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A TORAHIC CASE AGAINST SJR8

*Josh Burk**

I. INTRODUCTION

Arkansas is home to people of faith. According to a 2014 Pew Survey, 79% of Arkansans classify themselves as affiliated with Christianity.¹ Beyond mere affiliation, 45% of Arkansans believe that the Bible should be taken literally, and another 28 % think at least parts of it should be.² Anecdotally, a person would be hard-pressed to find an Arkansan without at least some affiliation with a neighborhood church.

This deep connection to faith was fundamental in the formation of the Arkansas government.³ To celebrate the state's Judeo-Christian heritage,⁴ the Arkansas General Assembly passed Act 1231 of 2015 for "The Placement of a Ten Commandments Monument Display on the State Capitol Grounds."⁵ The lead sponsor of the legislation, State Senator Jason Rapert, stated about the monument, "[w]e have beautiful Capitol grounds but we did not have a monument that actually honored the historical moral foundation of [our] law."⁶ The Act itself contains the following language:

The Ten Commandments, found in the Bible at Exodus 20:1–17 and Deuteronomy 5:6–21, are an important component of the moral foundation of the laws and legal system of the United States of America and of

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1. *Religious Composition of Adults in Arkansas*, PEW RESEARCH CENTER, <http://www.pewforum.org/religious-landscape-study/state/arkansas/> (last visited Jan. 5, 2018).

2. *See id.*

3. *See infra* Part II.

4. Both Judaism and Christianity share a common belief in the divine nature of Mosaic Law. For a discussion of the modern acceptance of the term "Judeo-Christian" and its derivatives, see generally Mark Silk, *Notes on the Judeo-Christian Tradition in America*, 36 AM. Q. 65 (1984).

5. An Act Concerning the Placement of a Ten Commandments Monument Display on the State Capitol Grounds; and for Other Purposes, No. 1231, 2015 Ark. Acts 5725–28 (codified at ARK. CODE ANN. § 22-3-221 (Repl. 2016)) [hereinafter Act 1231].

6. Laurel Wamsley, *Ten Commandments Installed at Arkansas State Capitol; ACLU Plans Lawsuit*, NPR (Jun. 27, 2017, 7:30 PM), <http://www.npr.org/sections/thetwo-way/2017/06/27/534558892/ten-commandments-installed-at-arkansas-state-capitol-aclu-plans-lawsuit>.

the State of Arkansas; . . . [t]he Ten Commandments represent a philosophy of government held by many of the founders of this nation and by many Arkansans and other Americans today⁷

Act 1231 paved the way for a six-foot tall, granite monument of the Ten Commandments to be erected on the Capitol grounds in June 2017.⁸ This monument demonstrates that Torahic⁹ law forms the bedrock of the moral beliefs and social edicts of the average Arkansan. This Torahic heritage underpins the foundation of the Arkansas government—including its state legal system.¹⁰ The Arkansas Constitution in its Preamble provides: “We, the People of the State of Arkansas, grateful to Almighty God for the privilege of choosing our own form of government; for our civil and religious liberty; and desiring to perpetuate its blessings, and secure the same to our selves and posterity; do ordain and establish this Constitution.”¹¹ With this endowment, the constitution continues with the basic rights of Arkansans.¹² One such right is that of a jury trial: “The right of trial by jury shall remain inviolate.”¹³

In the 2018 general election, Arkansans will vote on new “tort reform” legislation via a referendum on Senate Joint Resolution 8 (“SJR8”), a proposed constitutional amendment.¹⁴ If enacted, SJR8 will do three things: (1) limit attorney contingency fees to 33.3%; (2) limit non-compensatory and punitive damages to \$500,000 in personal injury cases; and (3) remove the Arkansas Supreme Court’s ability to amend the Arkansas Rules of Civil Procedure and place this power in the hands of the legislature.¹⁵ The following essay will examine these changes in light of the Torahic principles at the foundation of the Arkansas Constitution. Rather than establish a system of just compensation as demanded by these foundational ideals, I argue that SJR8 will effectively place a cap on compensatory damages by diverting a

