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COMPARATIVE LAW: LAW, REALITY AND SOCIETY  
(FIRST THREE CHAPTERS OF THE FORTHCOMING BOOK)

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## Chapter 1

### **Law in Books, Law and Reality: a Comparative Law Perspective**

I consider myself a comparative legal historian and range widely over time and space. My interest is in private law. My general conclusions, developed over years, on law in society are three and are interconnected and are as follows:

1) *First Conclusion*: Governments are not much interested in developing law especially not private law. They generally leave this to subordinate law makers to whom, however, they do not grant power to make law. For instance:

(a) The great Roman jurists from the second century B.C. to around 235 A.D. to whom modern private law owes so much were as such private individuals even though many, for instance Julian, Paul, Ulpian and Papinian, were top public officials. Others, such as the obscure jurist Gaius famous for his elementary textbook, were not. Much of their works formed Justinian's Byzantine *Digest* (533 A.D.) and thus lived on into the modern world.

(b) The great figures in the early and fundamental Reception of Roman law from the 11<sup>th</sup> century onwards, the Glossators and Post-Glossators such as Irnerius, Accursius, Baldus and, most famous of all, Bartolus, were University professors.

A pattern is already beginning to emerge: law lives on long after the death of the law maker, and in territories distant from his place of business. And it continues to thrive even in very different circumstances and even though misapplied. For instance, the *Ordenações Filipinas* promulgated by Philip II (of Spain) for Portugal under Spanish domination, and confirmed by João IV in 1643 gave subsidiary validity to the opinions of Bartolus. The *Ordenações* applied to the Portuguese colonies and remained in force even

when Brazil became independent in 1822.

(c) The development of English law which was mainly the work of judges whose task was supposedly to find the law, not to make the law, is equally unthinkable without the *Commentaries on the Laws of England* (first edition 1765-1769) of William Blackstone, composed when he was the first Vinerian Professor at Oxford from 1758.

The reception of English law in the U.S.A. after Independence is equally unthinkable without these *Commentaries*. There were, of course, numerous American editions with significant changes -- which must not be minimized -- but Blackstone remained Blackstone.

The accessible structure of Blackstone's *Commentaries* has been the subject of lively debate but the issue is simply resolved. The *Commentaries* follow the slightly flawed reconstruction of Justinian's *Institutes* by Dionysius Gothofredus (1549-1622). Gothofredus tabulates the arrangement with connecting lines. Blackstone does the same. Another example of extreme borrowing.

Perhaps an even more telling example for survival is William Geldart's celebrated *Introduction to English Law* [first edition, 1911; latest edition, 1995]. This also follows the structure of Justinian's *Institutes*. Thus:

Chapter 1, Statute law and Common law;

Chapter 2, Common law and equity;

Chapter 3, Other bodies of English law; = *J.* 1.1-2;

Chapter 4, Persons and personal relations; = *J.* 1.3-26; (end of *J.* 1.).

Chapter 5, Property = *J.* 2.1-25; 3.1-12;

Chapter 6, Contracts = *J.* 3.13-29; (end of *J.* 3).

Chapter 7, Torts = *J.* 4.1-5;

*J.* 4.6-17 on procedure have no equivalent in Geldart;

Chapter 8, Crimes = *J.* 4.18; (end of *J.* 4).

Even within a chapter the order may follow that of the *Institutes*. Thus, Geldart's Chapter 5 begins with the conception of property, then ownership and possession and ends with succession. *J.* 2.1-3.12 begins with the division of things and ends with a final point of succession.

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Western law is unimaginable without the input of scholars writing without governmental authority.

2) *Second Conclusion*: Even when famous legislators emerge, they are seldom much interested in inserting a particular social message or even certainty into their laws.

(a) Moses and the Ten Commandments. Moses is a leader in serious trouble with his own people who are on the verge of revolt. Moreover, his own father-in-law has just told him that he is wearing himself out deciding lawsuits, and that with God's help he should concern himself with weightier matters (Exodus 18.13ff). God comes to Moses' aid and gives him the Ten Commandments or Ten Words (Exodus 20. 1ff.) Significantly, God insists that Moses be given the laws in private, and far from the people. (Exodus 19.10ff.).

The secular legal provisions are banal in the extreme: no murder (or killing) (Exodus 20.13), no adultery (Exodus 20.14), no theft (Exodus 20.15). What society – apart from ancient Sparta and theft – would fail to have such rules? More to the point, these offences are not defined. But what amounts to murder, theft or adultery? Some precision is needful, but is not given. But if no precision is to be given, what is the point of stating no adultery and no theft? After all, they are certainly covered by the last Commandment. Adultery and theft are the strongest cases of coveting a neighbour's wife or anything that is your neighbour's.

Even the religious commands leave much to be desired. No work on the seventh day (Exodus 20.8ff). But work is not defined. What amounts to work? We are not told. The resulting endless debates of the Pharisees and rabbis can be no surprise. Exodus 20.8 tells us that on the Sabbath "you shall not do any work – you, your son or your daughter, your male or female slave, your livestock, or the alien resident in your town." There is a glaring omission: "Your wife." Is she permitted to work on the Sabbath? It would be very convenient if she were! Someone is needed to interpret the Commandments, but no one is appointed.

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(b) Justinian's enormous codification, the *Corpus Iuris Civilis*. The *Corpus Iuris Civilis* is in four parts: the *Institutes* (529 A.D.) is the elementary textbook, with the force of statute law, for first year law students; the *Digest* (529) is a vast collection of selected texts from the classical jurists; the *Code* (second edition 529) is a collection of imperial rulings; and the *Novellae*, a collection of subsequent Justinianic legal pronouncements.

A dominant concern in Justinian's time, and of Justinian himself, was religion. Which form of Christianity was to be accepted, which doctrines were heretical, the treatment of Jews. Yet in the whole body of the *Institutes* and *Digest* there is not one mention, not one, of Jesus, of the apostles or saints or fathers of the church. God is mentioned only once in the *Institutes*, in the very last text, *J. 4.18.12*. Justinian has given a very brief outline of public prosecutions which will be amplified, he says, *deo propitio*, with subsequent study of the *Digest*. The *Digest* has twelve mentions of the word 'god', but in none can we tell whether the god is that of the Christians or an old pagan deity. The *Code* has more of Christianity (and anti-semitism). But there is a wonderful twist. The *Institutes* were the subject of first-year study, the *Digest* of the second, third and fourth years. The *Code*, as an object of study, appears only in the fifth year. And even if by then the students' minds were not fixed, the fifth year was optional!

Justinian has not brought up-to-date the law of the pagan Latin-speaking jurists of classical Rome to reflect the Christian Greek-speaking lawyers of the very different Constantinople. And economic conditions had varied greatly from time to time. And if the *Digest* had been in Greek, not Latin, it could never have had much impact in western Europe.

One further example out of many. The ancient Roman law code of 451-450 B.C., the *Twelve Tables*, contained a provision *Si aqua pluvia nocet*, "if rain water does damage." This was the subject of intense discussion by jurists from at least the second century B.C. to the third century A.D., and it is the subject of a *Digest* title, *D. 39.3*. One issue was settled: an action did not lie when the flow of water onto a neighbour's land was diminished; it was not the water but its lack that caused loss. But what work on your land that increased the flow onto my land could give rise to an action to restore the

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*status quo ante*? The jurists mightily disagreed. No legislation was forthcoming, the juristic disputes were not settled, not even in the time of Justinian in the very different climatic conditions of Byzantium. Indeed – and this is why I have chosen this example – it was taken over in France. Robert Pothier (1699-1772) took it over in its entirety and cites no other source in his account. Odder still, it was not until the final revision of the draft French *code civil* of 1804 that any fundamental change was made.

3. *Third Conclusion: Legal Transplants.* Borrowing is the name of the legal game and is the most prominent means of legal change. That this is so often overlooked can only be explained by extreme prejudice brought about by notions such as that “Law is the Spirit of the People” or that “Law reflects the Power Structure of the Ruling Class.” But in the previous two main topics in this chapter transplants have appeared in almost every situation discussed. So true – and obvious – is this that I will limit myself to only two, more detailed, examples.

But before I come to these, I would like to insist on the intertwining of the factors shaping law in society. Much has already emerged about this intertwining:

A. The lack of interest on the part of government in making law, especially private law.

B. The fundamental role of subsidiary law makers who are not given power to make law.

C. The longevity of legal rules whether in the same or a different context, whether in the same or a different state. There has been no need to set this out under a distinct heading. It is self-evident.

Law, as we know it, is inconceivable without these factors. To come at last to the two examples of legal transplants which also inevitably throw still more light on the intertwining of the factors of legal development.

For Frederick the Great of Prussia it is enough to call attention to the first fruits of his attempts to codify the law. *Das Project des Corpus juris Fredericiani, d.h. S.M. in der Vernunft und Landes verfassungen gegründetes Landrecht, worin das Römische Recht in eine natürliche Ordnung und*

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*richtiges Systema nach denen dreyen Objectis juris gebracht*, which was published at Halle between 1749 and 1751. The very title is instructive; “The Project for the Corpus juris Fredericiani, that is, the Territorial Law of His Majesty, Founded in Reason and the Territorial Constitutions, in which Roman Law Is Brought into a Natural Order and Right System in Accordance with Its Three Objects of Law.” That is to say, it gives the *ius commune*, and it is in fact arranged in the order of Justinian’s *Institutes*. No attempt is made to compose afresh a law peculiarly suited to the Prussian territories. Indeed, some paragraphs of the preface, particularly 15,22,23, and 28, make it plain that for the drafters the impetus for the *Project* was not dissatisfaction with the substantive *ius commune* but with the difficulty of ascertaining the law because of the poor arrangement of Justinian’s *Corpus Juris Civilis* (apart from the *Institutes*) and of the multitude of writings on it by subsequent jurists. In the second section of part 1, book 1, Frederick claims it is only to be regretted that the German emperors when they received Roman law did not always systematize it. Frederick’s primary intentions – at least as they were perceived by his famous chancellor, Samuel Cocceii – ought best be revealed by the main thrust of this first production. The fact that, because of the Seven Years’ War, it never came into force (which is regarded, for instance, by Franz Wieacker as rather fortunate) is not of consequence here. For later attempts at codification, ultimately crowned with success, with rather different aims, Frederick was indebted to a new generation of lawyers and philosophers.

The other example is Atatürk, who wished to reform and modernize Turkish life in so many ways (and was very largely successful). He promulgated in 1926 the Turkish Civil Code, the *Türk Kanunnu Medenîsi* (*TKM*), which contained virtually all of the two Swiss codes, the *Schweizerisches Gesetzbuch* (*ZGB*) and the *Obligationenrecht*. Turkey in the same year issued its commercial code, which was a compilation of at least a dozen foreign statutes, and issued in 1929 its code of the sea, which is a translation of book 4 of the German Commercial Code (*Handelsgesetzbuch*).

The Turkish Minister of Justice of the time, Mahmut Esad Bozkurt, on the occasion of the *Festschrift* of the Istanbul Law Faculty to mark the

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civil code's fifteenth birthday, explained the reasons for the codification. First, the Turkish legal system was backward and primitive. Three kinds of religious law were in force, Islamic, Christian, and Jewish, each with its appropriate court. Only a kind of law of obligations, the "Mecelle," and real property law were common to all. (If I may interject a comment, I do not see why it is backward to have separate rules with separate courts to decide on family law and succession. In practice, families with a choice in a unitary system opt for the structure that fits their beliefs). Second, such an odd system of justice, with three kinds of law applied through three kinds of courts, could not correspond to the modern understanding of the state and its unity. Third and most important, each time Turkey had demanded the removal of the capitulation terms of the First World War by the victorious Allies, the latter refused, pointing to the backward state of the Turkish legal system and its connection with religion. When as a result of the Lausanne Peace Treaty the capitulation terms were removed, the Turks took it upon themselves to form a completely new Turkish organization of justice with a new legal system, new laws, and new courts. Bozkurt said that in one word the system was to be "worldly," The duties undertaken by the Turks under the Lausanne treaty had to be accomplished as quickly as possible. During the First World War commissions were already set up in Istanbul to prepare laws and they had started work. The results were examined in 1924. After seven or eight years the Turks had completed only two hundred articles on a law of obligations; the sections on succession, guardianship, formation of marriage, and divorce, of a civil code; and between seventy and eighty articles of a criminal code; and even the code of land transactions was only a torso. Consequently, after various systems had been looked at, the two Swiss codes were adopted virtually in their entirety.

