on the earth, it is important to identify which has authority to act in any given situation. With respect to analyzing issues of law and public policy, the authority which Civil Government may exercise is of particular significance. For that reason, the second component, Jurisdictional Considerations, develops in some detail the jurisdiction of Civil Government in the context of the other jurisdictions.

The Israel Example is the final component of the Model. Although God's relationship with Israel was unique, founded as it was upon a special covenant and distinct call for that people to be His holy nation, the Bible declares that God revealed His laws and ordinances to Israel as an example to other nations. Therefore, the Biblical account of God's dealings with Israel regarding the administration of justice and indicating the scope of authority He had vested in the Civil Government of that nation is instructive for the Civil Government of other nations as well. The Israel Example component significantly informed the development of the Jurisdictional Considerations component. It also assists in resolving questions that may arise in endeavoring to apply the principles of the other components in particular cases.

The same interrelationship of the three components which characterized the development of the Model is also crucial in its application. This is most obvious in those instances in which the jurisdiction of Civil Government is clear, but the issue that remains is what type of action by Civil Government is consistent with Biblical principles. In such instances the light shined by the other two components illumines the answer. It is also apparent when assessment under the Jurisdictional Considerations component alone is indecisive on the question whether Civil Government has jurisdiction to act. The Israel Example may then be particularly helpful in resolving that question. Appendix 1 sets forth, in chart form, the interrelationship of the three components.

A. Requisites for Law and Justice

The Psalmist extols God's law, its perfection and his love for

it,³⁸ and proclaims the righteousness of His judgments.³⁹ Consistent with His character,⁴⁰ God's law is the embodiment of truth⁴¹ and

38. The psalmist writes:

The law of the Lord is perfect, restoring the soul; The testimony of the Lord is sure, making wise the simple. The precepts of the Lord are right, rejoicing the heart; The commandment of the Lord is pure, enlightening the eyes. The fear of the Lord is clean, enduring forever; The judgments of the Lord are true; they are righteous altogether. They are more desirable than gold, yes, than much fine gold; Sweeter also than honey and the drippings of the honeycomb. Moreover, by them Thy servant is warned; In keeping them there is great reward.

Psalm 19:7-11. See also Psalm 119:33-35; 47-48; 96-97:

Teach me, O Lord, the way of Thy statutes, and I shall observe it to the end. Give me understanding, that I may observe Thy law, And keep it with all my heart. Make me walk in the path of Thy commandments, For I delight in it. . . . I shall delight in Thy commandments, Which I love. And I shall lift up my hands to Thy commandments, Which I love; And I will meditate on Thy statutes. . . . I have seen a limit to all perfection; Thy commandment is exceedingly broad. O how I love Thy law! It is my meditation all the day.

Id.

39. *Psalm 9:8* ("He will judge the world in righteousness . . ."); *Psalm 48:10* ("Thy right hand is full of righteousness . . ."); *Psalm 72:2* ("May He judge Thy people with righteousness . . ."); *Psalm 89:14* ("Righteousness and justice are the foundation of Thy throne . . ."); *Psalm 98:9* ("He will judge the world with righteousness . . .").

40. This important concept is evident in the earliest scriptural texts:

The Two Images of God, Man in the Image of God. Man is the crown of the creativity of God. The threefold use of the verb 'to create' in Gen. 1:27 marks man as both the creature *par excellence* and the perfect creative act. This human uniqueness is summed up in the description 'in our image, after our likeness.' . . . *Law in the Image of God.* Turning now to a very different genre of Scripture, we find in Lev. 19 that God has provided another image of [H]imself on earth. Every aspect of human experience is gathered into this rich review of man's life under God's law [ranging from filial duties, to caring for the needy, honesty in deed and word and many more]. Yet all this variety suspends from one central truth: 'I am the Lord.' Lord is the divine name, the 'I am what I am' (Exod. 3:14), so that the significance of the recurring claim is not 'you must do what I tell you (i.e. 'lord' as an authority word) but 'You must do this or that because I am what I am'; every precept of the law is a reflection of 'what I am.' Man is the living, personal image of God; the law is the written, preceptual image of God. . . . The Lord longs for people to live in [H]is image, and to that end [H]e has given them [H]is law.

Biblical Concept of Law, in *EVANGELICAL DICTIONARY OF THEOLOGY* 623-24 (Walter A. Elwell ed., 1984).

41. *Psalm 117:2* ("His lovingkindness is great toward us, And the truth of the Lord is everlasting."); *Psalm 119:142, 151, 160* ("Thy righteousness is an everlasting righteousness, And Thy law is truth . . . [A]ll Thy commandments are truth . . . The sum of Thy word is truth . . ."); *John 14:6* ("Jesus said to him, 'I am the way, and the truth, and the life' . . ."); *Romans 3:4* ("[L]et God be found true, though every man be found a liar . . .").

His perfect administration always produces judgments that are true.⁴² Three features of God's law, and requisites for its proper administration, are captured by the Hebrew words *tsedeq*,⁴³ *mishpat*,⁴⁴ and *mesnar*.⁴⁵

The noun *tsedeq* is sometimes translated into English as "justice,"⁴⁶ but is probably best rendered in the New American Standard Version as "righteousness."⁴⁷ *Tsedeq* connotes conformity to an ethical or moral standard. In Scripture, of course, that standard is the nature and will of God.⁴⁸

The noun *mishpat* is variously translated as "judgment,"⁴⁹ "right,"⁵⁰ and "justice."⁵¹ While it carries a number of meanings,

42. *Psalm* 19:9 ("The fear of the Lord is clean, enduring forever; The judgments of the Lord are true; They are righteous altogether.").

43. *Hebrew - Aramaic Dictionary*, in *NEW AMERICAN STANDARD EXHAUSTIVE CONCORDANCE OF THE BIBLE* 1585 (Robert L. Thomas ed., 1981) ("6664. [Hebrew script omitted] TSEDEQ [841c]; from an unused word; *rightness, righteousness . . .*") [hereinafter CONCORDANCE]. See also *id.* ("6666. [Hebrew script omitted] TSEDAQAH [842a]; from the same [root] as 6664; *righteousness . . .*"). See also *id.* ("6663. [Hebrew script omitted] TSADEQ or [Hebrew script omitted] TSAOQ [842c]; denom. vb. from 6664; *to be just or righteous . . .*").

44. CONCORDANCE, *id.* at 1557 ("4941. [Hebrew script omitted] MISHPAT [1048b]; from 8199; *judgment . . .*").

45. CONCORDANCE, *id.* at 1548 ("4339. [Hebrew script omitted] MESAR [449d]; from 3474; *evenness, uprightness, equity . . .*"). See also JAMES STRONG, *Hebrew and Chaldee Dictionary* in *THE EXHAUSTIVE CONCORDANCE OF THE BIBLE*, 65-66 (1890) where the same Hebrew word appears as *meysnar* and is defined in part as "aright, that are equal, equity."

46. See, e.g., *Deuteronomy* 16:20 ("Justice [*tsedeq*], and only justice [*tsedeq*], you shall pursue, that you may live and possess the land which the Lord your God is giving you."); *Proverbs* 8:15 ("By me kings reign, And rulers decree justice [*tsedeq*].").

47. *THE NEW BROWN, DRIVER AND BRIGGS HEBREW AND ENGLISH LEXICON OF THE OLD TESTAMENT* 841c- 842a (Francis Brown ed., 1981).

48. *Psalm* 145:17 ("The Lord is righteous [6662 *tsaddiq*, which from the same word at 6664 *tsedeq*] in all His ways and holy in all His deeds."). CONCORDANCE, *supra* note 43, at 1584. The same was reflected in His law. *Psalm* 119:172 ("[A]ll Thy commandments are righteousness [*tsedeq*]."). See also *Revelation* 15:3 ("Great and marvelous are Thy works, O Lord God, the Almighty; righteous [1342 *dikaiois*; correct, righteous] and true are Thy ways, Thou King of the nations."). *Greek Dictionary* in CONCORDANCE, *supra* note 43, at 1643.

49. See, e.g., *Leviticus* 19:15 ("You shall do no injustice in judgment [*mishpat*]; you shall not be partial to the poor nor defer to the great, but you are to judge your neighbor fairly."); *Deuteronomy* 1:17 ("You shall not show partiality in judgment [*mishpat*]; you should hear the small and the great alike."); *Deuteronomy* 16:18-19 (admonishing the judges to "judge the people with righteous judgment [*mishpat*]" and not to distort justice by being partial or taking bribes).

50. See, e.g., *Psalm* 35:23 ("Stir up Thyself, and awake to my right [*mishpat*], And to my cause, my God and my Lord."); *Isaiah* 32:7 ("A rogue . . . devises wicked schemes to destroy the afflicted with slander, Even though the needy one speaks what is right [*mishpat*].").

51. See, e.g., *Deuteronomy* 24:17 ("You shall not pervert justice [*mishpat*] due an alien or an orphan, nor take a widow's garment in pledge."); 1 *Samuel* 8:3 (Samuel's sons

in the context of law it generally refers to the administration of justice through impartial and evenhanded treatment of all without respect to social or financial status.⁵² The impartiality feature requisite for proper judicial administration parallels the uniform application of the underlying law itself.⁵³

The distinction between *tsedeq* and *mishpat* is perhaps best understood in terms of the vertical/horizontal context of Scripture — vertical with respect to man's relationship to God the Creator and law giver, and horizontal with respect to his relationship with others. In that context, the two words combine to express the thought of a righteous, moral standard (*tsedeq*) which is applied evenhandedly and impartially (*mishpat*). In fact, the two words are so frequently linked⁵⁴ that the necessity of their coalescence to the proper administration of justice cannot be missed.

Those two words are also frequently linked⁵⁵ with *meshar*. *Meshar* is typically translated into English as "equity."⁵⁶ Not to be confused with "equity" as contrasted with "law" in the Anglo-American legal system, the use of the word in this context appears to carry more the thought expressed in its Latin root, *aequus*, "equal, even, level."⁵⁷ That is consistent with its Hebrew definition of "evenness, uprightness, equity."⁵⁸

Its use with *tsedeq* and *mishpat* suggests the evenness or equality which *meshar* connotes is one in outcome or results.⁵⁹

whom he had appointed as judges "did not walk in his ways, but turned aside after dishonest gain and took bribes and perverted justice [*mishpat*]."; *Isaiah 59:8* (They do not know the way of peace, And there is no justice [*mishpat*] in their tracks; They have made their paths crooked . . .").

52. See *supra* note 49, 51. See also *infra* note 59.

53. See *supra* note 30.

54. See, e.g., *Deuteronomy 16:18* ("[The judges] shall judge the people with righteous [*tsedeq*] judgment [*mishpat*]."); *Psalms 33:5* ("[God] loves righteousness [*tsedeq*] and justice [*mishpat*]"); *Psalms 89:14* ("Righteousness [*tsedeq*] and justice [*mishpat*] are the foundation of Thy throne . . ."); *Isaiah 9:7* (With reference to the reign of Wonderful Counselor, Mighty God, Eternal Father, Prince of Peace "[t]here will be no end to the increase of His government or of peace, On the throne of David and over his kingdom, To establish it and uphold it with justice [*mishpat*] and righteousness [*tsedeq*].").

55. See, e.g., *Psalms 9:7-8* ("He has established his throne for judgment [*mishpat*], And He will judge the world in righteousness [*tsedeq*]; He will execute judgment for the peoples with equity [*meshar*]."); *Psalms 99:4* ("And the strength of the King loves justice [*mishpat*]; Thou hast established equity [*meshar*]; Thou hast executed justice [*mishpat*] and righteousness [*tsedeq*] in Jacob."). See also *Proverbs 1:3* and *2:9*, where the three are linked in an ethical, as contrasted with a governmental, context.

56. See *id.*

57. NOAH WEBSTER, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828).

58. CONCORDANCE, *supra* note 43, at 1548.

59. That it signifies a feature of evenness in outcome also draws support from the

Together then the three express the thought of the evenhanded and impartial application (*mishpat*) of a righteous moral standard (*tsedeq*) producing an evenness or equality (*meshar*) in outcomes in like cases. While the three Hebrew words are descriptive of distinct features of the administration of justice, with respect to the nature of substantive law itself, the one word, *tsedeq*, the righteous moral standard, appears to encompass the rule, its scope of application, and consequences for violation.

The fourth requisite for the proper administration of justice is jurisdiction, the authority to determine a matter. This feature is implicit when God Himself is establishing a rule of law or rendering judgment in a matter. By virtue of His being Creator of all things, God has jurisdiction over all things.⁶⁰ Thus, all of His judgments constitute a proper exercise of jurisdiction. Man, however, as a created being, does not have such expansive authority. Rather his jurisdiction is derivative and is only as extensive as the Creator delineates.

God's initial grant of jurisdiction to man, the Creation Covenant, is set forth in the opening chapter of the Bible.⁶¹ Therein God said to the first human beings: "Be fruitful and multiply, and fill the earth, and subdue it; and rule over the fish of the sea and over the birds of the sky, and over every living thing that moves on the earth."⁶² It is notable that while God gave man authority to rule over the earth, the fish, the birds and over every living thing upon the earth, He retained jurisdiction to rule man.⁶³

He exercised that jurisdiction when He judged the disobedience of Adam and Eve and pronounced their sentences.⁶⁴ He also exercised His jurisdiction over man when He judged Cain for the murder of Abel and made clear that other human beings had no jurisdiction at that time to punish for murder by appointing a sign for Cain as a protection against others' killing him.⁶⁵

remedies prescribed in the property loss cases of *Exodus* 21 and 22 (restoration in respective 1:1, 2:1, 4:1 and 5:1 ratios), and in the fixed amount fine of the defamed virgin case of *Deuteronomy* 22:13-19. Part of the thesis developed in Roger Bern, Rethinking "Unmeasurable" Damages From a Biblical Perspective: Aiming at the Right Target (June 8, 1993) (Summary Outline) (unpublished teaching materials) [hereinafter Bern, Unmeasurable Damages], is that an evenness in result principle is also reflected in *lex talionis*.

60. TITUS, BIBLICAL PRINCIPLES, *supra* note 19, at 65-67.

61. *Genesis* 1:28.

62. *Id.*

63. TITUS, BIBLICAL PRINCIPLES, *supra* note 19, at 65.

64. *Genesis* 3:8-19.

65. *Genesis* 4:8-15.

God's judgment of man's great wickedness in the Flood is yet another illustration of His exercise of jurisdiction over man.⁶⁶

God's covenant with Noah following the Flood, referred to as the Noahic Covenant, restated and expanded the Creation Covenant⁶⁷ and also established jurisdiction in man over his fellow human beings specifically in the context of murder.⁶⁸ Therein God directed: "Whoever sheds man's blood, [b]y man his blood shall be shed, [f]or in the image of God He made man."⁶⁹ The Noahic Covenant, which granted man jurisdiction to impose the ultimate mortal punishment in murder cases, is seen by some scholars as the basis for Civil Government for all nations, with jurisdiction in Civil Government also to take lesser coercive action against other crimes and wrongful conduct.⁷⁰ Such a conclusion is consistent with the basic principle established in the Genesis accounts, namely, whatever jurisdiction man has is limited to that which the Creator has granted.

B. Jurisdictional Considerations

1. Overview

The second component, Jurisdictional Considerations, states in propositional form the jurisdiction of Civil Government in light of the multiplicity of jurisdictions God has established. By way of introduction, the focus of this component is upon the respective duties owed to God by the Individual, and by each of the other institutions which God has established—the Family, Church, and Civil Government. Those duties in turn provide the basis for determining the appropriate relationships among individuals and between individuals and each of the other institutions. They also provide the basis for determining the appropriate relationships among the other institutions.

Basic to such determination is the premise that no individual or entity is to interfere with another's performance of duties owed to God. Thus, no individual or institution is to interfere with an individual's carrying out of his duties to God or with

66. *Genesis* 6, 7.

67. *Genesis* 9:1-7.

68. *Id.* at verse 6.

69. *Id.*

70. See Suzanne Last Stone, *Sinaitic and Noahide Law: Legal Pluralism and Jewish Law*, 12 CARDOZO L. REV. 1157, 1165 (1991) and authorities cited therein.

one of the other institutions' carrying out its duties to God. Breach of any duty owed to God is sin, and man, whether acting in his individual capacity or in his capacity as a functionary in the context of Family, Church, or Civil Government, is answerable to God, because God has jurisdiction over all things, even man's heart.

The significant point made in the Jurisdictional Considerations is that not every sin is within the jurisdiction of Civil Government. Some sins do not manifest themselves in conduct and are known only to God. Others may manifest themselves in conduct but are to be appropriately disciplined in the Family or Church context. Still others may manifest themselves in conduct for which Civil Government, with its unique coercive power, is to take appropriate action.

The focus of this component of the Model is upon man's duties to God as the basis for rights vis-à-vis his fellows. Such a focus is not a novel one, but it is certainly a dramatic contrast to the "rights" focus of contemporary society. That point was made by Justice Dallin H. Oaks of the Utah Supreme Court when he noted:

The performance of personal responsibility was such an important part of English and American citizen consciousness in the eighteenth and nineteenth centuries that rights like freedom were justified on the basis that they secured citizens in the performance of their responsibilities. Thus, in 1877 Lord Acton explained that by "liberty" he meant the "assurance that every man shall be protected in doing what he believes to be his duty" Walter Lippman described this same state of mind when he reminded a group of educators that our Western institutions were formed by men to whom freedom meant "a personal moral responsibility to perform their *duties* and to exercise their corresponding rights." How different this is from the modern formulation in which the exercise of individual rights is the focus, and responsibilities gain mention, if at all, only as an expression of the obligations of those against whom rights are enforced.⁷¹

The Jurisdictional Considerations component begins with God as the Creator of all things who, therefore, has jurisdiction over all.⁷² It recognizes the uniqueness of man, created in the

71. Dallin H. Oaks, *Rights and Responsibilities*, 36 MERCER L. REV. 427, 434 (1985).

72. See proposition 1 *infra* note 80 and accompanying text.

image of God,⁷³ and that man thus owes his very existence to God and has a duty to honor and obey God. It also recognizes that because of man's sin, he does not perfectly fulfill those duties.⁷⁴ It explores what is termed in this article as man's stewardship-dominion mandate, its scope and implications for man's relationship with God, with his fellowman and toward the environment.⁷⁵ In that context it is concerned with the most basic level of government—self-government.

It also notes that God has established other human institutions—the Family, Church, and Civil Government—which also have respective duties to God.⁷⁶ It then sets forth basic relationships between the Individual and those institutions, noting the principle of limited jurisdiction for all created institutions.⁷⁷ The remaining propositions explore in some detail the jurisdiction of Civil Government as indicated in Old and New Testament accounts.⁷⁸

2. The Jurisdictional Propositions⁷⁹

- (1) God is the Creator of all things and has jurisdiction over all.⁸⁰
- (2) Man is a unique creation, created in the image of God.⁸¹
- (3) Man as a created being owes duties to his Creator God,⁸² but because of sin he does not perfectly fulfill them.⁸³

73. See proposition 2 *infra* note 81 and accompanying text.

74. See proposition 3 *infra* notes 82-83 and accompanying text.

75. See propositions 4 and 5 *infra* notes 84-86 and accompanying text.

76. See proposition 6 *infra* notes 87-89 and accompanying text.

77. See propositions 7 through 9 *infra* notes 90-96 and accompanying text.

78. See propositions 10 through 16 *infra* notes 97-110 and accompanying text.

79. The propositions are set forth in chart form in Appendix 2.

80. *Genesis* 1 (Creation account); *Colossians* 1:16-17. ("For by Him all things were created, both in the heavens and on earth, visible and invisible, whether thrones or dominions or rulers or authorities—all things have been created by Him and for Him. And He is before all things, and in Him all things hold together."). That thought is also reflected in THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("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 . . .").

81. *Genesis* 1:26-27; 2:7.

82. See *supra* note 80. See also *Isaiah* 64:8 ("But now, O Lord, Thou art our Father, We are the clay, and Thou our potter; And all of us are the work of Thy hand."). Because man is wholly accountable to his Creator for the way he conducts himself toward God, toward himself, toward his fellows and toward his environment, self-government is the first level of government with which jurisdictional principles are concerned. It is the most basic form of human regulation and is the result of the individual's regulating his own behavior to conform to the requirements emanating from his duties to God. Self-

(4) Among the duties owed by man to God are:

(a) To exercise faithful stewardship-dominion to the glory of God over all things God has given him, including his very life and talents (the stewardship-dominion mandate);⁸⁴ and

(b) To recognize the image of God in his fellowman, and that his fellowman also has duties to God that he is to fulfill under the stewardship-dominion mandate.⁸⁵

government is critical to the maintenance of social order. Where there is no external human witness or restraint, the individual is still accountable to an omniscient Creator. Thus, the "fear of the Lord," acting as an internal restraint is not only the beginning of wisdom, *Proverbs* 9:10, but also the foundation of an ordered society. As to the latter, self-government's operation in relation to external conduct is most critical; but that should not overshadow its importance in the realm of heart and mind over which God has exclusive jurisdiction. See, e.g., *1 Samuel* 16:7; *Psalms* 44:21; 139:23-24; *Jeremiah* 17:9-10; *Matthew* 5:21-22, 27-28.

83. *Genesis* 3 (the account of the Fall—the first human sin).

84. *Genesis* 1:28-29 ("And God blessed them; and God said to them, 'Be fruitful and multiply, and fill the earth, and subdue it; and rule over the fish of the sea and over the birds of the sky, and over every living thing that moves on the earth.' Then God said, 'Behold, I have given you every plant yielding seed that is on the surface of all the earth, and every tree . . . yielding seed; it shall be food for you . . .'"). *Genesis* 9:1-7 ("And God blessed Noah and his sons and said to them, 'Be fruitful and multiply, and fill the earth. And the fear of you and the terror of you shall be on every beast of the earth and on every bird of the sky; with everything that creeps on the ground, and all the fish of the sea, into your hand they are given. Every moving thing that is alive shall be food for you; I give all to you, as I gave the green plant. Only you shall not eat flesh with its life, that is, its blood. And surely I will require your lifeblood; from every beast I will require it. And from every man, from every man's brother I will require the life of man. Whoever sheds man's blood, [b]y man his blood shall be shed, [f]or in the image of God He made man. And as for you, be fruitful and multiply; populate the earth abundantly and multiply in it.' Then God spoke to Noah and to his sons with him saying, 'Now behold, I Myself do establish My covenant with you, and with your descendants after you . . .'). *Psalms* 24:1 ("The earth is the Lord's, and all it contains, The world, and those who dwell in it."). *Matthew* 22:37-38 ("And He said to him, 'You shall love the Lord your God with all your heart, and with all your soul, and with all your mind.' This is the great and foremost commandment."). See also *Romans* 14:7-8 ("For not one of us lives for himself, and not one dies for himself; for if we live, we live for the Lord; or if we die, we die for the Lord, therefore whether we live or die, we are the Lord's."); *Colossians* 3:23-24 ("Whatever you do, do your work heartily, as for the Lord rather than for men; knowing that from the Lord you will receive the reward of the inheritance. It is the Lord Christ whom you serve."). Created in God's image and the recipient of the stewardship-dominion mandate, man has a duty to God to govern his own life and to steward all that he is and has in a way that glorifies God.

85. In carrying out his stewardship-dominion mandate in society, one of the duties man owes to God is the duty to recognize that his fellow human beings also bear the image of God and likewise have duties to God to fulfill under the same stewardship-dominion mandate. When man carries out God's mandate in recognition of the image of God in his fellows and without interfering with their efforts to do the same, he fulfills his duty to God and does no harm to them. This is but a particular application of the second great commandment, "You shall love your neighbor as yourself," *Matthew* 22:39; *Leviticus* 19:18. When he fails to so govern himself and instead interferes with his fellows' carrying out God's mandate in their lives, he is not only a sinner toward God, but also a evildoer toward his fellows.