7. Act 1231, *supra* note 5, at § 1.

8. Act 1231, *supra* note 5, at § 1. Although this monument was knocked down on June 28, 2017, the legislative reasoning and purpose of the monument continue to be relevant to this essay. In July, it was announced that the monument will be rebuilt using money donated by the producers of the *God’s Not Dead* film series. Anugrah Kumar, *Pure Flix Gives \$25,000 to Rebuild Ten Commandments Monument Destroyed in Arkansas*, CHRISTIAN POST (July 8, 2017), <http://www.christianpost.com/news/pure-flix-gives-25000-rebuild-ten-commandments-monument-destroyed-arkansas-191310/>.

9. The Torah generally connotes the first five books of the Bible or the Pentateuch. For purposes of this essay, Torahic refers to the principles and edicts found in the Torah.

10. Act 1231, *supra* note 5.

11. ARK. CONST. pmb1.

12. *See id.* art. II.

13. *Id.* art. II, § 7. Arkansas’s first constitution contains identical language, *see* ARK. CONST. of 1836, art. II, § 6.

14. S.J. Res. 8, 91st Leg. (Ark. 2017) [hereinafter SJR8].

15. *Id.*

plaintiff's recovery to pay for attorneys' fees and by limiting working-class families' ability to access courts.

II. BACKGROUND

The Arkansas Constitution is unabashedly rooted in Torahic law.¹⁶ According to Christian tradition, the God of the Israelites spoke to Moses in the wilderness and laid out rules governing the Israelites' everyday lives.¹⁷ The Torah recounts a broad swath of edicts given by God, from the Ten Commandments to regulations regarding sexuality.¹⁸ These religious rules even include rudimentary tort and criminal regulations (although no distinction is made between the two), for example:

If anyone injures his neighbor, as he has done it shall be done to him, fracture for fracture, eye for eye, tooth for tooth; whatever injury he has given a person shall be given to him. Whoever kills an animal shall make it good, and whoever kills a person shall be put to death.¹⁹

According to the Talmud,²⁰ the “eye for an eye” rule (*lex talionis* or *ayin tachat ayin*)²¹ was not to be taken literally but to stand for the principle of just compensation.²² This foundation continues to underlie the core of our modern notions of justice.²³ If a person injures you or your property, that person should be liable to pay you back for the costs of that injury.²⁴ This is not controversial, and the right to just compensation establishes our entire civil justice system.²⁵

16. The Arkansas Constitution's invocation of the phrase “Almighty God” in its preamble, references a widely accepted moniker of the Torahic God. See HERBERT LOCKYER, ALL THE DIVINE NAMES AND TITLES IN THE BIBLE 12 (1988) (referencing the Hebrew term *El Shaddai* as “Almighty God” in English).

17. See *Exodus* 21–25.

18. *Id.*; see also *Leviticus* 18:6–29.

19. *Leviticus* 24:19–21 (English Standard Version).

20. “The Talmud is a collection of records of academic discussion, homiletical exposition and judicial administration of Jewish Law by generations of scholars during several centuries after 200 c.e.” Chaim Saiman, *Jesus' Legal Theory—A Rabbinic Reading*, 23 J.L. & RELIGION 97, 130 n.18 (2007).

21. *Lex talionis*, BLACK'S LAW DICTIONARY (10th ed. 2014); Esor Ben-Sorek, *Ayin Tachat Ayin . . . An Eye for an Eye*, TIMES OF ISRAEL: THE BLOGS (July 1, 2016), <http://blogs.timesofisrael.com/ayin-tachat-ayin-an-eye-for-an-eye-plus/>.

22. See Bernard S. Jackson, *Models in Legal History: The Case of Biblical Law*, 18 J.L. & RELIGION 1, 18–22 (2002) (discussing the Talmudic interpretation of *lex talionis*).

23. See generally Mark A. Geistfeld, *Hidden in Plain Sight: The Normative Source of Modern Tort Law*, 91 N.Y.U. L. REV. 1517 (2016).

24. *Id.* at 1561.

