Should the penalty rule in contract law be abolished? A biblical answer to an apparently irreligious question

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Should the penalty rule in contract law be abolished? A biblical answer to an apparently irreligious question

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Since its inception, the penalty rule in English contract law has been the subject of considerable controversy. Its opponents have argued that it defies party autonomy without sufficient justification and should therefore be abolished. In response, its supporters have masterfully constructed a range of legal, ethical, political, psychological and economic arguments in favour of retaining the rule, yet its legitimacy remains hotly contested. Perhaps unsurprisingly in an increasingly secular age, a biblical perspective on this issue has thus far been absent from the literature. This paper first considers the extent to which The Bible might still have a role to play in relation to law reform and social policy, before exploring specifically whether biblical principles can offer support for or indeed opposition to the penalty rule.

1. Introduction

English contract law has long afforded cardinal status to the principle of party autonomy.[2] Whilst in recent decades some limited paternalistic restrictions have been imposed,[3] the freedom of parties to choose who they wish to contract with and on precisely what terms remains very well protected both nationally[4] and at a

[1] Thanks to Professor Peter Edge of Oxford Brookes University and to the peer reviewers for their comments on earlier drafts of this article. Any errors and opinions remain my own. Biblical quotations are drawn from the New Living Translation (NLT) of the Holy Bible, unless otherwise stated.

[2] For a full discussion of the origins of this principle in English law see PS Atiyah, *The Rise and Fall of Freedom of Contract* (Clarendon Press, 1979).

[3] See for example the Unfair Contract Terms Act 1977 and the Consumer Rights Act 2015.

[4] *Chertsey Urban District Council* v *Mixnam's Properties Ltd* [1965] AC 735 at 764 per Upjohn LJ; *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 at 848.

European level.[5] One controversial departure from this principle in the modern law of contract is the penalty rule. Whilst contracting parties are in principle free to agree in advance what their obligations will be following a breach of contract (and even to prescribe a measure of damages that will fall due in such circumstances; a so-called 'liquidated damages clause'), the penalty rule prohibits them from doing so where the consequences that are to be imposed on the prospective defaulter are disproportionate to any legitimate interest that the innocent party has in protecting itself against that particular breach.[6] Put simply: parties are *not* free to agree contractual remedies that have a punitive, rather than merely compensatory, purpose.

The modern version of the rule has been in existence for more than 100 years,[7] but it has been heavily criticised by judicial[8] and academic commentators.[9] In attempts to justify the rule's existence, commentators have not only constructed arguments using *legal* theory, but have also drawn upon a variety of other disciplines, including ethics, politics, psychology and economics.

This paper outlines the findings of an inter-disciplinary research project. It first considers the extent to which The Bible might still have a role to play in relation to law reform and social policy, before exploring specifically whether biblical principles can offer support for or opposition to the penalty rule. It makes a threefold contribution to legal scholarship. Firstly, it makes a theoretical contribution by presenting a new argument in the overall debate on the legitimacy of the penalty rule. Secondly, it makes a methodological contribution in the sense that an answer to the present socio-legal question has not previously been sought by means of a comparative approach which draws on biblical principles. And thirdly, it makes a broader methodological

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[5] Case C-441/07 *European Commission* v *Alrosa Co Ltd* [2010] ECR I-5945, Opinion of AG Kokott, at para 225; see also *Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law* Com(2011) 0635 final, recital 30.

[6] *Cavendish Square Holding BV* v *Makdessi* [2015] 3 WLR 1373, at [41].

[7] *Dunlop Pneumatic Tyre Company Limited* v *New Garage and Motor Company Limited* [1915] AC 79.

[8] *Robophone Facilities Ltd* v *Blank* [1966] 1 WLR 1428 at 1446 per Diplock LJ.

[9] S Worthington 'Common Law Values: The Role of Party Autonomy in Private Law' in A Robertson and M Tilbury (eds), *The Common Law of Obligations: Divergence and Unity* (Hart Publishing, 2016), ch 14; J Morgan *Great Debates in Law: Contract Law* (2nd edn, Palgrave 2015) 234-242.

contribution. The historical influence of The Bible on the modern law is clear,[10] yet today it may be considered a 'spent moral force'.[11] By exploring and evaluating a biblical perspective on the penalty rule, this article also serves to illustrate the potential value - irrespective of religious persuasion - that The Bible may still have today as a resource for makers of law and social policy.

The project's significance extends not only across disciplines but also across jurisdictions, since the debate is not unique to English law. Indeed, as recently noted by the UK Supreme Court, the penalty rule 'is common to almost all major systems of law, at any rate in the western world' and '…is included in influential attempts to codify the law of contracts internationally'.[12] Yet despite its widespread use, there is no apparent consensus across jurisdictions regarding its future; no sooner had the Australian High Court ruled to dramatically extend its application,[13] the UK Supreme Court unanimously decided to restrict it.[14] As such, the findings of this paper are relevant to the ongoing international debate and future policy developments across jurisdictions.

This paper begins with a critical review of the existing literature in relation to the penalty rule, highlighting the absence of a definitive justification for its existence, and thus the reason for the current debate. It then attempts to outline the merits of exploring a biblical perspective, before doing just that.

It is submitted that The Bible provides some support for the penalty rule and that this may go some way to explaining its resilience over the last 100 years in spite of its lack of an accepted underpinning justification to date.

2. The Current Debate

A. Party Autonomy

[10] For examples see Bruce M Metzger and Michael D Coogan (eds), *The Oxford Companion to the Bible* (OUP 1993), 424-426.

[11] Jonathan Burnside, 'The Spirit of Biblical Law' (2012) 1(1) *Oxford Journal of Law and Religion* 127-150, 127.

[12] *Makdessi* (n 6) 1394.

[13] *Andrews* v *Australia and New Zealand Banking Group Ltd* (2012) 247 CLR 205.

[14] *Makdessi* (n 6).

As noted above, most of the literature that opposes the penalty rule starts from the premise that contracting parties should be free to decide for themselves what the terms of their agreement will be, and it is fair to say that this principle has a long history in English law.[15]

In more recent decades there has been a noticeable shift away from complete autonomy towards paternalism but, even today, the courts strongly uphold the view that it is not their function to re-write parties' agreements.[16] Even in cases where the courts might appear to be doing just that (for example, through rectification, contractual interpretation or the implication of terms), a closer look reveals that a court will generally only intervene where something has gone wrong with the written document such that it is not considered to reflect the parties' objective intentions. Such intervention is therefore itself an attempt to promote, rather than override, party autonomy.

And this approach has been carefully justified in the literature. In particular, Charles Fried famously argued that the concept of 'promise' is both the defining characteristic of and theoretical justification for contract law;[17] as such, the starting point is that contractual rules should give legal effect to the obligations that the parties themselves create. It has also been argued that too much intervention by the courts risks uncertainty for contracting parties, which in itself has potential implications for justice[18] and for the economy.[19]

For these reasons, the debate surrounding the penalty rule has centred on whether the departure from party autonomy that it entails can be clearly justified. Clauses that fall within the scope of the rule are the parties' own,

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[15] See PS Atiyah, *The Rise and Fall of Freedom of Contract* (Clarendon Press, 1979).