Although the motivation was different from most earlier receptions – drastic modernization of society rather than the filling of gaps in the law – the Turkish reception was otherwise similar. Because the creation of new autochthonous law is difficult, it is much easier to borrow from an already existing, more sophisticated system that can be used as a model – above all, where the donor system is accessible in writing. By this time, of course,



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various excellent codes would have provided a model; notably the French, German, and Swiss were all greatly admired. Why was Swiss law chosen? Various answers have been given, but three strike me as most important: the Swiss laws were the most modern; Switzerland had been neutral during the war, whereas French law was that of a former enemy and German law was that of a defeated ally; and Bozkurt had studied law in Switzerland, so Swiss law was most familiar to him. Hirsch, a German scholar who was a professor of commercial law at Istanbul and Ankara between 1933 and 1952, emphasizes what was to him the overriding importance of the last factor. In any event, there is no reason to think that somehow Swiss law was more adapted than was French or German law to the society that Turkey wanted to become.

The Turks did not accept some Swiss rules at all and changed others. For instance, whereas the legal regime in Switzerland for spouses' property is community property (*ZGB* 178), in Turkey it is separate property (*TKM* 170); the surviving spouse's right to a usufruct is smaller in Turkey (*TKM* 444 §2) than in Switzerland (*ZGB* 462 §2); the judicial separation of spouses may in Switzerland be pronounced for an indefinite time (*ZGB* 147 §1); desertion as a ground of divorce in Switzerland must have lasted at least two years (*ZGB* 140), but in Turkey at least three months (*TKM* 132); the minimum age for marriage in the former is for males twenty, for females eighteen (exceptionally eighteen and seventeen), in the latter for males eighteen, for females seventeen. Other rules would be accidentally mistranslated and the final result need not be that of the donor nation. Others were deliberately given a different value in the translation. Still others remain a dead letter because they have no counterpart in Turkish conditions. The Turkish courts in giving flesh to the rules through interpretation may, as they usually but not always have done, follow the interpretation of the Swiss courts. Again, many rules have a different societal value in the two countries, such as those on a minimum age for marriage or on the requirements for a divorce. Finally, such a reception, as fast as Atatürk wanted it to be, will, like that of Roman law and of other systems, be a slow process, and the speed and the extent of its success – never complete – will vary with circumstances. Any new law resulting

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from a massive transplantation has to be learned by judges and lawyers as well as by the people before it becomes effective. In the case of Turkey, where the new legal system was so different from what had gone before but was so closely attached to European models, the solution was to import foreign professors from Germany and Switzerland, notably Andreas B. Schwartz and Ernest E. Hirsch, to teach the new law, and to send budding lawyers and law professors to study law in Europe. Also, aspects of traditional social life, such as marriage, respond only slowly to the pressures of new law, especially in country districts. Significantly, essays in a collection published to mark the thirtieth anniversary of the Turkish codification stress the extent to which the reception had not “taken,” whereas those in another collection to mark the fiftieth anniversary accept the reception but emphasize its continuing nature and the fact that it is not, nor will be, complete. In 1956 Kurt Lipstein could describe the extent of acceptance of compulsory civil marriage as “disappointing, to say the least.” In 1978 June Starr reported that in a particular village that she had studied, she found little evidence “that villagers are lax in obtaining state marriage licenses.”

The success or partial success of the transplanting of Swiss legal ideas into Turkey gives many insights into what happens when a less “modern” or less “developed” system comes into powerful contact with a sophisticated modern system. These insights become almost blinding when we notice that Eugen Huber, who virtually alone was responsible for the *ZGB*, said that “the law must be delivered in speech out of the thought of the people. The reasonable man who reads it, who has pondered the age and its needs, must have the perception that the law was delivered to him in speech from the people” And Virgile Rossel declared that “in particular if one could say of the Code Napoléon that it was ‘written reason,’ we intended to work according to the sense of the national spirit, raising the moral level of our law so far as possible, and we would be happy if it was said one day of the Swiss civil code that it is, to some extent, the written internal moral sentiment”. Yet the same Virgile Rossel was well aware that the differences in the laws of the various Swiss cantons could not be explained on the basis of religion,

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economy, language, or “race.”

Thus, the Swiss codification was intended by those who worked on it to be the written moral consciousness of the Swiss people. The arbitrary rules of cantonal law were to be remedied by federal law appropriate to the conditions of the Swiss. The “Swissness” of the codification is stressed. Yet the Swiss codification could be taken over, almost in its entirety, some years later by Turkey, a country with a vastly different history, legal tradition, religion, culture, economy, political setup, and geographical and climatic circumstances. Turkey under Atatürk is a prime example not only of legal transplants but of revolution in law. Substantive alternative alterations were few and minor. But what is striking is that the two Swiss codes were regarded by their creators as particularly Swiss and in accordance with the Swiss national spirit and moral consciousness. Yet, writing in the context of Turkish marriage law, N.U. Gürpınar can claim that “in addition, after the revolution in Turkey it was urgently necessary to create a law corresponding to the principles of the young Turkish republic. This for civil law was the Turkish civil code taken over from Switzerland.” And in a more general context, after explaining the need for a modern Turkish code, B.N. Esen writes:

That was the situation of fact. Now, Switzerland always was and is the land of democracy par excellence. As a land with a long democratic past Switzerland was quite especially called to serve as a model for the civil code. Turkey did not hesitate a single second. And in 1926 the Schweizerisches Gesetzbuch and the Swiss Obligationenrecht were taken over with minor alterations as the statute law of the state. If those codes of foreign origin have been used in Turkey for a quarter century without the slightest difficulty, then it is on this account, because they mirror exactly the spiritual inclination of the social milieu, that they reflect the idea of law and justice of the place in which they are interpreted and used.

Thus, insofar as private and commercial law are concerned, a revolutionary

leader seeking democracy in Turkey could find almost precisely what he needed in codes framed for very different conditions in Switzerland. I do not entirely agree with Esen. The making of a civil code for Turkey was proving difficult. So a model was borrowed. Swiss law was not easily accepted in practice. I do not believe that the Swiss code mirrored exactly what was wanted or needed.

For me, one personal example of the practical significance of my arguments is the translation into Serbian of my book, *Legal Transplants* (2000). This work is now a third part of a compulsory first year course at the University of Belgrade on introduction to law, of which the other two parts are from Theodor Mommsen and Sir Henry Maine. A Belgrade law professor, Sima Avramović, wrote to me that in the end examination most students wrote an answer on my work. He asserted that this was very important because the Belgrade students would soon become the top judges and legislators in Serbia. There was, he wrote, a general feeling that to borrow law from elsewhere was a sign of inferiority and that there was a consequent hesitation to borrow. But, he claimed, I had shown that to borrow law was virtually a universal phenomenon, and therefore wholly respectable for Serbia.

It will, of course, be claimed that legal borrowing is highly selective, and, hence, that borrowed law still reflects society. I would, of course, agree that borrowing is selective. But this selectivity is not to be equated with a search for the most satisfactory rules for the social, economic, political conditions of the borrowing state. Often law is borrowed because it is there. Factors include: (1) Imposition of law by an occupying force, and the law remains even when occupation ends. (2) Accessibility of the foreign law because it is in a language that is well-understood, or is available in a usable form such as Gaius' *Institutes*, Justinian's *Institutes* and the subsequent numerous local *Institutes*. (3) The search for legitimacy of some kind whether by legislators who seek to bolster their power by a reliance on esteemed models or by judges and jurists who desperately need authority but local authority is lacking. (4) Chance; for example, when Serbia won its

independence from the Turks and sought a new legal system it turned first to the French *code civil* but the translator proved incompetent and recourse was had to the Austrian civil code.

Indeed, even love can make a mess out of law. I give two examples. First the Roman senate passed a decree to enable the unfortunate Emperor Claudius to marry his brother's daughter, Agripina, but it still remained incest to have sex with a sister's daughter (*G.* 1.162), and the rules are still recorded for Ulpian, killed 223 by the praetorian guard (*Coll.* 6.1.1). Secondly, the great Justinian who wanted to marry Theodora who had been an actress or worse, had his uncle Justin issue a ruling in 530 that allowed him to do so. The constitution in question, *C.5.4.23*, is full of pious moralizing.

I hope that I have shown that the commonly-made distinction between law in books and law in action is too simple. The distinction is valid, but law in books must be subdivided. Much law in books reflects the conditions, needs and desires of the society in which it operates. But likewise much is accepted because it was borrowed often without much thought, and often without the intervention of any government. History shows that borrowed law, foreign law, is not necessarily to be regarded as unsatisfactory law. It may be as satisfactory as indigenous law.

Law to me is a mystery and to understand law it must not be deprived – brutally – of its mystery. The mystery must be gently unraveled.

(I have not given references for my examples which are taken from previous works of mine. Besides, the purpose of this chapter is to set the scene for what follows).

## Chapter 2

### Moses and the Ten Commandments

In the first chapter I set out my general conclusions on the development of law, and the relationship of this law to the society in which it operates. The conclusions were not based on abstract theory but on observation of what actually has happened in various societies at various times and places. I believe the conclusions from the numerous specific examples which follow in this book can be generalised.

Now I want to take a closer look at Moses and the Ten Commandments and their place in understanding legal development. But I will begin with an introduction and end with an appendix.

Yahweh directly gave the Ten Commandments to Moses on Mount Sinai.<sup>1</sup> Apollo, through the Delphic oracle, gave Lycurgus the laws of Sparta,<sup>2</sup> Zeus gave the Cretans their laws,<sup>3</sup> and Hermes gave the Egyptians theirs through Mneves.<sup>4</sup> The significance for us of these traditions is that the fiction of a gift of god heightens the laws' authority and makes their acceptance and maintenance easier. As Plutarch says: 'Thus the law code of Zaleucus found favour with the Locrians not least, it is said, because he asserted that Athena had constantly appeared to him and had in each case guided and instructed him in his legislation, and that nothing he proposed was of his own invention or devising.'<sup>5</sup> Nothing could illustrate better man's need to have his laws as authoritative as possible in order to ensure that they are

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<sup>1</sup> Exodus 20; Deuteronomy 5. Probably within biblical times the whole Pentateuch was regarded as so given.

<sup>2</sup> Cf., e.g., Herodotus, *Historiae*, 1.65; Plutarch, *Lycurgus*, 5.3; Plato, *Laws*, I (p. 624); Diodorus Siculus, 1.94.

<sup>3</sup> Plato, *Laws*, I (p. 624); Diodorus Siculus, 1.94.

<sup>4</sup> Diodorus Siculus, 1.94.