(5) The stewardship-dominion mandate encompasses not only the phases of acquisition, preservation and use, but also the phase of transfer, including transfer by gift.⁸⁶

(6) God has established other institutions which also owe duties to God—the Family,⁸⁷ the Church⁸⁸ and Civil Government.⁸⁹

86. See, e.g., *Proverbs* 6:6-8 ("Go to the ant, O sluggard, Observe her ways and be wise, Which, having no chief, Officer or ruler, Prepares her food in the summer, And gathers her provision in the harvest."); *Proverbs* 10:4-5 ("Poor is he who works with a negligent hand, But the hand of the diligent makes rich, He who gathers in summer is a son who acts wisely, But he who sleeps in harvest is a son who acts shamefully."); *Proverbs* 12:27 ("A slothful man does not roast his prey, But the precious possession of a man is diligence."); *Proverbs* 19:17 ("He who is gracious to a poor man lends to the Lord, And He will repay him for his good deed."); *Proverbs* 22:9 ("He who is generous will be blessed, For he gives some of his food to the poor."); *Proverbs* 27:23-24 ("Know well the condition of your flocks, And pay attention to your herd; For riches are not forever, Nor does a crown endure to all generations."). See also *Exodus* 35:21, 29 ("[In response to Moses' request for a contribution to the construction of the tabernacle] everyone whose heart stirred him and everyone whose spirit moved him came and brought the Lord's contribution for the work of the tent of meeting and for all its service and for the holy garments The Israelites, all the men and women, whose heart moved them to bring material for all the work, which the Lord had commanded through Moses to be done, brought a freewill offering to the Lord.").

87. The stewardship-dominion mandate, *Genesis* 1:28, was given to Adam and Eve, the first family which God had established as described in *Genesis* 2:24. God prescribed the authority structure within the family, *Genesis* 2:18-25; 3:16. See also *Ephesians* 5:22-31 and *Colossians* 3:18-19 dealing with the relationship of husband and wife in the family structure. The relationship of parents to children within the family is also set forth. See, e.g., *Genesis* 18:19 (God said He had chosen Abraham "in order that he may command his children and his household after him to keep the way of the Lord . . ."); *Exodus* 20:12 ("Honor your father and your mother. . ."); *Deuteronomy* 6:1-9 (God's command to parents to teach children God's ways); *Proverbs* 13:24 (parents' loving discipline of children); *Ephesians* 6:1-4 (children to obey and fathers not to provoke them, but to bring them up in discipline and instruction of the Lord). The above references make it clear that the family unit constitutes the second form of government which God established. For that unit He provides a governmental structure within which decisions are made, disputes or conflicts are resolved and the education and nurturing functions are carried out.

88. With respect to the New Testament Church, its nature, mission, structure for organization, and procedure for resolving disputes among members are set forth. See, e.g., *Matthew* 28:19-20 ("Go therefore and make disciples of all the nations, baptizing them in the name of the Father and the Son and the Holy Spirit, teaching them to observe all that I commanded you; and lo, I am with you always, even to the end of the age."); *Romans* 12:4-8 ("For just as we have many members in one body and all the members do not have the same function, so we, who are many, are one body in Christ, and individually members one of another. And since we have gifts that differ according to the grace given to us, let each exercise them accordingly: if prophecy, according to the proportion of his faith; if service, in his serving; or he who teaches, in his teaching; or he who exhorts, in his exhortation; he who gives, with liberality; he who leads, with diligence; he who shows mercy, with cheerfulness.") ; *1 Corinthians* 12:28 ("And God has appointed in the church, first apostles, second prophets, third teachers, then miracles, then gifts of healings, helps, administrations, various kinds of tongues."); *Ephesians* 4:11-

(7) Each person is subject to the governing authorities when such authorities are acting within the jurisdiction granted to them by God.⁹⁰

(8) The Romans 13 and 1 Peter 2 commands to "be in subjection to the governing authorities"⁹¹ and to "submit [yourselves] for the Lord's sake to every human institution"⁹² are *not* an endorsement of legal positivism.⁹³ They do not command obedience to every "law" or order just because the authority has demanded it.

(a) When a governing authority commands action which is prohibited by God, that authority is itself acting lawlessly; its "laws" are not law at all, and are not to be obeyed.⁹⁴

13 ("And He gave some as apostles, and some as prophets, and some as evangelists, and some as pastors and teachers, for the equipping of the saints for the work of service, to the building up of the body of Christ; until we all attain to the unity of the faith, and of the knowledge of the Son of God, to a mature man, to the measure of the stature which belongs to the fullness of Christ."); *James* 1:27 (benevolence); *Matthew* 18:17; 1 *Corinthians* 5:1-3, 12-13; 6:1-6 (All three selections relate to the dispute resolution authority of the Church.); 1 *Timothy* 3:1-15; 5:17-22 and *Titus* 1:5-9 (qualifications of various leaders in the Church). For the nation of Israel God established the Levitical priesthood with described responsibilities for a host of spiritual matters ranging from teaching, to sacrifices, to ceremonies, to health and dietary matters. See, e.g., *Exodus* 27:20-21; *Leviticus* 1; 10:8-11; 13:12-59; 15:15-31; *Numbers* 3:12-45; 18:3; *Deuteronomy* 10:8; 14:28-29; 1 *Chronicles* 23:3-6.

89. Following the Flood, God laid the basis for Civil Government with the Noahic Covenant prescribing capital punishment for the crime of murder, *Genesis* 9:6. With the nation of Israel God established a Civil Government system for resolving disputes and directed the types of coercive action it was to take in respective cases. See, e.g., *Exodus* 21:22; *Leviticus* 24:17-21; *Deuteronomy* 19:15-21; 25:1-3. The references in *Romans* 13:3-4 and 1 *Peter* 2:14 shine New Testament light on the nature and authority of Civil Government.

90. *Matthew* 18:15-17 (Church discipline); 22:17-21 (Render to Caesar the things that are Caesar's.); *Romans* 13:1-2 (Be subject to the governing authorities.); 13:3-4 (Civil Government as God's avenger); 1 *Corinthians* 5:12-13 (Church discipline); *Ephesians* 5:22-30 (Family authority); 6:1-4 (Parents/children); 1 *Peter* 2:13-14 (Civil Government as God's avenger).

91. *Romans* 13:1.

92. 1 *Peter* 2:13.

93. In its broadest sense, legal positivism is that philosophy of law which rejects all prior theological or metaphysical considerations and confines itself to the data of experience, empirical observation and connection of facts. EDGAR BODENHEIMER, JURISPRUDENCE: THE PHILOSOPHY AND METHOD OF THE LAW 92-98 (1974). For John Austin, an English jurist and the founder of the analytical school of law, the "most essential characteristic of positive law ... consists in its imperative character. Law is conceived as a command of the sovereign. 'Every positive law is set by a given sovereign to a person or persons in a state of subjection to its author.'" *Id.* at 97 (quoting JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINES AND THE USES OF THE STUDY OF JURISPRUDENCE 201 (1954)). A command qualifying as law need not issue directly from a legislative body. "It may proceed from an official organ to which lawmaking authority has been delegated by the sovereign." BODENHEIMER, *infra* at 97. For Austin, judge-made law was positive law in that sense of the term, since the rules which the judges make derive their legal force from the authority given by the state. *Id.*

94. See, e.g., *Exodus* 1:15-21 (Midwives refused to obey order of Pharaoh to kill the

(b) When a governing authority prohibits action which God commands, that authority is itself acting lawlessly; its "laws" are not law at all, and are not to be obeyed.⁹⁵

(9) Neither the Individual, nor any institution which God has established, has jurisdiction over all things, but each has been granted limited jurisdiction in which to function.⁹⁶

(10) The principle of limited jurisdiction for Civil Government was confirmed by Jesus when He stated, "render to Caesar the things that are Caesar's, and to God the things that are God's."⁹⁷ Caesar is not given control over all things.

(11) The jurisdiction of Civil Government exists in relationship to, and is best described and understood in terms of, duties owed to God by the Individual, the Family and the Church.⁹⁸

male Israelite babies, and God blessed them for it.); *Exodus* 2:1-3 (Moses' parents disobeyed the command of Pharaoh and kept Moses alive.); *Daniel* 3:1-30 (The three young Hebrew men refused to obey the command of Nebuchadnezzar to bow down and worship the King's golden image, and God honored their obedience to His prohibition against idol worship by delivering them unharmed from the fiery furnace.). Although these three examples all deal with the refusal to obey an order of Civil Government, the same principle would hold true in the context of the Family or the Church. No institution or other authority, e.g., employer or teacher or the like, has authority to demand performance of an act which God has prohibited.

95. See, e.g., *Daniel* 6:7-10, 22 (Daniel refused to obey the King's decree prohibiting praying, obeying instead God's command to pray, and God honored his obedience by preserving him in the lions' den.); *Acts* 4:18-31 (Peter and John refused to obey the Council's order not to speak or teach in the name of Jesus, obeying instead the command of God to preach the gospel. God answered their prayers and those of their companions to have boldness to speak His word, confirming the same with an earthquake and an outpouring of His Holy Spirit.). See also *2 Kings* 11:1-3 (Jehosheba thwarted the attempt of Queen Athaliah to murder all of the royal offspring, hiding Joash until the time he was established as king.).

96. Clearly, the Church has been given authority to proclaim the gospel, *Matthew* 28:19-20, but it has not been appointed God's avenger to execute His wrath on those who do evil. Likewise, the Civil Government, which has been authorized as God's avenger against evildoers, *Romans* 13:1-4, has not been given authority to preach the gospel. The Family has been authorized to apply the rod of discipline, *Proverbs* 23:13-14, but has not been authorized to administer capital punishment.

97. *Matthew* 22:21.

98. *Genesis* 9:6. The Noahic Covenant prescribes capital punishment as the response for an Individual's murder of another human being. *Id.* Likewise, the *Romans* 13:1-4 and *1 Peter* 2:13-14 references cast the authority of Civil Government in terms of its being God's avenger against the one who practices evil. Without question the Individual and the institution of the Family each predate the institution of Civil Government, which had its origin following the Flood. The coercive force of Civil Government is directed against the lawlessness unleashed in the world by sin which, if left unrestrained, would seriously interfere with Individuals' and the other institutions' carrying out their respective duties to God. Note that at the time of the Flood the "wickedness of man was great on the earth, and that every intent of the thoughts of his heart was only evil continuously [and that] the earth was filled with violence, *Genesis* 6:5, 11. See also *1 Timothy* 1:8-10 ("But we know that the Law is good, if one uses it lawfully, realizing the fact that law is not made for a righteous man, but for those who are lawless and rebellious, for the ungodly

(12) All sin is lawlessness,⁹⁹ and all who sin are answerable to God because He has jurisdiction over all things, even the heart of man.¹⁰⁰ But not all sin is within the jurisdiction of Civil Government, which has jurisdiction with respect to wrongful conduct¹⁰¹ by man, but not with respect to wrongful thoughts or heart motives.¹⁰²

(13) Civil Government is God's avenger on earth, with jurisdiction to punish¹⁰³ evildoers (those who do *kakos*),¹⁰⁴ prevent threatened harm,¹⁰⁵ provide redress for harm caused,¹⁰⁶ and to commend those who do well.¹⁰⁷

and sinners, for the unholy and profane, for those who kill their fathers or mothers, for murderers and immoral men and homosexuals and kidnappers and liars and perjurers, and whatever else is contrary to sound teaching.”).

99. 1 John 3:4 (“Everyone who practices sin also practices lawlessness; and sin is lawlessness.”).

100. See *supra* notes 80-82.

101. The teaching of Jesus in *Matthew* 5 underscores the proposition that Civil Government has authority to take action with respect to conduct, e.g., adultery, slander, battery, but that it does not have authority to punish for what a man may think, e.g., lustful thoughts.

102. See, e.g., 1 *Chronicles* 28:9 (“[T]he Lord searches all hearts, and understands every intent of the thoughts.”); *Psalms* 44:21 (“[G]od knows the secrets of the heart.”); *Proverbs* 17:3 (“[T]he Lord tests hearts.”); *Luke* 16:15 (God knows hearts.).

103. *Romans* 13:4 (“[Civil Government] is a minister of God to you for good. But if you do what is evil, be afraid; for it does not bear the sword for nothing; for it is a minister of God, an avenger [*ekdikos*] who brings wrath upon the one who practices evil.”); 1 *Peter* 2:14 (“[Civil Government is an authority] for the punishment [*ekdikesis*] of evildoers and the praise of those who do right.”). The Greek word *ekdikos*, translated “avenger” in *Romans* 13:4, when used in conjunction with the Greek word *orge*, translated “wrath”, suggests the imposition of punishment. However, even in that context it may signify a coercive response by Civil Government not expressly limited to punishment. See W.E. VINE, *THE EXPANDED VINE'S EXPOSITORY DICTIONARY OF NEW TESTAMENT WORDS* 47, 82 (John R. Kohlenberger III ed., 1984) [hereinafter VINE's]. The Greek word *orge* “is used of the . . . displeasure of human governments.” *Id.* at 47. *Ekdikos* “is used in *Romans* 13:4 of a civil authority in the discharge of [its] function of executing wrath [displeasure of human government] on the evildoer.” *Id.* at 82. See also CONCORDANCE, *supra* note 43, at 1646. *Ekdikos* is derived from two words, *ek* and *dike*, the latter a primary word denoting “right . . . [or] justice (the principle, a decision or its execution).” *Id.* at 1643, 1646. The Greek word *ekdikesis* of 1 *Peter* 2:14, translated punishment, while capable of that narrower meaning, is also capable of a broader meaning which could encompass a judicial vindication of a cause in a manner other than punishment. CONCORDANCE, *supra* note 43, at 1646. *Ekdikesis* of 1 *Peter* 2:14 carries the meaning “vengeance, vindication” and is derived from *ekdikeo*, “to vindicate, to avenge.” *Id.* See also *Genesis* 9:6, the Noahic Covenant's prescription of capital punishment for murder and the numerous commands directing imposition of punishment for various offenses under the justice system God established for the nation of Israel, e.g., *Exodus* 21:12-14 (capital punishment for murder), *Exodus* 21:22-25 (*lex talionis* for infliction of personal injuries); *Deuteronomy* 22:18-19 (stripes and monetary fine for defaming a virgin); and *Deuteronomy* 25:1-3 (stripes for the wicked according to his guilt).

104. See *infra* note 108.

105. *Leviticus* 13:46 and *Numbers* 5:1-4 (quarantining those infected with leprosy).

(14) Included within the category of "evildoer" is one who does an act which is innately evil, whether it causes harm to another or not, and also one who interferes with another's carrying out his duties to God.¹⁰⁸ With respect to both types of actions, Civil Government has a duty to be God's avenger, bringing to bear the coercive sanction appropriate to the action.

(15) When Civil Government punishes evildoers, prevents threatened evildoing, provides for redress for harm caused, and commends those who do well, it fulfills its duties to God and concomitantly contributes to or facilitates an environment in which the Individual, the Family and the Church may fulfill their respective duties to God in all godliness and dignity.¹⁰⁹

(16) Civil Government does not have jurisdiction to compel general love or affirmative expressions of love by an individual or group toward others.¹¹⁰

See also *Leviticus* 13:50-59; 14:33-47 (quarantine and potential ultimate destruction of infected goods or houses). Likewise, the requirement that persons infected with leprosy announce that fact when others come near them, *Leviticus* 13:45, reduced the likelihood of the spread of the infection to others. Each was a coercive measure not designed to punish or redress harm done to others, but rather to prevent threatened harm to others.

106. See, e.g., *Exodus* 21:33-34, 22:1-15 (prescribing restitution and, in some instances, multiple restitution in cases involving theft, destruction or loss of property).

107. *Romans* 13:3 ("For rulers are not a cause of fear for good behavior, but for evil. Do you want to have no fear of authority? Do what is good, and you will have praise from the same."); *1 Peter* 2:14 ("[Civil Government is for] the praise of those who do right.") The New International Version uses the word "commend" in place of "praise" in both *Romans* 13:3 and *1 Peter* 2:14.

108. The Greek word for "evildoer" used in both *Romans* 13:4 and *1 Peter* 2:14 is *kakos*. VINE'S, *supra* note 103, at 380. *Kakos* "stands for whatever is evil in character, base, in distinction (wherever the distinction is observable) from *poneros* ... which indicates what is evil in influence and effect, malignant. *Kakos* is the wider term and often covers the meaning of *poneros*. *Kakos* is antithetic to *kalos*, fair, advisable, good in character, and to *agathos*, beneficial, useful, good in act; hence it denotes what is useless, incapable, bad; *poneros* is essentially antithetical to *chrestos*, kind, gracious, serviceable; hence it denotes what is destructive, injurious, evil The use of *kakos* may be broadly divided as follows: (a) of what is morally or ethically evil, whether of persons ... or ... deeds ...; (b) of what is injurious, destructive, baneful, pernicious ... [*Poneros*] ... denotes evil that causes labour, pain, sorrow, malignant evil." *Id.* See also JOSEPH HENRY THAYER, A GREEK-ENGLISH LEXICON OF THE NEW TESTAMENT 320 (1977) (*Kakos* as "of a bad nature; not such as ought to be").

109. *1 Timothy* 2:1-2. ("First of all, then, I urge that entreaties and prayers, petitions and thanksgivings, be made on behalf of all men, for kings and all who are in authority, in order that we may lead a tranquil and quiet life in all godliness and dignity.") This proposition does not constitute a jurisdictional grant to Civil Government or any other institutional authority, but rather indicates the favorable consequences that flow from Civil Government's or other institutional authorities' fulfilling their respective duties to God.

110. This proposition is derived from the fact that by its very nature, love is something which cannot be compelled or coerced. See *Exodus* 35:4-5, 21-22, 29, where God

C. The Israel Example

The Biblical Model states principles of God's law order applicable to Civil Government and the administration of justice

made it clear that any gifts from the people for the building of the tabernacle needed to be from a willing heart, and the people responded as their hearts moved them. Additionally, love is a matter of the heart over which only God has jurisdiction, for only God can know and therefore judge a man's heart. *Jeremiah* 17:9-10 ("The heart is more deceitful than all else And is desperately sick; Who can understand it? I, the Lord, search the heart, I test the mind, Even to give to each man according to his ways . . .") See also *1 Chronicles* 28:9 ("[T]he Lord searches all hearts, and understands every intent of the thoughts."); *Psalms* 7:9 ("[T]he righteous God tries the hearts and minds."); *Proverbs* 17:3 ("[T]he Lord tests hearts."); *Proverbs* 21:2 ("[T]he Lord weighs the hearts."); *Luke* 16:15 ("God knows your hearts . . .").

The proposition is also confirmed by various moral commands which particularize the broader "love your neighbor as yourself" command and which notably do not suggest any Civil Government coercive or punishment response for disobedience. Consider in that regard the gleaning law, *Leviticus* 23:22, which prohibited gleaning and harvesting to the very corners so that a part of the crops might be left for the needy and the stranger. Although gleaning contrary to that command would be sin, there is no suggestion that those who did so were to be punished by Civil Government. Likewise with the tithing law. The tithe at the end of every third year was to be deposited in the tither's home town for the sustenance of the Levite, the alien, orphan and widow who were in his town. A blessing from the Lord was promised to those who did so, *Deuteronomy* 14:28-29, but no punishment or other action by Civil Government against those who disobeyed is suggested. *Malachi* 3:8-9 makes it clear that God Himself punished disobedience of the tithe and offering laws ("You are cursed with a curse, for you are robbing Me . . .").

In similar fashion, the moral duty to rescue or render assistance is made explicit in *Exodus* 23:4-5 (assisting the overburdened donkey of an enemy) and *Deuteronomy* 22:1-4 (assisting a countryman's animals or preserving his lost property), but with no hint that such assistance was something Civil Government could coerce, or the failure of which was something it could punish. The moral duty to rescue a woman threatened with rape is implicit in the *Deuteronomy* 22:23-27 accounts, but again without any suggestion of punishment by the Civil Government if the one with ability to rescue did not do so. In illustrating the second great commandment with the Good Samaritan account, *Luke* 10:33-37, Christ's appeal was clearly to the heart of His inquirer and in no way suggested a role for Civil Government with respect to the priest and Levite who failed to show love. That assistance/rescue is a moral rather than a legal duty is reflected in the Common Law which leaves the decision to act or not in such settings to the moral realm. Though failing to rescue may be sin in God's jurisdiction, it is not a basis for action by Civil Government. James B. Ames, *Law and Morals*, 22 HARV. L. REV. 97, 112 (1908); Francis H. Bohlen, *The Moral Duty to Aid Others as a Basis of Tort Liability*, 56 U. PA. L. REV. 217, 220-21 (1908).

A caveat should be noted with regard to the assistance/rescue matter where a special relationship exists between the victim and potential rescuer or helper which may raise a duty enforceable by Civil Government. Where the potential rescuer or helper has created the relationship of dependence or distress (e.g., parent/infant child), a duty enforceable by Civil Government may be raised. Non-action by the parents, e.g., not feeding the infant child, would then not be solely a matter of breach of their duty to God to show love and give care to the child, but would appear also to be a breach of their correlative duty to the child arising from their voluntary acts creating the situation of dependence or distress.

in all nations, not just Christian nations. While the Bible declares that God revealed His laws and ordinances to Israel in a way that He had not done with other nations,¹¹¹ it also makes clear that such righteous judgments and statutes were to be an example to other nations.¹¹² Therefore, the jurisdiction God vested in the Civil Government of Israel is instructive for the Civil Government of Gentile nations.

In assessing the nature and scope of the instruction to be gained from God's dealings with the nation of Israel, it is important to note that the laws of Israel were founded upon a special covenantal relationship begun with Abraham,¹¹³ and entered into formally with the nation of Israel at Sinai,¹¹⁴ reflected in what is termed the Mosaic Covenant. They included ceremonial¹¹⁵ and dietary¹¹⁶ laws as well as moral laws.¹¹⁷ As to some of the laws,

111. *Psalm* 147:19-20 ("He declares His words to Jacob, His statutes and His ordinances to Israel. He has not dealt thus with any nation; And as for His ordinances, they have not known them . . ."). See also *Romans* 3:1-2. ("Then what advantage has the Jew? Or what is the benefit of circumcision? Great in every respect. First of all, that they were entrusted with the oracles of God.").

112. Moses told the nation of Israel:

See, I have taught you statutes and judgments just as the Lord my God commanded me, that you should do thus in the land where you are entering to possess it. So keep and do them, for that is your wisdom and your understanding in the sight of the peoples who will hear all these statutes and say, 'Surely this great nation is a wise and understanding people.' For what great nation is there that has a god so near to it as is the Lord our God whenever we call on Him? Or what great nation is there that has statutes and judgments as righteous as this whole law which I am setting before you today?

Deuteronomy 4:5-8.

113. The author of *Genesis* records that,

Now the Lord said to Abram, Go forth from your country, And from your relatives, And from your father's house, To the land which I will show you; And I will make you a great nation, And I will bless you, And make your name great; And so you shall be a blessing; And I will bless those who bless you, And the one who curses you I will curse. And in you all the families of the earth shall be blessed.

Genesis 12:1-3.

114. *Exodus* 19:3-8 (God calls the nation to be a people for His own possession, to "be to [Him] a kingdom of priests and a holy nation," and to obey His voice and keep His covenant. The people pledge to do all that the Lord had spoken.) See also *Exodus* 24:3 (The people affirmed their Covenant with God, again promising to do "[a]ll the words which the Lord had spoken.").

115. See, e.g., *Exodus* 23:14-19 (national feasts to the Lord); *Leviticus* 1-5, 16 (laws of various offerings and sacrifices).

116. See, e.g., *Leviticus* 11 (laws about animals appropriate for eating).

117. See, e.g., *Exodus* 23:4-5 and *Deuteronomy* 22:1-4 (rescue of property). See also *Leviticus* 23:22 (gleaning laws).

no institutional coercive enforcement was provided in the event of violation.¹¹⁸ However, with respect to others, coercive institutional enforcement, the unique function of Civil Government, was prescribed.¹¹⁹

As to the ceremonial and dietary laws, their uniqueness to Israel as the "holy" nation from which Messiah was to come is confirmed in the New Testament.¹²⁰ They do not, therefore, serve as a basis for the laws of other nations. However, the moral laws declared to Israel and their corresponding call for coercive institutional intervention, or lack of such prescribed intervention, can be instructive with regard to the jurisdiction of Civil Government in all nations.¹²¹

Within that category of laws enforceable by institutions functioning in the role of Civil Government in Israel, special mention must be made of the expanded capital punishment jurisdiction granted to Israel. Some authorities conclude that by God's grant of that expanded authority to Israel, He also authorized it for all nations.¹²² Others, however, conclude that Israel's expanded authority in this matter is attributable to its holiness covenant with God and therefore not a direct authorization for such expanded authority in other nations.¹²³ The latter position is reflected in the Israel Example component of the Biblical Model. Thus, imposition of capital punishment in the nation of Israel for certain conduct does not, as such, dictate that the same punishment is authorized for the Civil Government of other nations.