[16] See the words of Moore-Bick LJ in *Procter & Gamble* v *Svenska Cellulose* [2012] EWCA Civ 1413, para [22].

[17] C Fried, *Contract as Promise: A Theory of Contractual Obligation* (Cambridge: Harvard University Press, 1981).

[18] NJ McBride and S Steel note that LL Fuller argues that a failure to create rules that are clear and understandable 'does not simply result in a bad system of law; it results in something that is not properly called a legal system at all.' LL Fuller *The Morality of Law* (Yale University Press, rev'd edn, 1969) 39, as cited in NJ McBride and S Steel *Jurisprudence* (Palgrave Great Debates in Law, 2014) 62.

[19] See Fuller and Purdue (n 53).

explicit attempts to determine their respective obligations in the event of breach. Of course the motivations for including such a clause may differ between contracts, and even between parties. Yet, in the absence of evidence to the contrary, the assumption must surely be that the clause reflects the parties' intentions and was freely agreed by them. Whilst one can imagine a range of circumstances in which a court might be justified in departing from the consequences of such a clause, it could hardly be legitimate for a court to do so capriciously. Similarly then, if the law is to retain the penalty rule - which has the potential to subvert the parties' explicit agreement - then it is legitimate for its opponents to ask why.

B. The arguments

One way in which supporters of the rule have sought to justify its existence from the perspective of legal theory, is its compatibility with the compensatory principle.[20] This is the well-established idea that contractual damages should have the effect of putting the innocent party in the position that they would have been in if the contract had been properly performed (awarding the 'expectation interest')[21] or alternatively, and less commonly, of restoring that party to the position they were in prior to formation of the contract (awarding the 'reliance interest'),[22] provided that this would not facilitate recovery of losses that would have been incurred even if the contract had been properly performed.[23] In other words, in the vast majority of cases damages should be calculated with reference to the claimant's 'loss' (however defined) and perform a restorative function, rather than with reference to the defendant's wrongdoing; in English law punitive/exemplary damages will not typically be awarded for a breach of contract.[24]

Much like the principle of party autonomy, the compensatory principle is also underpinned by widely-accepted legal theory. In their seminal article, Fuller and Purdue provide considerable support for the principle as a basis for the calculation of contractual damages.[25]

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[20] See for example A Burrows *Remedies for Torts and Breach of Contract* (OUP, 3rd edn, 2004), 440.

[21] *Farley* v *Skinner* [2001] UKHL 49, 76 (Lord Scott).

[22] *Anglia Television Ltd* v *Reed* [1971] 3 WLR 528.

[23] *Omak Maritime Ltd* v *Mamola Challenger Shipping Co Ltd* [2011] Bus LR 212.

[24] *Addis* v *Gramophone Company* [1909] AC 488.

[25] LL Fuller and WR Perdue Jr 'The Reliance Interest in Contract Damages: 1' (1936) 49 Yale Law Journal 52.

Nevertheless, however well-established or well-justified the compensatory principle might be, it does not of itself provide a complete justification for the penalty rule. In fact, many of Fuller and Purdue's own arguments that justify the compensatory principle could be used as ammunition against the penalty rule. Similarly, the compensatory principle is not the only restriction that the law imposes on the recoverability of loss. For example, losses which do not strictly arise as a direct result of the breach,[26] which are too remote[27] or which are properly attributable to the innocent party's failure to mitigate,[28] will not be recoverable at all. However, in the interests of party autonomy parties are permitted to contract out of each of these rules and/or, less controversially, to *limit* the damages that are recoverable following a breach.[29] Given the extensive freedom that parties have to contractually adjust the extent of their liability in other respects, the compensatory principle alone cannot explain why intervention is justified when it comes to clauses which prescribe the measure of damages payable.

Since a watertight justification could not be found within legal theory alone, supporters have also turned elsewhere in search of compelling arguments for retaining the penalty rule. Arguably the most obvious place to turn to next was ethics. Fried argued that the (intrinsically moral) concept of 'promise' is 'the moral basis of contract law'.[30] Building on the classical 'will theory', Fried contended that, when a contractual promise is made, there is a self-imposed moral obligation to honour that promise, and principles of contract law should, so far as possible, fit with this idea.[31] Indeed, contract lawyers will be well familiar with the maxim *ex turpi causa non oritur actio*, which in a range of circumstances can prevent a party from receiving a contractual remedy where there has been illegal or otherwise immoral conduct.[32] Ethics is therefore embedded within contract law. Query then: could there be a moral reason for retaining the penalty rule? For many, if left unregulated, penalty clauses

[26] *South Australia Asset Management Corporation Respondents* v *York Montague Ltd* [1996] 3 WLR 87.

[27] *Hadley and Another* v *Baxendale and Others* (1854) 9 Exchequer Reports (Welsby, Hurlstone and Gordon) 341; *Victoria Laundry (Windsor) LD* v *Newman Industries LD* [1949] 2 KB 528.

[28] *Brace v Calder* [1895] 2 QB 253.

[29] Worthington (n 9) 23.

[30] Fried (n 17) 1.

[31] Ibid 6.

[32] See for example *Euro-Diam Ltd v Bathurst* [1990] 1 QB 1, 34–37.

typically produce a result that 'conflict[s] with our intuitive understanding of justice',[33] and thus intervention is needed to prevent this result.

Hugh Collins explored this possibility in some depth. After systematically discrediting a range of possible moral arguments in favour of the rule, Collins finds himself effectively back at the compensatory principle, concluding that the rule against penalties is *morally* justified on the basis that:

> '…remedial arrangements should not cause a redistribution of wealth which provides the injured party with greater compensation than his actual losses. This is the principle of corrective justice, which in a contractual context leads to the compensatory principle of damages.'[34]

He further argues that, whilst the compensatory principle should be the starting point, some flexibility in the application of that principle is (morally and presumably economically) justified given the time and cost savings that are potentially associated with agreeing in advance the measure of damages that will be payable following a breach. This, in his view, explains why a genuine pre-estimate of loss is an acceptable measure of liquidated damages,[35] but anything in excess of that, should be rendered unenforceable by a penalty rule.

Whilst Collins' pragmatic approach is refreshing, it has been unable to silence the critics, who do not consider that morality - at least not in these terms - can provide the justification that is needed. Worthington questions why an extravagant payment obligation which arises on breach is any more objectionable than one drafted as a primary performance obligation, yet the law has typically intervened only in respect of the former.[36] Certainly as a matter of course a court would not look to assess the adequacy of any consideration present in a contractual agreement, however unequal or extravagant the provisions.[37] Instead the courts consider that the parties and the market are best-placed to determine this issue.

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[33] R Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977), 81-130.

[34] H Collins, 'Fairness in Agreed Remedies' in C Willet (ed), *Aspects of Fairness in Contract* (Blackstone Press 1996), 119.

[35] *Dunlop* (n 7) 86-87.

[36] Ibid.

[37] *Thomas* v *Thomas* (1842) 2 QB 851; *Chappell & Co Ltd* v *Nestle Co Ltd* [1960] AC 87.