25. *Id.* at 1564 (“[M]odern tort law has continued to develop the talionic reciprocity norms that first defined the early common law.”).

To determine the recompense necessary to hold the tortfeasor accountable for putting out his neighbor's "eye," the Arkansas Constitution's ratifiers adopted the jury system as a pathway for allowing community members to determine the value of an injury so that neighbors could make amends.²⁶ Rules of evidence and procedure were introduced to ensure fairness.²⁷ These legal rules, however, fundamentally require a familiarity that the average Arkansan lacks.²⁸ Thus, for effective advocacy in court, an Arkansan must hire an attorney.²⁹ As the United States Supreme Court has stated, "[f]ull-fledged representation in a battle before a court or agency requires professional skills that laymen lack; and therefore the client suffers, perhaps grievously, if he is not represented by a lawyer."³⁰

Attorneys in Arkansas help the working-class, lower-income litigants, and those unfamiliar with the legal world, by fighting for justice on their behalf.³¹ Lawyers are so essential to the fundamental fairness of the system that the federal constitution requires them in criminal cases "at the critical stage when [a defendant's] guilt or innocence of the charged crime is decided and his vulnerability to imprisonment is determined."³² In such cases, the government pays the wages of the advocate to ensure the tribunal's fairness.³³ This is not true for civil cases.³⁴ Representation of those unable to

26. See ARK. CONST. art. 2, § 7.

27. "From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law." *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

28. Beyond awareness of the nuances of the Rules of Evidence or Pleading Standards, the Comprehensive Legal Needs Study conducted by the American Bar Association showed that between 61–71% of the legal issues confronted by low and middle-income families do not even reach the courthouse steps, partially due to survey respondents' unfamiliarity with the basic functioning of the legal system. AM. BAR ASS'N, LEGAL NEEDS AND CIVIL JUSTICE: A SURVEY OF AMERICANS 28 (1994) [hereinafter LEGAL NEEDS].

29. "Even the intelligent and educated layman has small and sometimes no skill in the science of law . . . [he] requires the guiding hand of counsel at every step in the proceedings against him." *Gideon*, 372 U.S. at 345 (1963) (quoting *Powell v. Alabama*, 287 U.S. 45, 69 (1932)). When low or middle-income families were able to obtain legal counsel, a large majority were completely satisfied with most aspects of the performance of the lawyers involved. See LEGAL NEEDS, *supra* note 28, at 24.

30. *Hackin v. Arizona*, 389 U.S. 143, 149 (1967).

31. *E.g.*, *Who We Are*, LEGAL AID OF ARK., <http://arlegalaid.org/who-we-are/mission.html> (last visited Jan. 26, 2018) ("Our mission is to improve the lives of low-income Arkansans by championing equal access to justice for all regardless of economic or social circumstances.").

32. *Alabama v. Shelton*, 535 U.S. 654, 674 (2002); U.S. CONST. amend. VI.

33. 18 U.S.C. § 3006A (2012); *Gideon*, 372 U.S. at 344 ("[I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth.").

34. See LEGAL NEEDS, *supra* note 28.

afford lawyers is often lacking in the non-criminal arena.³⁵ As a matter of practice, when Arkansans cannot pay lawyers to advocate their cases outright, they bargain with attorneys to pay their wages on contingency fees, meaning the lawyers get paid only if the client does as well.³⁶ Even still, this contingency fee system does not solve the need for lawyers in all civil cases, evidenced by the 2003 Arkansas State Bar Association report suggesting a substantial need for lawyers in the civil law setting to help the low-income citizens of Arkansas.³⁷ In response, the Arkansas Supreme Court created the Arkansas Access to Justice Commission to help find solutions to the problem.³⁸