<sup>5</sup> *De se ipsum citra invidiam laudando*, II: cf. Scholiast in Pindar, *Olymp.* 10. 17. See also for the laws of Numa in regal Rome, Dionysius of Halicarnassus, 2. 61.

obeyed.<sup>6</sup>

Secondly, it is striking how often codifications are produced for, or demanded by, national heroes, despots, and military leaders. Thus, the king Lipit-Ishtar who “procured the freedom of the sons and daughters of Nippur, the sons and daughters of Ur, the sons and daughters of Isin, the sons and daughters of Sumer and Akkad upon whom slaveship had been imposed”<sup>7</sup> is the king responsible for one of the earliest known legal codes, probably of the early 19<sup>th</sup> century B.C. And Hammurabi, king of Babylon in the 18<sup>th</sup> century B.C. is as famous for his conquests as for his code. Moses, who led his people out of bondage in Egypt, also acquired for them the Ten Commandments. Both Julius Caesar<sup>8</sup> and Pompey the Great<sup>9</sup> wished to codify the law of Rome. Justinian, who did so successfully from Constantinople between A.D. 529 and 534, also reconquered Africa, Italy and part of southern Spain. In more recent times, the impetus for the first modern European codification, Prussia’s *Allgemeines Landrecht*, came from Frederick the Great, and Napoleon was responsible for the *code civil*. The phenomenon is complex and has several causes, one of which is the conqueror’s desire to be remembered as a wise man of peace since a main benefit of peace is law and justice. There is also the wish to be the initiator of a new era. Another cause is undoubtedly the man of action’s impatience with the convolutions and ambiguities which invade any legal system, and especially one which has developed without overall planning. What *he* wants is a system which is its own authority, one in which an answer to every problem exists, and can be quickly found by the interested parties. The speed and certainty of the answer is more important to *him* than its subtlety or absolute quality.<sup>10</sup> There is a link

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<sup>6</sup> See also, H.H. Cohn, ‘Secularization of Divine Law’, *Scripta Hierosolymitana*, xvi (Jerusalem, 1966), pp. 55ff.

<sup>7</sup> From the prologue of the Lipit-Ishtar Law code, translated by S.N. Kramer in J.B. Pritchard, *Ancient Near Eastern Texts Relating to the Old Testament*, 3<sup>rd</sup> edit. (Princeton, 1969), pp. 159ff).

<sup>8</sup> Cf. Suetonius, *Divus Iulius*, 44. 2; Isidorus, *Orig.* 5.1.5.

<sup>9</sup> Cf. Isidorus, *Orig.* 5.1.5

<sup>10</sup> Some of these leaders, notably Napoleon and Frederick the Great, were extremely interested in the quality of the rules of their codification. But always they

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here with transplants which owe much of their popularity to the ease with which the rule can be acquired even when it is not wholly appropriate in its adoptive society.

The central role in law of authority – as contrasted with quality – is thus emphasized.<sup>11</sup> Law should be its own authority; for some people (including legislators) it has sometimes seemed more important that the law be easily known than that it have objectively excellent rules.<sup>12</sup> Again a law is often adopted because of the reputation and authority of its model or promulgator; hence, in part, the reception of even less than adequate rules. Finally, law is maintained by the authority of the government, and even gods are invoked; questioning, examining of quality is reduced to a poor second best.

The Ten Commandments are beyond doubt the most celebrated collection of laws in the western world. They also have a very high approval rating for their quality. Yet they are extremely peculiar. I believe it is possible to understand them better if we approach them from the general understanding of law making that I have just sketched. But first I must set out some of the obstacles to our comprehension.

There is widespread but not universal scholarly opinion that they are not the work of Moses.<sup>13</sup> But, then there is no agreement as to the precise

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wanted a decision made as to what the law on a point was; and always they wished to end discussion, controversy and doubt.

<sup>11</sup> On the significance and effects of an authoritative tradition see, e.g., M.P. Gilmore, *Argument from Roman Law in Political Thought 1200-1600* (Cambridge, Mass, 1941).

<sup>12</sup> Cf. the Roman tradition of the plebs' demand in the 5<sup>th</sup> century B.C. for codification – which led to the XII Tables – because they did not know what the law was: Livy, 3.9. 1 ff.

<sup>13</sup> For a brief introduction see C.J.H. Wright, 'Ten Commandments,' in *The International Standard Bible Encyclopedia*, 4, ed. Geoffrey W. Bromiley, (Grand Rapids, 1988), pp. 786 ff.; see also Brevard S. Childs, *The Book of Exodus* (Philadelphia, 1974), pp. 385 ff.; Reuven Yaron, 'The Evolution of Biblical Law,' in *La formazione del diritto nel Vicino Oriente Antico* (Rome, 1988), pp. 77 ff.,



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dating of the laws or the historical circumstances in which they were made. Or even if they were originally laws at all. It is by no means certain that they were the work of one leader at one time. It can be plausibly argued that they are a collection from various materials and were never established at one time. If so, can one reasonably talk of a common purpose? Again, in Exodus the account of them is immediately followed by judicial laws and by ceremonial laws, both ostensibly given to the Israelites by God through Moses. Should we see the Ten Commandments as one part of a trilogy? Again a rather different version of their origin is given in Deuteronomy. What are we to make of this?

My approach will be to assume that there were standard – more than one, but connected – traditions about God giving laws to the Israelites. These traditions were formed into the accounts in Exodus and Deuteronomy. Those responsible for the final version of the traditions made choices, but they were limited in their options by the traditions themselves.

On this basis, I will treat the Ten Commandments in Exodus as a unit – ignoring for the time being the judicial and ceremonial laws. I will not be concerned with the historical accuracy of God delivering the laws to Moses. My concern will be with the nature of the tradition. Historical or not, the tradition should reveal much for the understanding of the factors in law-making, not only of the belief of the redactor, but also of the people from whom it derived and for whom it was intended.

On this basis I wish to address some of the peculiarities of the Commandments. The relevant passages of Exodus 20 read:

1. Then God spoke all these words:
2. I am the Lord your God, who brought you out of the land of Egypt, out of the house of slavery;
3. you shall have no other gods before me.
4. You shall not make for yourself an idol, whether in the form of

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especially pp. 90 ff.; Reuven Yaron, 'Social Problems and Policies in the Ancient Near East,' in *Law, Politics, and Society in the Ancient Mediterranean World*, edd. Baruch Halpern and Deborah W. Hobson (Sheffield, 1993), pp. 19ff.

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anything that is in heaven above, or that is on the earth beneath, or that is in the water under the earth.

5. You shall not bow down to them or worship them; for I the Lord your God am a jealous God, punishing children for the iniquity of parents, to the third and the fourth generation of those who reject me,

6. but showing steadfast love to the thousandth generation of those who love me and keep my commandments.

7. You shall not make wrongful use of the name of the Lord your God, for the Lord will not acquit anyone who misuses his name.

8. Remember the Sabbath day, and keep it holy.

9. Six days you shall labor and do all your work.

10. But the seventh day is a Sabbath to the Lord your God; you shall not do any work – you, your son or your daughter, your male or female slave, your livestock, or the alien resident in your towns.<sup>14</sup>

11. For in six days the Lord made heaven and earth, the sea, and all that is in them, but rested the seventh day; therefore the Lord blessed the Sabbath day and consecrated it.

12. Honour your father and your mother, so that your days may be long in the land that the Lord your God is giving you.

13. You shall not murder.

14. You shall not commit adultery.

15. You shall not steal.

16. You shall not bear false witness against your neighbor.

17. You shall not covet your neighbor's house; you shall not covet your neighbor's wife, or male or female slave, or ox, or donkey, or anything that belongs to your neighbor.<sup>15</sup>

A first peculiarity to notice is that the provisions are remarkably non-threatening. A glance at other ancient codes or laws will point the difference. Thus, the first section of the Code (or Laws) of Hammurabi (of, at the latest, the early 17<sup>th</sup> century B.C.) reads:

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<sup>14</sup> Is the omission of the wife significant?

<sup>15</sup> The translation is that of the *New Revised Standard Version*.

If a man has made allegations against another man, and he has laid a charge of homicide against him but is unable to substantiate his guilt, the one who made the allegations against him shall be killed.<sup>16</sup>

In contrast, penalties are noticeably absent from the Ten Commandments. Mention of punishment occurs only in three, two of them among the religious rules, and they are non-specific. Thus, for bowing down to other gods, God will punish the children for the offence of their parents down to the fourth generation (20.6). The precise punishment, however horrible it might be, is not expressed. For wrongly using the name of God He will not acquit (20.7). The remaining mention of punishment scarcely deserves that name: you should honour your parents “so that your days may be long in the land that God is giving you.” (20.12). The provision on honouring parents might be regarded as transitional. The rule of human kindness is interpersonal, but the “penalty” involves God. It might be suggested, moreover that this “penalty” is a much later addition: as such it does not appear in the corresponding text of Deuteronomy 5:16:

Honour your father and your mother, as the Lord your God commanded you, so that your days may be long and that it may go well with you in the land that the Lord your God is giving you.

Here the supposed penalty appears as a reward. Indeed, in Jewish tradition the Commandment in Exodus is regarded as a blessing.

Again the Commandments are split into two very distinctive parts: behaviour toward God, behaviour toward other humans. And the parts are distinctly unequal. Duties toward God are much more prominent. It is not just that these rules come first. They are much more detailed. For example, prohibitions against work on the Sabbath are spelled out to apply not only to

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<sup>16</sup> Translation of M.E.J. Richardson, *Hammurabi's Laws* (Sheffield, 2000), p. 41.

the male head of the family, but also to his sons, daughters, male slaves, female slaves, even his animals and visitors. In contrast, for inter-human law we have, for instance, simply “you shall not kill”. There is a translation difficulty: “kill” or “murder”?<sup>17</sup> No matter for the moment. Not only is the penalty not set out, but the offence is not defined or described. Yet the offence cries out for clarification.

But there is much more. The rules about behaviour to other humans are socially necessary but banal in the extreme: no murder, no theft, no adultery, no false witness. Why did God bother with these? Why was He needed? Not even the penalty is spelled out.

Then the two interpersonal commands that are not just framed “You shall not \_\_\_\_” are framed in a more complex manner. Thus, a reason for honouring father and mother is given, and it scarcely seems to have a legal content.<sup>18</sup> It is also expressed more directly: “Honour \_\_\_\_.” The last command, “You shall not covet \_\_\_\_\_” concerns mental activity, not physical action, and can scarcely give rise to a law suit. And there is a third peculiarity in the tradition – though this time not in the substance of the Commandments – in the role of Aaron. And Aaron’s role is pivotal.

These peculiarities in the tradition must be explained and, for me, the explanation must lie within the tradition itself.

[I am well aware that some readers will reject this chapter as giving too few references to standard scholarship. I understand. But my concerns are not with the precise meaning of individual provisions, nor with the historical provenance of our accounts in Exodus and Deuteronomy, nor even with Deuteronomy. All I set out to do is to understand the tradition in Exodus in the context of the place of legislation in the history of legal development.]<sup>19</sup>

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<sup>17</sup>See, e.g. Childs, *Exodus*, pp. 419 ff.

<sup>18</sup>For a convincing explanation of the formulation of this commandment and its position in Exodus immediately before the prohibition on murder, see above all, Calum Carmichael, *The Spirit of Biblical Law* (Athens, GA 1996), pp. 94 ff.

<sup>19</sup> It has been suggested to me that the structure is exactly what one should expect if God actually gave the Commandments to Moses. The interpersonal laws would be familiar, and would need no detail. Yet for me, detail would still be needed

Legislation is a very particular form of law making – the only source of law that rulers keep under their direct control. And the only necessary talent of rulers is to remain in power. Moses is a leader in trouble. Indeed, for him, one problem follows another. It was God who appointed Moses as the Israelites’ leader, and who performed miracle after miracle to keep Moses in power. Defeat for Moses would be defeat for God. And Moses always had a prospective rival in the wings, his elder brother Aaron. Aaron is prominent in Moses’ leadership from the very beginning, and is also a leading figure in the Israelites’ rebellion against God, in the making of the golden calf. Just before God gave the Commandments to Moses his sympathetic father-in-law told Moses he was wearing himself out in deciding law suits. Moses has to keep his authority and God’s authority. Legislation is his solution. God is Moses’ authority, and the legislation must stress God’s authority for the Israelites. The control of legal relations between humans is of little concern. These can be dealt with by lower officials.