Consumer transactions aside, the courts do not generally assess the fairness of terms agreed.[38] Yet in spite of this, the penalty rule does require the courts to examine clauses within its scope and to assess them, essentially, for fairness. Unless intervention on the grounds of fairness (or an absence of good faith dealings) is to be permitted in relation to *all* contractual terms (a step which incidentally may have some merit,[39] but which thus far Parliament has decided not to take) then it is presumably necessary to identify a specific reason why a liquidated damages clause, in contrast to any other, should firstly be subjected to such scrutiny and secondly be deemed unenforceable if the damages it specifies exceed what is fair in the eyes of a judge.

A liquidated damages/penalty clause is typically, by its nature, very clear: it prescribes specifically the consequences that a party will suffer if it fails to comply with its contractual obligations. Putting aside (for obvious reasons) the question of enforceability, such a clause is potentially able to provide contracting parties with a level of clarity and certainty that far exceeds any understanding that they might have about common law damages. As such, whenever such a clause has been included in a written contract then, absent any vitiating factors (e.g. duress, misrepresentation, undue influence or unconscionability) one might assume that the parties understood and voluntarily accepted the effect of the clause (or were at least careless in that regard), particularly in the case of individually negotiated contracts. Yet, as the law stands, where the rule against penalties is invoked a promisor is potentially able to escape paying the very sum that they promised to pay in the very circumstances they promised to pay it. If anything, it could be argued that this in fact provides a moral reason *for* enforcement.

There already exists legislation to provide consumers with protection against unfair contractual terms[40] which ensures that a vulnerable and inexperienced consumer is not unwittingly caught out by an excessive or disproportionate liquidated damages clause, and neither the European nor domestic legislature has so far

[38] Worthington (n 9) 22.

[39] E McKendrick, *Goode on Commercial Law* (4th edn, Penguin 2010) 125.

[40] Consumer Rights Act 2015.

considered it necessary to extend the same level of protection to small businesses or those contracting on another's standard terms.[41]

It is true that English contract law does sometimes intervene in commercial 'bargains' in the interests of morality, but typically this is to scrutinise the circumstances in which agreement to terms was procured, rather than the agreed terms themselves. Consider for example the law on duress. Where one party secures contractual agreement using illegitimate pressure, amounting to 'compulsion of the will of the victim…', then the resultant agreement can be avoided by the other party.[42] Importantly, the presence of illegitimate pressure calls into question the quality of the consent obtained and not the fairness of the terms 'agreed'.

Any moral basis for the defence of duress (or similar vitiating factors which centre on the quality of consent), cannot be used to justify the rule against penalties on moral grounds. Nor has any other moral reason yet been articulated which would justify a significantly lower threshold for intervention in respect of penalty clauses than in respect of any other agreed terms.

Continuing this theme, Melvin Eisenberg has sought to justify the penalty rule by questioning the quality of consent and the extent to which penalty clauses are truly 'agreed' in the first place. He has argued that the courts are justified in intervening in penalty clause cases because parties are unlikely to have rationally considered the consequences of such a clause at the point of contract formation; a limitation which is analogous to a lack of capacity to contract and therefore capable of justifying a departure from party autonomy on similar grounds.[43] With reference to a wealth of empirical evidence, Eisenberg explains that '…actors are often systematically irrational; that is, they often fail to make rational decisions even within the bounds of the information they have acquired.'[44] Amongst other things, the evidence indicates that, generally speaking, people are: (1) overly optimistic in their future predictions;[45] (2) influenced by how different outcomes are framed;[46] and, crucially, (3)

[41] The Unfair Contract Terms Act 1977 represents a much thinner layer of protection for businesses than exists for consumers under the Consumer Rights Act 2015.

[42] *Attorney-General* v *R* [2003] EMLR 24 (PC), paras [15]-[16] (Lord Hoffmann).

[43] MA Eisenberg 'The Limits of Cognition and the Limits of Contract' (1995) 47 Stanford Law Review 211.

[44] Ibid 216.

[45] Ibid.

unlikely to consider in any detail what are perceived to be low-probability risks.[47] He thereby contends that the risks and potential consequences of a penalty clause are far less likely to have been accurately calculated (or in many cases even contemplated) by the parties, than the primary obligations relating for example to price.[48]

There is no doubt that Eisenberg makes a compelling argument here which must go some way to appeasing opponents of the rule against penalties. If the rule represents a licence for greater intervention by the courts in relation only to terms which are less likely to have been properly considered by the parties, it would appear to be a much smaller threat to party autonomy than one which allowed the courts to unpick contractual provisions which were specifically calculated and negotiated. However, this argument presents two issues for supporters of the rule against penalties.

Firstly, Eisenberg contends that the real assessment should be of the quality of consent, rather than the fairness of the contractual provision; he proposes the following approach:

> '…If, in the breach scenario that has actually occurred, liquidated damages are significantly disproportional to real losses (that is, losses in fact, not simply legal damages), the provision is unenforceable unless it is established that the parties had a specific and well-thought-through intention that the provision apply in a scenario like the one that actually occurred.'[49]

Whilst this formulation of the rule may itself be well-justified, it does not represent the rule as it currently exists in English contract law. The latter does not question merely the quality of consent, but rather, the court's assessment of the fairness of the liquidated damages clause itself. Opponents of the rule would presumably prefer Eisenberg's formulation articulated above to the existing rule against penalties in English contract law. His version of the rule would presumably enable sophisticated commercial parties to include specific wording in their contract to the effect that the clause had been considered and was understood by the parties.

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[46] Ibid 219.

[47] Ibid 223.

[48] Ibid 227.

[49] Ibid 235.

However, English courts are arguably already equipped to deal with liquidated damages clauses that would offend Eisenberg's formulation, through the rules on contractual interpretation. Although more recent authority indicates a concern to ensure that a contextual approach to interpretation remains an exception rather than becoming the rule,[50] the rules of contractual interpretation do provide some protection against the enforcement of a liquidated damages clause in a way that is wholly unexpected and unintended by the parties.

To the extent that the consequences of and triggers for a liquidated damages clause are clearly articulated within a contract, then it is difficult to see why the fact that parties may have inadequately assessed the risk of the clause being invoked should be a reason to prohibit its enforcement. Indeed many clauses might operate harshly against one party and many of those clauses may not have been considered in detail by one or both of the parties, but the general position in English contract law is that '[w]here the parties have used unambiguous language, the court must apply it'.[51]

In *Wickman Machine Tools Sales Ltd* v *Schuler AG*,[52] Lord Reid explained that:

> 'The fact that a particular construction leads to a very unreasonable result must be a relevant consideration. The more unreasonable the result, the more unlikely it is that the parties can have intended it, and if they do intend it the more necessary it is that they shall make that intention abundantly clear.'

Opponents of the rule would no doubt support this as a formula for assessing the legitimacy of a liquidated damages clause. Ultimately if a court is confident that the parties intended it, then Eisenberg's concerns are to some degree alleviated and so too is his justification for retaining the rule.

Secondly, Eisenberg's argument does not appear to deal comprehensively with the economic impact of restricting party autonomy, even on this reduced scale. Fuller and Perdue have argued: '[w]hen business agreements are not only made but are also acted upon, the division of labour is facilitated, goods find their way

[50] *Arnold* v *Britton* [2015] 2 WLR 1593.

[51] *Rainy Sky* v *Kookmin Bank* [2011] 1 WLR 2900, 2908 (Lord Clarke).