Beyond its rules of fairness, Arkansas's legal system affords mechanisms to prevent frivolous claims and excessive awards. For example, Arkansas Rules of Civil Procedure 12(b)(6) provides a litigation defense against claims that fail "to state facts upon which relief can be granted."³⁹ This is a higher standard of pleading than that required by the Federal Rules.⁴⁰ Further, Arkansas rules and case law compel the state courts to limit excessive jury awards through remittitur.⁴¹ This remedy dates back to 1841 and can be applied to both compensatory and punitive damages.⁴² Thus, Arkansas's legal system, from its inception, has provided remedies commensurate with its Judeo-Christian ideologies of justice and fairness,⁴³ allowing only legitimate claims in the courthouse and preventing jury awards in excess of a just amount. The system is designed to keep unscrupulous lawyers from lining their pockets at the cost of business and economic growth.⁴⁴ If

35. See *supra* note 28.

36. Peter Karsten, *Enabling the Poor to Have Their Day in Court: The Sanctioning of Contingency Fee Contracts, a History to 1940*, 47 DEPAUL L. REV. 231, 231 (1998).

37. See *In re* Ark. Bar Ass'n, 178 S.W.3d 457, 460 (Ark. 2003) ("While there are no comprehensive studies of the unmet civil legal needs of poor and near poor Arkansans, case data from Arkansas' two legal services providers suggest the unmet need is substantial.").

38. *Id.*

39. Ark. R. Civ. P. 12(b)(6).

40. "Arkansas has adopted a clear standard to require fact pleading, which is deemed to be a higher standard by which the sufficiency of the allegations in a complaint is tested." *McGehee v. Hutchinson*, No. 4:17-CV-00179 KGB, 2017 WL 1381663, at *20 (E.D. Ark. Apr. 15, 2017).

41. See *Advocat, Inc. v. Sauer*, 353 Ark. 29, 47, 111 S.W.3d 346, 355–56 (2003).

42. *Id.*, 111 S.W.3d at 355–56.

43. "Do not pervert justice; do not show partiality to the poor or favoritism to the great, but judge your neighbor fairly." *Leviticus* 19:15 (New International Version); see also *Isaiah* 61:8–9 (New International Version) ("For I, the Lord, love justice; I hate robbery and wrongdoing . . .").

44. There exists in the American legal system an unconscious bias against individuals profiting from the legal troubles of others, regardless of how meritorious the claims. See Anthony J. Sebok, *The Inauthentic Claim*, 64 VAND. L. REV. 61, 62–63 (2011).

our current judicial system represents the religious values of the people as described above, what role does tort reform legislation play in this picture?

III. ARGUMENT

For personal injury cases, SJR8 limits non-economic and punitive damages to \$500,000.⁴⁵ For those unfamiliar with damages terminology—or like me, have long-since forgotten the basic tenets of first-year Tort Law—this cap does not include compensatory damages, like medical bills or other economic losses, but rather limits damages like pain and suffering or loss of companionship.⁴⁶ At first blush, restrictions on non-economic and punitive damages seem consistent with the Judeo-Christian principle of just compensation.⁴⁷ One could argue that SJR8 is simply a prophylactic measure against unethical personal injury attorneys and ridiculous jury verdicts at the expense of Arkansas businesses: No million dollar jury awards for spilled coffee—Arkansans have had enough.

This reasoning, however, may be somewhat deceptive. As a practical matter, non-economic damages help working- and lower-class litigants cover the expense of hiring an attorney.⁴⁸ Personal injury lawyers take on cases under contingency fees⁴⁹ because many plaintiffs cannot pay otherwise.⁵⁰

45. SJR8, *supra* note 14.

46. *See* Matthews v. Rodgers, 279 Ark. 328, 335–36, 651 S.W.2d 453, 457–58 (1983) (distinguishing medical expenses, loss of earnings, physical disfigurement, and mental anguish as separate elements of damages); *but see* Wilson v. Martin, 2016 Ark. 334, at *9, 500 S.W.3d 160, 167 (rejecting a similar ballot proposal for lack of explanation of the term because “[t]he term ‘non-economic damages’ is a ‘technical term’ that is not readily understood by voters”). SJR8 defines non-economic damages as those “damages that cannot be measured in money, including without limitation any loss or damage, however characterized, for pain and suffering, mental and emotional distress, loss of life or companionship, or visible result of injury.” SJR8, *supra* note 14, Section 2, § 32(a)(1).