118. See *supra* note 110. Additionally, for violation of some laws regarding sexual improprieties, God indicated that He would punish directly, *Leviticus* 20:17-21.

119. See, e.g., *Exodus* 21:12-14 (capital punishment for murder); 21:22-25 (*lex talionis* for infliction of physical injuries); *Deuteronomy* 25:1-3 (stripes according to the guilt of the wicked party).

120. *Acts* 10:9-15; 11:4-18 (God's revelation to Peter that all foods were to be considered clean); *Colossians* 2:13-19 ("[L]et no one act as your judge in regard to food or drink or in respect to a festival or a new moon or a Sabbath day—things which are a mere shadow of what is to come; but the substance belongs to Christ."); *Hebrews* 7-10 (Christ's sacrificial death accomplished once for all what all of the former sacrifices could not do, and the living Christ is our High Priest forever.).

121. See *supra* notes 103-106, 110, 117-118 and accompanying text.

122. GREG L. BAHNSEN, BY THIS STANDARD: THE AUTHORITY OF GOD'S LAW TODAY 270-84 (1985); GREG L. BAHNSEN, THEONOMY IN CHRISTIAN ETHICS 435-68 (1979); ROUSAS JOHN RUSHDOONY, THE INSTITUTES OF BIBLICAL LAW 235-37 (1973) [hereinafter RUSHDOONY]; Joseph Kickasola, Capital Punishment: Right or Wrong (Faculty Forum March 31, 1989) (video cassette available in Regent University Library).

123. Herbert W. Titus, Capital Punishment: Right or Wrong (Faculty Forum March 31, 1989) (video cassette available in Regent University Library); Herbert W. Titus, Capital Punishment lecture in Common Law course (1991) (unpublished teaching notes and audio tape).

Nevertheless, Israel's jurisdiction to administer punishment, even capital punishment, for certain types of conduct may be instructive on the more general issue, namely, for which types of conduct does Civil Government have jurisdiction to impose punishment of some kind? The premise for its relevance on that issue is that although God was accomplishing some special purposes with and through His covenant nation, which necessitated a particular form of punishment for violation of aspects of the holiness covenant, God did not act contrary to His own character or His law order for all the nations when doing so.

That suggests two corollary points. The first is that conduct, which may call for punishment by Civil Government in all nations because it is contrary to God's law order revealed to all nations, may call for greater punishment when it also constitutes violation of a particularized command in the special covenant He made with the nation of Israel.¹²⁴ The second point is this. It is clear that not every violation of the Mosaic Covenant was punishable by capital punishment, or, for that matter, punishable at all by Civil Government.¹²⁵ Therefore, when God authorized Civil Government in Israel to administer punishment at all for certain conduct, let alone capital punishment, it is indicative that such conduct is of the type appropriate for punishment by Civil Government in all nations.

To that point, however, a special caveat needs to be made. The same inference cannot be drawn with respect to the authorization for Civil Government in Israel to punish idolatry and solicitation of others to engage in idolatry.¹²⁶ In the theocratic nation of Israel, where God Himself was King,¹²⁷ such actions were of the same character as treason or open revolt against the governing authority would be in other nations.¹²⁸ Thus, it appears

124. See, e.g., *Leviticus* 20:10, 13 and 15-16, prescribing capital punishment for adultery, acts of homosexuality and bestiality in the nation of Israel. While these acts appear to be acts of evil-doing, see *infra* ILLUSTRATION 22, they do not appear to have the characteristics of murder for which *Genesis* 9:6 prescribed capital punishment in all nations. These particular capital penalties are positioned between verses 7 and 26 of *Leviticus* 20 which remind Israel it was called to be consecrated, set aside, to be holy. That, coupled with the dissimilarity of such acts to the act of murder condemned in *Genesis* 9:6, suggests the severity of the penalty is related to the special status of Israel and the covenant which that nation had entered into with God.

125. See *supra* notes 110, 118.

126. *Exodus* 22:20; *Deuteronomy* 13:6-18.

127. *Exodus* 19:5-6; 1 *Samuel* 8:7.

128. Joseph Kickasola, Lecture on Treason in Biblical Law Course (1986) (unpublished teaching materials).

that while such actions constitute sin, in the other nations they do not also constitute treason or open revolt against the governing authority; therefore they would not serve as a basis for punishment by Civil Government in those nations.¹²⁹

The same premise, that God was not acting contrary to His character or His law order for the nations, suggests yet other ways in which the Israel Example may be instructive regarding the jurisdiction of Civil Government in all nations. For example, the extent to which God gave the Civil Government in Israel jurisdiction to impose and enforce orders requiring restitution for victims in property theft, loss or damage cases,¹³⁰ and for other measurable losses,¹³¹ is indicative that such enforcement authority is within the jurisdiction of Civil Government in other nations. Since conduct producing such results constitutes, at the very least, interference with another's carrying out his stewardship-dominion duties to God originating with the Creation Covenant, it is not uniquely an offense of the Mosaic Covenant.

Likewise, corporal punishment under the Mosaic Covenant, which was to be administered in accordance with the guilt of the wicked person,¹³² does not appear to be confined to the violation of any special holiness command and, thus, does not appear to be a unique authorization for Israel. As such, the prescription of corporal punishment in Israel, coupled with the absence of any prescription for incarceration as a form of punishment,¹³³ may be indicative of the lack of authority for Civil Government in other nations to impose imprisonment as a form of punishment.¹³⁴

An even broader implication is suggested by that latter point. To the extent that God did not authorize Civil Government

129. *Id.*

130. *Exodus* 21:33-34; 22:1-9 (restitution for theft and destruction of property).

131. *Exodus* 21:19 (expenses related to medical care and loss of earnings).

132. *Deuteronomy* 25:1-3.

133. The city of refuge for the accidental manslayer did limit the liberty of such a person as it provided a safe haven from the blood avenger. Although the manslayer could leave before the appointed time, such early departure would be at his own risk. *Numbers* 35:11-34. The period of that limitation, until the death of the high priest, appears to be more related to the need for a death to symbolically make expiation for the accidental killing than to assure a particular punishment for the party responsible for the killing.

134. 3 GARY DEMAR, GOD AND GOVERNMENT: THE RESTORATION OF THE REPUBLIC 206-211 (1986); and RUSHDOONY, *supra* note 122, at 514-522 discuss the lack of Biblical basis for imprisonment as a form of punishment. See also Tuomala, *The Value of Punishment: A Response to Judge Richard L. Nygaard*, 5 REGENT L. REV. 13, 22-30 (1994) (discussing the Scriptural support for capital and corporal punishment and the potential for benefits to the wrongdoer, the victim and society from the same which are not available from imprisonment as a form of punishment); Tuomala, *Atonement*, *supra* note 18.

in His special nation to deal with certain matters, that is indicative that Civil Government in other nations also lacks jurisdiction to deal with such matters. As previously noted, the Israel Example component significantly informed the development of the Jurisdictional Considerations. Proposition 16 of the Jurisdictional Considerations (Civil Government cannot compel love) reflects the implication drawn from the notable lack of authority for Civil Government in Israel to compel or to punish for breaches of moral duties; for example, to assist those in need, to rescue, and to leave fields ungleamed for food for the poor.¹³⁵ In conjunction with the New Testament description of the authority of Civil Government¹³⁶ and both Old and New Testament teachings on God's exclusive jurisdiction over the heart,¹³⁷ the lack of jurisdiction over such matters by Civil Government in Israel was confirmation of the similar lack of jurisdiction over such matters by Civil Government in other nations.

The Israel Example component also gives additional insight helpful in resolving questions that may remain in particular instances after application of the general jurisdictional principles. For example, with respect to the question of whether certain conduct should be punished by Civil Government, the fact that God identified such conduct as something punishable by Civil Government in Israel may be a good indication that jurisdiction to impose punishment for such conduct also exists for Civil Government in other nations.¹³⁸

If, on the other hand, God, in establishing the laws for Israel, provided a remedy for certain conduct, but that remedy was not punishment, that appears to indicate that such conduct is not to be punishable by Civil Government in other nations.¹³⁹

D. The Coordinated Use of the Model's Components

While one component of the Model may be more relevant than another in resolving a particular legal or public policy issue, such fact should not detract from the necessary interrelationship of the components. This is most apparent in those instances in which assessment in light of the Jurisdictional Considerations

135. *Supra* note 110.

136. *Romans* 13:1-4, 1 *Peter* 2:13.

137. *Supra* notes 102, 110.

138. See *infra* ILLUSTRATION 22 regarding the criminalization of sodomy.

139. See *infra* ILLUSTRATION 22 regarding the inappropriateness of criminalizing fornication.

demonstrates that the matter is within the jurisdiction of Civil Government. Then the question which remains concerns the type of action which is consistent with Biblical principles. To resolve that inquiry, one should assess the action or proposed action in light of the Requisites of Law and Justice and the Israel Example components.

The interrelationship of the components is also apparent when assessment under the Jurisdictional Considerations component alone is indecisive on the question whether Civil Government has jurisdiction in a matter. The Israel Example may then be particularly helpful in resolving that question.

The material that follows in part II, ILLUSTRATIVE APPLICATIONS OF THE BIBLICAL MODEL, is presented in the format of hypothetical questions, followed by answers based upon analysis under the Biblical Model. In some of the hypotheticals, the issue is resolved on the basis of analysis under the Jurisdictional Considerations component alone, with a conclusion of no jurisdiction.¹⁴⁰ In others, the analysis proceeds on the basis that there is jurisdiction for Civil Government, but the appropriateness of the particular type of conduct involved, whether it be a remedy or a defense, or the like, is assessed under the Requisites for Law and Justice and the Israel Example components,¹⁴¹ or under the latter alone.¹⁴²

Two instances in which analysis under the Jurisdiction Considerations component alone left the question of the jurisdiction of Civil Government still problematic appear in ILLUSTRATION 22. There three related hypotheticals are presented. As to one of them jurisdiction of Civil Government to impose criminal punishment was clear under the Jurisdictional Considerations alone. As to the other two, assessment under the Jurisdictional Considerations alone was indecisive. However, assessment under the Israel Example component confirmed no jurisdiction of Civil Government as to one, and jurisdiction to impose criminal punishment as to the other.

II. ILLUSTRATIVE APPLICATIONS OF THE BIBLICAL MODEL

A. *In the Contracts Setting*

One of the ways man may more effectively carry out his stewardship-dominion duties to God¹⁴³ is by entering into

140. See *infra* ILLUSTRATIONS 2, 4, 5, 18, 19, 21.

141. See *infra* ILLUSTRATIONS 8, 13, 14, 15.

142. See *infra* ILLUSTRATIONS 10, 16, 17, 22.

143. Genesis 1:28; 9:1-3, 7. See also *supra* notes 84-86 and accompanying text.

agreements¹⁴⁴ with his fellows. Such agreements are possible because, in creating man in His own image, God has endowed man with language, the ability to communicate with words. In particular, He has given man the ability to communicate with words of a special quality — words of promise. The essence of such words, spoken by one created in the image of God, is to instill in the one who hears them a confidence, an expectation, that they will be kept.¹⁴⁵ In light of that, consider the following illustrations in the Contracts setting.

1. Basis for Civil Government's Enforcing Promises

Illustration 1: Enforcement in typical commercial setting.

This illustration is placed in the typical commercial setting in which the promises are exchanged in connection with acquiring, preserving or using resources. The hypothetical case:

A promises to purchase raw materials for use in his manufacturing business from *B* for a price, and *B* promises in return to sell them to *A* at that price. Thereafter, and before *A* has changed his position in reliance on the promise, *B* breaks his promise to *A* and sells them at a higher price to *C*. *A* sues, requesting appropriate relief for the breach.

144. Agreements among individuals permit them to join their skills and resources to achieve results that reflect not merely the sum of their combined efforts, but synergistic effects, and thus more effectively carry out their respective stewardship-dominion responsibilities.

145. *Genesis* 1:27 (man created in image of God). Because of the Fall, man's nature has been corrupted, and he no longer walks in the perfection in which he was created. However, the Noahic Covenant confirms that he remains the unique image bearer of his Creator, *Genesis* 9:6; and God is a promise maker and promise keeper. See, e.g. *Psalms* 105:8 ("He has remembered His covenant forever, the word which He commanded to a thousand generations."); *Isaiah* 40:8 ("The grass withers, the flower fades, but the word of our God stands forever."); *Jeremiah* 1:12 ("I am watching over My word to perform it."); *2 Corinthians* 1:20 ("For as many as may be the promises of God, in [Jesus] they are yes . . ."). That God expects man to keep his promise to his fellow is underscored in *Deuteronomy* 23:23 ("You shall be careful to perform what goes out from your lips, just as you have voluntarily vowed to the Lord your God, what you have promised."). Even prior to that explicit command to Israel, the Bible records numerous accounts reflecting mankind's clear understanding that confidence could be instilled by exchange of words of promise. See, e.g., *Genesis* 21:22-32. (Abraham and Abimelech entered into a treaty of nonaggression and resolved a dispute over a well by the exchange of promises and an oath.); *Genesis* 26:26-31 (Isaac and Abimelech entered a treaty of nonaggression by an exchange of promises and an oath.); *Joshua* 2:12-14 (Rahab exacted an oath from the spies that she and her family would be preserved in the impending attack if she assisted them in their escape.). See also, TITUS, BIBLICAL PRINCIPLES, *supra* note 19, at 203-204.

Under the Biblical Model analysis, *B*'s conduct of breaking his promise under these circumstances would, at the very least, appear to be sin for which he is accountable to God. That fact alone, however, serious as it is, does not mean that the breach is within the jurisdiction of Civil Government. The additional inquiry must be made as to whether *B*'s conduct in this instance is such as to put him in the category of an evildoer¹⁴⁶ with respect to which Civil Government has jurisdiction to act.

In pursuing that inquiry, recall that under the stewardship-dominion mandate *A* is under a duty to steward to the glory of God all of his time, talent and resources. *B* is under a duty to God to recognize that duty and not to interfere with *A*'s carrying it out. By his words of promise, *B* created an expectation in *A* that his assistance in *A*'s stewardship-dominion activity would be forthcoming and has now dashed that expectation. Not only has *A*'s expectation been disappointed, but the transaction costs (including time, effort, and potential foregone opportunities) inherent in putting the *A-B* agreement together have been wasted. Additional transaction costs will be incurred when *A* arranges a substitute transaction or otherwise alters his business operations to accommodate not having the raw materials, to say nothing of the transaction costs in endeavoring to obtain redress from *B* for the disruption he has caused. These adverse effects confirm that *B*'s actions have interfered with *A*'s efforts to carry out his stewardship-dominion duties to God and constitute evildoing (*kakos*) with respect to which Civil Government has jurisdiction.¹⁴⁷ Additionally, such actions, if unchecked by Civil Government, also threaten the sanctity of promise and its continued effectiveness as a unique vehicle for enhancing stewardship-dominion capabilities.

This position is, of course, contrary to that of the proponents of law and economics analysis who advocate the "efficient breach" theory. The premise for such analysis is the non-Biblical proposition that the greatest good is achieved by actions which facilitate the movement of goods and services to their highest and best use, judged by the willingness, at a particular point in time, of people to pay for them.¹⁴⁸ According to that analysis, because

146. See *supra* notes 103-108 and accompanying Propositions 13 and 14. Recall that encompassed within the word *kakos* (evildoer) is not only the concept of that which is innately evil or evil in character, but also that which is injurious in effect to others.

147. *Id.*

148. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 105-07 (3d ed. 1986).

C is willing to pay more for the materials now than *A* had previously agreed to pay, *B* should break his promise to *A* and sell them to *C* if, after *B* pays *A*'s damages, *B* will have a larger profit and the materials will be in the hands of the one who presumably has a more valuable use for them.

Apart from its non-Biblical premise, which undermines the planning benefit that is one of the key individual and societal gains from agreement, the efficient breach theory is patently deficient in other respects. First, it does not attempt to measure all of the costs inherent in the transaction in determining whether the overall wealth of society is increased or decreased by the breach. For example, it does not seek to put a value on what may be termed the disruption factor, which will inevitably result from *A*'s effort to find a substitute transaction or to otherwise accommodate the breach. That factor would include his need to seek legal assistance and to cooperate with those assisting him at least in the calculation of damages, even if liability is admitted, and the intangible stress and anxiety associated with all of them. Nor does it attempt to assess the costs to society from the harm done to the planning function of agreement due to the uncertainty in performance introduced by the efficient breach theory.

Second, efficient breach theory ignores the reality that the remedies system, pursuant to which *A*'s damages will be measured, is grossly undercompensatory. *A*'s recovery will be limited to the damages foreseeable at the time of contracting, even though greater damages in fact occur and were foreseeable just prior to the breach. Additionally, *A* will be permitted to recover only those damages which he can prove in court with reasonable certainty. That factor, and the general rule that damages for emotional distress caused by the breach are not recoverable, combine to insure that the intangible transaction costs will not be compensated. In addition, the American Rule regarding attorney fees, absent prior agreement by the parties to the contrary, would require *A* to pay his own attorney fees incurred in establishing his entitlement to recover and the amount of his damages.

Third, the instances in which an "efficient breach" can occur are most limited. They occur only in instances of market distortion such that *C* is willing to pay greater than market price for the materials, so that *B* could make the sale to *C*, pay damages to *A* based on the difference between the contract price and the market price at the time of breach, and still have a greater return than had he kept his promise.

Such extremely limited opportunities for "efficient breach" surely do not justify the more broadly felt undermining of prom-

ise which the theory engenders. Law, contrary to what Justice Holmes thought, has a normative force.¹⁴⁹ What it permits is perceived by members of society to be right or at least morally acceptable. Thus, the message that promise breaking is commendable conduct carries a significance that should not be treated lightly. In the torts realm, conduct injurious to others undertaken after calculating whether it would be more profitable to harm and pay damages rather than to avoid the harm has not been commended. It has been condemned as morally reprehensible and worthy of punishment.¹⁵⁰

Fourth, even if one were to accept the premise that society will be better off if the materials in this Illustration end up in C's hands, there are ways to accomplish that other than by B's breach. B could negotiate a release from A and then sell the materials to C without breach. (That would mean a sharing with A the "gain" to be made from the sale to C). Or B could sell the materials to A who could then resell them to C. If A were aware of the amount C was willing to pay and nevertheless declined to sell to C, it would appear A values them more highly than does C, and the good of society is enhanced by leaving them with A.

To what extent should the promise be enforced? Because the underlying basis for enforcement of promises is the recognition that a promise enhances stewardship-dominion activities through its power to create an expectancy of performance, the appropriate remedy is that which protects the promisee's expectations.¹⁵¹ Thus, such promises should be specifically enforced when it is feasible to do so. When it is not, as in this instance in which the goods have already been sold to C, damages should be calculated to place the promisee (A) in as good a position financially as if performance had occurred. In the unusual instance in which the expectation interest is incapable of calculation, enforcement should be measured to protect the promisee's reliance interest (expenditures and opportunities foregone on the strength of the promise).¹⁵²

149. DOUGLAS LAYCOCK, *MODERN AMERICAN REMEDIES: CASES AND MATERIALS* 8 (2d ed. 1994).

150. *Grimshaw v. Ford Motor Co.*, 174 Cal. Rptr. 348 (1981).

151. L.L. Fuller & William R. Purdue, *The Reliance Interest in Contract Damages*, 46 YALE L. J. 52, 57-66 (1936) [hereinafter Fuller & Purdue]. See also Michael B. Kelly, *The Phantom Reliance Interest In Contract Damages*, 1992 WIS. L. REV. 1756, 1759.

152. Fuller & Purdue, *supra* note 151, at 96. See also RESTATEMENT (SECOND) OF CONTRACTS § 349 comment a (1979).

Illustration 2: Non-enforcement in the typical gift promise setting where there has been no detrimental reliance.

The hypothetical case:

B promises to make a gift of \$20,000 to *A*, the money to be given ten days later. Before *A* has detrimentally relied on the promise, *B* repudiates it. *A* sues, requesting the court to enforce the promise.

It certainly appears that *B*'s breaking his promise under these circumstances is sin for which he is accountable to God. It is not clear, however, that by his conduct he has placed himself in the category of evildoer over which Civil Government has jurisdiction. *B*'s words of promise naturally raised an expectation in *A* that they would be kept, enhancing *A*'s financial position; and *A* is disappointed when the promise is not kept.

However, under the Biblical Model analysis we would inquire whether *A* has been harmed in the sense that *B* has interfered with *A*'s carrying out his duties to God. Does *A* have less in terms of resources and abilities to steward to the glory of God after the promise was broken than he had before it was made? Note in this instance, contrary to that in ILLUSTRATION 1, *A* has no wasted transaction costs from putting the transaction together. The answer is that, without detrimental reliance, *A* is in the same position, albeit disappointed, as he was in before the gift promise was made. It thus appears *B*'s actions do not constitute evildoing (*kakos*) toward *A* which would serve as a basis for jurisdiction by Civil Government to enforce the promise.¹⁵³

Such conclusion is reinforced by the understanding that giving is a matter of the heart. The very essence of gift is the voluntary transfer from a willing heart. Coercion by Civil Government to produce a transfer of the \$20,000 from *B* to *A* would drain all of the gift character from the transaction. Certainly Civil Government's enforcement power is not necessary for *B* to carry out his expression of kindness or affection. Nor will coercion by Civil Government of the promised sum in any way assist *B* in carrying out his duty to God in this setting, for that duty can

153. Whether breaking a promise to make a gift is the type of conduct that constitutes *kakos* in the sense that it is innately evil and for that reason punishable by Civil Government requires a further analysis. Are there occasions when not keeping a promise is nonetheless not an evil act? Consider a promise that was extracted by physical duress, induced by fraud, or the result of a mutual mistake: Such instances suggest that failing to keep a promise is not something that in its very nature is evildoing.

be fulfilled only by making the promised gift with a willing heart.¹⁵⁴

The admonition of the writer of Proverbs appears instructive as well in this setting. "Do not contend with a man without cause, if he has done you no harm."¹⁵⁵ If Civil Government enforced such gift promises, it would be acting in the unauthorized role of attempting to compel love.¹⁵⁶

Illustration 3: Limited enforcement of gift promise upon which there has been detrimental reliance.

The hypothetical case:

The facts are the same as in Illustration 2: (*B* promises to make a gift of \$20,000 to *A*, the money to be given ten days later). But now add the fact that before *B* repudiated his promise *A*, in reliance upon it, entered into a contract to purchase a new car for \$15,000. *A* sues, requesting the court to enforce the promise.

Because the promise has induced *A* to make a commitment, and *B*'s breach has now exposed *A*'s own pre-promise resources to a claim which would not otherwise have existed, it is clear that *B*'s reneging on the promise has done more than merely disappoint *A*. It has worsened *A*'s position with respect to his efforts to steward his resources, triggering the jurisdiction of Civil Government.

A pure economic argument might be made that *A*'s balance sheet after his commitment to purchase the car is same as it was before, i.e., although his obligations have increased, so have his assets (ignoring for the moment the depreciating value of the new car). The essence of such an argument would be that *A* has the same amount of resources as before the car transaction, but that they are simply in a different form. However, choice of the form in which assets are held is itself a significant stewardship-dominion decision which has profound implications on future stewardship-dominion opportunities. When *A* made the commitment to purchase the car, he did not believe he was making a choice regarding the form in which his own pre-promise assets

154. See *id.* for the rationale that promise breaking is not within the innately evil *kakos* category and, therefore, would not support Civil Government's intervention by punishment in these circumstances.

155. Proverbs 3:30.

156. *Supra* note 110 and accompanying Proposition 16, and Appendix 2.

were held. *B*'s subsequent action, if permitted to stand, would constitute a retroactive forcing of that decision, a clear interference with *A*'s stewardship-dominion duties.

To what extent should *B*'s promise be enforced? Because it was the promisee's detrimental reliance which triggered Civil Government's jurisdiction,¹⁵⁷ the appropriate remedy will be enforcement to the extent necessary to restore the promisee to the stewardship-dominion position he was in prior to learning of the promise.¹⁵⁸ In the hypothetical, *A* should be placed in a position such that his pre-promise assets will not be invaded to meet the car purchase commitment. That can be accomplished by an order directing *B* to pay \$15,000 or a damage award for \$15,000. Thus, the focus of the award is to redress harm caused, not to enforce the promise as such. In that respect, the later Restatement § 90¹⁵⁹ is more consistent with the Model than was its predecessor.¹⁶⁰

Illustration 4: Non-enforcement of promise made in recognition of a benefit previously received, the case of moral obligation.