[52] [1974] AC 235, 251.

to the places where they are most needed, and economic activity is generally stimulated'.[53] By subverting the agreements of (often highly sophisticated) contracting parties in relation to the consequences for breach of contract, the rule against penalties *prima facie* threatens the commercial efficacy of those agreements and therefore the economy as a whole.

Ironically, attempts have also been made to justify the penalty doctrine on economic grounds. Some have argued that penalty clauses prevent what Robert Birmingham has called 'efficient breach',[54] the idea that rational contracting parties will want (and should be entitled) to preserve their right to breach a contract in circumstances where they could profit from doing so; the theory is that such an approach maximises wealth generation for society as a whole. But Worthington notes that: 'penalty clauses do not outlaw efficient breach; they merely alter the price at which the breach is efficient'.[55] It is false logic then to suggest that unravelling an agreed liquidated damages clause on these grounds is economically efficient. On the contrary, the rule arguably works against a free market economy, potentially creating a number of economic issues.

One such issue is that the rule against penalties leaves some contracting parties without a mechanism to ensure strict performance of the agreed terms, which is especially important when there is a significant subjective value placed on performance.[56] Put another way, how else are contracting parties able to demonstrate their reliability, for example when bidding for new public contracts? Morgan describes this as a 'public cost' of the rule,[57] highlighting that it not only has macro implications for the British economy, but also very specific implications for the efficiency of the public sector - ultimately the British tax payer is unable to get value for money as public sector organisations opt to contract with a smaller number of 'safer' suppliers. Again therefore, not only does economics fail to provide a definitive justification for the rule's existence, but it provides the rule's opponents with some new arguments of their own.

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[53] LL Fuller and WR Perdue Jr 'The Reliance Interest in Contract Damages: 1' (1936) 49 Yale Law Journal 52, 61.

[54] RL Birmingham 'Breach of Contract, Damage Measures, and Economic Efficiency' (1970) 24 Rutgers LR 273.

[55] Worthington (n 9) 24.

[56] CJ Goetz and RE Scott, 'Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach' (1977) 77 Columbia LR 554.

[57] Morgan (n **Error! Bookmark not defined.**) 240.

A political argument in favour of the rule against penalties comes from the idea that the state should have a monopoly on punishment and, by allowing parties to agree punitive damages, the law is allowing parties to circumvent that monopoly.[58] However, as Seana Shiffrin points out:

> '…to succeed, this defense of the ban on punitive damage agreements would have to distinguish between liquidated damages and consideration…. many punitive damage agreements can be recast as forms of consideration. Graduated payment schedules that appear in the body of a contract may present alternative courses of performance and thereby appear to be complex articulations of enforceable contractual duties, even though they achieve the same result as liquidated damage clauses that overreach and are invalidated as penalties. Some theory of what makes a voluntarily elected penalty a penalty would have to be provided to vindicate a defense of the ban. Perhaps that can be done.'[59]

Whilst this line of reasoning could in principle provide justification for a rule against penalties, the writer is not aware of any such theory which satisfactorily justifies a distinction between the treatment of even vastly excessive consideration (as morally neutral) and agreed, punitive damages (as morally unacceptable). Unless and until such a theory is found, the rule's opponents are unable to end the debate on political grounds. Furthermore, Collins argues that:

> 'There can be no objection [in principle] to private agreements which fix the sanction for breach of contract; otherwise, all agreed remedies would be invalid.'[60]

Perversely, in seeking to protect a contract-breaker from the punitive consequences of his actions, the rule against penalties in fact arguably most penalises the innocent promisee, since the promisee obtains neither performance of the primary obligation nor of the obligation to pay the agreed sum in default, despite any premium that might have been paid in exchange for these promises.[61] Even the strongest supporters of the rule

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[58] SV Shiffrin 'The Divergence of Contract and Promise' (2007) 120 Harvard Law Review 708.

[59] Ibid 735.

[60] *Collins* (n 34) 105.

[61] Ibid 25.

must surely concede that this is a highly undesirable consequence of its operation. Whilst it may be true that in some cases the defaulting party will not have adequately assessed the risks when signing up to the penalty clause, it does seem likely that in many cases the presence of the penalty clause might at least in part have influenced the innocent promisee to enter into the agreement and/or to agree the precise nature of the primary obligations.

C. Cavendish v Makdessi and ParkingEye v Beavis

The Supreme Court of England and Wales was recently asked to consider the legitimacy and utility of the penalty rule in the conjoined appeals of *Cavendish* v *Makdessi* and *ParkingEye* v *Beavis*.[62] The currency and complexity of the debate surrounding the rule is evident from the judgment, and it serves to highlight the pressing need for further research in this area.

In the absence of a clear justification for its departure from party autonomy, one might have expected - and indeed the appellants had hoped - that the Supreme Court might abolish the rule altogether. Yet, citing the rule's long history,[63] the court declined to do so and instead decided to adopt a legislative role and rewrite the penalty rule, albeit in a form that was rather more limited in scope. Lord Neuberger PSC and Lord Sumption JSC (with whom Lord Carnwath JSC agreed) decreed that the penalty rule would henceforth only be infringed only where:

> '…the impugned provision is a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation. The innocent party can have no proper interest in simply punishing the defaulter.'[64]

In the particular appeals before the court, none of the clauses under scrutiny were deemed to infringe this new version of the penalty rule; Mr Makdessi, a wealthy businessman who had sold a large proportion of his shares in a group of companies, lost out on up to $44m due to having breached certain restrictive covenants in the sale agreement, and Mr Beavis was required to pay an £85 parking ticket issued by ParkingEye, for overstaying in a privately owned and managed car park.

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[62] *Makdessi* (n 6) 1373.

[63] Ibid 1439.

[64] Ibid 1392.

Although these cases represent two ends of the spectrum, they do have something important in common. In both cases the court was strongly of the view that the contractual provisions were sensible, legitimate and not overly punitive, and that there were key pragmatic reasons for permitting such clauses to stand. In that sense, the fact that the clauses in question were able to withstand the new version of the penalty rule may be seen as positive - the court arrived at the 'right' outcome in both of these cases. Yet the basis for and implications of the decision are less satisfactory. A severely restricted version of the penalty rule may be more palatable to its opponents, but cannot dispose of the argument that the rule itself is without any underpinning justification.

D. The gap

In spite of the wealth of literature that exists in support of the rule, opponents argue that no one has been able to satisfactorily articulate a sufficiently compelling justification for the departure from party autonomy that it entails. Diplock LJ famously said that he would 'make no attempt, where so many others have failed, to rationalise this common law rule'[65] and Jonathan Morgan has concluded that 'the rule may have to be treated as a mere artefact of legal history'.[66]

As a result, the penalty rule remains highly controversial. On the one hand, as *ParkingEye* demonstrates, the lack of a clear underpinning justification means that some law makers will want to keep a tight rein on any extension of its scope for the foreseeable future, and may well see fit to narrow it further. [67] Yet the rule is so firmly entrenched in English law, and in other jurisdictions, that it is difficult to imagine that it will be completely abolished any time soon.[68]

As we have seen, arguments in favour of retention have been constructed with reference to a range of academic disciplines, yet no such argument has been able to silence the rule's critics once and for all. Additional research

[65] *Robophone* (n 8) 1446.