Moses murdered an Egyptian and fled to Midian (2.11ff.). God appeared to Moses and told him He would send him to Pharaoh to deliver the Israelites from bondage (3.7f.). Moses protested, but God insisted (3.11ff.). God emphasized that the Egyptian king would not let them go, but that He would smite the Egyptians, and the Israelites would be allowed to leave (3.19ff.). Moses continued to protest and God showed him miracles (4.1ff.). Moses continued to protest, claiming that he lacked eloquence (4.10ff.). God was angered and replied that his brother Aaron (who was coming to meet Moses) had fluency and would act as his mouthpiece (4.14ff.). “He indeed shall speak for you to the people: he shall serve as a mouth for you, and you shall serve as God for him” (4.17).<sup>20</sup> Moses left for Egypt with his wife and

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-- as we find in other ancient legislation -- and the sanctions should be set out.

<sup>20</sup>At 4.10, Moses says literally that “he is not a man of words.” It has been

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sons (4.18ff.). God told Aaron to meet Moses, and Moses told Aaron of God's miracles and what He had said (4.27f.). Moses and Aaron assembled the Israelite elders (4.29). "Aaron spoke all the words that the Lord had spoken to Moses, and performed the signs in the sight of the people" (4.30). The people believed (4.31). Moses and Aaron went to Pharaoh and told him God wanted them to celebrate a festival in the wilderness (5.1ff.). But Pharaoh answered: "Moses and Aaron, why are you taking the people away from their work? Get to your labours" (5.5). Note that Moses and Aaron are treated as equals before Pharaoh. Pharaoh increased the work load of the Israelites who blamed Moses and Aaron (5.20ff.). God spoke to Moses, promising freedom (6.1 ff). "Moses told this to the Israelites: but they would not listen to Moses, because of their broken spirit and their cruel slavery" (6.9). God told Moses to tell Pharaoh to let the people go, but Moses protested that Pharaoh would not listen because he was a poor speaker (6.10ff.). God then gave Moses and Aaron His orders (6.13). We are again told that God ordered Moses and Aaron to bring the people out of Egypt (6.26), and they spoke again to Pharaoh (6.27). God spoke again to Moses who again protested he was a poor speaker, and that Pharaoh would not listen. God said "See I have made you like God to Pharaoh, and your brother Aaron shall be your prophet. You shall speak all that I command you, and your brother Aaron shall tell Pharaoh to let the Israelites go out of his land." (7.1f). Then comes the biblical treatment of the ten plagues inflicted upon Pharaoh by God for failing to let the Israelites leave (7.14-12.32).

The chapters reveal a fascinating dichotomy. God speaks primarily to Moses, with Aaron very much Moses' helpmeet. Yet Moses' weakness is

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suggested that his difficulty was not lack of fluency, but that he was a foreigner in Egypt. But: (1) apart from his stay in Midian he had spent his whole life in Egypt; (2) After his childhood Moses was treated as a son by an Egyptian princess (2.10). (3) In Midian the daughters of Jethro thought he was an Egyptian (2.19). (4) Aaron would have the same problem with speech; (5) Pharaoh is reported as speaking Hebrew. Another late version is that as a child Moses burned his tongue with a coal of fire; for sources see Louis Ginsberg. *The Legends of the Jews* 2 (Philadelphia, 1923), pp. 272 ff.

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very much stressed. In contrast, in their interaction with Pharaoh Moses and Aaron appear very much on the same level. If we can assume, as I believe is reasonable, that, when Moses and Aaron were before Pharaoh and his officials, members of the Israelite elite were to be regarded as also present or at least knew of the meeting, Aaron would be regarded by them as very close to being Moses' equal.

But a side issue then arises. If God can work so many miracles, why does He leave Moses with such a defect that he needs Aaron's constant help? The issue, I think, is significant.

While the Israelites were still in Egypt, God gave Moses and Aaron instructions for the first Passover (12.1 ff.), but it is Moses who communicated them to the Israelites (12.21 ff.). Yet again, God gave Passover instructions to both Moses and Aaron (12.43 ff.). And the people followed their instructions (12.50). God told Moses to consecrate all the firstborn to Him (13. 1f) and Moses did so. In these fundamental legal matters Moses is basically his own spokesman.

God told Moses to camp before the Red Sea (14.1 ff.); Pharaoh prepared to attack (14.5 ff.), and the people blamed Moses vehemently for what seemed an approaching disaster (14.11ff.), but, through the agency of Moses, God destroyed the Egyptians (14.15 ff.). The miracle of the Red (or Reed) Sea is the climax of the Exodus, and Aaron is not mentioned. 14.31 records "So the people feared the Lord and believed in the Lord and in his servant Moses." According to the tradition in the Passover Haggadah (section 'The Plagues'), the number of plagues inflicted on the Egyptians at the sea was vastly greater than the ten plagues in Egypt.

Later at Marah the water was bitter and could not be drunk and the people blamed Moses (15.23 ff.). In the wilderness the Israelites complained against both Moses and Aaron (16.1ff.) And God told Moses he would rain manna from Heaven (16.4), and Moses and Aaron gave instructions to the people (16.6ff.). Moses then told Aaron to say to the people "Draw near to the Lord" (16.9). Moses gave further instructions to the people about manna, but not all of them obeyed (16.5ff.). Further on, again the people disobeyed (16.27ff.). God told Moses that some manna should be placed before the

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covenant for ever, and Moses so instructed Aaron (16.31 ff.). The people quarreled with Moses because they had no water, and Moses told God that the people were almost ready to stone him. God told Moses to strike a rock with his staff and water came forth (17.1ff.). God enabled Moses, with the help of Aaron and Hur, to defeat Amalek (17.8 ff).

Again a clear pattern emerges. God had chosen Moses to be the leader of the Israelites. For God, Aaron is definitely Moses' subordinate, and Aaron acted as Moses' intermediary with the people. Time and again God saved the Israelites in distress with a miracle performed through Moses. Yet time and again when the people were in distress, they quarreled with Moses. Despite his authority from God, Moses did not have the confidence of his people. His control was shaky.

Perhaps more immediately in the present context, Moses was wearing himself out with hearing lawsuits all day long. His father-in-law had come for a visit, saw Moses judging all day, wearing himself out (18.13), and he advised him to teach the people the statutes and instructions. He also advised that Moses should appoint judges to hear minor cases, but should hear major cases himself. Moses agreed. He summoned the people and they agreed to do whatever God said (19.7). Shortly thereafter, God delivered the Ten Commandments. Thus, a leader in trouble received authoritative legislation.

I need not record the steps by which God ensured that only Moses would see Him and speak with Him (19.9ff.). Nor is it important to discuss the laws that God subsequently gave orally to Moses (20.22-40.38). Whether they come from a different time in history need not concern us. But three points about them should be mentioned:

First, the rules on behaviour between humans do not confirm the widely held view that the Ten Commandments cover all the law in short compass.<sup>21</sup> The Commandments contain nothing about slavery, violence less than murder, the law of torts and restitution; all these are matters treated in the Book of the Covenant. These rules in the Book of the Covenant again indicate the lack of interest in 'secular' law in the Commandments.

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<sup>21</sup>For this view see, e.g., G. Henton Davies, *Exodus* (London 1967), pp. 167 ff.



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Secondly, the rules on religious ceremonial matters are very much more detailed than those on interpersonal law. Again the authority of God and the importance of reverence toward Him are stressed. They are of supreme importance to Moses as leader.

Thirdly, much is made of Aaron and his sons being appointed priests, their vestments, the ephod, and of a splendid breastplate for Aaron, other priestly vestments for the sons and their ordination, their tending of the lamp (27.20-29.46). God, or Moses, needs to keep Aaron loyal to the service of God, and hence to Moses. [It may be worth noting that rabbinic tradition emphasizes that Moses and Aaron were of equal worth.<sup>22</sup>]

A little more should be said about the distinction made between the Ten Commandments and the judicial and ceremonial laws which existed – as Philo shows<sup>23</sup> – as early as the time of Jesus. The Ten Commandments, it is often claimed, were addressed to all, the other laws only to the Jews. Not so. The Ten Commandments are expressly addressed to the Jews. Exodus 20.2 reads: “I am the Lord your God who brought you out of the land of Egypt.” A further distinction often drawn is that God gave the Ten Commandments directly, the other laws were mediated through Moses. This distinction seems arbitrary. The real difference seems to me that the ceremonial and judicial laws could never be acceptable outside of a small Jewish section.

When Moses descended from Mount Sinai the worst had happened (32.1ff.). The Israelites had made a golden calf, a new god, who was asserted to have brought them out of Egypt (32.4). Thus, God was denied, and so was Moses’ authority. Aaron is not reported to be the ringleader of the revolt, but only as much involved from the start. The people said to Aaron: “Come, make gods for us, who shall go before us.” (32.1). Aaron’s reported response was: “Take off the gold rings that are on the ears of your wives, your sons,

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<sup>22</sup>Shir Ha-shirim Rabbah 4.5. See Ginsberg, *Legends* 4 (1925), p. 424 n. 152.

<sup>23</sup> See his distinction in his books (*De Decalogo* and *De Specialibus Legibus*).

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and your daughters, and bring them to me.” (32.2). Aaron actually made the calf-god (32.4) and instituted a festival for it (32.5f.).

At this point I would like to respond to a friendly criticism from a Christian fundamentalist who believes God did give the Ten Commandments to Moses. He says with respect to the final Commandment: “God, but not man, would care about coveting”.<sup>24</sup> I disagree. Moses, a leader in trouble, has supreme interest in coveting. His job! It is at risk. The behaviour of Aaron is revealing. When Moses left for the mountain, Aaron has not yet made his move, but he will. No one should underestimate the vigour with which political figures protect their job. I can understand that God *might* oppose coveting but I see no compelling reason for Him to legislate. But in the tradition Moses has a strong positive interest.

Another point should be made. The prohibition against coveting makes superfluous the rules against stealing and adultery. Both involve coveting.

My conclusions about the history of the tradition behind the Ten Commandments in Exodus are as follows:

1) Of the four sources of law only legislation is under the direct control of governments.

2) The lesson of history is that in general most governments at most times are little interested in legislating in many areas of law.

3) The sole necessary talent of governments and rulers is remaining in power. Hence the paucity of legislation in many areas of law. Rulers have better things to do (for themselves) with their time.

4) Legislation is accordingly always or usually political: its *raison d’être* is to keep the government in power.

5) According to the tradition of Exodus, the Ten Commandments are no exception.

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<sup>24</sup>See, e.g., Childs, *Exodus*, pp. 425 ff.

6) Moses became leader of the Israelites who were under the subjugation of the Egyptians; on the basis that he was elected by God. Moses, we are told, was reluctant to accept the office, because of his lack of fluency in speech, but God insisted and appointed Moses' brother Aaron to be his helpmeet.

7) Moses' authority before the people was based precisely on the belief that he was the elect of God.

8) Through miracles of God Moses did obtain the Israelites' release from slavery in Egypt.

9) Moses' authority continued to rest on his unique position from God. Whereas God kept Aaron in a clearly subordinate position, Aaron's status among the Israelites seems, in contrast, almost like that of Moses.

10) When great hardships befell the Israelites during the Exodus they continually blamed Moses for their plight. This inevitably entails a diminution of faith in or respect for God on whose authority Moses' power depended. Aaron was less criticized. Despite God's miracles the Israelites repeatedly showed a lack of confidence in Moses' leadership, and hence in God. Moses' authority was under siege. Hence, he could not afford to seem too threatening.

11) Moses was under great strain not only from this but also because he was spending his days in judging. A solution was proposed by his father-in-law, significantly not an Israelite but a Midianite.

12) God intervened, and provided laws for the Israelites but under specific circumstances. a) The people were told that God would legislate with no input from the people. b) The laws were given directly by God to Moses, but to no one else. c) Indeed, God was to be absolutely hidden to others.

13) As is to be expected, if my first four conclusions are correct, the laws of God very much bolstered the authority of Moses. The stress is precisely on religious laws, hence on the authority of God, hence on the authority of Moses. Laws with a secular impact were little considered. This is why they are banal.