The hypothetical case:

B, in gratitude for *A*'s heroic effort that saved *B*'s life but resulted in serious injury to *A*, promises thereafter to pay *A* \$500 per month for the rest of *A*'s life. *B* repudiates prior

157. See *supra* note 153-154 for the rationale that promise breaking is not within the innately evil category of *kakos* and, therefore, would not support Civil Government's intervention by punishment in these circumstances.

158. Such reliance-based award would not fully restore *A* to his pre-promise stewardship-dominion position if the American Rule regarding attorney's fees were followed. As indicated in ILLUSTRATION 17 *infra* at notes 311-316, analysis under the Model does not support the American Rule on attorney's fees.

159. RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (1979). "A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee . . . and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. *The remedy granted for breach may be limited as justice requires.*" (emphasis added). *Id.* Comment d provides, "[R]elief may sometimes be limited . . . to damages or specific relief measured by the extent of the promisee's reliance rather than by the terms of the promise." *Id.*

160. RESTATEMENT (FIRST) OF CONTRACTS § 90 (1932). "A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." *Id.* RESTATEMENT (FIRST) contemplated full expectation-based recovery although reliance was the expressed basis for enforcement.

to making any payments and prior to any detrimental reliance on the promise by A.

Once again, B's breaking his promise under these circumstances appears to be sin for which he is accountable to God. However, just as in the gift promise setting of ILLUSTRATION 2, B's words of promise created an expectation in A that they would be kept and a disappointment when they were not, but did not adversely affect A's stewardship-dominion position. A has no less in terms of resources and abilities to steward to the glory of God than he had before the promise was made. Although A had sustained serious injuries in saving B, such detriment was incurred independently of and prior to the promise.¹⁶¹

It appears that an expression of thankfulness by B from a grateful heart would be pleasing to God (this may be where B is to be operating in the giving mode of the stewardship-dominion mandate) and thus a good thing for B to express to A. That, in fact, seems to be the essence of B's promise in this setting, a tangible expression of a grateful heart. As in ILLUSTRATION 2, Civil Government's enforcement is not necessary for B to carry out his grateful intent. Nor will compulsion of the payments in any way assist B in carrying out his duty to God in this setting. That duty can be satisfied only by making each payment voluntarily from a grateful heart. If Civil Government were to coerce the keeping of this promise, it would result, as in the pure gift promise of ILLUSTRATION 2, in a transfer of dollars, but would drain all of the character of an expression of a grateful heart from the transaction. The admonition from Proverbs 3:30 is equally applicable in this setting.¹⁶²

2. Implied in Law (Fictitious) Promises

Illustration 5: Moral obligation in a rescue setting in which the rescued party made no promise.

The hypothetical case:

This is the classic *Cotnam v. Wisdom*¹⁶³ setting in which physician A responds to calls from bystanders to give medical

161. It may well be that in performing the rescue, A was properly acting in the giving phase of his stewardship-dominion duties, using his abilities to confer a tangible benefit on B.

162. *Supra* note 155. This conclusion is contrary to that proposed in RESTATEMENT (SECOND) OF CONTRACTS § 86 (1979), which charts a course for enforcing such promises which courts have traditionally left as matters of moral obligation to the realm of the conscience. *Mills v. Wyman*, 20 Mass. (3 Pick.) 207 (1825).

163. 104 S.W. 164 (Ark. 1907) (The court, using an implied in law, quasi contract, theory, found B's estate obligated to pay the reasonable value of the services rendered.)

assistance to *B*, an unconscious accident victim. *A* renders emergency services but *B* nevertheless dies without regaining consciousness. *A* sues *B*'s estate, claiming it owes money for the services.

In assessing the appropriateness of the court's creating a fictitious promise on the part of *B*, the following inquiries would be suggested by the Model. First, has *B*, by receiving the medical assistance from *A*, interfered in any way with *A*'s fulfilling his duties to God under the circumstances, such that *B*'s conduct is evildoing triggering the jurisdiction of Civil Government? The answer to that question really turns on what *A*'s duties to God are in these circumstances. Is it his duty to function in the acquisition phase of his stewardship-dominion obligations? If so, then it would appear that he should be charging and receiving payment for his services, and *B*'s refusal to pay means that *A*'s stewardship-dominion position has been worsened, i.e., *A* gave up valuable time and applied valuable skills but acquired nothing in return.

However, recall that the acquisition phase is not the only phase of the stewardship-dominion mandate. Teaching of both the Old and New Testaments suggests that, before God, *A* is being called to function in the "giving" phase of the mandate in these circumstances.¹⁶⁴ If that is the case, (i.e., *A* has a duty to give assistance whether he will be paid by *B* or not), then it does not appear that, by receiving the services rendered and not paying for them, *B* has interfered with *A*'s stewardship-dominion obligations. Because the jurisdiction of Civil Government extends to punish evildoers (which *B* does not appear to be) and to provide redress for harm caused (of which there appears to be none), it does not appear Civil Government has jurisdiction to compel payment by *B*'s estate.¹⁶⁵

If the above analysis is correct, leaving the parties where it finds them in no way interferes with *A*'s carrying out his duties to God. But what is the impact of such a "no jurisdiction" conclusion on *B*'s duties? If *B* had lived and been in a position financially to pay something to *A* out of a sense of heartfelt gratitude and appreciation, it may well have been the appropriate

164. See, e.g., *Exodus* 23:4-5 (assisting the lost or overburdened helpless animal of an enemy); *Deuteronomy* 22:1-4 (assisting a countryman's animals or preserving his property); *Luke* 10:33-37 (the Good Samaritan account with Jesus' admonition to "Go and do the same.").

165. Because *B*'s estate is authorized under current law to pay only legal obligations of *B* and is not authorized to make gifts to others, *B*'s estate does not have the same liberty with the resources of *B* which *B* himself had.

exercise of stewardship by *B* to do so. If that would have been the use of his resources most pleasing to God and *B* did not do so, that would appear to be a sin matter of the heart for which he would be accountable to God (but not accountable to the Civil Government).

However, if Civil Government perceived that it would be appropriate for *B* to express the gratitude he should feel and compelled some payment to *A* when *B* did not have a willing heart to do so, such coercion would drain all of the essence of gratitude from the transaction,¹⁶⁶ and would assist neither *B* nor *A* in fulfilling their respective duties to God. It would merely be a failed effort to compel love by *B* and a misguided effort to enhance *A*'s financial position on the basis of an erroneous presumption that *A* is always to be functioning in the acquiring phase when he renders professional services.

One further point should be noted with regard to the fiction of the implied in law promise. Consistent with God's character, His law order is the embodiment of truth,¹⁶⁷ and His judgments are always true.¹⁶⁸ Therefore, whenever the court engages in the fiction of implying promises where none existed in fact, one should be particularly wary. Clearly, an order for *B*'s estate to pay *A* accomplishes a redistribution of wealth because the court deems it appropriate to do so. As indicated, the basis for such redistribution appears misguided under the Model analysis. Fictionalizing a promise by *B* to justify that decision does not alter that reality and does not reflect truth in the administration of justice.

Illustration 6: Measuring recovery in a losing contract case on the basis of the value of the benefit conferred on the breacher rather than on the basis of the contract price.

The hypothetical case:

Owner *O* promises to pay Builder *B* \$100,000 for *B* to build a house for *O*, and *B* agrees to do so for that price. As it turns out, *B*'s costs to build it would be \$120,000 (a losing contract for *B*). When the house is almost completed the parties have a disagreement in which each, in good faith,

166. *Supra* discussion at notes 153-154.

167. *Supra* note 41 and accompanying text.

168. *Supra* note 42 and accompanying text.

accuses the other of being in material breach of the contract. Ultimately the court determines that *O* was the first material breacher by his ordering *B* off the job. *B* would prefer not to sue for damages for breach of contract because under current rules of law, the \$20,000 loss he would have incurred had he been permitted to complete the job would be deducted as a "negative profit" from his costs incurred in calculating damages under the formula: Damages = costs incurred + profit.¹⁶⁹ Therefore *B* sues on a restitutionary (promise implied in law) theory under which his projected loss would be ignored, and he could recover an amount based upon the value conferred on *O* by carrying the job almost to completion.¹⁷⁰ The value conferred in the hypothetical is \$115,000.

Under the Model, the first inquiry would be whether *O*'s action of ordering *B* off the job was evildoing. It was, based upon the adjudication that, since *O* broke his promise stating that *B* could complete the house for the total price of \$100,000, he was the first material breacher and, thus, the initial "evildoer." Civil Government's jurisdiction to provide for redress for any harm to *B* resulting from that broken promise is apparent. *O*'s actions have prevented *B* from keeping his promise to build the house, and, in our hypothetical, *B* has not yet been paid anything for the work he has already done.

However, concluding that Civil Government has jurisdiction with regard to a matter does not itself determine the appropriate fashion in which it should be exercised. Had *O* not breached, *B* would have completed the house and been paid the agreed upon price of \$100,000. From that amount *B* would have had to pay his labor and material costs. In the normal case, the amount the builder is paid by the owner is enough for the builder to pay his costs, with something left over as his profit. However, in this case, the amount which *B* agreed to receive for the job was insufficient to do so, and *B* would have realized a net loss of \$20,000 after he paid all of his costs. Is that \$20,000 loss harm caused by *O*'s precluding *B* from finishing by breaking his prom-

169. RESTATEMENT (SECOND) OF CONTRACTS § 349 (1979). Under RESTATEMENT (SECOND) OF CONTRACTS § 347, the \$120,000 cost in construction eclipses the \$100,000 contract price value of the job to him, meaning he has no recognizable damage from the breach.

170. RESTATEMENT (SECOND) OF CONTRACTS § 373 (1979) dispenses with the fictitious promise theory and merely purports to protect what it describes as the restitutionary interest of the non-breaching party. "Subject to the rule stated in Subsection (2), on a breach by non-performance that gives rise to a claim for damages for total breach or on a repudiation, the injured party is entitled to restitution for any benefit that he has conferred on the other party by way of part performance or reliance." *Id.*

ise? Obviously it is not. The \$20,000 loss is the result of *B*'s decision to agree to build the house for a price below his cost to complete the project. His completing the house would not have averted the \$20,000 loss.

If Civil Government makes a damage award in an amount from which *B* is able to pay all but \$20,000 of his costs for labor and material to the date of breach, *B* will be in the same position financially as if there had been no breach. Civil Government would thus have fully protected *B*'s expectation interest in the transaction.

However, the remedy *B* is pursuing, foregoing any claim on the basis of the contract and claiming only for restitution of the value of the benefit his partial performance produced,¹⁷¹ holds the prospect for a better recovery for him. Under such a theory, the court would ignore the agreement actually made and imply a fictitious promise by *O* to pay the reasonable value of the partially completed house, in our hypothetical, \$115,000. That would be an amount which would permit *B* to pay all of his costs except for \$5,000. In essence, with that remedy *B* could successfully shift to *O* \$15,000 of his bargained for loss of \$20,000.

Is there any basis under the Model analysis for such loss shifting? As already noted, the \$20,000 loss was not caused by *O*'s breach. What was its cause? In Model terms, the cause would be characterized as the result of *B*'s own bad stewardship decision to bid the job at a price below his costs. Whether that decision was deliberate, or the result of carelessness or just bad judgment, it was a decision for which *B* was responsible. When a court proceeds on the basis of Restatement Second § 373¹⁷² and awards \$115,000 to *B*, it obviously is not acting within its jurisdiction to order redress for harm caused by an evildoer.¹⁷³ Rather, it is

171. *Id.*

172. *Id.*

173. Note that there is no suggestion that this remedy is designed to be punishment for the act of breach and, as indicated *supra* note 153, Model analysis would not find the conduct innately evil. Even if it were, the restitutionary measure obviously lacks those features which would make the punishment fit the offense. The differences between the damage amount and the amount determined on the basis of value conferred bears no necessary or likely correlation to the act of breach. As a matter of fact, it is less and less likely that the breach by the party on the winning side of a contract is by deliberate design as the benefit of the bargain to him becomes more and more apparent. In such cases, one would expect that it is more likely that the winning party's being the first material breacher is the result of his mistaken belief that the other had already committed a material breach justifying his own action of halting performance, *infra* note 176 and accompanying text.

merely making a choice to redistribute part of the loss, for which *B* is wholly responsible, to prevent what it perceives to be "unjust enrichment" for *O*. (Note that the court is able to characterize *O*'s retention of the partially completed house as "unjust enrichment" absent a payment \$115,000 only by pretending that the parties' agreement did not exist.) As previously noted, such pretense is not consistent with God's character of truthfulness reflected in true judgments in His law order.¹⁷⁴

Yet another concern arises under a Model analysis because of the loss-shifting authorized by Restatement Second § 373.¹⁷⁵ Such a remedy provides incentive to the party who makes a losing contract to provoke the other into breach in order to shift all or some of the loss he would otherwise experience because of his bad bargain.¹⁷⁶ Since in bargains honestly made the duty of each party before God is to keep his promise, it would be contrary to Civil Government's proper role to design remedies which encourage one of the parties to provoke the other into a breach. Yet that is exactly what it has done here. That defect, coupled with the calculation of the award in a manner totally unrelated to the breach, more than confirms the impropriety of the remedy under the Model analysis.

3. Defenses for Not Keeping Promises

Illustration 7: The fraud defense.

The hypothetical case:

A induces *B* to enter into a contract to purchase a used car by turning the odometer back from 70,000 miles to 20,000. When *B* learns of the misrepresentation a week after taking possession of the car, he promptly returns it, demands a refund of the down payment, and states he will make no further payments because of the misrepresentation. *A* refuses to return the down payment and now sues *B* for the next monthly installment.

174. *Supra* notes 41 and 42 and accompanying text.

175. *Supra* note 170.

176. RESTATEMENT (SECOND) OF CONTRACTS § 373 (1979) comment d. "Since a contract that is a losing one for the injured party is often an advantageous one for the party in breach, the possibility should not be overlooked that the breach was provoked by the injured party in order to avoid having to perform." *Id.*

Under the Model analysis it appears *A*'s misrepresentation to *B* constitutes evildoing (*kakos*), an interference with *B*'s carrying out his stewardship-dominion duties over his resources. *A*'s fraudulent conduct is in the nature of stealing. But the question remains, at this point in the transaction, does *B*'s refusal to keep his promise to buy the car constitute evildoing as to *A* such that Civil Government has jurisdiction to enforce the promise? Recall that under the Model, the basis for Civil Government's enforcing promises in this commercial context is the expectation in the promisee which is created by the promisor's words of promise.

In this case *A* is the promisee, but it is quite clear that *A* had no reason to expect that *B*'s words meant that *B* wanted to purchase the kind of car *A* was in fact selling. To the contrary, *A*'s actions make it clear that he knew *B* would not have wanted to purchase the car at all, or at least not for the price he agreed to pay, but for the misrepresentation. Thus, there is no legitimate expectation on *A*'s part which is in need of protection by Civil Government. Additionally, in this context, *B*'s refusing to perform does not appear to be evildoing in the sense of interfering with *A*'s carrying out his stewardship-dominion duties. *A* certainly has no duty to acquire by fraud.

Nor will a refusal by Civil Government to enforce *B*'s promise under these circumstances threaten the sanctity of promise and its continued effectiveness as a unique vehicle for enhancing stewardship-dominion capabilities. On the other hand, enforcement of *B*'s promise in this setting would yield those undeniable results. For it would sanction the use of fraudulent promises to put together transactions which, when enforced, would cause harm to the defrauded promisors; and it would leave them, at best, with an item they never wanted and a damage claim with its built-in difficulties of calculating the amount of damages.¹⁷⁷

A comment must be made in this context with respect to the difference between promises which are coupled with an oath before God¹⁷⁸ and those which are not. The distinction has pro-

177. In most jurisdictions the measure of damages in the fraud action is the difference between the value of the goods as promised, in this instance a 20,000 mile car, and the actual value of the car as it was delivered. Both RESTATEMENT (SECOND) OF TORTS § 549(2) (1976) and U.C.C. § 2-721 (1990) permit the recovery of expectation damages for material misrepresentations. However, this does not obviate the difficulties which may be encountered in attempting to determine values to be assigned to those factors.

178. The transactions respectively between Abraham and Abimalech and Isaac and Abimalech involved promises to each other confirmed by an oath that was an appeal for God to be the enforcer, *supra* note 145.

found jurisdictional implications that cannot be ignored and underscores the lack of jurisdiction by Civil Government to enforce promises induced by fraud. In the former instance, God Himself is brought in as either a party to the transaction or as its enforcer. In the latter instance, God's name has not been implicated, nor has His direct enforcement been invoked by the promisor against himself.

That is a matter which was of great significance regarding the promise which the Gibeonites fraudulently induced Joshua and the leaders to make on behalf of the nation of Israel.¹⁷⁹ Joshua and the leaders of the nation swore an oath before God that they would let the Gibeonites live,¹⁸⁰ having been deceived¹⁸¹ into thinking the Gibeonites were not living within the Promised Land. When the fraud was exposed, the leaders affirmed that they could not avoid keeping their promise because they had sworn an oath before God to keep it and knew they would bear His wrath if they broke it.¹⁸² Years later King Saul, contrary to that promise, killed many of the Gibeonites. God then sent a famine on the land, demonstrating that fraud was not a justification for breaking the oath.¹⁸³

On the other hand, when parties exchange promises without an oath, and thus have not invoked God as the direct enforcer of the transaction between them, they may still be subject to the jurisdiction of Civil Government which is not as expansive as God's jurisdiction. Under the Model analysis, as noted above, it does not appear that *B*'s refusal to keep his promise has made him an evildoer with respect to *A*. Although in God's eyes *B* may have sinned in not acting more carefully in the matter, or in not seeking God's counsel before making the promise, the limited jurisdiction of Civil Government with respect to acts of evildoing is not thereby triggered.¹⁸⁴

179. *Joshua* 9.

180. *Id.* at verse 15.

181. *Id.* at verses 6-14. Joshua and the leaders relied upon the fraudulent misrepresentations of the Gibeonites that they had come from a distant land and also did not ask for God's counsel before they entered into the oath linking God and His name to their promise.

182. *Id.* at verses 18-21.

183. 2 *Samuel* 21:1.

184. Nonenforcement by Civil Government in this context is reflected in RESTATEMENT (SECOND) OF CONTRACTS §§ 159-64 (1979), treating as voidable promises induced by misrepresentation, concealment, and nondisclosure in instances where there is a duty to disclose.

Illustration 8: The unconscionability defense.**The hypothetical case:**

This is based on the classic *Jones v. Star Credit Corp.*,¹⁸⁵ in which *B*, a ghetto resident with limited education and very low income, promises to pay *A*, a merchant in the ghetto, \$900 (\$1234 when all credit charges were considered) for a home freezer. The court finds that at the time of purchase the freezer had a retail value of approximately \$300. After paying more than \$600, *B* refuses to pay more. *A* sues in order to recover the promised amount remaining unpaid. *B* defends on the ground that enforcement would be unconscionable in light of the vast disparity between the promised price and the value of the item, particularly in light of the great disparity in bargaining position between a person of his economic and educational abilities and the merchant who had much more of each. *B* does not contend that any misrepresentations of fact were made by *A* to induce *B*'s promise.

Unconscionability is a defense recognized by both the Uniform Commercial Code¹⁸⁶ and Restatement (Second) of Contracts.¹⁸⁷ Neither provision provides a definition of "unconscionability," and all authorities agree the term is undefinable.¹⁸⁸ The concept is typically said to include "an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party."¹⁸⁹

Factors of status, behavior and substance often combine in the court's assessment of whether there was an absence of meaningful choice or whether the terms were unduly favorable to one of the parties. In the cases in which the unconscionability defense is asserted, the behavior factor itself is insufficient to raise a defense consistent with Biblical principles.¹⁹⁰ Rather the behavior, (e.g., the sales pitch used, or the way terms were worded or presented in written documents) is usually posited to

185. 298 N.Y.S.2d 264 (1969).

186. U.C.C. § 2-302 (1990).

187. RESTATEMENT (SECOND) OF CONTRACTS § 208 (1979).

188. See, e.g., E. ALLAN FARNSWORTH, CONTRACTS 327-28 (2d ed. 1990) [hereinafter FARNSWORTH].

189. *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965).

190. A defense of misrepresentation or duress would be consistent with Biblical principles. Civil Government has been granted authority to protect the exercise of stewardship-dominion duties by the Individual and the Family, but has not itself been granted authority to make stewardship-dominion decisions for them.

have significance because of the social, educational or economic status of the promisor, or because of a perceived disparity in the substance of the transaction.

Under the Model analysis, it appears that both the status factor and the substance factor are contrary to Biblical principles. Considering the economic, social, and educational status of the litigants, and favoring the weaker party is inconsistent with the *mishpat* requisite for the proper administration of justice.¹⁹¹ That feature of impartial and even-handed treatment of all without regard to social or financial status is impossible to implement when the status of the litigants is one of the two most significant factors to consider in applying the defense.

Consideration of the substance of the transaction and whether it appears to be unreasonably one-sided is also improper under the Model analysis. Civil Government does not act within its authority when it dictates directly or indirectly the terms upon which parties can or cannot contract, save to the extent of prohibiting bargains to accomplish purposes antithetical to the creation order.¹⁹² If Civil Government attempts to limit or proscribe the substance of what parties might otherwise independently agree upon in otherwise lawful bargains, it acts not in its authorized role as an avenger against evildoers, but rather in a dominion role which has never been assigned to it.¹⁹³

Civil Government is not the recipient of the dominion-mandate, nor is there anything in Scripture to suggest that it is a better judge of what value an article or service has for an individual than is the individual himself. Yet that is the message communicated when Civil Government interposes its judgment that the individual agreed to pay too much. When Civil Government does so, it sends a very negative message about the worth of the individual, or a category of individuals, i.e., that their personal judgments about the worth of an item and the pleasure it will bring to them are unworthy of recognition by Civil Government. It also sends a clear message that such an individual is not responsible for making improvident stewardship-dominion

191. *Supra* notes 49-53 and accompanying text. In particular, the status favoritism called for by the unconscionability defense is offensive to the command in *Leviticus* 19:15 to not be partial to the poor, but to judge fairly.

192. A promise to pay money in exchange for a promise to commit murder is an example of such an improper purpose for the exchange of promises.

193. *Supra* notes 84-86. The dominion mandate was given to Adam and Eve, as individuals and also as the first human Family. It is a mandate under which the Individual and the Family operate.

decisions because the Civil Government, which is acting more in the role of a guardian than an avenger of evil, will relieve him of the obligation that his promise would ordinarily create. In so doing, Civil Government undermines the creation order primacy of self-government,¹⁹⁴ as well as the principle of individual accountability to God for stewardship-dominion decisions.¹⁹⁵

The combined effect of violation of the *mishpat* requisite (by favoring the poor and weak) and the usurpation of dominion authority suggests that in these instances Civil Government is really endeavoring to compel love by the merchant (by precluding him from collecting the promised amount) rather than to provide redress for evildoing. Although *A*, the ghetto merchant, may be motivated by greed¹⁹⁶ and may be guilty of sin by not acting in a loving way toward *B* in pricing the freezer, his lack of charity is a sin before God alone, and does not in this instance trigger the jurisdiction of Civil Government.

Under the Model analysis, the appropriate inquiry is: has *A*, by setting the price at \$900 (plus credit charges) on the freezer and encouraging *B* to purchase it, interfered with *B*'s carrying out his stewardship dominion duties to God? The facts do not suggest that he has. *A* offered *B* the opportunity to make a choice about the freezer. *B* could choose to purchase at the price asked, try to negotiate a better price, or simply not purchase the freezer at all. *A* could not compel *B*'s decision. As steward over his resources, *B* had the duty to exercise effective self-government in making that choice.

B's decision, the product of neither misrepresentation nor duress, appears to have been that having the freezer presently would be of more value and benefit to him than having \$1234 in cash available over the next several years to purchase other items or services. If *B*'s decision was not the exercise of good self-government and stewardship-dominion duties, that would be sin for which he is answerable to God. If it was a good exercise of his obligations to God, then God is pleased with his use of promise in this setting. In either case, *B*'s breaking his promise to pay the full amount is not only sin, but also an act of evildoing

194. *Supra* note 82.

195. *Supra* note 84.