[66] Morgan (n **Error! Bookmark not defined.**) 234.

[67] See W Day, 'A Pyrrhic victory for the doctrine against penalties: Makdessi v Cavendish Square Holding BV' [2016] JBL 115-127, 115; see also W Day 'Penalty clauses following Makdessi: postscript' [2016] JBL 251-252.

[68] See A. Nicholson, 'Too entrenched to be challenged? A commentary on the rule against contractual penalties post Cavendish v Makdessi and ParkingEye v Beavis' (2016) 22(3) *European Journal of Current Legal Issues*.

is therefore needed to inform law and policy makers internationally as they make difficult decisions about whether to extend, restrict or even abolish the rule altogether.

3. A Biblical Perspective

A. Why consider a biblical perspective?

In a sense it is unsurprising that a biblical answer to the present question has not previously been the subject of any published research since, as Charles Taylor writes, '[a]lmost everyone would agree…' that we live in a secular age.[69] Yet there are a number of reasons why exploring a biblical perspective on this and other topical legal issues might still be a worthy intellectual pursuit that has implications for law reform and social policy, even in the context of an increasingly secular society.

Firstly, for the large proportion of individuals across the world who subscribe to the Christian faith, biblical answers to questions about morality, law and justice remain as relevant and important today as they have ever been. The Bible itself states that: '[a]ll Scripture is inspired by God and is useful to teach us what is true and to make us realize what is wrong in our lives. It corrects us when we are wrong and teaches us to do what is right' (2 Tim 13:16) and in that sense it holds itself out as a moral resource. Furthermore, the psalmist writes that God's 'understanding is infinite' (Ps 147:5, KJV) and it therefore follows that, for the Christian at least: all conceivable moral questions have a theological answer. Although not all such answers may be known (or indeed even humanly knowable) The Bible directs the believer to meditate on its text 'day and night…[as o]nly then will you prosper and succeed in all you do' (Josh 1:8). Thus though secularism may dominate in a particular time or place, individual Christians will still refer to their bible and their god in forming their own views about right and wrong and in determining their conduct. For the Christian community a biblical perspective is not only *relevant* when debating law reform and social policy, it carries the greatest moral force.

It is accepted that within and amongst Christian communities there will inevitability be a diverse range of different interpretations of so-called biblical law and that identifying a common view is not straightforward. References to cases in which the courts have been asked to determine the content of religious belief more

[69] Charles Taylor, *A Secular Age* (Belknap Press of Harvard University Press 2007) 1.

generally illustrate all too clearly the complexity, if not impossibility, of this task.[70] However, such diversity strengthens, rather than diminishes the continued relevance and importance of research in this area; with the right research, presented in the right way, it is possible to identify and even develop common ground between individual Christians and even between denominations.[71]

In the 2011 UK census, as many as 33.2 million people (59%) declared that they were Christian.[72] This data alone suggests that, notwithstanding the increasing secularisation of western society, it would be at best unwise for modern law reformers and policy makers to ignore a biblical perspective altogether. Even if one were to speculate about a possible decline in those numbers in the time since the data was collected, it seems likely that professing Christians still represent a significant proportion, if not a majority, of the UK population and there is significant data to suggest that this is still the case across the western world.[73]

Accordingly, a biblical perspective should be considered, partly in a prescriptive sense as a result of its pseudo-democratic mandate and partly in a predictive sense, in order to anticipate likely support for and/or opposition to any proposed reforms. A prime example can be found in the government's recent attempt to reform Sunday trading law. During the Commons debate, the Rt Hon Mr Gavin Shuker stated that he would:

> '...be part of the holy alliance trying to keep Sundays special. For people of a Christian ethos, this is not necessarily about the promotion of church; it is about a deep-rooted sense of who we believe people to be. We are created with the ability to rest as well as to work.'[74]

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[70] Peter W. Edge, 'Determining Religion in English Courts' (2012) 1(2) *OJLR* 402.

[71] See for example N. Doe, *Christian Law* (Cambridge University Press, 2013).

[72] Office for National Statistics, 'Religion in England and Wales 2011' (2012); see <http://www.ons.gov.uk/peoplepopulationandcommunity/culturalidentity/religion/articles/religioninenglandandwales2011/2012-12-11/pdf> accessed on 12 August 2016.

[73] Pew Research Center, 'The Future of World Religions: Population Growth Projections, 2010-2050'; see <http://www.pewforum.org/files/2015/03/PF_15.04.02_ProjectionsFullReport.pdf> accessed on 31 January 2017, 234-245.

[74] HC Deb 9 March 2016, vol 607, col 330.

The government ultimately failed to get the support that it needed for its reforms to pass into law.

In addition to any utility that The Bible might have as a moral resource today, the undeniable influence that it has had historically in shaping law and society in western civilisation renders it an essential reference point when seeking to understand existing legal theory and doctrine. As a case in point, many principles of English law today have their roots in biblical teaching about right and wrong.[75] Even if in the present age a law or policy maker might (legitimately) consider it inappropriate to pursue a purely theological agenda, understanding the rationale, origins and development of existing law and policy ought to be a precondition for proposing change, not least because it helps ensure that: (1) the current position is properly evaluated; (2) lessons are learned from mistakes of the past; and (3) ancillary benefits of the existing framework are not inadvertently lost. In that sense, biblical insights in relation to legal issues may help law and policy makers better understand existing legal rules in order for them to then make a more informed decision about whether or not to change them. As Harold Berman writes:

> 'It would contribute enormously, I believe, to our understanding of modern contract law if teachers and writers were to trace its formation to the canon law of the church as it developed in a pre-capitalist, pre-individualist, pre-rationalist, pre-nationalist era.'[76]

Finally, we are currently living in time of significant social and political division on the one hand and economic turmoil on the other. This context creates an opportunity to re-examine and critique the very building blocks of modern western civilisation. In spite of its historic influence, the reality is that in so many different areas biblical law offers insight into legal issues that may now appear in many respects to be radical to the modern lawyer and for this reason may previously have been dismissed as merely ideological. However, as academics, law and policy makers, and other stakeholders explore the potential for wholescale reforms across a range of contexts, there is a rare opportunity and arguably even an appetite for radical proposals to be put forward and objectively evaluated. In that context, now is a good time to revisit biblical law (and indeed the law of other ancient civilisations) in search of 'new' approaches to both old and new socio-legal problems.

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[75] Metzger and Coogan (n 10).

[76] H J Berman 'The Christian sources of general contract law' in J Witte, Jr and F S Alexander (eds), *Christianity and Law an Introduction* (Cambridge University Press, 2008).

For these reasons, it is submitted that The Bible still has a role to play when reforming law and social policy in the modern world.

B. What is biblical law and how and where can it be found?

Biblical law has been defined as '*an integration of different instructional genres of the Bible which together express a vision of society ultimately answerable to God*'.[77] Biblical law is then rather more elusive, and more complex, than it might seem at first glance; it is neither limited to nor arguably even best understood by the explicit rules articulated in the final form text of The Bible. Rather, biblical law can only be properly understood through a holistic reading of the overarching narrative that The Bible presents.