47. *See supra* Part II.

48. Historically,

while some tort plaintiffs were capable of paying for legal representation, others clearly would not have been able to do so were it not for the judicial sanctioning of contingency fee contracts. This innovation opened the doors of justice in most jurisdictions to many indigent or working-class plaintiffs in the same mid-nineteenth century years that civil juries were beginning to award large damages to accident victims of corporations.

Karsten, *supra* note 36, at 243.

49. *See id.* at 244 (noting many innovations of contingency fees “concerned personal injury suits”).

50. Adam Shajnfeld, *A Critical Survey of the Law, Ethics, and Economics of Attorney Contingent Fee Arrangements*, 54 N.Y.L. SCH. L. REV. 773, 776 (2010). “[S]uch arrangements enable the impecunious to obtain representation. Such persons cannot afford the costs of litigation unless and until it is successful. Even members of the middle- and upper-

These attorneys are not guaranteed any profit unless they win.⁵¹ Thus, at the outset, lawyers are incentivized to take on cases in which there is a high chance of winning (that is, meritorious) and in which the result will be profitable.⁵² Lawyers will not take cases on a contingency fee basis if there exist no legitimate possibilities that they will be rewarded in amounts commensurate with their efforts.⁵³ This is not unscrupulous lawyering; it is simply good business.

A typical contingency fee structure extracts the agreed-upon percentage of the jury award from both economic and non-economic damages.⁵⁴ The costs of litigation, like hiring an expert to prove damages, are charged on top of this.⁵⁵ As a hypothetical, say a plaintiff loses his arm in a car accident, and the loss of limb prevents him from doing his job. At trial, an expert demonstrates that the accident cost \$100,000 in medical bills and \$1,000,000 in lost earnings. The jury additionally awards the plaintiff \$500,000 in pain and suffering. Assuming a 33.3% contingency fee arrangement, the lawyers would take around \$533,333. Thus, of the total \$1.6 million-dollar award, the plaintiff will only receive \$1.05 million, leaving the plaintiff with less than his actual economic losses by more than \$100,000.

As a real-life example, in March of 2017, an Arkansas jury awarded \$46.5 million in damages to a baby who received permanent brain damage at the hands of hospital staff.⁵⁶ This substantial award may seem like a practical example of a need for tort reform like SJR8; however, if you dig below the numbers, this case actually proves the reverse. At trial, experts testified

socioeconomic classes may find it difficult to pay legal fees in advance of success and collection of judgment.” *Id.*

51. *Id.* at 775.

52. *Id.* at 787–88.

Key to understanding contingent fee arrangements is appreciating the concept of risk. Generally, contingent fees may exceed hourly fees for the same work because an attorney must be compensated for accepting the risk that payment will be either inadequate for the services performed, or entirely absent. This premium is a familiar concept to those in business and finance, where riskier investments command higher rates of return than safer ones.

Id.

53. *Id.* at 788 (“Viewed in the aggregate, the attorney is performing a form of redistribution of costs among clients to ensure that all have adequate representation.”).

54. *Id.*

55. For a discussion about the subtraction of costs from contingency fee awards, *see id.* at 793–94.

56. Press Release, PR Newswire, Arkansas Jury Enters \$46.5 Million Verdict for Toddler in Medical Malpractice Case (Mar. 10, 2017), <http://www.prnewswire.com/news-releases/arkansas-jury-enters-465-million-verdict-for-toddler-in-medical-malpractice-case-300422217.html>.

that the medical care for the duration of the child's life would cost \$33.7 million.⁵⁷ Experts also testified that the baby had an estimated \$3.2 million in lost earnings.⁵⁸ Therefore, \$9.6 million accounted for the non-economic losses. When you subtract the attorneys' fees (assuming 33.3%) from the entire award,⁵⁹ the family is left with \$30.69 million, substantially less than would be required to care for their child's well-being for her prospective lifetime. Now, imagine SJR8 were passed and those non-economic damages were capped at \$500,000. After attorneys' fees, the family would be left with \$24.7 million, almost a full \$9 million less than the cost of properly caring for the child. This amount not only fails to reach the compensation necessary to make the family whole again, but may also prohibit the injured child from receiving the proper care necessary to sustain life.