196. The higher price for items in the ghetto may not necessarily be a reflection of greed. It may reflect the significantly higher costs and greater personal risks to which the merchants in that area are exposed.

as to *A* under the principles previously discussed in connection with ILLUSTRATION 1.¹⁹⁷

The final point to be made takes us back to the acknowledged inability to define "unconscionability." Apart from all of the other problems with the defense previously addressed, the inherently definitionless nature of the defense makes clear that it represents a statement of feelings rather than a statement of a rule of law. Its standardless character obviously offends the *tsedeq* (righteous moral standard) feature of God's law and thus violates a requisite for human law and its proper administration.¹⁹⁸ There can be no expectation that justice will be done in any case in which that feature is not operative.¹⁹⁹

Illustration 9. The contrary to public policy defense.

The hypothetical case:

B, an exercise enthusiast, joins *A*'s health and fitness club, signing the club's form contract after reading all of its terms. One of the terms is an exculpatory clause. It states that *B* releases *A* and *A*'s employees from any obligations they would otherwise have to *B* for causing him any harm by their negligence; it further states that *B* promises not to bring any legal action against *A* or *A*'s employees for any negligence on their part which causes *B* any harm. Shortly thereafter, *B* sustains serious physical injuries as a result of the negligence of *A*. *B* sues *A* in a tort action for negligence, and *A* asserts the exculpatory clause as a defense to that action. *B* now asks the court to hold the exculpatory clause unenforceable on the ground that it violates public policy.

Under the Model analysis, absent the exculpatory clause, Civil Government would, of course, have jurisdiction to order the appropriate redress and/or punishment in light of the actions of *A* and the harm caused to *B*.²⁰⁰ By causing *B* serious physical injuries, with their attendant economic costs, *A* has clearly in-

197. *Supra* notes 146-147.

198. *Supra* notes 46-48.

199. To the extent that "unconscionability" has been incorporated into the unilateral mistake defense, RESTATEMENT (SECOND) OF CONTRACTS § 153(a) (1979), that defense is also deficient under the Model analysis. Its incorporation into U.C.C. § 2-719(3) (1990) as a policing device with respect to efforts to limit remedies invites the same non-Biblical considerations into that area.

200. *Supra* notes 103-106.

terfered with *B*'s carrying out his stewardship-dominion duties to God.²⁰¹

Does *B*'s promise not to sue for such harm alter the matter? If the subject matter of the exculpatory clause is an appropriate one for the use of promises, then it would appear under the analysis developed in connection with ILLUSTRATION 1,²⁰² that *B*'s breaking his promise would constitute evildoing as to *A*. Then *B*'s promise should be enforced. That would preclude *B*'s tort claim, and *B*'s case against *A* should be dismissed.

However, is the subject matter of the exculpatory clause an appropriate one for the use of promise? Recall that under the Model analysis, a promise is a unique vehicle for enhancing stewardship-dominion capabilities.²⁰³ Does its use here assist or enhance *A*'s abilities to carry out his duties to God? Apart from *B*'s exculpating promise, *A*'s duty to God would appear to be to make restitution or other appropriate payment to *B* because of the harm caused. Even before the incident causing the harm, *A*'s duty to God was to recognize the image of God in *B*, *B*'s operation under the stewardship-dominion mandate, and *A*'s corresponding duty to take care not to interfere with *B*'s carrying it out.

It would appear, however, that the promise which *A* obtained from *B* is designed to do just the opposite. The essence of the promise obtained is that *A* may act negligently toward *B* and cause him physical harm without incurring any obligation to compensate or otherwise pay for it. As such it tends to encourage both lack of care toward *B* to avoid harming him and omission by *A* of his duty to make restitution or other payment for harm actually done.

Additionally, it is clear that enforcement of such a promise has serious negative implications for Civil Government's duty to provide for the appropriate redress and/or punishment in such instances. If the subject matter is recognized as appropriate for the use of promise and the promise is enforced, the effect is to preclude Civil Government's availability to provide a forum for resolving the parties' dispute regarding the harmful conduct of *A*.²⁰⁴

201. *Supra* note 85 and accompanying text.

202. *Supra* notes 146-47 and accompanying text.

203. *Supra* notes 143-44.

204. This situation must be contrasted with the use of promise after harm has occurred and the parties, with knowledge of all the facts and the extent of harm or potential harm, enter into an agreement satisfactory to each to settle the matter without

Thus, under the Model analysis, the subject matter of an exculpatory clause appears to be antithetical to the appropriate use of promise, and the promise should not be enforced by Civil Government to bar *B*'s tort claim. The non-enforcement in this case is not based upon sympathy for *B*, who is, after all, a promise breaker. It is solely because the subject matter of the clause is inappropriate for bargaining.

B's position before God in this case is not an enviable one. In making the exculpating promise and exposing himself to physical injury without recourse from *A*, it appears *B* was not exercising good stewardship-dominion over his physical body. If that were the case, then that would be sin before God. Now, in bringing the tort action, *B* has broken his improvidently made promise, which appears to be yet another sin on *B*'s part for which he is answerable before God.

The above analysis of *B*'s position underscores the serious implications of signing such exculpatory clauses, even if courts might refuse, on public policy grounds, to enforce them. Jesus' teaching with regard to the contrasting jurisdictions of Civil Government and of God is on point.²⁰⁵ Using the slap on the cheek illustration,²⁰⁶ Jesus noted that recourse to a remedy provided by Civil Government was available. However, He was quick to note that recourse to such a remedy might not be the course most pleasing to God in that instance.

It certainly would not be most pleasing to God if the plaintiff's heart motive in pursuing his remedy before Civil Government were vindictive.²⁰⁷ And there may be instances as well in which

availing themselves of the services of Civil Government. Such use of promise in no way undermines the duty of care each owes to the other prior to the event causing the harm, and the voluntary resolution is a way in which the parties can determine the compensation or payments appropriate in the circumstances. It is also consistent with the admonition:

Do not go out hastily to argue your case; Otherwise what will you do in the end, When your neighbor puts you to shame? Argue your case with your neighbor, And do not reveal the secret of another, Lest he who hears it reproach you, And the evil report about you not pass away.

Proverbs 25:8-10, See also *Luke* 12:57-58.

205. *Matthew* 5:21-48.

206. *Id.* at verses 38-39.

207. *Romans* 12:18-21. This admonition not to seek personal revenge but to leave room for the vengeance of God precedes the *Romans* 13 identification of Civil Government as God's avenger on earth against those who do evil. When an aggrieved party's heart motive is right and he is led by God to permit Civil Government to be God's avenger against one who does evil, he may do so with confidence that he is right in the eyes of both jurisdictions.

it would be more pleasing to God for the one who was slapped to simply give up his rights before Civil Government as a witness of love and forgiveness toward the assailant. In the latter instance, the victim's decision to forego his legal right might appear odd or even inappropriate in the eyes of Civil Government, and yet it will be perfectly right in God's eyes. For one who knows and reverences God, being right in His eyes is always the best course.

In the exculpatory clause setting, the two jurisdictions teaching suggests the following analysis: The mere fact that Civil Government would be willing to disregard the exculpatory clause and grant a tort remedy for *B*, the promise breaker, does not mean that *B* is right in God's eyes to pursue that remedy. Before God, *B*'s suit and his raising of the public policy defense to enforcement of his promise, appear to be yet additional sins following the first one of making the improvident promise.²⁰⁸

The analysis of the public policy defense to enforcement of exculpatory promises should make it clear that "duties to God" serves as the basis for determining public policy under the Model analysis. Public policy thus has a definite and fixed content. It is not merely an ever evolving standardless reflection of the changing morals and values of a society.²⁰⁹ Thus, for example, a promise made to induce another to have an abortion would be contrary to public policy under the Model analysis, for such a promise does not appear to be for the purpose of fulfilling a duty to God, or encouraging or assisting in its fulfillment, but rather for a purpose violative of that duty.²¹⁰

B. In the Antitrust Setting

The federal antitrust law prohibits, among other things, agreements that unreasonably restrain trade.²¹¹ Comparable prohibitions

208. The implications of this for Christian organizations which would consider the use of such clauses with their patrons, students and the like should also be clear. First, by insisting upon such clauses, they are seeking to induce the other party into a bad stewardship decision (sin). Then, once they have succeeded in inducing that decision, they have set the other party in the next potential sin temptation when they cause him harm and rely upon the clause to bar a tort claim. Should he break his word and challenge the clause before Civil Government in order to recoup the losses he would incur by keeping the promise? Finally, the witness to the non-Christian community, including Civil Government which adjudicates the clause as unenforceable on grounds of public policy, would not bring glory to God. Rather, it would show the organization to be unconcerned with its duties to God regarding the safety and well-being of others.

209. *But see* FARNSWORTH, *supra* note 188, at 352-53.

210. *But see* L.G. v. F.G.H., 729 S.W.2d 634 (Mo. App. 1987) (arguing that because abortions under some circumstances are lawful, "enforceability" of father's agreement to change his will if daughter had abortion was a question of fact).

211. 15 U.S.C. § 1 (1988).

have been enacted by the various states.²¹² These laws reflect a public policy that favors competition. They are designed to help ensure a healthy competitive climate in which businesses may operate and to ensure that consumers receive the benefits which flow from competition. Some years ago, the Supreme Court²¹³ captured the importance of such laws to the free enterprise system and our economic way of life in these words:

Antitrust laws ... are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is freedom to compete—to assert with vigor, imagination, devotion, and ingenuity, whatever economic muscle it can muster.²¹⁴

That last sentence to a large degree reflects effective operation under the stewardship-dominion mandate. In terms of the acquisition phase of the mandate, one operates effectively to the glory of God when, for example, he uses the skills, ingenuity, resources, and imagination which God has given to him to produce the best product for the lowest cost. Consider the next two illustrations particularly in light of duties to God which arise from the stewardship-dominion mandate.

1. Agreements Among Competitors (Horizontal Agreements)

Illustration 10: Criminal prosecution of horizontal price fixing agreement.

The hypothetical case:

Manufacturers *A*, *B* and *C* are competitors who make widgets. They agree among themselves that none of them will sell widgets for less than \$100. When the Justice Department learns of the agreement, it institutes a criminal prosecution against the three, seeking fines and imprisonment²¹⁵ as punishment for their conduct.

212. ABA ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS 619-20, 633-34 (3d ed. 1992) [hereinafter ABA ANTITRUST DEVELOPMENTS].

213. *City of Lafayette, La. v. La. Power & Light Co.*, 435 U.S. 389 (1978).

214. *Id.* at 398 n.16.

215. 15 U.S.C. § 1 (Supp.II 1990).

Because *A*, *B* and *C* are all operating at the same level, manufacturing, and are making the same kind of product, their relationship with each other is called a "horizontal" one. The law is well settled in the United States that horizontal price fixing agreements are *per se* illegal.²¹⁶ Such harsh treatment of these agreements is said to be warranted because they eliminate a significant form of competition which would otherwise flow from uninhibited price competition.²¹⁷

Under the Model analysis, with its focus on duties to God as the basis for public policy, the inquiry is whether the promises exchanged among the competitors are such as to assist or encourage them in the fulfillment of their stewardship-dominion duties to God. The duty of each is to fully use, to the glory of God, the skills, initiative, resources and other capabilities with which God has endowed him. In this instance, it would mean each should be endeavoring to produce the best widgets for the lowest cost and to sell as many widgets as he can produce. If *A*, for example, had the best skills, resources, initiative, and the like, enabling him to produce the best product at the lowest price, he should be able to charge less than his competitors and outsell *B* and *C*.

The essence of this case is that each is promising to limit himself in what he would otherwise do in terms of competing on price. If, for example, *A* had the capability of making the best widgets and selling them profitably for \$95 and could increase his volume of sales and overall profits by doing so, then it would appear to be a good exercise of his stewardship-dominion duties to do so. If, at the agreed minimum price of \$100, *B* and *C* account for more sales than their own skills and abilities would otherwise permit in a competitive market, then the agreement appears to reward inefficient producers and penalize the efficient.

Why might *A* be willing to enter into such an agreement? Perhaps *A* is searching for an easier life, free from present and future price competition, so that he would not have to be so careful in using his resources and skills. *B* and *C* would like the protection that *A*'s promise would bring from the competitive pressures on them to find ways to produce high quality widgets at lower costs. If they have been slothful in the past, but with efficiency could produce at a lower price, the agreement diminishes

216. *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927). See also ABA ANTITRUST DEVELOPMENTS, *supra* note 212, at 62-67.

217. *Trenton Potteries*, 273 U.S. at 397. See also 7 P. AREEDA & D. TURNER, ANTITRUST LAW 410-413 (1986).

the incentive to do so. It appears that laziness and greed are among the motivating factors which combine to prompt such an agreement.

From the above, it appears that the use of promises here is for a purpose or purposes contrary to assisting in the carrying out of the stewardship-dominion mandate. It provides a disincentive to do one's best with the skills and abilities God has given and encourages greed and slothfulness.²¹⁸ Thus, this type of agreement is contrary to public policy and should not be enforced by Civil Government.

The next question is whether the parties' agreement constitutes evildoing of the kind deserving of punishment by Civil Government? It appears to be in the nature of an agreement to deceive the buyers who are unaware of it and believe the price they are paying has been set competitively. This also suggests that the agreement is in the nature of stealing, that is, taking by deceit at a price higher than what could have been charged under competitive conditions. As such, the promises appear to constitute evildoing (*kakos*) in the sense of interfering with another's (the purchaser's) carrying out his stewardship-dominion duties to God.²¹⁹

With respect to the use of promise for the purpose of inducing the other competitors not to make the best use of the skills, resources, and the like God has given them, it is not inconceivable that such use might fit within that category of *kakos* referring to innately evil conduct. The voluntariness of the agreement among them would not diminish the potential that such use of promise would fall in that latter category.²²⁰

Punishment is clearly appropriate for *kakos* of the innately evil type,²²¹ and often is also appropriate for that which may or may not be innately evil, but which hinders others in carrying out their duties to God.²²² Thus punishment of some form for the

218. See *American Crystal Sugar Co. v. Mandelville Island Farms, Inc.*, 195 F.2d 622, cert. denied, 343 U.S. 957 (1952); *United States v. Aluminum Co. of America*, 148 F.2d 416, 427 (2d Cir. 1945) (upon certification and transfer from the Supreme Court, 322 U.S. 716 (1944), pursuant to the Act to Amend the Expediting Act, ch. 239, 58 Stat. 272 (1944), repealed by Judicial Code and Judiciary Act, ch. 646, 62 Stat. 869, 989 (1948)); *Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co.*, 40 F.R.D. 96, 103-06 (N.D. Ill. 1966).

219. *Supra* note 108.

220. See Jurisdictional Proposition 14, *supra* note 108, and *infra* notes 337-44, 351-54 and accompanying text concerning the criminalization of Sodomy in ILLUSTRATION 22.

221. *Supra* note 108 and accompanying text.

222. *Id.* See also *supra* note 119 and *infra* notes 241-79 and accompanying text concerning the appropriate remedies in the instances of acts causing physical pain and suffering or emotional distress, ILLUSTRATIONS 13 AND 14.

hypothetical price-fixing conduct appears appropriate. The larger question about punishment raised under the Model analysis relates to its form—imprisonment. As observed previously,²²³ the notable absence of imprisonment as a form of punishment in the nation of Israel raises questions about its appropriateness in other nations.²²⁴ The award of multiple damages prescribed for civil damage actions establishing such illegal agreements²²⁵ finds its counterpart in the Israel Example.²²⁶ It would also appear that corporal punishment would be consistent with the Israel Example.²²⁷

2. Agreements Between Manufacturers and Distributors (Vertical Agreements)

Illustration 11: Vertical agreement limiting the geographic area into which a distributor can resell the manufacturer's brand goods.

The hypothetical case:

Manufacturer *M* sells its brand of television sets to Retailer *R*, but as a part of the transaction requires *R* to promise that he will not attempt to resell them outside of a designated geographic territory. Thereafter *R* sells some of the television sets outside that designated territory and in the territory of *X*, another retailer of *M*'s brand of television sets. *X* brings an

223. *Supra* note 133.

224. *Supra* note 134. Additionally, it is clear that imprisonment as we know it in this country is devastating to the inmate's carrying out stewardship-dominion duties to God. Note, by way of contrast, the wrongdoer in Israel could be sold into slavery (presumably to work off the debt) if, in a theft case, he lacked the means to make the required restoration, *Exodus* 22:3(b). Even if the city of refuge limitation upon the accidental manslayer's liberty is likened to imprisonment, it is apparent that within that setting the manslayer was permitted to exercise all of his skills and resources in accordance with his own self-government and his duties to God under the stewardship-dominion mandate.

225. 15 U.S.C. § 15 (1988) (treble damages for private plaintiffs); 15 U.S.C. § 15a (Supp. IV 1992) (treble damages for the federal government plaintiff).

226. *Exodus* 22:1-4. Although many commentators treat the multiple restitution prescribed for theft as penal in character, *see, e.g.*, HANS J. BOECKER, LAW AND THE ADMINISTRATION OF JUSTICE IN THE OLD TESTAMENT AND ANCIENT EAST 167 (1980); DAVID DAUBE, STUDIES IN BIBLICAL LAW 137 (1947); MARTIN NOTH, EXODUS: A COMMENTARY 183 (1962); others see it as restorative but with respect to interests beyond the mere market value of the item stolen, JAMES G. MURPHY, COMMENTARY ON THE BOOK OF EXODUS 259 (1979); GARY NORTH, TOOLS OF DOMINION 505-27 (1990). The latter is the position taken in the Model.

227. *Deuteronomy* 25:1-3.

action (under a third-party beneficiary contract theory) against *R* for damages and for an injunction enforcing *R*'s promised limitation on sales outside his territory.

This hypothetical raises the question of the basic enforceability of such agreements. In 1967 the United States Supreme Court announced that such agreements were *per se* illegal in the setting where title had passed to the retailer.²²⁸ However, ten years later it abandoned the *per se* condemnation of such agreements,²²⁹ and in the ensuing years such agreements have become virtually presumptively lawful²³⁰ and, therefore, enforceable.

Under the Model analysis, the inquiry is made as to *R*'s stewardship-dominion duties with respect to the property he owns. Is he to use all of his skills and ingenuity to sell the goods which he has purchased to resell? That would appear to be effective stewardship. To do less than his best to resell would expose *R* to the danger of not making the sales and having to absorb a loss, diminishing the resources available to him with which to glorify God.

The essence of the promise which *M* has obtained from *R* is that even if the most effective way for *R*'s conducting his business is to sell some of the television sets outside the designated territory, he will not do it.²³¹ It is a limitation on *R*'s ability to fully exercise stewardship-dominion responsibilities over his business and over property which he owns. It also appears to gain for *M* authority to make a significant business decision for *R*, where *R* can market the goods he owns, while being exposed to none of the risks of that decision. If *R* is unable to sell all of the television sets in the designated territory, the loss will fall solely on *R*. Additionally, it precludes the competition among retailers of *M* brand television sets that might otherwise occur.²³²

The Supreme Court grounded its *Schwinn* decision condemning such restraints on the passage of title from the manufacturer

228. *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967).

229. *Continental T.V. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977).

230. HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE* (Hornbook Series) 431 (1994).

231. Such is also the essence of vertical price fixing agreements in which the retailer promises that he will not resell the goods he has purchased from the manufacturer at a price lower than that set by the manufacturer.

232. Roger Bern & Michael M. Tansey, *Proper Application of the Rule of Reason to Vertical Territorial Restraints: Debunking the "Intrabrand-Interbrand" and "Efficiencies" Deviations*, 20 AM. BUS. L. J. 435, 448-49 (1983); *In re Coca Cola*, 91 F.T.C. 517, 643-44 (1978).

to the reseller.²³³ That basis for decision was later derided as "an exercise in barren formalism"²³⁴ and a mistaken reading of history.²³⁵ However, under the Model analysis, passage of title, with the concomitant passage of responsibilities it engenders with regard to the property, is not a matter of mere formalism. For *R* to do less than his best in reselling the property he owns would be a failure of his stewardship-dominion duties to God.

It, therefore, appears that the promise obtained in this setting does not have the purpose or effect of assisting or encouraging the parties to carry out their stewardship-dominion duties to God. *M* has no stewardship-dominion duty to make decisions for a business (*R*'s) which it does not own. Making such a decision appears to be an interference with the stewardship-dominion duties which the owner (*R*) does have. Under the Model analysis, the promise should not be enforced by Civil Government. Whether *R* is in a good position in God's jurisdiction to break his promise is, of course, another matter which has been previously addressed.²³⁶

C. In the Remedies Setting

ILLUSTRATIONS 1, 3 and 6 touched some remedies issues in the contracts setting. The Illustrations in this section address selected remedies issues regarding tort damages, the matter of injunctive relief, and the issue of punitive damages.

1. Tort Damages Issues

Illustration 12: The loss in value rule and the depreciation factor.

The hypothetical case:

A's seven year old car is totally destroyed in a crash caused by *B*'s negligence. The market value of the car immediately prior to the incident was \$4,000. To replace the car with an identical model new car will cost \$20,000. *A* had been very careful to maintain his car and had hoped to drive it another several years. He had no intent to replace it and does not

233. *Schwinn*, 388 U.S. at 378-80.

234. *Sylvania*, 433 U.S. at 48 n.13.

235. *Id.* at 53 n.21.

236. *Supra* text accompanying and following note 204.

have the resources to purchase a new car if *B* is required to pay only the \$4,000 loss in value. Nor does *A* have any confidence that he could find a car of comparable quality to the one destroyed if he had to shop in the used car market with a \$4,000 damage award.

The goal in property damage cases is to award an amount which will put the injured party in as good a position, financially, as he was in just prior to the loss.²³⁷ That would mean a damage award of \$4,000 in this case. Those who have shopped for a used car understand *A*'s reluctance to do so and his impression that \$4,000 does not put him in as good a position as he was in prior to the incident. At that time he owned a car with which he was thoroughly familiar, knowing its qualities, good and bad. Many persons in *A*'s position would feel that to purchase a seven year old car with the damage recovery seems like being forced to buy a "pig in a poke." Yet an award requiring *B* to pay *A* \$20,000, enough to buy a new car, would appear to be assessing more than the harm *B* caused.

The depreciation factor built into the valuation of *A*'s car is what produces the \$4,000 damage award and leaves *A* feeling undercompensated. Under the Model analysis, is such a depreciation reduction appropriate? First, the fact that most goods decline in value with use and age is undeniable. That is certainly the case with cars. If the proper administration of justice is to reflect truth,²³⁸ that fact cannot be ignored. Additionally, stewardship principles indicate that those who own property must not only properly care for it, but should also anticipate its ultimate replacement. The "ant principle"²³⁹ seems particularly on point. Applying it to this context, *A* was aware that someday his car would need to be replaced. As a good steward over his resources, he should have been making provisions for that day. If he had done so, then clearly with those resources of his own and the \$4,000 damages awarded he would have been able to buy another new car. The fact that *A* did not do so, and thus is not in a position to buy a new car, is not the result of any evil-doing on *B*'s part. *B*'s conduct only brought to light what appears to have been lack of good stewardship by *A*.

Although the depreciation factor is consistent with Biblical principles, it is important to note one other matter regarding

237. 1 DAN B. DOBBS, *LAW OF REMEDIES* 298, 836-37 (1993) [hereinafter DOBBS].

238. *Supra* notes 41 and 42.

239. *Proverbs* 6:6-8.

valuation of the property destroyed. Drawing from the Israel Example, in making the valuation, all doubts should be resolved in favor of the aggrieved party. Such a conclusion appears implicit in the requirement that one who permits his animals to graze another's field is to "make restitution from the best of his own field and the best of his own vineyard."²⁴⁰ In such instances the negligent party had to pay with his best stocks, regardless of the quality of the product that his animal had actually consumed or damaged.

Illustration 13: Unmeasurable damages—physical pain and suffering.

The hypothetical case:

When *A*'s car was destroyed by *B*'s negligence, *A* also sustained serious physical injuries, including two broken legs, a ruptured spleen and a punctured lung. Among the damages *A* seeks in his suit against *B* are those for the physical pain and suffering he experienced.

Commentators and courts have uniformly recognized that, although they are characterized as compensatory, damages awarded for pain and suffering are not compensatory in the ordinary sense; for they neither make the plaintiff whole, nor replace what was lost, nor are they measurable in fact.²⁴¹ Commentators have variously described the process of assessing such damages as one that "lacks objective standards,"²⁴² is "open-ended and unpredictable,"²⁴³ "arbitrary,"²⁴⁴ and one which attempts to "evaluat[e] the imponderable,"²⁴⁵ and can be likened to a "lottery" which plaintiffs are enticed to play through the prospect of a "jackpot" recovery.²⁴⁶

240. *Exodus* 22:5.