14) The people were still not impressed by Moses' leadership and during his absence on Mount Sinai they worshiped as god a golden calf, thus

attacking God's first Commandment (which they still did not have), hence God's authority and thus Moses' authority.

15) If not the instigator, Aaron, the second in command, was prominent in the revolt, even suggesting where to obtain the material for the calf and making it. As often, the second-in-command is eager for the leading role. In Exodus the talent of Aaron is presented above all as the power of persuasion. Given that fact, it seems plausible that at one stage in the tradition (now unrecorded) Aaron appeared as the instigator of the revolt. As often in history, then, Moses would have coopted Aaron, and used him against his followers.

16) Thus, God had been eager to encourage or placate Aaron by giving favours. In vain. (Aaron's resentment against Moses is brought up very sharply in Numbers 12. It is part of the tradition. God weighs in in favour of Moses.)

17) Moses ultimately triumphed through the power of God. Aaron easily submitted to him.

18) The role of Aaron is essential to the tradition. Moses must have weaknesses for the story to unfold. He must have a helpmeet. Moses must have great problems with the people, and the people must have an alternative power-figure. For the authority of God fully to emerge this figure must in the end fail miserably.

I will not dwell here on the subsequent history of the Ten Commandments ripped out of context. It is enough to note that "Honour your father and mother" survives in the French *code civil* of 1804, art. 371, though it has almost never been applied. And the reason given for it has disappeared. And the debate over the placing of the Commandments in U.S. court houses continues to this day.

*Appendix:*

The short appendix to this chapter relates to the often repeated, but groundless, claim that "the United States Constitution is a Judaeo-Christian document." It is nothing of the kind. There is no mention of God, nor of

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Jehovah or Moses, nor of Jesus or Paul. There is nothing in the Constitution that would point distinctively to Judaism or Christianity. The mainsprings are Humanism and more especially the eighteenth century Scottish Enlightenment, above all David Hume and even more, Thomas Reid. A very direct influence was John Witherspoon, President of the Presbyterian Princeton University, born and educated in Scotland. The Declaration of Independence was signed on his appeal to the representatives. Six of the signers of the Declaration were students of his at Princeton, as were President James Madison and Vice-President Aaron Burr. Two of the signers of the Constitution were born in Scotland.

Of course, in the various constitutional debates before, during and after the U.S. Constitution, biblical references were very common.<sup>25</sup> That in itself cannot surprise for it was the one work known to all, and best known to all especially to the Presbyterians. Paul was the biblical writer most often cited especially for the passages in Romans concerning authority and obedience. Given the history of the Revolution that is only to be expected. To make a point they would naturally use Scripture. It would make a good argument. The frequency of references to Montesquieu on separation of powers is also not remarkable. But it is to be noted indeed that Montesquieu's views on separation of powers differ from those the framers in that he pays little attention to control of the executive and legislative branches by the judiciary.<sup>26</sup>

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<sup>25</sup> For figures see, e.g. Donald S. Lutz, *The Origins of American Constitutionalism* (Baton Rouge, 1988), pp. 136 ff.

<sup>26</sup> For the argument see Alan Watson, *The Making of the Civil Law* (Cambridge, Mass., 1981), pp. 154 ff.



## Chapter 3

### Two Gospel Vignettes: Jesus and the Samaritan Woman; Jesus and the Adulteress.

One of my legal heroes is Rudolf von Jhering, and one of my best-loved law books is his *Law in Everyday Life*.<sup>27</sup> Law is everywhere, and usually not noticed. A favourite example of mine is law in the Gospels: Jews do not read the New Testament, Christians ignore rabbinic law.<sup>28 29</sup>

Here I wish to bring forward two vignettes, beloved episodes from the Gospels. In both, rabbinic law is necessary to understand what is going on. In the first it is usually not noticed, in the second it is underplayed and misunderstood.

#### I.

#### Jesus and the Samaritan Woman

Jesus' meeting with the Samaritan Woman, recorded in John 4.4-30, seems straightforward. Still, when we take the episode at face value we encounter several peculiarities.

Jesus is resting about noon beside Jacob's well, while the disciples have gone to the town to buy food. He is alone. A Samaritan woman comes to draw water. This is surprising because the time to draw water is the early

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<sup>27</sup> First published in 1870 as an Appendix to his *Civilrechtsfälle ohne Entscheidungen*, then subsequently in many editions: translated into English by Henry Goudy under the title *Law in the Daily Life* (Oxford, 1904).

<sup>28</sup> See, e.g. Alan Watson, *Jesus and the Jews* (Athens, GA., 1995); *The Trial of Jesus* (Athens, GA., 1995); *Jesus and the Law*, (Athens, GA 1996).

<sup>29</sup> There are exceptions: see above all, *New Testament Judaism: Collected Works of David Daube*, edit. Calum Carmichael (Berkeley, 2000). See also E.P. Sanders, *Jewish Law from Jesus to the Mishnah* (Philadelphia, 1990); J.D. Derrett, *Law in the New Testament* (London, 1970).

morning and in the cool of the evening,<sup>30</sup> and the timing of a visit to the well is important because it is the occasion for female sociability. Moreover, when a time is mentioned in John, it is usually significant. Still stranger, as commentators stress, there were springs between the woman's town -- if it is to be identified, as it usually is, with the modern 'Askar<sup>31</sup> -- and the well. "Why," asks Marcus Dods, "should a woman have come so far, passing good sources of water supply?"<sup>32</sup> Jesus asks her for a drink, a perfectly natural request in the context<sup>33</sup>, except that, as we are told, Jews did not drink from the same vessels as Samaritans.<sup>34</sup> She responds, "What! You, a Jew, ask water from me, a Samaritan woman?" Is this response to be seen as expressing surprise or rudeness? Or is it flirtatious, the beginning of a wider conversation?<sup>35</sup> Certainly, Jews did not use vessels used by Samaritans,<sup>36</sup> but Jesus is a thirsty man, and there is no one else to give him water. Moreover, the great majority of Jews were AmHaaretz, scarcely observing, and the

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<sup>30</sup> Genesis 24.11; see also W.E. Hull, in *The Broadman Bible Commentary*, p. 9, p. 250; W.F. Howard, in *The Interpreter's Bible*, 8, p. 521; J.A. Gossip, in *The Interpreter's Bible*, 8, p. 521. For this whole episode see the detailed account in Craig S. Keener, *The Gospel of John*, 1, (Peabody Mass., 2003) pp. 588 ff.

<sup>31</sup> See, for example, Herman L. Strack and Paul Billerbeck, *Kommentar zum Neuen Testament aus Talmud und Midrasch*, 2, 4<sup>th</sup> ed. (Munich, 1965), pp. 431f.: C.K. Barrett, *The Gospel According to St. John*, 2 ed. (Philadelphia, 1978) p. 231.

<sup>32</sup> Marcus Dods, in *The Expositor's Greek Testament*, 1, ed. W. Robertson Nicoll (Grand Rapids, 1974). Cf. Howard, *Bible*, 8, p. 521; John Painter, *The Quest for the Messiah*, ((Nashville, 1993), p. 200.

<sup>33</sup> A parallel request is that of Abraham's servant to Rebecca in Genesis 24.17-20.

<sup>34</sup> A translation such as that of *The New English Bible* is inaccurate: "Jews and Samaritans, it should be noted, do not use vessels in common." Only the Jews were exclusive, and that is expressed in the Greek.

<sup>35</sup> I am not persuaded by David Daube's suggestion (in an otherwise convincing paper) that she was expressing surprise at his kindness in being willing to drink from her vessel: "Jesus and the Samaritan Woman: the Meaning of συγγράω" *Journal of Biblical Literature* 69 (1950); pp.137 ff.

<sup>36</sup> For this as the meaning of συγγράω see Daube, "Jesus and the Samaritan Woman"; cf. Barrett, *St. John*, p. 232.



woman would have no reason for believing that Jesus was otherwise.<sup>37</sup> Jesus replies that if she knew who he was, she would have asked him, and he would have given her living water. What is the Samaritan supposed to make of this? Jesus has no water. What is she supposed to understand by “living water”? Often “living water” is used to mean spring water, usually better tasting than well water.<sup>38</sup> But an offer by Jesus of spring water, rather than well water, makes no sense here precisely because Jacob’s well was a spring.<sup>39</sup> The Samaritan woman has access to her own spring water! Jesus seems to be offering her nothing she does not already have. And the problem remains that he has not the implements to provide her with any water. If we, from our vantage point, interpret “living water” as something like eternal life, how was the Samaritan supposed to know that? Jesus appears to be playing games. After her obvious response, she asks how Jesus can give her living water. He does not answer the question but says he can give her water after which she will never thirst again. The woman’s response is still odder: “Sir, give me that water, and then I shall not be thirsty, nor have to come all this way to draw.” The reply is nonsensical, if taken at face value. On the wording, the woman understands Jesus as talking quite simply about water.<sup>40</sup> Otherwise, she could not say that she would never again have to come to draw, which shows she is not talking about eternal life. Yet she does not act as if Jesus were behaving like a madman which would have been reasonable behaviour on her part because, in truth, the fact remains that he does not have the means to provide her with water. Moreover, she would still have had to come to the

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<sup>37</sup> See, for example, Raymond E. Brown, *John I-XII*, (New York, 1970), p. 325; Davies, *Invitation*, p. 33.

<sup>38</sup> Strack-Billberbeck, *Kommentar*, 2, p. 436.

<sup>39</sup> John 4.6.

<sup>40</sup> Rudolf Schnackenburg’s treatment is revealing: *The Gospel According to St. John* (New York, 1980), 1, p. 428. For him, the “woman is moved by Jesus’ words but has not grasped their profounder meaning. Hearing Jesus’ offer of ‘living water’ she misunderstands it as a promise of something earthly and natural . . . . She is interested in the ‘living water’ but can only think of the water in the well of Jacob. Still, she now addresses the stranger respectfully as ‘sir,’ and asks him ‘whence’ he can procure this water without a vessel to draw it in.”

well to draw water -- if not for herself to drink, then for her household needs. The issue is acutely brought out by John Ashton:

It is easy to see that many of Jesus' utterances in the Fourth Gospel have the flavour of a riddle... "If you knew...who it is that is saying to you, 'Give me a drink,' you would have asked him and he would have given you living water" (4.:10). Living water -- ὕδωρ ζῶν – the first meaning of this phrase is *running* or *flowing* water. How could the Samaritan woman be expected to know that Jesus was going to understand the word literally (*living water*) and apply it to his own revelation?<sup>41</sup>

How indeed? Jesus next asks her to fetch her husband, she replies that she has none, and Jesus acknowledges this. It emerges that the Samaritan has led a less than respectable life, has had five husbands, and is living with a man to whom she is not married. A woman was expected not to marry more than two or three times.<sup>42</sup> A further surprising feature in the text is that the disciples, on their return, are "astonished to find him talking with a woman" (4:27). Why?

I would like to suggest that much light may be cast on the episode in the first instance if we consider Proverbs 5.15-20:

Drink water from your own cistern and running water from your own spring; 16. do not let your well overflow into the road, your runnels of water pour into the street; 17. let them be yours alone, not shared with strangers. 18. Let your fountain, the wife of your youth, be blessed, rejoice in her, a lovely doe, a graceful hind, 19. let her be your companion; you will at all times be bathed in her love, and her love will

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<sup>41</sup> John Ashton, *Understanding the Fourth Gospel* (Oxford, 1991), p. 190; cf. p. 219.

<sup>42</sup> See Strack-Billerbreck, *Kommentar*, 2, p. 437.

continually wrap you round. Wherever you turn, she will guide you; when you lie in bed, she will watch over you, and when you wake, she will talk with you. 20. Why, my son, are you wrapped up in the love of an adulteress? Why do you embrace a loose woman?