With the limits placed on non-compensatory damages by SJR8, plaintiffs who are truly injured, as determined by a jury, will lose a substantial portion of their compensatory damages to attorneys' fees, as demonstrated in the hypothetical and case above. Lawyers will also be less likely to take on cases that will yield small compensatory damages amounts, no matter how meritorious, because the costs of litigation will necessarily exceed the amount of the award.⁶⁰ To this problem, one may argue that the solution is not just a cap on non-economic damages but also an additional and more stringent cap on attorneys' fees.⁶¹ Yet this solution creates further injustices in our market economy. More rigid caps on attorneys' fees will make more cases economically unviable for attorney representation.⁶² Many deserving plaintiffs will have no avenue to seek compensation for their injuries, as predicted by the Arkansas Bar Association:

SJR8 will also result in the courtroom door being closed to many Arkansans. One in four Arkansans live at or below 125% of the federal poverty level. SJR8 does not affect those people in Arkansas who can afford to pay for legal services. Justice for all necessarily means we must provide a system that is open to poor, working poor, and the middle class in our state.⁶³

57. Max Brantley, *Jury Awards \$46.5 Million in Malpractice Case in Camden*, ARK. TIMES (Mar. 10, 2017), <https://www.arktimes.com/ArkansasBlog/archives/2017/03/10/jury-awards-465-million-in-malpractice-case-in-camden>.

58. *See id.*

59. *See* SJR8, *supra* note 14.

60. *See* Press Release, *supra* note 56.

61. SJR8 already proposes to limit attorneys' fees to 33.3% of the total award. *See* SJR8, *supra* note 14.

62. Shajnfeld, *supra* note 50, at 788.

63. Press Release, Ark. Bar Ass'n, ArkBar Opposes Senate Joint Resolution 8 (SJR8) (Feb. 8, 2017), <https://www.arkbar.com/blogs/denise-hoggard/2017/02/08/arkbar-opposes-senate-joint-resolution-8-sjr8>.

Additionally, the rulemaking power provided to the legislature by SJR8 will compound these problems by making it easier for the legislature to further restrict recovery on other tort issues.⁶⁴ According to the Advance Arkansas Institute, a lobbying group and proponent of SJR8, the purpose of this rulemaking power is to enable the legislature to create “loser-pays reform” or “class-action reform.”⁶⁵ These types of reforms will further eliminate access to courts by plaintiffs, and the average Arkansas voter will have little say in these legislative reforms. On its face, the rulemaking amendment seems unrelated to tort reform, but in actuality, it will have the effect of keeping people from their day in court.⁶⁶

IV. CONCLUSION

If one adopts both the Torahic principle that citizens should be justly compensated for their injuries, as well as the principle that the Arkansas legal system was designed to help ensure a fair process for compensating those injuries, SJR8 represents a deviation from these principles by having the effect of keeping meritorious claims from reaching the courthouse steps and preventing plaintiffs who actually reach the justice system from receiving the full payment for their injuries. By incorporating SJR8, Arkansas voters will be amending the Arkansas constitution in a way that detaches itself from the Torahic principles in which it was founded upon and therefore ignoring the founders’ original intention. A constitutional amendment of this magnitude would fundamentally alter the system of justice in contradiction to the fundamental core of the Arkansas constitution.

64. SJR8, *supra* note 14, § 3.

65. DAN GREENBERG & MARC KILMER, ADVANCE ARKANSAS INSTITUTE, HOW TORT REFORM WILL MAKE ARKANSAS HEALTHIER AND WEALTHIER 7 (2017), http://www.thearkansasproject.com/wp-content/uploads/2017/02/tortreformamendment.web_.pdf.

66. *Closing the Lottery*, ECONOMIST (Dec. 10, 2011), <http://www.economist.com/node/21541423> (recognizing that a loser-pays law that sharply decreased suits in Florida was quickly repealed with broad support).