241. 2 DOBBS, *supra* note 237, at 382-84, 398-99; Randall R. Bovbjerg et al., *Valuing Life and Limb in Tort: Scheduling "Pain and Suffering,"* 83 NW. U. L. REV. 908, 912-17 (1989) [hereinafter Bovbjerg]; Louis Jaffe, *Damages for Personal Injury: The Impact of Insurance*, 18 LAW & CONTEMP. PROBS. 219, 222-24 (1953) [hereinafter Jaffe]; Stanley Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 CAL. L. REV. 772, 778-84 (1985).

242. Bovbjerg, *supra* note 241, at 917.

243. *Id.* at 908.

244. Marcus L. Plant, *Damages for Pain and Suffering*, 19 OHIO ST. L. J. 200, 205 (1958); William Zelermeyer, *Damages for Pain and Suffering*, 6 SYRACUSE L. REV. 27, 28 (1955) [hereinafter Zelermeyer].

245. Jaffe, *supra* note 241, at 224.

246. Bovbjerg, *supra* note 241, at 916, citing J. O'CONNELL, *THE LAWSUIT LOTTERY* 8-9 (1979).

With juries receiving no more guidance than to award an amount for pain and suffering that will be "fair compensation" or a "reasonable amount,"²⁴⁷ and review of awards for excessiveness or inadequacy being a "real embarrassment [because] there are no standards for measurement,"²⁴⁸ the inevitability of substantial discrepancies and "enormous" variation in awards is apparent.²⁴⁹

Even a cursory comparison of the current system for compensating pain and suffering with the touchstone requisites of *tsedeq*,²⁵⁰ *mishpat*,²⁵¹ and *meshar*²⁵² demonstrates glaring deficiencies as to each. Standardless in its essence,²⁵³ contemporary practice is obviously the antithesis of the *tsedeq* feature. While it is possible to apply even an improper "standard" evenhandedly, in the sense that all are equally subjected to it, this current standardless "standard" raises doubts "whether it merely invites the administration of biases for or against individual parties."²⁵⁴ This is quite contrary to the *mishpat* feature. The *meshar* (evenness in outcome) feature is certainly also lacking in the current system. As indicated above,²⁵⁵ the hallmarks of the current system are randomness, arbitrariness, disparity and unevenness in result in similar cases.

It appears that the current standardless system distorts each of the features necessary to the proper administration of justice. Furthermore, truth itself is lacking since the essence of the current system is fiction, pretending to measure the unmeasurable. Founded, as it is, upon pretense, even when the verdict in a particular case is in, "nowhere breathes the man who can say with confidence that . . . justice has been done."²⁵⁶

The Israel Example is instructive with regard to unmeasurable damages in this setting of pain and suffering from a physical injury. The *talionic* prescription enunciated in Exodus,²⁵⁷ and the

247. 2 DOBBS, *supra* note 237, at 383.

248. *Id.*

249. Bovbjerg, *supra* note 241, at 923-24. "Within an individual severity level, the highest valuation can be scores of times larger than the lowest. Awards for the most serious permanent injuries . . . range from a low of \$147,000 to a high of \$18,100,000 Although the median, and even mean, awards in a given category may be considered relatively reasonable, the seemingly uncontrolled variability of awards is cause for concern — similar to anxiety about drowning in a pool averaging only two feet in depth." *Id.*

250. *Supra* notes 46-48 (a righteous moral standard).

251. *Supra* notes 49-53 (evenhanded and impartial application of the law).

252. *Supra* notes 56-58 (evenness or equality in outcomes in similar cases).

253. *Supra* notes 241-49.

254. 2 DOBBS, *supra* note 237, at 382, 389-99.

255. *Supra* notes 241-49.

256. Zelermyer, *supra* note 244, at 34.

257. Exodus 21:22-25 (presenting an incident of striking a pregnant woman, with resulting injury).

additional *talionic* prescriptions in Leviticus²⁵⁸ and Deuteronomy²⁵⁹ appear relevant. These Biblical case law accounts appear to support a retributive, rather than a compensatory, focus. The context in which the Exodus *talionic* prescription is given, chapters 21 and 22, also appears indicative of an understanding that the response described is retributive in nature. The context in which the *talionic* principle is set in the Leviticus and Deuteronomy accounts is also clearly retributive. Additionally, the particular Hebrew restorative word, *shalem*,²⁶⁰ used to prescribe the response for the cases of destruction and theft of property in those chapters,²⁶¹ is not used in connection with death or personal injury of human beings. That appears to confirm, by way of contrast, the retributive thrust of the *talionic* principle.²⁶²

Research into this area leads to the conclusion that the appropriate response for Civil Government suggested by the Israel Example in such instances is the assessment of a civil penalty, payable to the injured party. Contrary to the compensatory response under the current damages system for such injuries, the retributive response focuses on the act done by the one causing the harm, and the penalty appropriate to it.

A retributive focus is not a panacea that frees courts and legislatures from the need to exercise sound and careful judgment in addressing the matter of appropriate penalties in the myriad of cases that may be presented. Yet, knowing that the purpose of the assessment is retributive, a penalty appropriate to the defendant's conduct offers more hope for achieving a just result in the individual case, as well as a just uniformity in like cases, than does the present system based upon pretense. Eliminating pretense as it does, a retributive focus provides the opportunity for a straightforward assessment of the appropriate penalty based upon facts which are capable of objective proof. It provides, as

258. *Leviticus* 24:17-21.

259. *Deuteronomy* 19:16-21.

260. CONCORDANCE, *supra* note 43, at 1607 ("7999a [Hebrew script omitted] SHALEM [1022a]; a prim. root; to be complete or sound [variously translated as] ... pay (19) ... recompense (2) ... repay (20) ... restore (2) ... surely make restitution (2)").

261. *Exodus* 21:3 (*shalem* [restitution] in the case of the animal that falls into a pit dug by defendant); 21:36 (*shalem* [shall surely pay] for the ox killed by defendant's goring ox); 22:1, 3, 4 (multiple *shalem* [shall pay, shall surely make restitution] in the case of theft of animals; 22:5 (*shalem* [shall make restitution] for grazing animals on another's field; 22:6 (*shalem* [shall surely make restitution] for the destruction by fire of another's grain in a field); 22:7-15 (*shalem* [shall pay, shall make restitution] in various property loss cases arising out of bailment arrangements).

262. *Supra* note 59, Bern Unmeasurable Damages, 32-33.

well, a theoretical basis for developing approaches designed to introduce evenhandedness, uniformity, and, yes, justice into this most "unlaw-like" area of the law.

Illustration 14: Unmeasurable damages—emotional pain and suffering.

The hypothetical case:

A sustained great emotional distress when she was subjected to an unlawful strip search by police officers acting under the direct supervision and command of B. In a suit against B, A seeks damages for that pain and suffering.

The same discrepancies and wide variations in damage awards in physical pain and suffering cases also occur in the related unmeasurable area of emotional distress apart from physical harm. Such discrepancies may be triggered not only by a strip search as in the hypothetical, but also in cases of defamation or deprivation of constitutional rights. Additionally, they are seen in awards for other unmeasurables such as loss of society or loss of consortium in wrongful death or personal injury cases.²⁶³ In all of these areas as well, the awards are stated to be compensatory but are produced by courts and juries operating under similarly standardless guidance. In these areas, as with physical pain and suffering, courts and juries are purporting to measure losses which are inherently intangible and not measurable in fact.²⁶⁴ The same deficiencies with respect to the touchstone requisites of *tsedeq*,²⁶⁵ *mishpat*²⁶⁶ and *meshar*²⁶⁷ noted in connection with compensatory damages for physical pain and suffering are present in this context.

The Israel Example is also instructive on the issue of remedy in this setting. The Israel Example's respective case law accounts of the pregnant woman where physical injury does not occur²⁶⁸

263. 2 DOBBS, *supra* note 237, at §§ 7.2(6), 7.4(2-3), 8.3(5).

264. 50 AM. JUR. 2d *Libel and Slander* §§ 375, 384 (1995); 16A AM. JUR. PL & PR. FORMS (REVISED), Forms 16A; 431-39; 22A AM. JUR. 2d *Death* § 223 (1988); 2 DOBBS, *supra* note 237, § 7.2(7).

265. *Supra* notes 46-48 (a righteous moral standard).

266. *Supra* notes 49-53 (evenhanded and impartial application of law).

267. *Supra* notes 56-58 (evenness or equality in outcomes in similar cases).

268. *Exodus* 21:22 ("If men strive, and hurt a woman with child, so that her fruit depart from her, and yet no mischief follow: he shall be surely punished, according as the woman's husband will lay upon him; and he shall pay as the judges determine.") (King James Version).

and the defamed virgin²⁶⁹ appear relevant. The particular Hebrew word choice, *anash*,²⁷⁰ for the monetary assessment to be made in each instance suggests a retributive rather than compensatory focus for the assessment. Consistent with its Hebrew meaning and root, the word is variously translated into English as "fine,"²⁷¹ "fined,"²⁷² "imposed a fine,"²⁷³ "pay the penalty,"²⁷⁴ "punished,"²⁷⁵ and "surely be fined."²⁷⁶

That the focus of the *anash* remedy is not compensatory is further confirmed by the fact that there is a Hebrew word, *shalem*, that has a clearly restorative, compensatory meaning.²⁷⁷ That word is used to state the prescribed remedial response for cases involving destruction and theft of property,²⁷⁸ but, notably, it is not the word selected to state the prescribed remedy in pregnant woman and defamed virgin cases.

Research into this area leads to the conclusion that, as in the instance of unmeasurables associated with physical pain and suffering, a retributive focus in the form of a civil penalty payable to the aggrieved party is also appropriate under the Model analysis for emotional pain and suffering.²⁷⁹

Illustration 15: Punitive damages.

The hypothetical case.

The facts are the same as in ILLUSTRATION 13 except for the additional fact that *B* intentionally drove his car into *A*'s for the purpose of causing the harm to *A*. In addition to seeking recovery for the property damage and the measurables and unmeasurables related to the physical injury, *A* also seeks punitive damages for *B*'s intentional misconduct.

269. *Deuteronomy* 22:13-19 ("[T]he elders . . . shall take the man and chastise him, and they shall fine him a hundred shekels of silver. . .").

270. CONCORDANCE, *supra* note 43, at 1576 ("6064 [Hebrew script omitted] ANASH [778d]; denom. vb. from 6066; to fine, mulct [variously translated as] fine (2), fined (1), imposed a fine (1), pay the penalty (1), punished (2), surely be fined (1)."). The Hebrew word from which *anash* is derived, is *onesh*. That word is treated in CONCORDANCE, *supra* note 43, at 1576 as "6066 [Hebrew script omitted] ONESH [778d] from an unused word; an indemnity, fine: fine (1), penalty (1).").

271. *Id.* *Deuteronomy* 22:19, *Proverbs* 17:26. See also 2 *Kings* 23:33 (*onesh* as "fine").

272. *Supra* note 270. *Amos* 2:8.

273. *Supra* note 270. 2 *Chronicles* 36:3.

274. *Supra* note 270. *Proverbs* 27:12. See also *Proverbs* 19:19 (*onesh* as "penalty").

275. *Supra* note 270. *Proverbs* 21:11, 22:3.

276. *Supra* note 270. *Exodus* 21:22.

277. *Supra* notes 260-61.

278. *Supra* note 261.

279. *Supra* note 262.

Under current law the jury would be instructed to consider the egregiousness of *B*'s conduct to determine if punitive damages were appropriate in order to punish *B* for his act and also to deter *B* and others from committing such acts in the future.²⁸⁰ The jury would also be told that the decision to make such an award (or not to do so) is solely within its discretion.²⁸¹ Additionally, it would be instructed that the wealth of *B* is among the factors it should consider in determining the amount of the award.²⁸²

Contemporary criticism of the assessment of punitive damages in this country focuses on the randomness and arbitrariness of such awards as a result of the standardless nature of the remedy reflected in such instructions.²⁸³ The criticism is well founded. In terms of the Model analysis, the lack of a standard, the *tsedeq* requisite,²⁸⁴ is the fundamental and insurmountable problem with the current system of making such awards.

Additional problems are also reflected under the Model analysis. Assessing the amount of punitive damages based upon the wealth of the defendant appears to violate the *mishpat* requisite.²⁸⁵ The wealthy will be made to pay more for the same conduct than would the poor, precisely because of their wealth, a result which seems to fly in the face of the command of impartiality toward the rich and the poor underscored in the Israel Example.²⁸⁶

Drawing further from the Israel Example, several case law examples reflect retributive responses to a defendant's wrongful conduct.²⁸⁷ However, only the case in which a goring ox kills a human being²⁸⁸ implicates the wealth of the defendant as a factor in determining the magnitude of that response. As indicated in connection with the discussion of ILLUSTRATION 14, the penalty in

280. 1 DOBBS, *supra* note 237, at 459, 467-68, 476-82.

281. *Id.* at 456, 458.

282. *Id.* at 485-94.

283. *Id.* at 534-39.

284. *Supra* notes 46-47. 1 DOBBS, *supra* note 237, at 476-82, for a critical assessment of the deterrence basis for punitive damages. See also Tuomala, *Atonement*, *supra* note 18, at 239-41 (the appropriate retribution will produce the appropriate deterrence); Tuomala, *Essays*, *supra* note 2, at 29-31.

285. *Supra* notes 49-53.

286. *Supra* note 49.

287. *Exodus* 21:12 (murder and capital punishment); *Exodus* 21:22-25 (pregnant woman and *lex talionis*); *Deuteronomy* 22:18-19 (defamed virgin); *Deuteronomy* 25:1-3 (corporal punishment).

288. *Exodus* 21:29-30 ("If, however, an ox was previously in the habit of goring, and its owner has been warned, yet he does not confine it, and it kills a man or a woman, the ox shall be stoned and its owner shall be put to death. If a ransom is demanded of him, then he shall give for the redemption of his life whatever is demanded of him.").

the case of the defamed virgin was a set monetary fine, without regard to the wealth of the defamer, and corporal punishment in the form of stripes.²⁸⁹ Likewise with respect to the case of the pregnant woman in which no physical harm occurred, there appeared no suggestion that the amount of the fine was to be based upon the defendant's wealth.²⁹⁰

Where physical harm is caused, application of the *lex talionis* retributive principle (discussed in connection with ILLUSTRATION 13²⁹¹), yields a penalty that is appropriate to the act done by the defendant causing harm without a hint that the wealth of the defendant is a relevant concern to that assessment. Finally, with respect to corporal punishment itself, the Deuteronomy prescription is explicit that the number of stripes is to be "according to his guilt,"²⁹² the clear implication being that wealth is not a factor in the determination. Although it is not clear that the multiple restitution requirement²⁹³ in property theft cases is retributive in nature,²⁹⁴ even if it were, it is to be measured in terms of a multiple of the item stolen, not the wealth of the thief.

In the case of the goring ox and the culpable owner, the penalty prescribed is: "the ox shall be stoned and its owner also shall be put to death. If a ransom is demanded of him, then he shall give for the redemption of his life whatever is demanded of him."²⁹⁵ Unlike the fine in the pregnant woman case,²⁹⁶ there is no explicit reference that moderates the ransom demanded by any objective standard. It is not unlikely that the reason for the distinction is that the death of the defendant is deserved in this case, and the ransom is to redeem his very life from that fate.

Further confirmation that ransom is a unique remedy with a most limited application (being used as an alternative to capital punishment only in the ox goring case) is the explicit prohibition of ransom in other homicide cases.²⁹⁷ Such explicitly limited application suggests that ransom in that unique setting cannot support the larger principle of assessing punishment based upon the wealth of the defendant in other cases.

289. Deuteronomy 22:18-19.

290. Exodus 21:22.

291. *Supra* notes 257-262.

292. Deuteronomy 25:2.

293. Exodus 22:1-5, 7, 9.

294. *Supra* note 226.

295. Exodus 21:29-30.

296. Exodus 21:22.

297. Numbers 35:30-32.

The *meshar* requisite²⁹⁸ also appears to be violated by current punitive damages applications. Unpredictability and wide disparity in retributive assessments for comparable conduct flows inevitably from the lack of a substantive governing standard. It is aggravated by consideration of the wealth of the defendant. The *meshar* requisite is further distorted by the additional consideration the jury is to undertake in weighing the award's impact as an effective deterrent to such future conduct by the defendant or by others.²⁹⁹

Those deficiencies, precluding evenness of treatment in similar cases, are magnified by the practice of permitting juries to make the assessment.³⁰⁰ Juries, operating without standards and without an understanding of the retribution which has been assessed in similar cases, are even more likely than judges to produce disparate results. Judges making such assessments would at least have the benefit of their own and other courts' experiences regarding similar cases.³⁰¹ The Israel Example indicates that the role of lay juries was fact finding³⁰² not assessing penalties. The latter appears to have been committed to judges.³⁰³

2. Injunctive Relief

Illustration 16: Injunction to prevent threatened harm.

The hypothetical case:

A learns that B is about to bulldoze down several old and stately oak trees on the edge of A's property abutting land owned by B. B claims the trees are on his land and that development of his land makes their removal necessary. A sues

298. See *supra* notes 55-58.

299. *Supra* note 284.

300. See *supra* note 241 and accompanying text regarding the disparity of jury verdicts flowing from the guideless instructions in the area of the unmeasurables.

301. That is not to say that even if juries considered what the punishments had been in other similar cases, there would be a likelihood of achieving justice. Although with respect to the *meshar* requisite, such information would enhance the opportunity for achieving uniformity, there is no basis to suppose the prior cases were correctly decided because of the absence of the *tsedeq* and *mishpat* requisites.

302. *Numbers* 35:24 ("[T]he congregation shall judge between the slayer and the blood avenger according to these ordinances [dealing with accidental, as contrasted with intentional, homicide]"). But for cases too difficult to decide, the Levitical priest or the judge who is in office shall declare the verdict as between one kind of homicide or another, between one kind of lawsuit or another, and between one kind of assault or another. *Deuteronomy* 17:8-9.

303. See, e.g., *Exodus* 21:22; *Deuteronomy* 22:18.

B seeking an injunction against the bulldozing pending resolution of the underlying boundary dispute.

Under the Model analysis, such a preventive injunction would be appropriate. If *A* owns the land, *B*'s threat itself appears to be an act of evildoing (*kakos*). It prompts distress and concern by *A* that the property over which he has stewardship-dominion obligations is about to be destroyed and obligates him, as an effective steward, to take action (self-help or otherwise) to preserve his property. Additionally, the threat itself is disruptive and an immediate distraction for *A* from his other stewardship-dominion obligations. The conclusion that the threat itself is evildoing is reflected in the historically recognized tort and crime of assault.³⁰⁴

Even if there is a genuine dispute over the ownership of the land on which the trees are standing, it is clear that *B* has a means available to resolve the matter—recourse to Civil Government, the institution God has ordained for that very purpose. Resolution in that manner would avert the potential of an erroneous decision by *B* causing *A* harm that could never be adequately compensated for by an award of money damages. *B*'s pursuit of the bulldozing prior to resolution of the boundary dispute thus appears contrary to his duty to recognize the stewardship-dominion duties which *A* may very well have over the property and needlessly exposes *A* to potentially irreparable harm.

The Israel Example also confirms the appropriateness of coercive force by Civil Government to prevent the occurrence of harm. The instruction to expel from the rest of the population those infected with leprosy³⁰⁵ appears to be illustrative of such coercive action. Although the command to exclude those infected was followed with the stated reason, "so they will not defile their camp where I [God] dwell in their midst,"³⁰⁶ the spread of the disease to others was clearly averted by the quarantine command. The coercive directives regarding destruction of contaminated houses³⁰⁷ and contaminated articles of personal property³⁰⁸ also indicate coercive action designed to prevent harm to others from the spread of disease.

Specific performance, the special form of injunctive relief in the contracts setting, is likewise consistent with the Model anal-

304. MELVIN MADISON BIGELOW, *THE LAW OF TORTS* 323-27 (1907); 1 WAYNE R. LAFAVE AND AUSTIN W. SCOTT, JR., *SUBSTANTIVE CRIMINAL LAW* 90 (1986).

305. *Numbers* 5:1-4.

306. *Id.* at verse 3.

307. *Leviticus* 14:33-47.

308. *Leviticus* 13:47-57.

ysis. In such instances, the party threatening the breach is enjoined to perform. His threat is itself evildoing, disruptive to the other party's planning, and exposing him to the various transaction costs referred to in connection with the discussion of ILLUSTRATION 1.³⁰⁹ Additionally, if the breach is permitted to occur, in addition to the actual transaction costs of arranging a substitute transaction, the aggrieved party would be exposed to the damages remedy which is notably undercompensatory.³¹⁰ Ordering performance avoids those negative consequences and holds the best prospect for protecting the aggrieved party's expectation.

3. Attorneys' fees

Illustration 17: American Rule on attorneys' fees.

The hypothetical case:

As a result of a collision between a car driven by A with that driven by B, A sustained not only damage to his car, but also physical injuries. In the suit against B, A introduced undisputed evidence that his medical expenses from the injuries were \$110,000 and that his lost income during the recuperation period was \$100,000. He had also introduced evidence regarding the pain and suffering he had experienced.³¹¹ The jury returned a verdict in the amount of \$300,000 compensatory damages.

Under the American Rule on attorney's fees, each party is responsible for paying his own attorney.³¹² Because A had entered into a 33 percent contingency fee contract with his attorney, A is obligated to pay him \$100,000 under these circumstances. It is obvious that after that is done, A will not be restored to as good a position financially as he had been in prior to the collision. The \$200,000 remaining after he pays his attorney is less than the amount of financial harm from medical expense and lost earnings (measurable damages) he had sustained, to say nothing about the pain and suffering award (unmeasurable damages) which the jury

309. *Supra* discussion at and following note 146.

310. *Supra* discussion following note 148.

311. *But see supra* notes 250-62 and accompanying text regarding the impropriety under the Model analysis of treating pain and suffering as a basis for a compensatory damage award.

312. *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 245 (1975).

believed it was awarding for the benefit of assuaging that item of harm to A.

The American Rule is not consistent with analysis under the Model. The jury verdict has established *B*'s position as an evildoer (*kakos*) toward A. His causing the collision interfered with A's carrying out his stewardship-dominion duties, placing him in a worse position in terms of his resources and the condition of his body. The restorative goal illustrated by the Israel Example in the instances of measurable damages³¹³ is achieved only by an award that actually restores for the losses caused. The American Rule precludes that result by diverting part of the award from its restorative purpose to the payment of attorneys' fees instead.

This is not to say that *B* is engaging in evildoing by defending against A's claim in court. Where there is a dispute as to liability or damages Civil Government, through its court system, is an appropriate vehicle for resolution. It is to say that the result of that process is an adjudication that *B* is responsible for the harm he caused; and only if the restorative goal is abandoned can the costs of establishing *B*'s responsibility be left for A to pay out of the damages award (or out of A's other resources). Clearly A would have experienced none of the damage to person and property, nor would he have had to pay attorneys' fees to establish *B*'s position as an evildoer toward him, had the collision never occurred.

Would the analysis be any different if, as the Model suggests, the remedy for the pain and suffering were a civil fine (retributive judgment) payable to A, rather than a judgment for compensatory damages? Establishment of *B*'s evildoing is required whether the remedy for it is to be compensatory in nature or retributive, or a combination of the two. Obviously, a part of the fee for the attorney reflects the effort to establish *B*'s status as that of an evildoer. To the extent that the attorney also assists the court in determining the appropriate remedy, whether its basis be compensatory, retributory, or a combination of the two, that also is an important aspect of accomplishing a just result in the case. Without both an adjudication of responsibility and determination of the appropriate remedy, Civil Government would not have fully resolved the dispute between the parties.

There is nothing in the Israel Example even hinting that any civil penalty was to be paid to Civil Government. If it were,

313. See, e.g., *Exodus* 21:19; 22:5-6.

then whatever amount were assessed for that purpose would not be available to *A* for the payment of his attorney. Thus *A* would be compelled to pay his attorney either out of the portion of the award designed to compensate him for his medical expenses and lost income, or from his own pre-judgment resources, and the intended restorative goal would not be achieved.