The sexual implications of the passage are well known. “The joys of sex at home with one’s own wife are set in contrast with the bitter and disastrous results of loving a ‘strange woman,’” says Marvin E. Tate. “The sexual pleasures of a wife are commended in vv. 18-19,” he continues.<sup>43</sup> In the symbolism of verse 15, the words *cistern* (Hebrew, *bor*) and *well* (Hebrew, *beér*) – “metaphors for the lawful wife,” according to *The Jerusalem Bible*<sup>44</sup> – refer to her genitalia. Such a verbal usage is common practice and -- even in an age that eschews euphemisms -- will be found in American novels of the recent past.<sup>45</sup>

If we return now to John, we may suspect a subtext. The woman, perhaps flirtatiously as an opening gambit to more conversation, asks why Jesus requests water from her. Jesus responds by saying he could give her living water. However this may be intended, the woman covertly takes this as a hint of a sexual advance. She takes “living water” in the sense of semen. What liquid could be more alive? She responds: “You have no bucket and this well is deep,” or “You have no dick and this (my) cunt is deep.” The woman uses *well* with the meaning we saw in Proverbs. In a different context, *bucket* might also be used of a vagina, but with respect to the well it means a penis: that enters the well and goes up and down. Sexual innuendo by a willing woman implying that she is too much woman for the male who

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<sup>43</sup> In the *Broadman Bible Commentary*, 9, p. 24.

<sup>44</sup> (New York, 1966), p. 939 n. c. Sexual symbolism is, of course, extremely common. For examples from Latin, see J.N. Adams, *The Latin Sexual Vocabulary* (Baltimore, 1982), pp. 82 ff.; for visual examples from Dutch painting, see Simon Schama, *The Embarrassment of Riches* (Berkeley), 1982, pp. 433 f., 473 f.

<sup>45</sup> See, for example, Jean M. Auel, *The Plains of Passage* (New York, 1990), p. 59.

comes too close is a common come-on trick. We shall see an example from Apuleius later in this chapter. When Jesus says whoever drinks the water that he can give will never thirst again, she demands it. She takes his words as hinting that he will give her such a stupendous orgasm that she will never need sex again. She wants such good sex. It is on this basis that she wants Jesus' "living water" so that she will never need it again. Nor to have to come so far to draw! From her very first words she has been testing Jesus out.<sup>46</sup>

Jesus backs off from the direction in which the conversation is going by telling her to fetch her husband. She responds by stating that she has no husband. She is a free agent!

This approach to the episode enables us to go still further. We now see why we are told the woman is not respectable.<sup>47</sup> She goes to the well at an unusual time when other local women would not be there, either because she has been (as many believe) ostracized or (as I believe) in the hope of meeting a man, perhaps indeed a stranger as Jesus is. In fact, she behaves exactly as she should have done if she wished to meet and entice a male stranger. A well beside a roadway at the heat of noon is precisely where and when she could expect to find a stranger relaxing<sup>48</sup> and no local inhabitants. The alternative would have been for her to wait at a crossroads, a favourite spot for prostitutes to find passing clients.<sup>49</sup> But in my view the alternative was out of the question. The woman is not a professional -- there is no sign of that in the texts -- and at the crossroads there could have been no pretense. Likewise, we understand why the disciples are "astonished" to find Jesus talking with a woman. A woman at that time and place could not possibly be respectable.

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<sup>46</sup> Calum Carmichael also notices the sexual overtones in the episode, but he gives the whole encounter a spiritual meaning: "Marriage and the Samaritan Woman," *New Testament Studies* 26 (1979): 332ff.

<sup>47</sup> See, for example, Strack-Billerbeck, *Kommentar*, 2, p 437; Hull, *Commentary*, 9, p. 250; Gossip, *Bible*, 8, pp. 521f. Gossip also suggests that she "was a trachled, futile creature always behindtimes."

<sup>48</sup> The heat of noon is the time of rest and also of dalliance: cf. Song of Songs 1.7.

<sup>49</sup> See, for example, Genesis 38. 13-21.

(It might be objected that my thrust is misdirected. After all, Jacob did meet Rachel at a well at high noon (Genesis 29.6ff.). Still, sexuality is not absent from that encounter. Jacob asks Laban, Rachel's father, for her in marriage (Genesis 29.18).)

We can now begin to answer a question that has troubled commentators: why does the woman go to this well when there are streams between it and her town? There are, I suggest, three reasons. First, the well is beside a highway; therefore, she is more likely to meet a passing stranger. It is precisely because the road is nearby that Jesus stops there. Secondly, simply because there is running water between her village and the well, the chance of her being caught out by neighbours is diminished. Any woman who ran out of water would go to a nearby stream and not venture so far as the well. Thirdly, Jacob's well was deep, with a shaft of 106 feet.<sup>50</sup> No passing stranger would have the equipment to draw water. With her bucket, the woman of Samaria could be assured that any male stranger would enter into conversation with her.<sup>51</sup>

The preceding paragraph requires expansion or qualification. There is some doubt as to the whereabouts of the town that is called Sychar in almost all of the manuscripts (4.5). No traces of a town with that name have been found in Samaria. The most common view is that it is modern 'Askar, which lies about one mile northeast of the well. Raymond Brown, who actually gives Shechem as his translation, objects that this site is mediaeval. Yet he seems more troubled by the fact that if the woman was from 'Askar she had come so far. Shechem was only 250 feet from the well, he says, and if Shechem is the correct reading, "everything fits." But, no, it does not fit. Brown has to admit: "Probably Shechem was only a very small settlement at the time."<sup>52</sup> But "a very small settlement" does not fit John's description of the Sychar as πόλις, a city (4.4, 28, 30), and that "many" of the Samaritans believed because of the saying of the woman (4.39), and "many more" believed because of Jesus' own words. (I do, of course, accept G. E. M. de

<sup>50</sup> Cf. Schnackenburg, *Gospel*, 1, p. 424.

<sup>51</sup> See, for example, Howard, *Bible*, 8, p. 520.

<sup>52</sup> Brown, *John I-XII*, p. 169

Ste. Croix's argument that in the New Testament πόλις corresponds more to our notion of a village than to the Greek notion of πόλις.)<sup>53</sup> Shechem as a city was destroyed in 128 or more probably in 107 B.C. by John Hyrcanus, who ruled the Jews as ethnarch and high priest. If small villages clustered around modern Balâtah,<sup>54</sup> and the woman was from one of these, her distance to Jacob's well would still not be inconsiderable. But even if Sychar were very close, the thrust of the argument in my paragraph would stand. The woman could still hope to meet a stranger resting at the well and avoid seeing neighbours at that time of day. Even if by some unfortunate chance a neighbour appeared, she had lost little. Further activity was needed before there could be a scandal.

My explanation is strengthened by some parallels in Apuleius, *Metamorphoses*, 2.3. Lucius comes upon Fotis cooking and stirring the pot. He says: "O Fotis, how prettily, how merrily you stir the pot, wiggling your hips. What a sweet sauce you prepare. Happy and even blessed would he be whom you permit to dip his finger in." Here *pot* (*ollula*) is used, as was *well*, with the meaning "vagina." The symbolism is the same. Fotis replies: "Leave me, wretch. Go as far as possible away from my fire. For if my tiny fire should blaze forth even a little, you will burn up inside, and no one can put out your heat but I alone who with dainty seasoning know how to shake both pot and bed." Fotis is very willing and, as I have suggested for the Samaritan woman, seeks to entice the male further, suggesting that she is too much for him.

To this point, I have said as little as possible about Jesus' role in all this. But that must now be examined. The woman has widened the conversation by expressing surprise that a Jew would ask a Samaritan for water. There is more to the issue than that Jews do not use vessels that Samaritans have used. David Daube has pointed out with his usual acumen

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<sup>53</sup> In *The Class Struggle in the Ancient Greek World* (Ithaca, N.Y., 1981), p. 428, de Ste. Croix describes Sychar as "a mere village, of course." He has in mind, I believe, the English notion of a village – not all that tiny.

<sup>54</sup> See, for example, *The Biblical World*, ed. Charles F. Pfeiffer (Grand Rapids, 1966), p. 522.

that, for Jews, Samaritan women were to be deemed unclean.<sup>55</sup> A regulation supposedly of A.D. 65 or 66 declared that “the daughters of the Samaritans are menstruants from the cradle,”<sup>56</sup> and this view would have been held by the more rigid for a considerable time before. Moreover, since Samaritan purification rites were different from those of the Jews, strict Jews would regard Samaritan women -- and their men through contact with them -- as always unclean. Thus, Jesus’ offence against rabbinic teaching is even greater. As Daube observed, this explains a detail previously thought inexplicable: after the disciples returned, “the woman put down her water jar and went away to the town” (4.28). John is emphasizing the nature of Jesus’ behaviour: he will drink again from the unclean vessel.<sup>57</sup> I would add that the detail might also suggest that the woman’s need for water from the well was not that urgent in the first place.<sup>58</sup>

At this point we should go back to yet another detail that is overlooked but that cries out for explanation. As they come to Jacob’s well, Jesus is tired out by his journey (4.6). But what about his disciples? They go into Sychar to buy food (4.8). How many disciples are there? By my calculations there are at least two from John the Baptist (1.37), plus Peter (1.41f), plus Philip (1.43), plus Nathaniel (1.45), thus five, but there may be more who are not mentioned. All would have been tired. But five out of six

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<sup>55</sup> Daube, “Jesus and the Samaritan Woman,” p. 137; cf. Painter, *Quest*, p. 199.

<sup>56</sup> Mishnah Niddah 4.1. A.D. 65 or 66 is the date supported by Daube. The regulation was certainly before the destruction of the Temple in 70: Babylonian Talmud, Shabbath 13b, 16b. The date is quite uncertain, but it is after the division of the schools of Shammai and Hillel: cf. I. Epstein, *Babylonian Talmud: Seder Mōed*, 1 (London, 1938), p. 54 n.i.

<sup>57</sup> It should be noted that, though he does not say so, Daube’s treatment of the woman leaving her pot behind presupposes a source such as I am suggesting. The realistic detail has a real meaning and direct relevance to the story, yet it has nothing to do with John’s theological message.

<sup>58</sup> Of course, the significance of the detail is not just that the woman left her pot behind but that John treats the detail as worth recording. For Schnackenburg there is no need to see anything in the detail except that she wants to return home quickly and unimpeded: *Gospel*, 1, p. 443.

tired men -- the sixth being Jesus -- set off to Sychar to buy food for lunch for six. Why are so many needed to bargain and to carry back? They aren't. Yet they go. Not one stays to keep Jesus company. Five go off to carry back the lunch pail of six, leaving the master alone.<sup>59</sup> Why? Oddly, Schnackenburg writes that "we must not ask why they all went off together."<sup>60</sup> The easiest answer is that their absence from Jacob's well is necessary for the episode. Again, why? Their absence is not needed if Jesus is going to reveal he is the Messiah. But it is necessary if the Samaritan is going to make sexual advances to Jesus. The presence of third parties, I suppose, would have been a deterrent.<sup>61</sup>

When the Samaritan expresses surprise that he asks her for water, Jesus replies that if she knew who he was she would have asked him and he would have given her living water. At this stage, she cannot understand Jesus as meaning eternal life, and the meaning, "spring water," which is the obvious, innocent meaning, has to be excluded from her understanding. "Living water" has to suggest something else. Jesus seems to be deliberately encouraging the woman to go further. She does. Jesus leads her on: after the water he can give, she will never want more. After she asks for it, Jesus stops the course of the conversation. She realizes that he is a "prophet." For her then, and for later generations, Jesus' words are understood in their spiritual sense.

Indeed, the whole encounter, as told by John, now takes on a deeper spiritual meaning, as we shall see. Still, the episode reveals a previous layer, an earlier source. For the spiritual point of the story, the woman's sexual

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<sup>59</sup> But at 13.29 some disciples thought Jesus was sending Judas by himself to buy food for thirteen.

<sup>60</sup> Schnackenburg, *Gospel*, I, p. 424.