One characteristic that fundamentally distinguishes biblical law from the overwhelming majority of national and supranational legal systems existing in the world today is that The Bible teaches that the discovery of truth is possible by divine revelation (Matt 16:17; Heb 10:16); in other words the content and/or application of biblical law may be revealed to a believer by God himself. Such an approach is unapologetically unscientific by its very nature, and therefore inevitably lacks credibility with those who do not identify with the Christian faith.

By contrast, if the text of The Bible is taken as its sole source, biblical law can be studied systematically and scientifically. Such an approach has clear advantages in terms of reliability. Furthermore, whilst acknowledging that there will inevitably be a diverse range of beliefs within Christian communities about both the content of and appropriate methods for studying biblical law,[78] such an approach is at least arguably internally consistent, since The Bible itself emphasises firstly that there is a need for believers to test truth against the written text (1 John 4:1; 1 Thess 5:21) and secondly that the final form text of The Bible is complete and cannot be amended or added to (Rev 22:19). In the leading text on the subject, Professor Jonathan Burnside adopts a purely canonical approach to the study of biblical law. Such an approach is attractive to legal scholars as it enables a familiar doctrinal methodology to be adopted when studying biblical law. Burnside justifies this approach as follows:

[77] Jonathan Burnside, *God, Justice, and Society* (OUP 2011), xxxii.

[78] Edge (n 70).

> '…the world of biblical law is one that we access today by means of the finished canon, and so the literary choices that have been made in the final editing of the text are an important aspect of how we make sense of biblical law. Moreover…there is an affinity between doctrinal law and a canonical approach. Both work with the finished product and seek to make sense of it as a body of normative materials (that is, as materials claiming authority).'[79]

Thus, whilst as a source of 'law' The Bible must be read and interpreted quite differently from the statutes and case law that are familiar to common lawyers,[80] it is possible for it to be studied doctrinally in a way that at least offers reliability and that feels very familiar to a legal scholar, thereby attracting a certain credibility from that discipline. Accordingly, in seeking to explore the penalty clause issue, this research adopts a traditionally legal, doctrinal methodology in interpreting the final form text of The Bible.

C. Binding agreements in biblical law

In order to fully understand any contractual legal principles that might exist in biblical law, it is important to first recognise that biblical law views the nature of property (and any rights relating to such property) in a particular way. Through the lens of the biblical narrative, we see that God is not only the *creator* of all things (Gen 1:1; Rev 4:11), but also their rightful owner (Ps 24:1). Whilst any wealth, possession or ability that one person has is a gift from God (John 3:27), the relationship is a fiduciary one - all things, whether tangible or intangible, natural or manmade, innate or acquired, are held by humanity as trustees (or, as The Bible puts it: stewards) only (1 Pet 4:10). Whilst this does not necessarily prohibit the making of binding agreements, it does indicate that any such agreements and their terms should presumably be designed to further the purposes of God, as the ultimate principal. Although The Bible states that the purposes of God are beyond human understanding (Eph 3:20), on a basic level they would appear to at least include the salvation (1 Tim 2:4), freedom (Gal 5:1) and ultimate prosperity (Jer 29:11) of all of humanity.

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[79] Burnside (n 77) xxxv.

[80] For example, when compared to modern law, biblical law is far more heavily integrated with narrative (that is: the story of God's changing relationship with humanity from the point of creation up until the end of time) and all biblical law must be interpreted in that context.

This paradigm arguably provides a certain contrast to 21st century contracting; not only are modern day contracts typically (and quite obviously) made without any consideration of the purposes of God, but in fact each party is most (and often exclusively) concerned with furthering its own purposes and/or interests. Rarely is it considered necessary (at the level of individual negotiations at least) for there to be any consideration of how the agreement or its terms might impact the other contracting party, less still society as a whole. Rather, the contracting process is an adversarial one in which each party is predominantly concerned with securing the greatest advantage for itself.

In modern jurisprudence, attempts are often made to justify contractual legal principles (including, as we have seen, the penalty rule) with reference to the ways in which those principles benefit society at large. There is a wealth of literature to support the idea that parties' freedom to negotiate in their own self-interest benefits society as a whole.[81] Yet biblical law would appear to suggest that at least some consideration of the greater good (however defined) may also be appropriate at the level of individual contractual negotiations.

In an analysis of biblical law as it relates to the ownership and use of land, Jonathan Burnside argues that the status of land in the modern law has been relegated to that of a mere commodity. He writes:

> '…narrative [now] has no part to play in understanding land law: the model is land as a form of share dealing. By reducing the significance of land in this way, English land law has lost the sense that land creates relationships and interdependencies. Instead, English law now concentrates exclusively on what occurs within the physical boundaries of the user's property. There is little sense of an obligation to use the property for the benefit of the less fortunate; nor is there even much sense of the way in which properties are *physically* interconnected.'[82]

One might legitimately levy the same criticism against the modern law of contract. Contractual rights (particularly if one includes those derived from contracts of employment) are arguably as important today as land was in biblical Israel; such rights determine an individual's status, their power and the extent of opportunity available to them. Yet contractual rights are readily assigned and leveraged, often in an attempt to promote only

[81] See most famously for example A. Smith, *The Wealth of Nations* (London: Everyman's Library, 1991).

[82] Burnside (n 77) 213.

the interests of an individual. Much like English land law, the modern law of contract has arguably 'lost the sense that [contracts] create relationships and interdependencies'.

A similar analogy can be drawn with interest charges, which are prohibited under biblical law. On this topic, Jonathan Burnside writes:

> '..the biblical ban on interest encourages the use of capital to build relationships, especially between lender and borrower. This is because if one cannot lend at interest, the options are either to make an outright gift, to lend interest free, to rent/lease property, or to make an equity-based investment. The ban on interest pushes the lender toward sharing risk with the borrower. The lender shares in the profits of the enterprise if it is successful, as opposed to simply making a return for the use of his money, regardless of whether the business fails or succeeds. Thus, capital is used in biblical Israel in a way that encourages personal engagement between the parties, especially on the part of the provider.'[83]

It is clear then that biblical law seeks to strengthen relationships between individuals, rather than put them at distance. Given the ban on interest, it seems likely that biblical law would at least ask questions of the increasingly individualistic approach that now defines contractual negotiations in the modern world.

Biblical law therefore serves as a reminder that the state enforces agreements only because the enforcement of agreements is considered to be of benefit to society; this is a reminder that must surely be accepted by law and social policy makers irrespective of religious beliefs. Whilst there may well be economic benefits associated with a laissez faire approach to market regulation, when an individual agreement or its terms clearly run counter to that overarching objective (as is arguably the case in relation to so-called penalty clauses), it must be at least more difficult for the state to justify enforcement.