If, on the other hand, the civil penalty were paid to *A*, would that alter the analysis? In the first place, if the amount of the civil penalty bore any relationship to the amount of attorneys' fees attributable to establishing that remedy, it would be purely fortuitous. Second, perhaps the key reason for awarding the civil penalty to the aggrieved party is to reinforce in him the sense that justice has been done in the case. For although the assessment does not pretend to measure his actual loss, it was the real harm that he sustained that called for the imposition of the civil penalty against the evildoer. Both *B*'s payment of that civil penalty and *A*'s receipt of it are important features in producing what is perceived by each to be a just result. Such a perception is foundational to any potential restoration of relationship between the parties.³¹⁴ If *A* is required to pay his attorney from the penalty assessed for pain he really suffered, or from his pre-judgment resources, *A*'s sense that the dispute has been justly resolved is undermined.

If in this case the jury determined that *B* was not responsible for the collision, and therefore that *B* owed *A* nothing, should *B* then recover from *A* the attorney's fees he had to pay to defend the action? Under the Model analysis, Civil Government has jurisdiction to punish or assess an appropriate remedy against one who has done evil. In this instance, if the facts regarding liability were disputed, *A* was guilty of no evil-doing by presenting the matter to the appropriate Civil Government entity for determination. Recall that the key to permitting *A* to recover his attorneys' fees above was the adjudication that *B* was responsible for causing the collision, and thus an evildoer. Since there is no established evildoer in this setting, but each party is proceeding

314. Tuomala, *Atonement*, *supra* note 18, at 231-33; Tuomala, *Essays*, *supra* note 2, at 28-29, 35-36. See also the multiples of *Exodus* 22:1-4, 7, 9 payable by the thief to the theft victim, the *Exodus* 22:5 provision for resolving all doubts against the wrongdoer and in favor of the victim, and the *Leviticus* 6:1-5 requirement of the added one-fifth to the restoration of what was wrongfully taken in cases where the wrongdoer confessed. All suggest the importance of ameliorating the wrongdoing in the eyes of the victim, which, in turn, can provide a basis for ultimate restoration of the relationship between the parties.

to resolve a dispute implicating his respective stewardship-dominion position, the attorneys' fees for each appear to be a cost of honest dispute resolution in a fashion consistent with Biblical principles.

If, however, *A*'s claim against *B* is frivolous and in the nature of an extortion attempt, then it appears *A*'s use of Civil Government is improper and constitutes evildoing toward *B* as well.³¹⁵ The attorneys' fees which that evildoing compelled *B* to incur in order to successfully defend and to show the improper use of Civil Government by *A* would be recoverable by *B* under the Model analysis. *A*'s wrongful act has diminished the resources otherwise available to *B*, and restoration to put *B* financially in the position he was in just prior to the wrongful act would compel restoration by *A* of those expenses.

The Model analysis thus does not dissuade parties from using Civil Government to resolve genuine disputes. In this respect, it does not have that downside inherent with automatic two-way fee shifting.³¹⁶ At the same time, it does discourage litigation which constitutes an abuse of the appropriate functioning of Civil Government and an act of evildoing toward another, types of conduct which are not deserving of protection.

D. In the Setting of Other Public Policy Issues

The matters previously addressed were primarily set in the litigation context, and for the most part assessed common law

315. *Supra* note 108 and accompanying text. See also *Christiansburg Garment Co. v. Equal Employment Opportunity Commission*, 434 U.S. 412, 422 (1978). Although it appears to be unfaithful to the facially neutral 42 U.S.C. § 1988 (1988) (now 42 U.S.C. § 1988(b) (Supp. IV 1992)), providing the court discretion to allow the prevailing party reasonable attorney fees, the Court permits prevailing defendants to recover fees only when plaintiff's claim was "frivolous, unreasonable or groundless, or plaintiff continued to litigate after it clearly became so." *Id.*

316. Under automatic two-way fee shifting, the losing party, plaintiff or defendant, would be required to pay his own and the winner's attorney fees. The fear has been great that such a prospect would unduly deter even meritorious litigation. Professor Laycock notes that the "principal concern has been with the litigant of modest means, and especially with plaintiffs of modest means. Most personal injury plaintiffs can't pay their own attorneys, and are able to proceed at all only because of contingent fee arrangements. Now suppose their lawyer said:

You don't have to pay me if we lose, but you'll have to pay defendant's lawyers. They'll be billing at \$250 per hour But if things go badly we can probably get a settlement that avoids total defeat. And if not, I have a friend who does bankruptcies.

DOUGLAS LAYCOCK, *MODERN AMERICAN REMEDIES: CASES AND MATERIALS* 844-45 (2d ed. 1994).

rules under the Model analysis. That they occurred in the litigation setting does not detract from the fact that the rules discussed reflect fundamental policy decisions about the appropriate role of Civil Government in such matters. In this section issues arising from legislation or potential legislation are addressed. That they even more clearly implicate fundamental public policy issues is apparent. ILLUSTRATIONS 18-22 raise the very basic question of authority—does Civil Government have authority to act, or to act in a particular way in these areas? They also illustrate instances in which one component of the Model may be more relevant than another in resolving a particular legal or public policy issue. In each the Jurisdictional Considerations component of the Model, which focuses directly on the authority issue, is the most relevant, and the analysis proceeds accordingly. The section closes with an exploration of the issue of civil disobedience under the Model analysis.

Because of the controversial nature of the issues illustrated in this section, the point made at the outset is restated here. What is presented here is the application of the most precise and comprehensive version of the Model to date. Because the Model is ever under review for further modifications and refinements as greater insight into God's word indicates appropriate, it may not be the last. Perhaps the application of Model analysis to these controversial issues will prompt comments and suggestions that will assist in developing the very best Biblical framework for analyzing issues of law and public policy.

1. Public Education

Illustration 18: Legislation creating schools operated and funded by Civil Government.

The actual case:

Civil Government establishes a system of government (public) schools operated by employees of Civil Government and funded by taxes imposed by Civil Government.

Under the Model analysis, Civil Government is acting beyond its jurisdiction when it establishes and operates such schools. In doing so, it is not functioning within its acknowledged jurisdiction to punish evildoers, to prevent evildoing, or to provide for redress

for harm caused by evildoing.³¹⁷ With the exception of its jurisdiction to commend those who do well, Civil Government's realm of authority is clearly coercive in nature. That is reflected even in the manner in which it obtains funding for its authorized functions — by taxation, a compulsory assessment, as contrasted with the manner in which private institutions obtain resources for their activities.

Nowhere in Scripture is authority over men's minds given to Civil Government;³¹⁸ and the coercive authority which it wields is incompatible with influencing men's beliefs by reason and conviction as contrasted with force and violence.³¹⁹ Nor have those intent on exercising domination over others missed the point that the ability to dictate truth translates into the ability to control.³²⁰

317. See *supra* notes 103-108.

318. Titus, Essay on Law, *supra* note 30, at 29.

319. TITUS, BIBLICAL PRINCIPLES, *supra* note 19, at 72, referring to James Madison's 1784 *Memorial and Remonstrance on the Religious Rights of Man*. See also Herbert W. Titus, *Education, Caesar's or God's: A Constitutional Question of Jurisdiction*, 3 J. CHRISTIAN JURIS. 101 (1982), and Herbert W. Titus, *Education, Religious Freedom, and the Role of the State* (Faculty Forum CBN University, April 22, 1988) (video cassette available in Regent University Library). See also FRANCIS W. GARFORTH, JOHN STUART MILL, *THEORY OF EDUCATION* (1971). "A government which can mould the opinions and sentiments of the people from their youth upwards can do with them whatever it pleases. *Id.* at 23 (quoting from MILL, *PRINCIPLES OF POLITICAL ECONOMY* i and ii (COLLECTED WORKS II and III), at ii 950). See also JOHN STUART MILL, *On Liberty*, in 43 GREAT BOOKS OF THE WESTERN WORLD (Robert M. Hutchins ed., 1952), in which Mill reflects that:

A general State education is a mere contrivance for moulding people to be exactly like one another: and as the mould in which it casts them is that which pleases the predominant power in government; . . . in proportion as it is efficient and successful, it establishes a despotism over the mind, leading by natural tendency to one over the body.

Id. at 318.

320. See, e.g., *A DOCUMENTARY HISTORY OF COMMUNISM* (Robert V. Daniels ed., 1960), stating that:

In the period of the dictatorship of the proletariat . . . the school must not only be the conductor of communist principles, but it must become the conductor of the intellectual, organizational and educational influences of the proletariat, to the semi-proletariat and non-proletarian sections of the toiling masses, in order to educate a generation capable of establishing communism.

Id. at Vol. I, 167 (quoting from *THE PROGRAM OF THE ALL-RUSSIAN COMMUNIST PARTY* (Bolsheviks) 1919). See also FRANCIS NIGEL LEE, *COMMUNIST ESCHATOLOGY* (1964), for the context in which Lenin said:

One of the bourgeois hypocrisies is the belief that the school can stand aloof from politics. You know very well how false that belief is Communists alone must determine the content of the curriculum, in so far as this concerns general educational subjects, and particularly philosophy, the social sciences

The Scripture is clear, however, that parents have been given jurisdiction and the command to teach their children.³²¹ Parents may carry out their responsibility to educate their children in a variety of ways, including joining together with other parents to establish private schools to do so. Whatever the means selected, however, the responsibility is one which the parents cannot abdicate. The Church has also been given jurisdiction and the command to teach the truth.³²²

Might it be said that Civil Government is commending those who do well when it provides government education? Not under the Model analysis. First, it must be underscored that the doing well which is to be commended is that of others (i.e. those outside the institution of Civil Government), and that under the Model there is no roving commission for Civil Government itself to do well in the abstract. Recall that under the Model, the jurisdiction of Civil Government is defined in its relation to the other jurisdictions and not in some freestanding, independent way.

That being established, the next inquiry is whether its action in establishing government schools and taxing to support them is a commendation of the exercise of jurisdiction by those to whom it has expressly been granted. Rather than being a commendation, it appears to be an interference with the exercise of the jurisdic-

and communist education.

Id. at 354 (quoting Lenin's 1919 Speech at the Second All Russian Congress of Internationalist Teachers, and Lenin's Instructions of the 1921 Central Committee to Communists Working in the People's Commissariat for Education). A Russian encyclopedia states:

The aim of education is "to develop in children's minds the Communist morality, ideology and Soviet patriotism, to inspire unshakable love toward the Soviet fatherland, the Communist Party and its leaders; to propagate Bolshevik vigilance; to put emphasis on atheist and internationalist education; to strengthen Bolshevik will power and character."

Id. at 358. Putting it quite bluntly, Lenin stated, "We must hate — hatred is the basis of Communism. Children must be taught to hate their parents if they are not Communists," *THE WIT & WISDOM OF THE 20th CENTURY* (compiled by Frank S. Pepper 1987) (quoting Lenin's Speech to the Commissars of Education, Moscow 1923). For the Chinese Communist perspective on the purpose of education, reference *QUOTATIONS FROM CHAIRMAN MAO TSE-TUNG* 165 (1966). "Our educational policy must enable everyone who receives an education to develop morally, intellectually and physically and become a worker with both socialist consciousness and culture." (quoting from *On the Correct Handling of Contradictions Among People* (February 27, 1957)).

321. See, e.g., *Genesis* 18:19; *Deuteronomy* 6:1-7; *Ephesians* 6:1-4.

322. See, e.g., *Exodus* 24:12 (the law given to Moses for the purpose of instruction for the people); *Leviticus* 10:8-11 (priests to teach people all the statutes); *Deuteronomy* 33:10 (Levites as teachers); *Matthew* 28:19-20 (New Testament Church to teach all Jesus commanded). See also Titus, Essay on Law, *supra* note 30, at 29-30.

tion granted to parents. The interference is quite direct in impinging upon the parents' resources which would otherwise have been available to steward as they believed best to advance the education of their children. To those without children, taxing them to support the education of others clearly diminishes the resources over which they have been given stewardship-dominion duties, and, to that extent, limits their exercise of jurisdiction over their resources.

Under the Model analysis, Civil Government's attempt to exercise jurisdiction not belonging to it by establishing schools and taxing to support them is not, however, justification for civil disobedience in the form of refusing to pay the taxes. Although its unauthorized action interferes with individuals and families in their respective efforts to carry out duties to God, it does not compel them to sin.³²³

Two other observations should be made, which may help cushion the initial shock caused by what might be termed the Model's counter-intuitive conclusion regarding public education. First, recall that stewardship-dominion duties include the phase of giving. Consider the benefits that could accrue if Civil Government did not tax to support its schools. Individuals, families, and the voluntary associations they might form would have additional resources over which to exercise authority. Consistent with effective stewardship principles, they might well choose to express love those who have less by providing scholarship assistance or other assistance to aid them in educating their children.

The Church as well might find new opportunities (and challenges) to really operate fully as the Church, that is, to be an instrument of love and assistance to those endeavoring to carry out their duties of educating their children.

The second observation is pragmatic. There is no reason to believe that an entity which is attempting to perform a function outside of the authority conferred upon it is likely to do it well. In fact, in the case of public education, the "proof is in the pudding" test appears to be strong confirmation of the Model's conclusion that education is not within the jurisdiction of Civil Government.³²⁴

323. See *supra* notes 91-93 and accompanying Proposition 8 of the Jurisdictional Considerations. If, on the other hand, Civil Government prohibited parents from educating their children and compelled them to turn their children over to the government's schools for that purpose, Proposition 8 would support parental disobedience.

324. SHELDON RICHMAN, *SEPARATING SCHOOL & STATE* (1994):

As shown in the Appendix [of the Richman book] there are many empirical

2. The National Endowment for the Arts

Illustration 19: Legislation establishing the National Endowment for the Arts and taxing to fund its activities.

The actual case:

Congress has established the governmental body and taxes to support its activities which include financial support to artists to encourage them in their activities.

Under the Model analysis, Civil Government is not acting within its jurisdiction when it does so. What has just been said regarding its taxing to support government schools is also applicable here. It is obviously not acting within its jurisdiction to punish evil-doing, to prevent evil-doing, or to provide for redress for harm caused by the same.

Can it be said that it is appropriately acting in its "commending those who do well" authority? Is there anything inherently different in the activity of one who, for example, paints or sculpts or dances, and that of one who practices medicine or builds bridges or works as a plumber? It cannot be doubted that elements of skill and creativity are involved in every stewardship-dominion activity from which one might produce income for the needs of life. In terms of an individual's "doing well," it is not self-evident that there is an inherent difference between doing an activity in the "fine arts" or in the "useful arts" or in other productive endeavors.

A difference which does appear to exist between the activities mentioned is the nature and extent of the demand for them. Activities illustrated by the examples in the first category or the products produced by them have aesthetic appeal. The appeal to taste holds the potential for great financial gain if one can create something which, in turn, creates great aesthetic appeal in another who is able and willing to pay money to satisfy that appeal. But because its appeal is to taste, instead of to functional needs, the market in which to sell is more limited.

However, this difference is not unique between the categories. It exists within the categories as well. There may be a

indications that the public schools are in bad shape. Test scores, students unprepared for the world of work, crime, irrelevant subjects, and a general process of 'dumbing down' have all combined to create the greatest disenchantment with American public schooling in 150 years.

Id. at 100.

larger market for the services of a plumber than for those of a bridge builder. Because of specialties or geographic location, there may be a larger market for one physician than for another in terms of potential buyers of their services.

Taxing by Civil Government, and payments by it to make up for these economic realities, accomplishes a redistribution of income by Civil Government. This is perhaps a reflection of the belief that Civil Government itself should make up for any harsh economic realities. This belief, however, does not thereby transform such activity into the realm of "commending" those who do well.³²⁵ From what has been said with regard to the public education issue, it is also clear that this income redistribution to accomplish a function which is not within the jurisdiction of Civil Government improperly interferes with the stewardship-dominion duties of those taxed.

If an argument were advanced that Civil Government is seeking to provide the benefits of culture for its citizens and not merely to redistribute income, the Model analysis would again find a lack of jurisdiction to do so. There is no grant of authority identified in the Model for such a function; nor is there anything to suggest that in the area of determining aesthetics for its citizens, any more than in the area of determining and imparting truth, Civil Government has been endowed with special competence.

3. TAX STATUS OF NONPROFIT ORPHANAGES

Illustration 20: Revenues received by nonprofit orphanages are not subject to income tax.

The illustrative case:

Kind Orphanage, a nonprofit organization whose sole activity is caring for orphans, receives income in the form of gifts from those who admire and voluntarily choose to support its work. It is not required to pay taxes to the Civil Government on that income.

Under the Model analysis, Civil Government's refraining from taxing that income appears to be an appropriate exercise of, and

325. The expanded copyright protection now encompasses the classes of performing arts (including performance of musical and choreographic works) and visual arts (including sculptural works), NEIL BOORSTYN, COPYRIGHT LAW § 2.05 (1994). This appears to be an appropriate method of protecting such activities from "theft" by others and to that extent offers an encouragement to creative activity in this realm, even as the patent laws do in the realm of scientific discovery.

an appropriate manner of exercising, its "commending those who do well" jurisdiction. The activities of the orphanage appear to be expressions of love and worthy of commendation. Teaching in both Old and New Testaments commends such unselfish activity.³²⁶ This confirmation is important, because the category of activity for which commendation is appropriate must be in accord with a standard. The *tsedeq* requisite of a righteous moral standard,³²⁷ is equally applicable in this context. Therefore, that which is commendable is to be judged according to Biblical principles, not according to evolving societal norms or Civil Governmental dictates.³²⁸

The manner of commendation appears appropriate. It takes the form of refraining from a coercive action against Kind Orphanage which would make doing its work of love more difficult. It does not compel others, who may not value the mission or methods of the orphanage, to support it by taxing them. Thus, it does not interfere with the resources over which others are to exercise stewardship-dominion duties. Additionally, it does not engage in the impermissible and impossible task of compelling others to show love to the orphanage or its work. As well, such a plan recognizes that Civil Government does not have a jurisdictional basis for doing the work, and therefore does not seek to justify using taxation to accomplish an unpermitted end.

To be contrasted with taxing to support the work of the orphanage, which would not be within Civil Government's jurisdiction, is taxing for the purposes of supporting its authorized function of commending those who do well. The costs associated, for example, with Civil Government's arranging a ceremony for the purpose of awarding a certificate or medal of commendation to a girl who risked her life to rescue several children from a burning building, appear to be costs appropriately incurred in the course of its functioning within its jurisdiction. Taxation to support this jurisdictional function is appropriate, just as taxation, for example, to provide for a court system or a police force is appropriate. Although taxation always diminishes the resources available to

326. See, e.g., *Leviticus* 14:18-29; *Deuteronomy* 24:17-21; *Psalms* 146:9; *Isaiah* 1:17; *James* 1:27.

327. *Supra* notes 46-48 and accompanying text. In this regard, note it is the Lord who is described as the one who supports the fatherless and the widow, *Psalms* 146:9.

328. *Ecclesiastes* 1:15 ("What is crooked cannot be straightened, and what is lacking cannot be counted."); *Proverbs* 28:4 ("Those who forsake the law praise the wicked . . ."); *Romans* 1:32 (Those who suppress the truth in unrighteousness "give hearty approval to those who practice [evil].").

those taxed, it does not constitute evil-doing toward them on the part of Civil Government when it is for the purpose of enabling Civil Government to carry out its jurisdictional duties.³²⁹

4. Social Security

Illustration 21: The federal government's program of taxation of wages to provide retirement benefits.

The actual case:

The federal government has legislated a tax on wages which is to be for the purpose of providing a stream of retirement income to those taxed. Over the years, the rate of the tax and the amount of wages subject to taxation for this purpose have been increased, and the retirement age for calculating entitlement for benefits has been raised.

Under the Model analysis, Civil Government is not acting within its jurisdiction when it establishes and supports such a program through its taxing power. It is not punishing those who do evil, preventing evil-doing, or providing redress for harm caused by evil-doing. Nor is it commending those who do well. Rather, it is seeking to compel the one taxed to do well by making some provision for the future when he will no longer be able to earn wages.

The "ant principle"³³⁰ of stewarding resources with an eye to the future is certainly one which an individual should take into account if he is to properly exercise self-government, the most basic level of government. But Civil Government's interposition with its compelled retirement program undermines the individual's exercise of self-government. Not only does its tax deprive the individual of making his choice regarding the use of those funds, for retirement purposes or otherwise, but, even more significantly, its program is premised on an assumption that individuals are incapable of self-government in this stewardship-dominion area.

Additionally, inadvertently or intentionally, a perception was created in the minds of many that because the Civil Government

329. *Romans* 13:3-7.

330. *Proverbs* 6:6-8. See also *supra* note 84 and accompanying Proposition 4(a) of the Jurisdictional Considerations.

had, through its compelled retirement savings program, made provision for that eventuality, no further individual planning was necessary. Even if the Social Security retirement program were actuarially sound, which it is not, it was never designed to be the exclusive source of income for retirees. However, the perception that it was, provided a disincentive for individuals to exercise their important stewardship-dominion responsibilities in this area.

The Social Security retirement program also undermines the Family in a subtle way. It creates the twin misperceptions that (1) children of retired parents have no responsibility for the support and care of their parents and (2) Civil Government does. Such a message is contrary to the Biblical admonitions for children to honor and respect their parents³³¹ and to provide for them in old age,³³² and it can encourage an attitude of hardness by children toward the needs of parents.

This subtle suggestion undermining a godly sense of Family responsibility also desensitizes the Church with respect to the jurisdictional role it is authorized and expected to play with regard to the elderly in need.³³³ Thus as to that institution also, the program does not commend those who do well, but tends to discourage them from doing so by creating the perception that it is the responsibility of Civil Government, not that of the Church, to provide the needed care.

Additionally, all of the redistribution of income improprieties associated with taxation for government schools or to fund the National Endowment for the Arts are present in this instance. They are, however, compounded by the presence of an element of deception not found in those programs. The deception flows from the fact that the program is not actuarially sound, guaranteeing that many of those paying into it with the thought that they will receive from it in the future, will not.³³⁴ The impropriety of Civil Government's undertaking this program is also confirmed by the "proof is in the pudding" test, which it fails miserably. The demographics reveal that the program will become bankrupt without a continuing upward push of the retirement age,³³⁵ confirmation that the guarantee of retirement income is not within the jurisdiction of Civil Government.

331. *Exodus* 20:12; *Proverbs* 23:22; *1 Peter* 5:5.

332. *1 Timothy* 5:4.

333. *Deuteronomy* 24: 19-21; *1 Timothy* 5:5,9.

334. LARRY BURKETT, *THE COMING ECONOMIC EARTHQUAKE* 133-38 (1991).

335. *Id.* at 137.

5. Identifying Sexual Conduct For Which Criminal Sanctions Are Appropriate

Illustration 22: Sodomy, Adultery and Fornication.

The hypothetical cases:

In the Sodomy case, the sexual act is anal intercourse between single consenting male adults. In the Adultery case, an unmarried man and a married woman engage in consensual sexual intercourse. The consensual sexual intercourse in the Fornication case is between unmarried adults of the opposite sex. The three different categories of sexual acts are considered in conjunction with each other as the appropriateness of criminal penalties for any such acts under the Model analysis is assessed.

First, consider what the acts have in common. Each involves sexual activity outside of marriage. Under Biblical principles such would constitute sin within God's jurisdiction.³³⁶ In each instance, not merely matters of heart and mind are present; acts are also present. That at least opens the potential for Civil Government's involvement in some fashion, because its jurisdiction is operative in the realm of conduct. But each also has in common the element of consent. So it is not precisely like the sin-plus-act pattern in, for example, a robbery or rape setting, in which evildoing in the sense of overpowering another's will is so obvious.

At this juncture, if only the benefit of the New Testament's description of the jurisdiction of Civil Government were available to guide the inquiry, how might the cases be analyzed? We know that Civil Government has jurisdiction to punish *kakos*, and that *kakos* encompasses both acts which are innately or inherently evil and those which are evil in the sense of interfering with or hurting others in fulfilling their duties to God.³³⁷ The consent element suggests that neither party interfered with the other in that latter sense which would implicate Civil Government. Perhaps one of the parties took the lead in inducing the other to engage in the sinful conduct. But even then, the end result is a

336. See, e.g., *Genesis* 2:23-24 (sexual relations within marriage expressly ordained by God); *Exodus* 20:14 (prohibition of adultery); *Leviticus* 18:22 (homosexual act characterized as an abomination); *Acts* 15:20, 29; *1 Corinthians* 6:9 (these acts condemned as unrighteous).

337. *Supra* note 108 and accompanying text.

voluntary choice which, although it results in a sinful act, is hardly an interference by another with the latter's stewardship over his or her body.