<sup>61</sup> The significance of the disciples' absence is not noted, for instance, by R.K. Bultmann, *The Gospel According to John: A Commentary* (Philadelphia, 1970), Barrett, *St. John*, or Brown, *John I-XII*, though Bultmann (p. 178) and Barrett (p. 231) stress that it was natural for Jesus to be tired at that time of day. Barrett calls the removal of the disciples "a stage direction," and some scholars see 4.8 as an insertion by John into the episode. But if it were natural for Jesus to be tired, why not also the disciples?



advance and Jesus' ambiguous response are quite unnecessary. But they are prominent and must originally have had a purpose. John has not succeeded in removing all traces of the earlier source. I suggest that, in the original, Jesus was shown as again offending against Jewish law -- indeed, the text emphasizes this directly, by having the Samaritan bring it up. Jesus was also portrayed as less than perfect by his ambiguous response.

But John endows the episode with spirituality. Jesus is shown as dealing with the lowest of the low, a Samaritan, a woman outcast even by her own people, who is even inciting him to sin. He does not condemn or insult her. Rather, he goes along with her, perhaps humours her, and then reveals his true power and nature. She is won over and persuaded, all the more perhaps because of her previous improper conduct. Jesus is to be seen here taking his message at an early point of time to a non-Jew. And he has chosen as the recipient of the news, not the best and most powerful, but the sinner and the powerless.

My interest is law but religion is also involved. The episode with the Samaritan woman is one of four which occur only in *John*, and which show Jesus behaving in a way that seems not entirely perfect. The others are the wedding feast at Cana, the raising of Lazarus, and the scenes involving Nicodemus. My explanation is that they derive from a Pharasaic source which was so well known in the community where John wrote that he could not ignore it. John incorporated the episodes but added a spiritual message in each to defang it.<sup>62</sup>

#### *Appendix to Jesus and the Samaritan Woman*

When I first taught this subject I was received with skepticism and even anger. So I produced a spoof piece under the pseudonym Sandy Jardine: my full name is William Alexander Jardine Watson, and 'Sandy' is the Scottish traditional abbreviation for 'Alexander'. With Jesus removed from

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<sup>62</sup> Watson, *Jesus and the Jews*, *passim*.

the story, none of my students doubted the idea of a sexual encounter. I reproduce the coda below:

A Monk's Musings  
A *Coda* by Sandy Jardine  
(Afterword by Alan Watson)

Editor's note:

In the *Infortiatum* volume of what we now call the *Corpus Iuris Civilis*, published at Venice in 1590, I found a folded vellum folio sheet. This contained musical notes accompanied by large letters:

Laudate eum in cymbalis sonantibus  
Laudate eum in cymbalis tinnientibus  
Omne quod spirat laudat Dominum.

It is, thus, the final page of a manuscript psalter, and the hand appears to be Italian of the early 15th century. Beneath appear in a minuscule script the musings that I have translated below. The hand appears to be of similar date to the main text. No provenance can be established. The point of the musings is not clear: are they historically accurate, or purely fictitious? Is there a reminiscence of a much earlier true event? Is the monk disillusioned, affected by the suspicions against him of heresy? Why did he write at all?

The folio leaf was removed from the psalter. But by whom? Was it the writer of the musings, perhaps anxious over what he had done? Or was it by someone else, who found the page offensive? In either event, the conclusion must be that the removal was shortly after the monk mused. Not very much later the growing popularity of printing would make reading and excision of a manuscript page unlikely (except for stuffing and binding of a printed book).

Nor can I discover how the manuscript page came to be placed in this volume. The book was purchased some years ago from the celebrated dealer in early law books, Libreria Petrarca of Arezzo, but its ownership could not now be traced further back. The edition was a cheap one for its time, quarto not folio, full of abbreviations, unlikely to be owned by anyone prominent as

a jurist or in social life. Various owners (presumably) have left their signatures on all five title pages of the set, but none of these is known to history.

The Latin of the musings is simple but without distinction, and I have not thought it necessary at the present time to present it or proffer an *apparatus criticus*.

Sandy Jardine

Manuscript Text:

My lord abbot with five monks (of whom I was one and the youngest) was traveling through Sieneese territory during a period of calm. We came to the famous deep spring well of Santa Lucrezia. It was noon and my lord abbot was tired so he sat at the well-head while we five went to the village to fetch food. A serving woman came to the well to draw water. My lord abbot asked her to give him a drink. She said, "Why do you, a lord abbot from Florence ask drink from me, a Sieneese serving woman?" For Florentine lord abbots do not drink from the cup of Sieneese serving maids. To her he replied, "If you knew the gift of God, and who he is who asks you for a drink, you would have asked me first, and I would have given you living water." The woman replied "you have no bucket and the well is deep. Where will you get this living water?" My lord abbot: "Whoever drinks this water will be thirsty again. But whoever drinks the water that I will give shall never thirst again. It will be a well of water springing up forever." The woman replied, "Give it to me, so that I never thirst again." My lord abbot told her to fetch her husband, she told him she had none; he knew that (he said), because she had had five husbands and was now living with a man to whom she was not married. This made her think he had second sight. At this point we came back, and were astonished that my lord abbot was with a woman. She departed hurriedly, leaving her pot behind.

I am, I am told and believe, naive, but at that time I had not long been a monk. There were so many questions I wanted to put to my brothers but did not dare in case they laughed at me. But why did my lord abbot send all five of us to fetch food for us six? Did he not want our company? Did he want to be alone? But why did he not want an entourage? And why did this woman

come to the well in the noontime heat? On our way to the village we passed fresh rivulets. Why did she not fill her jug at one of these? It was rather beneath my lord abbot's dignity to ask a strange serving woman for water. Could he not have waited until we returned with utensils? And what did he mean by asking "If you knew the gift of God, you would have asked me first for water"? I believe there is a saying that some men think they are God's gift to women but my lord abbot was not talking in that sense. Was he? But what on earth could he mean by "living water"? How would this well up in her that she would not be thirsty again? In any event, she would have to come back for water for her household. And how was he to get water anyway? Why did my lord abbot say he was interested in meeting her husband? And why was he interested in her background? We were, of course, astonished at seeing him chatting to a strange woman. But what really stirs my curiosity is that she left her pot behind. Had she come this distance when she did not really need the water? Why was she there?

In the end I could not restrain my curiosity, and I asked my mentor, Fra Giacomo (now of blessed memory), one question. "What," I asked, did my lord abbot mean when he offered to give "living water" and how to an unreasonable statement could the woman reasonably respond "You have no bucket and the well is deep"? Fra Giacomo told me that in the Holy Scriptures of the Jews 'well' is sometimes used to designate those parts of a woman that are shaded, are frequently wet, and sometimes overflow. I was no wiser. "What is the bucket and what is my lord abbot's living water"? I insisted. Fra Giacomo replied that it was good to know everything, but not to seek to understand.

Much later, I think I may understand Fra Giacomo. But I am a staunch upholder of what I know are the true Franciscan values, of poverty and chastity. I am suspected of heresy, and of my youthful experiences I prefer not to speak.

Editor's comment:

The musings raise many questions. The reader will have noticed parallelisms with the holy, mystical account of Jesus' meeting with the

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woman of Samaria at Jacob's well that is found in the Gospel of John. If the monk is recalling a true episode, was the abbot engaging in a suggestive discourse with the maid, using the imagery of Our Lord? Or was the encounter of Jesus only in the subconscious of the abbot's mind? One thing, I believe, cannot be denied if the monk is recalling a factual event: the episode has overt sexual implications for the abbot and the maid. It is easy to imagine how Boccaccio would have reveled in the story. If the monk's musings have no substance in fact then we can guess at his fevered imagination. I showed the musings to my colleague -- though scarcely friend -- Alan Watson, who had written a scandalous account of Jesus' meeting at the well.<sup>63</sup> His response, iconoclastic as ever, took me no further. He insisted on the importance of context. The meaning of the monk's musings, he said, fictitious or not, was clear: sexual advances were being made with obvious innuendoes. The same, he claimed, was true of the episode in John. The details were the same; only, because Jesus was a participant, readers would not accept the obvious. He also added his opinion that the monk's musings were fictitious. One argument that he gave -- unattributed as is Watson's wont, but I suspect deriving from John Cairns -- is that the monk could not know what happened at the well in the monk's absence.

Appendix by Watson. I have set out this *coda* by my close relative and colleague with some reluctance. My reluctance has nothing to do with the quality of the piece. But Sandy is insistent. He is keen on advancement within his law school. Publications are needed. But no Law Review would be interested in this; it is too short, and has not enough footnotes.

My reluctance to deal with Sandy's *coda* increased because it contains no law. Yet it is precisely that which brings out the importance of the episode of Jesus and the Samaritan woman in the Gospel of John. For the Gospel episode is full of law. The woman was Samaritan, and therefore always unclean and should not have been touched by a Jew. Her water pot was presumably made of pottery and would therefore partake of her

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<sup>63</sup>*Jesus and the Jews: The Pharisaic Tradition in John* (Athens, Ga., 1995), pp. 29ff.

uncleanliness and pass it on to Jesus. The Samaritans who sold food to the disciples would be unclean through contact with Samaritan women. Moreover, it was wrongful for religious Jews to buy food that had not certainly been tithed to the Temple, and this food had certainly not been tithed because Samaritans did not accept the Temple. Law in everyday life is found in many contexts but is often unnoticed. This is especially true for the Gospels: Jews do not read the Gospels, and Christians do not read Jewish legal works. But the Gospels, especially Mark and John, are full of law in action but are largely ignored by comparative lawyers and legal historians. Yet knowledge of law adds a further dimension to such episodes, and the episodes add a further dimension to our understanding of law. Law in action is often different from law in books.

## II.

### Jesus and the Adulteress

John 7.53: Then each of them went home, 8.1. while Jesus went to the Mount of Olives. 2. Early in the morning he came again to the temple. All the people came to him and he sat down and began to teach them. 3. The scribes and the Pharisees brought a woman who had been caught in adultery; and making her stand before all of them, 4. they said to him, "Teacher, this woman was caught in the very act of committing adultery. 5. Now in the law Moses commanded us to stone such women. Now what do you say?" 6. They said this to test him, so that they might have some charge to bring against him. Jesus bent down and wrote with his finger on the ground. 7. When they kept on questioning him, he straightened up and said to them, "Let anyone among you who is without sin be the first to throw a stone at her." 8. And once again he bent down and wrote on the ground. 9. When they heard it, they went away, one by one, beginning with the elders; and Jesus was left alone with the woman standing before him. 10. Jesus straightened up and said to her, "Woman, where are they? Has no one condemned you?" 11. She said, "No one, sir." And Jesus said, "Neither do I condemn you. Go your way, and from now on do not sin again."

The opening verses of chapter 8 of John (with 7.53) present one of the most puzzling episodes in the New Testament. There is widespread agreement that the pericope was not part of the original Gospel. It is missing from the earliest manuscripts.<sup>64</sup> In the manuscripts in which it does appear it is usually in this position, sometimes after John 8.36 or John 8.44, or even after Luke 21.38. The language also seems not to be consistent with the general pattern in John.<sup>65</sup> In

<sup>64</sup> For the manuscript history see Ulrich Becker, *Jesus und die Ehebrecherin* (Berlin, 1968).

<sup>65</sup> See J. Duncan M. Derrett, *Law in the New Testament* (London, 1970), pp. 156f.; C.K. Barrett, *The Gospel according to St. John*, 2d ed. (Philadelphia, 1978), pp. 589 f.; P. Perkins in *The New Jerome Biblical Commentary*, ed. Raymond E. Brown et al. (Englewood Cliffs, 1990), p. 965; Leon Morris, *The*

presenting a new interpretation of the pericope I will leave open its genealogy.<sup>66</sup> My concern is with its meaning. It is not related to the four episodes mentioned in the Appendix to part I of this chapter.

I believe it would be generally accepted that the episode has never been adequately explained. I should like to begin with listing the troubling features.

## II

1. The woman is accused of adultery, we are told she was caught in the act (v.4), yet she has not been tried for the crime, nor apparently will she be. Jesus asks if no one has condemned her (v.10), and she replies “No one, sir.” (v.11).