The biblical narrative describes God's changing relationship with humanity from creation until the end of time. At the heart of that changing relationship are covenants (or binding agreements) made between God and humanity, with the aim of strengthening that relationship and furthering God's plan. A detailed account of the biblical covenants and their role in the overarching narrative is beyond the scope of this paper, but nevertheless

[83] Burnside (n 77) 227.

their existence tells us that biblical law is not opposed to binding agreements *per se* (at least not vertical agreements, between God and humanity), on the contrary: it is premised on them.[84]

However, the extent to which biblical law permits the making of binding agreements more generally, at a horizontal level (i.e. between individuals), is less clear. On the one hand, it cautions against the giving of security or the making of pledges (Prov 22:26) and warns that '…the borrower is servant to the lender' (Prov 22:7) and these instructions appear to represent at least hypothetical imperatives against the making of certain binding agreements. Yet agreements of marriage provide a contrasting example. Such agreements are not only presented as permissible, but are arguably positively encouraged (Gen 2:18; Prov 18:22; Eph 5:31; Matt 19:4-5) and are unquestionably treated as binding in biblical law (Matt 19: 6; Mark 10:9; 1 Cor 7:10).

A need arises therefore to distinguish between those binding agreements that are permissible under biblical law, and those that are not. Since biblical law is derived from the covenants and shares their primary purpose, one way in which that distinction could be made is to say that biblical law permits (and even encourages) those binding agreements (and perhaps even individual terms) that strengthen the relationship between God and humanity and/or (to the extent that this is different) further the purposes of God.

A marriage agreement does this quite easily, since marriage appears to be the only permissible context for procreation (Heb 13:4; 1 Cor 7:1-9), and humanity is urged to '[b]e fruitful and multiply' (Gen 1:22). Whilst clearly more difficult to justify, a purely commercial agreement might also in theory promote the purposes of God and on that basis may be both permissible under and promoted by biblical law.

D. Penalty clauses in biblical law

Reference to a biblical map for direction in this quest may lead the inquirer to quickly conclude that they are vastly off course. There is clear support in both the Old and New Testaments for the argument that, so far as possible, parties should avoid litigation altogether as a means of resolving their disputes.

In particular, the Old Testament cautions against proceeding prematurely to litigation, emphasising that all court proceedings carry litigation risk (Prov 25:8). It further suggests that even a victory will not bring true

[84] See Burnside (n 77), 31-66.

satisfaction for the litigant (Prov 29:9). In the New Testament, Jesus himself endorses this ancient wisdom, advising: '[w]hen you are on your way to court with your adversary, settle your differences quickly' (Matt 5:25)[85] and '[i]f you are sued in court and your shirt is taken from you, give your coat, too' (Matt 5:40). The Apostle Paul later goes as far as rebuking believers for bringing their disputes before a court (1 Cor 6:1-8); in verse 7 he claims that '[e]ven to have such lawsuits with one another is a defeat…'.

There is clearly something intuitively attractive about the reconciliatory nature of this counsel. Yet, whilst Christians and non-Christians alike would almost certainly agree that there is merit in the pre-action settlement of *any* civil dispute: that in itself is not enough to dispose of the present question. Even parties who settle out of court are presumably influenced, at least in part, by the laws of the relevant jurisdiction and/or by their own beliefs about the moral or religious laws to which they are subject. Under biblical law, except in the event of an explicit contradiction,[86] the former is taken to be part of the latter, since The Bible advocates submission to the laws of the land (Romans 13:1, 1 Peter 2:13).

Similarly, it may be argued that an investigation into any aspect of biblical *law* is of limited value because the New Testament appears to considerably downgrade its obligatory force - the text makes very clear that believers are justified before God by faith alone, and wholly apart from their conduct.[87] In other words, The Bible is clear that a believer cannot earn any blessing, or indeed eternal life, through mere compliance with biblical law; believers are made right with God, and thereby legally entitled to such things, because this right has been paid for by the death and resurrection of Jesus Christ, who has already taken any punishment that might be due in respect of an individual's non-compliance (2 Cor 5:21).

Yet Jesus makes clear that his purpose in dying for humanity was not to remove biblical law, but rather, to fulfil it (Matt 5:17); in fact the nature and content of biblical law is timeless[88] and remains unchanged (albeit in many respects clarified) by Jesus. In Matthew 5:18 Jesus says:

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[85] See also Luke 12:58, NLT.

[86] Consider for example Daniel's defiance of King Darius' law in Daniel 6:6-10.

[87] For example see John 3:16; Romans 4:5; Romans 5:1; Romans 11:6; Ephesians 2:8-9; Galatians 2:16; and Galatians 5:6.

[88] 'In the beginning was the Word…' (John 1:1).

> '…until heaven and earth disappear, not even the smallest detail of God's law will disappear until its purpose is achieved. So if you ignore the least commandment and teach others to do the same, you will be called the least in the Kingdom of Heaven. But anyone who obeys God's laws and teaches them will be called great in the Kingdom of Heaven.'

Thus whilst the role of biblical law for the believer is a complex one, what is clear is that The Bible (and thus biblical law) is intended to provide some form of moral guidance to believers.

Nor does biblical law oppose the existence of a judicial system *per se*. Indeed, in Deuteronomy 1:16-17 it records how Moses instigated the first judicial system amongst the wandering Israelites, instructing the newly appointed officials as follows:

> "…'You must hear the cases of your fellow Israelites and the foreigners living among you. Be perfectly fair in your decisions and impartial in your judgments. Hear the cases of those who are poor as well as those who are rich. Don't be afraid of anyone's anger, for the decision you make is God's decision. Bring me any cases that are too difficult for you, and I will handle them.'"

Accordingly, it is submitted that there is merit in taking a closer look at the biblical map for guidance in relation to so-called penalty clauses.

It is clear that biblical contract law as a whole is premised on very different foundations and with very different objectives to the modern law of contract. In that context, the penalty clause question requires some considerable translation before it can be answered in the language of biblical law. Furthermore, any answer given is one that tells at best half the story, since it seems likely that biblical law would advocate far more radical and wide-reaching reform than merely altering the scope of the penalty rule. Nevertheless in the context of such a hotly contested legal doctrine, there is merit in the short-term of seeking out any principle of biblical law that might help inform its future development.

In addition to the greater role of narrative, biblical law also differs from the modern law in that, for the most part, it is presented by way of paradigm cases, rather than rules. As Barton notes, '…Sinai does not legislate; it illustrates'.[89] In other words when interpreting biblical law, in contrast to the modern law, there is less emphasis on the words themselves and whether or not the particular facts of the case under consideration fit within a given description, and greater emphasis on conceptually how far removed the present case is from the case that is articulated in the text of The Bible.

As a matter of legal theory, there is still some debate as to whether judges 'make' or 'find' law when they extend or restrict legal principles in the light of circumstances which were almost certainly not considered when the original rule or principle was created, and this has significant implications for the development of the law and the way that judges make decisions.[90] Scholars of biblical law however need not be troubled by this in the same way, since biblical law as presented in The Bible is never intended to comprise a comprehensive set of rules to govern all conduct. Indeed, a significant proportion of biblical law is presented not in the form of general rules, but rather, as a series of paradigm cases against which the reader, scholar or judge can compare the facts of the case under consideration. The closer that they are to each other, the more likely it is that the prescribed consequence should follow, and in establishing this: the exercise of wisdom and judgment is not only permissible, but necessary.

As such, although a penalty rule cannot be found explicitly in the text, it would be inaccurate to say that biblical law is silent on this issue. It is more accurate to say that an investigation of this kind is concerned with 'finding' rather than 'making' new biblical law, through interpretation of the narrative as presented in the text.