In any of the Illustrations, are there other parties who are adversely affected by the act? In the Adultery Illustration, the spouse of the woman and any children certainly appear to be such parties. The wife has broken her promise of fidelity to her husband and the damage to their relationship is enormous. The continued viability of the marriage, and thus the family unit, is jeopardized, exposing the children to the risks inherent in its destruction. The children are exposed as well to the risks flowing from the tensions brought into the family unit by the wife's/mother's unfaithfulness.

At another level, that of the institution of the Family, the act of adultery is nothing less than a direct assault. The Family is the most basic unit of government (after Individual self-government), a unique stewardship-dominion functioning unit and the educating, nurturing, and civilizing unit for children. Any attack on it obviously has only negative implications for the well-being of society at large. Such attack thus clearly appears to be encompassed within the second category of *kakos*, evildoing in the sense of interfering with another's carrying out of his duties to God.³³⁸ Here the others interfered with are the members of the family unit and the institution of the Family as well.

It is not so clear that the sexual acts in the other two Illustrations fall into that second category of *kakos*. In a sense, each is an attack on the institution of Family. Sodomy constitutes a rejection of the Biblical limitation upon sexual activities to sexual intercourse between the sexes, foundational to the institution of the Family; and fornication constitutes a rejection of the limitation of such sexual intercourse to the marriage setting as is the case with Family.³³⁹ Perhaps as to each, one could also suggest that each increases the potential for disease which might cause harm to other innocent parties and, ultimately, to the society itself. However, since the question considered is whether such acts should be punishable as criminal acts, it is problematic

338. See *supra* note 108.

339. Note that concubinage practiced in Old Testament accounts was a relationship that carried certain rights and duties for the participants and the offspring (legitimacy). In this regard in particular it differed from fornication which did not. A more thorough analysis of concubinage in relation to both marriage and fornication is found in Paul Morken, Family Law Lecture Materials (unpublished teaching materials 1992) [hereinafter Morken, Family Law].

to turn the answer on the basis of either or both of those justifications. Put another way, if the New Testament description of Civil Government's jurisdiction to punish were the only source available to assist the analysis, it would not generate a confident answer either way.

It is at this point that the Israel Example sheds light that is particularly helpful in resolving the question. All three sin-plus-act-plus-consent cases are treated in the Mosaic Covenant. Before addressing them, recall that the premise for consulting the Israel Example in any setting is that when God dealt with Israel, He did not act contrary to His own character or His law order for the nations.³⁴⁰ That premise suggested God's authorization to Civil Government in Israel to administer punishment for certain conduct is indicative that such conduct is of the type appropriate for punishment by Civil Government in other nations as well, with the caveat carved out for idolatry, which would constitute treason in that nation.³⁴¹ When those points are linked with the New Testament's description of Civil Government's jurisdiction to punish those who do *kakos*, it suggests that those acts identified for punishment in Israel constituted the kind of conduct captured later by that Greek word.

One additional point should be made before examining the treatment in the nation of Israel of the three types of conduct under consideration. Numerous sexual acts and relationships were proscribed in Israel, but not all were punishable by Civil Government.³⁴² Because God demonstrated a selectivity in identifying which of those various sexual offenses were within the jurisdiction of Civil Government, Israel's detailed moral proscriptions in this area should not detract from the insight to be gained from the particular treatment accorded to the Illustrations under consideration, but rather should reinforce its significance. With that perspective, consider the treatment of each of the three Illustrations in Israel.

In that nation, adultery carried the death penalty for both parties.³⁴³ The same penalty was prescribed for sodomy.³⁴⁴ However, for consensual sexual intercourse outside the marriage covenant by a man and woman, our fornication case, no punish-

340. *Supra* notes 111-139 and accompanying text regarding The Israel Example.

341. *Id.*

342. *Leviticus* 18.

343. *Leviticus* 20:10.

344. *Leviticus* 20:13.

ment was prescribed.³⁴⁵ Rather, the prescribed consequence was that the man should pay the bride price and, if her father consents,³⁴⁶ the two should be married. The Deuteronomy account also provides that the husband may not thereafter divorce her.³⁴⁷ However, that limitation on the husband's future rights did not detract from the significantly different way in which the fornication case was addressed—as essentially a Family matter designed to furnish security for the woman and to protect the economic interest of her father.³⁴⁸ The implication for the Fornication Illustration is that such conduct should not carry criminal sanctions in other nations. However, the implication for the Adultery and Sodomy Illustrations is that such conduct is appropriate for criminal sanctions of some type in the other nations.

That implication confirms the initial impression regarding the Adultery Illustration. Under the second category of *kakos*, adultery appeared to be the type of evildoing that would interfere with others' carrying out their duties to God. But analysis of the Sodomy and Fornication Illustrations, under the New Testament alone, left a real uncertainty about the appropriateness of criminalizing that conduct as falling within that "interference" category of *kakos*. The Israel Example confirms that the hesitance to put fornication in that category was correct. Apart from the very nature of the sex act in the Sodomy Illustration, the basis for putting sodomy in that "interference" category of *kakos* appeared essentially no stronger. Its status as a punishable offense in Israel suggests the appropriateness of examining that act in light of the other category of *kakos*, that which is innately evil.³⁴⁹

In assessing that potential, the treatment of the heterosexual conduct is instructive. Obviously sexual intercourse between a man and a woman is not innately or inherently evil in light of the Creation mandate to the first Family to be fruitful and multiply and fill the earth³⁵⁰ and the institution of marriage by God Himself.³⁵¹ The act of sexual intercourse between members of the opposite sex was treated as evildoing, subject to punishment by Civil Government, or not, according to the context in

345. *Exodus* 22:16-17; *Deuteronomy* 22:28-29.

346. *Exodus* 22:17.

347. *Deuteronomy* 22:29.

348. Morken, Family Law, *supra* note 339.

349. *See supra* note 108.

350. *Genesis* 1:28; 9:1.

351. *Genesis* 2:22-24.

which it occurred. Thus, fornication, although contrary to God's law, and therefore sin, was not evildoing of the kind Civil Government in Israel was authorized to punish. Adultery, on the other hand, was treated not only as sin, but also as evildoing, punishable by Civil Government as well.

In this light, consider the treatment given to the proscription of sodomy in Israel. In the sodomy case presented, unlike that in the adultery and fornication cases, there is no description of the context in terms of the status of the participants other than to identify them as two males.³⁵² Whether both are single, or whether either might be married to a woman is not stated and is apparently irrelevant to the proscription. This suggests that it is the act itself which is the evildoing and which triggers the jurisdiction of Civil Government to punish.

That thought is reinforced by the stated justification for punishment: "both of them have committed a detestable act."³⁵³ The absence of any suggestion in either the Old Testament or New that sexual acts between members of the same sex is ever appropriate, coupled with the uniform condemnation of such acts in both, without regard to the external setting in which they occur,³⁵⁴ appears to be further confirmation that the act itself is *kakos* of the innately evil type. The account in Romans makes explicit what appears implicit from the created order, that is, that such use of the human sex organs is contrary to the creation order itself,³⁵⁵ and thus appropriately categorized as an innately evil act within the jurisdiction of Civil Government to punish.

6. Civil Disobedience

Illustration 23: Doing that which Civil Government prohibits.

The hypothetical case:

This is the Operation Rescue setting in which A, along with a hundred other people, peacefully positions herself in front of the doors of an abortion clinic to prevent pregnant women, intent upon entering in order to have abortions, from doing

352. *Leviticus* 18:22; 20:13.

353. *Leviticus* 20:13. See also *Leviticus* 18:22 where the act is termed "an abomination."

354. *1 Kings* 14: 24; *Romans* 1:26-27; *1 Corinthians* 6:9.

355. *Romans* 1:26-27. See also *Leviticus* 18:22.

so.

For the purposes of the Illustration, assume that A's sole purpose in positioning her body as a blockade to the entrance is to prevent the immediately impending abortion out of a pure motive to save the life of the child in the womb.³⁵⁶ After some time, during which women seeking abortions have turned away, A is arrested and charged with the crime of trespassing on the private property owned by the abortionist.

Under the Model analysis it is clear that the question to be addressed in this instance is not the broad one of: "Is civil disobedience ever justified (in the sense that it would not constitute sin in God's jurisdiction)?" Rather, as Proposition 8 of the Jurisdictional Considerations³⁵⁷ makes clear, the more narrow and precise question which must be answered is: "Has Civil Government prohibited what God commands, or commanded what God has prohibited?" For under the Model analysis, those are the only instances in which the citizen's disobedience would be authorized and, indeed, mandated, in order to fulfill his duties in another jurisdiction within which he lives—God's jurisdiction.

For the Illustration then, the first question to be asked is whether Civil Government has commanded A to do anything? Because Civil Government's approval of abortions does not compel A or any woman to have an abortion, it appears to compel nothing which would call for a response of disobedience from A. Does it, however, prohibit something which God commands? Because under current constitutional theory, decisions of the United States Supreme Court are considered "law" binding on all,³⁵⁸ the Court's rule established in *Roe v. Wade*³⁵⁹ and its progeny³⁶⁰ establishes not only the right of private parties to murder unborn children, it also effectively prohibits state governments from punishing the murderers or from intervening to

356. The Model analysis for this ILLUSTRATION is proceeding on the premise that the child in the womb is a human being, created in the image of God, which has the inalienable right to live. See *Psalm* 139:13-16; *Jeremiah* 1:5.

357. *Supra* notes 91-95 and accompanying text.

358. *Cooper v. Aaron*, 358 U.S. 1,18 (1958). "[T]he federal judiciary is supreme in the exposition of the law of the Constitution It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land." *Id.* See also LAWRENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 33-35 (2d ed. 1988).

359. 410 U.S. 113 (1973), *reh'g denied*, 410 U.S. 959 (1973).

360. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *Thornburgh v. American College of Obstetrics and Gynecologists*, 476 U.S. 747 (1986).

save the lives of the unborn. It appears that the "law" of those decisions is an interference with the duty, before God, of those state governments to punish evildoers, in this instance, murderers. For God has directed Civil Government to punish such evildoers lest the land become polluted with innocent blood to the detriment of the respective state and, ultimately, the nation.³⁶¹

State governments, in response to those federal court decisions, have, by enforcement of their trespass laws and by injunctions, prohibited private parties from intervening to save the lives of the unborn; that is, they have prohibited the rescue of innocent lives. Are such prohibitions contrary to what God commands? That is the crux of the matter, for if they are, then A's action is not sin in God's jurisdiction. Consider the following Scripture references in making the assessment.

Even apart from the quite explicit admonition to rescue in Proverbs,³⁶² a principle of duty to rescue or aid one's fellowman appears to be clearly established. The "second great commandment," "[L]ove your neighbor as yourself,"³⁶³ is certainly a relevant starting point. In the law which God gave Israel, which does not contradict His law order for all nations, He fleshed out this commandment in ways which shed light on our question of duty to rescue or assist. In both Exodus³⁶⁴ and Deuteronomy³⁶⁵ God commands assistance to aid another (even one's enemy) in the preservation of his property, stating in the latter account, "You are not allowed to neglect them."³⁶⁶ As discussed in conjunction with the Jurisdictional Considerations³⁶⁷ and the Israel Example,³⁶⁸ failure to assist was not punishable by Civil Government, but violation of the command would be sin in God's jurisdiction.

Even more directly on point is the duty to rescue a rape victim which appears implicit in the Deuteronomy case accounts

361. *Genesis* 4:8-10 (innocent Abel's blood crying out to God); *Leviticus* 18:21, 25-28 (child sacrifice among the evil deeds for which nations occupying Canaan were spewed out of the land ahead of the nation of Israel); *Psalms* 106:34-43 (child sacrifice by Israel prompting God to give that nation into captivity).

362. *Proverbs* 24:11-12. (Verse 11 directs: "Deliver those who are being taken away to death, And those who are staggering to slaughter, O hold them back.")

363. *Matthew* 22:39.

364. *Exodus* 23:4-5.

365. *Deuteronomy* 22:1-4.

366. *Id.* at verse 3.

367. *Supra* note 110 and accompanying Proposition 16.

368. *Supra* note 125 and accompanying text.

bearing on that matter.³⁶⁹ The victim is to cry out so that someone who hears may "save her."³⁷⁰ If she is an engaged woman and does not cry out, the presumption is that she was not a rape victim, but rather, a willing participant in an act of adultery. Those accounts strongly suggest that if a person were in a position to rescue when the rape victim cried out, and did not do so, he would have violated a moral obligation, a sin in God's jurisdiction.

The Good Samaritan account,³⁷¹ with Jesus' closing admonition to "[g]o and do the same,"³⁷² is yet another indication of the Biblical principle of man's duty to render assistance to a fellowman in need. Other illustrations of assistance also come to mind, including Abram's rescue of Lot and his family from the four kings, for which Abram received a blessing from Melchizedek,³⁷³ and David's rescue of his family and the families of his men from the Amalekites.³⁷⁴

All of the accounts noted, both from the Old as well as New Testament, appear to be but illustrations of the more general duty each man owes to God to recognize the image of God in his fellowman and the stewardship-dominion duty under which his fellowman also operates. They suggest, therefore, a duty common to all mankind and not one confined to those who were parties to the Mosaic Covenant. If that is correct, then under the Model analysis, A's conduct would not be sin in God's jurisdiction even though in the eyes of Civil Government it appears to be a violation of its "laws" on the matter.

Does the fact that the murdering is occurring on property owned by the murderer change the analysis? Nothing in Scripture indicates that it does, and a good deal indicates that it does not. Certainly the rescue directive of Proverbs³⁷⁵ does not suggest the location of the victim is in any way a limitation on the duty. The commands to rescue another's straying animal or other property make no reference to the ownership of the land on which such animal or property is found,³⁷⁶ suggesting it was not a limitation on the command.

369. *Deuteronomy* 22:23-27.

370. *Id.* at verse 27.

371. *Luke* 10: 25-37.

372. *Id.* at verse 37.

373. *Genesis* 14:14-20.

374. *1 Samuel* 30.

375. *Proverbs* 24:11-12.

376. *Exodus* 23:4-5; *Deuteronomy* 22:1-4.

Likewise, the Deuteronomy case law with respect to rescuing a rape victim³⁷⁷ suggests no significance with respect to the ownership of the property where the rape is occurring and, in fact, clearly indicates that wherever the attempted rape is occurring, the victim is to cry out so someone will hear and "save her."³⁷⁸ The Good Samaritan account,³⁷⁹ as well, does not indicate that location of the rescue is the key to the command. It is not clear from the text in that case whether the victim was lying on a public road or was off on the side (on private property) but visible from the road.

A related question might be raised regarding entry onto another's property. In terms of the Model analysis, is *A* violating his duty to God to recognize the image of God in his fellowman and the stewardship-dominion duties his fellowman also has, when he enters the abortionist's property against his will and interferes with his use of it? That is, is *A* an evildoer as to the abortionist when he does so, thus triggering the jurisdiction of Civil Government to intervene? The answer under the Model analysis is clearly "no" when the reason for going on the property is to save lives.

The abortionist is not carrying out his duties to God when he uses his property to commit murder. Thus, when *A* enters upon the abortionist's property to prevent the killing he is in no way interfering with the abortionist's carrying out his duties to God. Thus *A* is not an evildoer which Civil Government would be authorized to punish. The only evildoer in the picture is the abortionist himself who is interfering with the unborn child's duty to live to the glory of God.

Perhaps the truth of the above would have been more apparent if the illustration chosen had been that of the owner of property beating a two-year old to death on his front door step. Would one on the sidewalk who saw the beating occurring be an evildoer if he rushed onto the property and took the child out of the grasp of the landowner assailant? That is, would it be sin before God to trespass upon the assailant's property to avert the impending murder? The command to rescue in the rape cases³⁸⁰ certainly indicates God would not be favorably impressed with inaction. Is it a relevant distinction that, in the abortion cases,

377. *Deuteronomy* 22: 23-27.

378. *Id.* at verse 27.

379. *Luke* 10: 25-37.

380. *Supra* note 370.

the child is smaller and not visible while still in the womb? For those who believe abortion is murder, it is a distinction without a difference. If so, the result should be the same in the one case as in the other.

One more thing which should be underscored is the very narrow basis for civil disobedience under the Model analysis.³⁸¹ As discussed in connection with ILLUSTRATION 18 dealing with public education, Civil Government's taxation for purposes beyond its jurisdiction, which interferes with the taxpayer's stewardship-dominion duties, nevertheless does not excuse the taxpayer from paying the taxes. That is because, although Civil Government has in such instance been "sinning" against the taxpayer, it has not caused the latter to sin by acts or omissions contrary to his duties to God.

The final matter which deserves comment is what may be termed the matter of "call" to save lives in this manner. Even as the Great Commission³⁸² is a command to all believers, the role which one plays in responding to it is a matter of call. Just as some are called to the foreign mission field, others are called to be in a support role for them, and so forth. Likewise, some may be called to intervene at the clinic site as A has done, while others may be called to support that intervention in prayer or financially, or to assist by providing loving care for women to facilitate their carrying their pregnancies to term, or to take other action to counter the lawlessness of the present policy of Civil Government on the matter. Those who are called to intervene as A did, however, do not fall into the category of evildoers nor into the sin category under the Model analysis when they do so.

CONCLUSION

Without an understanding that God, as Creator of all, has established and revealed a law order to which human laws and human administration of justice are to conform, a Biblical model for analysis seems foolishness. Absent such an understanding, conformity with the external standard of the Bible would seem not only irrelevant but also quite confining, and the notion of limited jurisdiction would seem counter-intuitive, confining and

381. Civil disobedience in the context of Operation Rescue is addressed more fully in Roger Bern, *Operation Rescue and the Biblical Model* (1988) (unpublished manuscript).

382. *Matthew* 28:19-20; *Mark* 16:15.

unsettling. Limited jurisdiction of Civil Government means, for example, that some moral failings will not be judged by Civil Government. That is bound to be unsettling to those who believe that if "perfect justice" is not accomplished by the court system of Civil Government, justice will never be done. Such a belief may, for example, be the impetus for the current expansion of Civil Government into the realm of enforcement of promises based on a theory of moral obligation.

However, for those who do have such understanding, knowing that there is a God who judges all and whose judgments are always right, limited jurisdiction is not counter-intuitive, confining or unsettling. Rather, it is liberating in the sense that its recognition of individual and institutional limitations obviates the pressure to impose demands upon the respective entities which they are incapable of successfully fulfilling. Additionally, those with such understanding do not see the external standard of the Bible as something which is undesirably confining. Rather, they see it as the source of truth which brings true freedom, the ability to conform their behavior to the standards established for their good by an omniscient and loving God.

When Civil Government exceeds its jurisdiction, it cannot be expected to perform the usurped function well. Additionally, when Civil Government usurps jurisdiction granted to the Individual or to another human institution, it poses a genuine threat of discouraging the latter's authorized exercise of it. Even if Civil Government does not purport to preclude a parallel exercise by the authorized entity, its intrusion into the jurisdiction of another is likely, over time, to have a numbing effect on the latter's sense of duty in that area, thus reducing the likelihood that such jurisdictional role will be effectively carried out. Thus, confining Civil Government to its important but limited role does not constitute a threat to the well-being of society. Rather, it enhances the prospect of a better society in which each entity is functioning as it was authorized by God to do.

On the other hand, when Civil Government does not exercise the jurisdiction which has been conferred upon it, or does not exercise it in accordance with Biblical principles, lawlessness is encouraged. In a society in which the internal restraint, prompted by the fear of the Lord, is on the wane, and in which there is a corresponding weakening of self-government, each failure by Civil Government presents a magnified threat to its well-being.

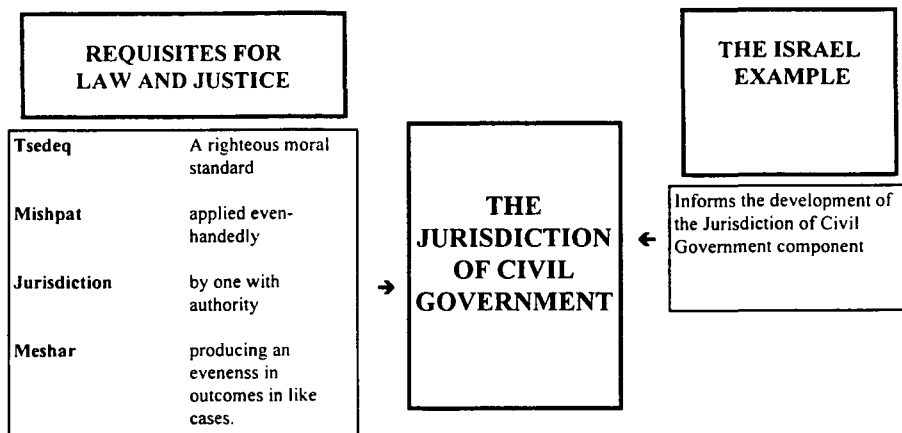
The combination of the evils flowing from Civil Government's intruding into the jurisdiction of others and failing to faithfully

perform its own jurisdictional duties also tends to denigrate law and the justice system in the eyes of its citizens and others who observe. Additionally, lost are the benefits, and also lost is the witness which could otherwise have been, even to other nations, from a society operating fully in accord with Biblical principles.

In sharp contrast to all of the above, are the blessings which flow to individuals and nations from obedience to God's revealed principles of law and justice. Those blessings, and their concomitant witness to the nations of the wisdom and goodness of God, make the task of developing a Biblical framework for analyzing and implementing such principles more than worth the effort.

Appendix 1

INTERRELATIONSHIP OF THE MODEL'S THREE COMPONENTS



Inquiry: Does Civil Government have jurisdiction to act in a particular instance?

The Assessment: Using the Jurisdiction of Civil Government component may yield:

The Policy: The Model guides the outworking of Civil Government:

1. Yes, there is jurisdiction.

a. If so, the question must be pressed further: Is the particular type of act by Civil Government consistent with Biblical principles?

← **REQUISITES FOR LAW AND JUSTICE and THE ISRAEL EXAMPLE** assist in answering the inquiry.

2. No, jurisdiction is lacking.

← The Civil Government will be engaging in wrongdoing if it assumes jurisdiction in this matter.

3. It is unclear whether there is jurisdiction.

← **THE ISRAEL EXAMPLE** may be particularly insightful in determining if jurisdiction is proper.

Appendix 2

Jurisdiction Chart

GOD HAS JURISDICTION OVER ALL

(Propositions 1, 6, 12)

↑	Duties to God	↑	Duties to God	↑	Duties to God
INDIVIDUAL ⇐Rights*⇒ (Propositions 2-5, 7-9) Love God Matt. 22:37-38 Love Neighbor Matt. 22:39 Stewardship/Dominion Gen. 1:26-30; 9:1-3, 7	FAMILY ⇐Rights⇒ (Propositions 3-9) Stewardship/Dominion Gen. 1:26-30; 9:1-3, 7 Structure/Governance Gen. 2:24; 3:16; Prov. 13:24 Relationships/Nurture Eph. 5:22-31; 6:1-4, Deut. 6:1-9	CHURCH ⇐Rights⇒ (Propositions 6-9) Nature/Mission Rom. 12:4-8; Matt. 28:19-20 Structure/Organization 1 Cor. 12:28; Eph. 4:11-13 Dispute Resolution/Discipline Matt. 18:17; 1 Cor. 5:6; 1-6 Benevolence Deut. 14:28-29, James 1:27	CIVIL GOVERNMENT (Propositions 6-15) Punish Evildoers* Deter Evildoing Provide For Redress For Harm Caused Commend Those Who Do Well	<i>(See elaboration below †)</i>	
† Focusing on Right Column Above:					
Civil Government Jurisdiction					
Punish Evildoers** Gen. 9:6; Rom. 13:3-4; 1 Pet. 2:14 (Propositions 13, 14)	Deter/Redress Harm, Commend Rom. 13:3-4; 1 Pet. 2:14; Exod. 21:23-26; 22:1-15; Num. 5:1-4 (Propositions 13, 14)			No Civil Government Jurisdiction to Compel General Love Israel Example Exod. 23:4-5; Lev. 19:9-10; Mal. 4:8-9 Heart Motive Jer. 17:10; Heb 4:12-13 (Proposition 16)	
Facilitates a 1 Tim. 2:1-2 Environment					

* Rights of one individual or entity vis a vis another are defined in terms of duties to God, i. e., a right that another not interfere with one's carrying out duties to God.

** Evildoer = One who does kakos (Gk). Kakos encompasses both the act of harm to another by interfering with another's carrying out his duties to God (poneros) (Gk), and that which is innately evil.