There are two specific aspects of the character of biblical law in particular that are arguably relevant to the penalty rule. The first is that biblical law is concerned primarily with restoration, rather than retribution;[91] indeed, the central theme of the text is God's plan to restore humanity (2 Cor 5:18-19), albeit the two are easily confused when interpreting individual portions of the text.

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[89] John Barton, *Ethics and the Old Testament* (SCM, 1998) 73, as cited in Burnside (n 77) 84.

[90] Nicholas J McBride and Sandy Steel, *Great Debates in Jurisprudence* (Palgrave 2014), 114-123.

[91] Burnside (n 77) 107.

Consider for example the 'compensatory principle' referred to above; a principle of the modern law of contract which is readily endorsed by biblical law; 'an eye for an eye' (Exodus 21:24) is a theme that underpins many of the Old Testament 'laws'. Whilst this paradigm case is often interpreted as prescribing a punitive sanction, this famous rule is '…best understood as setting limits to retaliation ("no more than an eye"), in contrast to the disproportionate ("seventy-sevenfold") response typified by Lamech (Genesis 4:23 -24…'.[92]

If it is accepted that biblical law has a predominantly restorative function (rather than a punitive one), this implicitly endorses the current English law penalty rule and the idea that '[t]he innocent party can have no proper interest in simply punishing the defaulter'.[93] The restorative function of biblical law lends support to the penalty rule, which is similarly concerned with ensuring that any damages awarded do not go further than awarding the claimant its reliance or expectation interest.

A second feature of biblical law that may be relevant here is that biblical law universally favours the oppressed.[94] The giving of biblical law in the biblical text and/or recitals of the covenants often begins with reference to the Exodus; they recall how God first rescued his people from their oppressors, the Egyptians (e.g. Ex 20:2; Ex 29:46; Lev 11:45; Lev 23:34).

By analogy, the defaulting party that benefits from the penalty rule is in the vast majority of cases, the weaker contracting party, who may have agreed to the term only because it was necessary to do so in order to secure the contract. Whilst one might legitimately attach blame to the defaulting party here for consenting to the clause, the circumstances giving rise to the oppression are of little concern to biblical law; the fact that oppression is present at all is sufficient to justify a legal remedy. For example, the Israelites were taken captive by the Babylonian empire precisely because they failed to follow God's laws (2 Kin 24: 20), yet God promised to rescue them again (Jer 29:10). Thus to the extent that the rule seeks to rescue a contract breaker from a disproportionate or even oppressive sanction that may be prescribed in a written agreement, it appears to be supported at least in principle by biblical law.

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[92] Ibid 116.

[93] *Makdessi* (n 6) 1392.

[94] Ibid 106.

4. Conclusions and Recommendations

The nature of traditional legal scholarship - and not least its typically narrow focus and tendency to be conducted within a single legal system, having its own unique methodology and sources of authority - presents certain challenges for legal scholars conducting interdisciplinary work.[95] Yet reference to other disciplines in search of answers to 'legal' questions has grown in popularity in recent decades; Bradney reports that 'a new generation of legal scholars are either abandoning doctrinal work or infusing it with techniques and approaches drawn from the humanities and the social sciences'.[96] Formerly, legal researchers lagged behind their social science colleagues in this regard. However, Cotterall argues that recent interdisciplinary or socio-legal approaches have significantly enhanced the value of legal research.[97] It is precisely because a purely doctrinal approach has so far been unable to provide a complete answer to the present question that supporters of the penalty rule, presumably with some inherent conviction about its legitimacy, have explored a range of other disciplines in their attempts to rationalise it.

The penalty rule is arguably one of the most contentious doctrines in contract law today. Whether or not the departure from party autonomy that it entails can be justified remains a hotly contested issue and law and policy makers across the western world are faced with decisions about whether to extend or restrict the rule. It is clear from the decision in *ParkingEye*, that law 'makers' are torn between the fact that the doctrine appears to be unjustified, and an inherent conviction about its legitimacy.

In an increasingly secular age, The Bible is not a resource that law and policy makers typically refer to when contemplating reform. Yet the influence that it has had historically on shaping principles that remain part of the

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[95] Peter W Edge, 'The contribution of law to interdisciplinary conversations on law and religion' in Silvio Ferrari (ed), *Routledge Handbook of Law and Religion* (Oxford: Routledge 2015).

[96] A Bradney, 'Law as a Parasitic Discipline' (1998) 25 *Journal of Law and Society* 71, 71.

[97] A Bradney notes that Cotterall argues that: '[a]ll the centuries of purely doctrinal writing on law have produced less valuable knowledge about what law is, as a social phenomenon, and what it does than the relatively few decades of work in sophisticated modern empirical socio-legal studies…' R Cotterrell, *Law's Community* (1995), 296, as cited in Bradney (n 96) 73.

law today, and the large Christian populations that still exist around the world, provide two important reasons against ignoring biblical material entirely as part of this process.

In relation to the penalty rule specifically, biblical principles would appear to strongly endorse its retention on two key grounds.

Firstly, The Bible strongly favours restorative remedies, rather than punitive ones. Much if not all biblical law is aimed at restoring individuals to the position that they were in before they experienced the consequences of particular wrongdoing. This can also been seen on a thematic level in terms of God's relationship with humanity, which is predominantly concerned not with the punishment of evil, but with the restoration of good. In these respects, it appears that biblical principles would support a penalty rule which ensured contractual provisions did not subvert the compensatory principle.

Secondly, The Bible's strong emphasis on offering protection against and freedom from oppression - which arguably goes well beyond legal protections that currently exist in the modern law of most jurisdictions - lends further support for retaining, or perhaps even extending, the penalty rule. Again this principle can be seen both at a micro level in individual biblical 'laws', but also on a thematic level in the sense that the biblical narrative tells the story of God's redemptive plan for humanity. In this respect, biblical principles do not sit quite so neatly with the existing penalty rule; what matters is not so much whether the obligation in question is primary or secondary, but whether it is necessary and/or whether there is any oppression either at the point of contract formation or in its application.

The present formulation of the penalty rule appears to prioritise certainty and commercial pragmatism. Whilst these are laudable aims, it seems likely that a biblical version of the penalty rule would be willing to sacrifice these aims to some extent, in favour of an approach that ensures: (1) a restorative approach; (2) that freedom from oppression in each individual case is not compromised; and (3) that parties have regard to the likely impact on each other and on society more generally, when agreeing damages clauses, or indeed any other clauses.

It is submitted therefore that The Bible provides its own underpinning justification for the penalty rule, or at least a revised version of it. The fact that it does so may, of itself, go some way to explaining why the rule has

enjoyed such a long history in spite of the frequent allegation that it defies party autonomy without justification. Whether or not that is the case, it surely goes some way to explaining the root of the inherent conviction that might be felt about the rule's legitimacy, at least amongst (not insignificant) Christian populations.

In an increasingly secular age, a biblical perspective should not determine a debate such as the present one - nor is it suggested that it would be appropriate for law and policy reform to blindly follow a biblical map. However, when determining the future of the penalty rule and of the law more generally, it is submitted that there is still significant merit in having regard to biblical principles. Law and policy makers can then decide whether or not those principles represent the views of the Christian and non-Christian populations that make up the relevant electorate, and thereby ensure that law and policy is developed in a way that is informed, democratic and socially useful.