2. Although she has not been tried or condemned, Jesus accepts that the woman is guilty. “Go your way, and from now on do not sin again,” he says (v.11).

3. We are not told of the evidence for this adultery. Adultery, with its penalty of stoning to death, was very difficult to prove. Two eye-witnesses were required who could testify to the unequivocal nature of the act, to the time when and the place.<sup>67</sup>

4. The witnesses are remarkably absent from the scene: they do not appear in front of Jesus, and according to Jesus (and contrary to Scripture) it is not they who should cast the first stone.

5. Where is the adulterer? If the woman was caught in the very act of adultery, the man would also have been caught. And the man was equally liable to the death penalty; Leviticus 20.10: “If a man commits adultery with the wife of his neighbour, both the adulterer and the adulteress shall be put to death.”<sup>68</sup>

6. Why was the woman brought by the Pharisees and scribes to Jesus. We are told that it was ‘to try him’ or ‘to tempt him.’ What can this mean? The usual explanation is that this is connected with the Sanhedrin’s loss of power to inflict the death penalty.<sup>69</sup> I am not convinced that the Romans had taken from the Sanhedrin the power to impose the penalty of death, but let us take the worst-case scenario for me and assume they had.<sup>70</sup> The argument is, I suppose, that if

*Gospel according to John* (Grand Rapids, 1995), p.p.778f. A particularly fine account of the problems of origins, canonicity, and meaning of the periscope is Raymond E. Brown, *The Gospel according to John I-XII* (New York, 1966), pp.332 ff. See also Keener, *John*, 1, pp. 735ff.

<sup>66</sup> I do agree, of course, that meaning and context are much intertwined. But since I am proposing a fresh interpretation I prefer not to complicate matters by offering a hypothetical genealogy for the pericope. Still, see the final section of this chapter. Some commentators on John leave the whole pericope out of account: e.g. John Ashton, *Understanding the Fourth Gospel*.

<sup>67</sup> Susanna (Chapter 13 of the Greek Daniel, mid-second century); Mishnah Sanhedrin 5; Babylonian Talmud Sanhedrin 30a. For an extreme analysis of the difficulty of proof see Derrett, *Law*, pp. 160ff.; cf. Morris, *John*, p. 781.

<sup>68</sup> See also Deuteronomy 22.22.

<sup>69</sup> See, e.g. Barrett, *St. John*, pp. 591f.; Perkins, *Jerome*, p. 965; Morris, *John*, p. 782.

<sup>70</sup> Alan Watson, *The Trial of Jesus* (Athens, GA, 1995), pp. 100ff.; with slight modification,

Jesus said the woman should be stoned, then he would offend the Romans, and be in danger. This approach to the issue I find entirely unconvincing. Why on earth would the Romans be angered if Jesus, a private individual, claimed that an adulteress should be stoned? He would not even be insisting that a verdict of the Sanhedrin should be enforced. There had been none.

Even more to the point, on this approach the Pharisees are putting themselves, not Jesus, at risk with the Romans. It is they who claim that the law of Moses that they follow imposes the penalty of death by stoning. They even said “Moses commanded *us* to stone such women.” The supposed scenario and its explanation are entirely implausible.

7. The outcome, when Jesus says “Let anyone who is among you without sin be the first to throw a stone at her” (v.7), is psychologically unreal. The normal reaction would be for everyone to grab a rock, not to disappear (v.9). To some at least the words would seem to be a challenge. Actually, this translation of *The New Revised Standard Version* is not quite accurate. More accurate would be “Let the one who is among you without sin . . .”

8. Why is the person without sin singular, not plural, and what sin is he free from? And, in the rabbinic tradition, it is the witnesses who have to throw stones first.<sup>71</sup>

9. What is the purpose of Jesus writing on the ground? Why is the act of writing stressed – we are twice told of it, at v.6 and again at v.8 – when we are not told, and cannot discover, what he wrote?<sup>72</sup>

10. Why was this an issue on which to test Jesus? What had it to do with him?

With all these problems the representation in the pericope cannot have historical accuracy. Reasonably, Duncan Derrett claims that parts of the text “cannot be understood as they stand.” Are we to follow Derrett in thinking the woman was caught in a trap set by her husband who thus was at fault for not preventing a crime? Or should we, like Ulrich Becker, strip away texts of the pericope as secondary.<sup>73</sup>

For my explanation of the episode I wish to make two assumptions that I hope will not be judged unreasonable. My first assumption is that the episode as it was originally had a point. My

*Jesus: A Profile* (Athens, GA. 1998), p. 85. Still, I would accept that at least later the Romans claimed sole authority to try secular capital crimes, and they might include adultery among these: Origen (in the translation by Rufinus) on Romans 6.7. But it should be noted that Jesus’ invitation, “Let the one among you that is without sin be the first to throw a stone.” implies that in fact an adulteress was liable to be stoned by the Jews. Moreover, the very clear implication of Origen’s Letter 14 is that still in the third century Jews were putting criminals to death in accordance with the law, although without Roman authority: see, e.g., David Daube, *The New Testament and Rabbinic Judaism* (London, 1956), pp. 306f.; Watson, *Trial*, pp. 110f.

<sup>71</sup> Deuteronomy 17.6f.; Mishnah Sanhedrin 6.4; cf. Daube, *New Testament*, pp. 304f.; 308ff.; *Collected Works I Talmudic Law* (Berkeley, 1992), pp. 167ff.

<sup>72</sup> For one ingenious attempt to discover what he wrote see Derrett, *Law*, pp. 176ff.; see also Brown, *Gospel*, pp. 333ff., and the works he cites.

<sup>73</sup> Derrett, *Law*, pp. 158, 161ff.; Becker, *Jesus*, pp. 165ff.



second assumption is that the troubling elements of the episode should illuminate that point. They are survivals. A satisfactory explanation of the original tradition should cause these elements to be less troubling. The main troubling points are again that proof of adultery is declared, the woman has not been tried, no one condemns the woman, the adulterer does not appear, the supposed witnesses have no role, Jesus is asked his stance vis-à-vis the Mosaic law, his response is ambiguous, “Let the one who is without sin throw the first stone.” Above all perhaps, we are expressly told that the Pharisees and scribes were out to trap Jesus.

I would put the episode in a specific historical context. Jesus had declared that a woman whose husband had divorced her and who remarried committed adultery (Matthew 5.31 f.; 19.3ff.; Mark 10.2ff.) The woman brought to Jesus was, I suggest, a remarried divorcée. By Jesus’ own claim she was thus an adulteress, but not for the Pharisees. Moses allowed divorce, Jesus forbade it. The trap of the Pharisees for Jesus was this: the law of Moses demanded death by stoning for an adulteress; Jesus claimed remarried divorcées were adulteresses though Moses did not, and neither did the Pharisees. Would Jesus follow his argument to its logical conclusion and impose death on a remarried divorcée? The scribes and Pharisees brought the woman to Jesus very precisely to test him.

We can see now why there was no trial before the Sanhedrin. For the Pharisees there had been no crime. The problem of evidence of adultery and of the difficulties of proof disappears. For Jesus, the remarriage of the divorcée was itself adultery. Besides, we are no longer concerned with a trial and its practical problems. We are confronted rather with a theoretical issue: namely, would Jesus make a divorcée who remarried liable to suffer the Mosaic penalty for adultery?

Jesus wrote on the ground but we are not told what he wrote. The purpose of the writing was to give time for reflection, to put distance between the charge and Jesus’ response. What Jesus wrote is thus of no consequence, with no need to record it. The time for reflection was for both Jesus and the Pharisees.

Jesus’ “The one among you who is without sin, let him cast the first stone at her” (v.7), is typical of him. Jesus is on the attack against the Pharisees. “The one without sin” is ironic. This does not mean ‘anyone.’ He is singling out an individual. The person he means is the ex-husband: for the Pharisees the husband had not sinned in divorcing his wife, for Jesus he had. For the Pharisaic position we have Mishnah Gittin 9.10:

A. The House of Shammai say, “A man should divorce his wife only because he has found grounds for it in unchastity,

B. “since it is said, *Because he has found in her indecency in anything* (Dt. 24:1).”

C. And the House of Hillel say, “Even if she spoiled his dish,

D. “since it is said, *Because he found in her indecency in anything.*”

E. R. Aqiba says, “Even if he found someone else prettier than she,

F. “since it is said, *And it shall be if she find not favor in his eyes* (Dt. 24:1).”<sup>74</sup>

Thus, at least for the supporters of the school of Hillel (of around 70 B.C. to A.D. 10) and Rabbi Akiba (of around 45-135), the divorcing husband needed no excuse for his act, hence was without sin. It would be unreasonable to suppose that their position was not also held even earlier. Much early evidence is lost.<sup>75</sup> Jesus’ attitude is different, expressed most notably at Matthew 5.31f.

“It was also said, ‘Whoever divorces his wife, let him give her a certificate of divorce.’ But I say to you that anyone who divorces his wife, except on the ground of unchastity, causes her to commit adultery; and whoever marries a divorced woman commits adultery.

A husband who divorces his wife, except for unchastity, causes her in the eyes of Jesus to commit adultery, i.e. when she remarries.

We can go further. We know from Matthew 19.3ff. that this was an issue of contention between Pharisees and Jesus:

Some Pharisees came to him, and to test him they asked, “Is it lawful for a man to divorce his wife for any cause?: 4. He answered, “Have you not read that the one who made them at the beginning ‘made them male and female,’ 5. and said, ‘For this reason a man shall leave his father and mother and be joined to his wife, and the two shall become one flesh?’ 6. So they are no longer two, but one flesh. Therefore what God has joined together, let no one separate.” 7. They said to him, “Why then did Moses command us to give a certificate of dismissal and to divorce her?” 8. He said to them, “It was because you were so hard-hearted that Moses allowed you to divorce your wives, but from the beginning it was not so. 9. And I say to you, whoever divorces his wife, except for unchastity, and marries another commits adultery.”

The very language is the same. The Pharisees put the question of the lawfulness of divorce in the context of testing Jesus. In fact, the Greek *πειράζοντες* (tempting) is the same in Matthew 19.3, Mark 10.2, and John 8.6.<sup>76</sup> Also, in all three passages the issue is framed in terms of a supposed disagreement between the law of Moses and the stance of Jesus. This is precisely a tricky issue to bring to Jesus.

C.K. Barrett cites with approval a then unpublished paper of David Daube in which

<sup>74</sup> The translation is that of Jacob Neusner, *The Mishnah: A New Translation* (New Haven, 1988), p. 487.

<sup>75</sup> See, e.g., Daube, *New Testament*, pp. 166ff.; Calum Carmichael, *The Story of Creation* (Ithaca, 1996), p. 39 n. 16.

<sup>76</sup> Cf. Barrett, *St. John*, pp. 591.

Daube suggests that: “in its original context, the slogan ‘He that is without sin among you, let him be the first to cast a stone at her’ is directed specifically against the unfair treatment of women by men and their laws; and that it is representative of a strong movement in Tannaitic Judaism.”<sup>77</sup> If this view of Daube is plausible, as it is to me, it would even be strengthened if in the pericope the one without sin who had to cast the first stone was the divorcing husband.

Not only that, but if Jesus’ challenge to cast the first stone was not to the crowd in general but to the ex-husband we can understand why there was no response but the crowd melted away. Moreover, for the husband too, his ex-wife would not have committed adultery: he could not cast the first stone.

John v.6, indeed, is very specific. The scribes and Pharisees were ‘tempting’ Jesus so “that they may have [reason] to accuse him.” What was to be the ground of this intended accusation? It cannot have been, I have already claimed, an accusation to the Romans that he was seeking to have the Sanhedrin put the woman to death, a power that the Romans had supposedly taken from the Jews. Rather, the accusation would be before the Jews themselves, that Jesus was seeking to alter the law of Moses. Such an accusation could be seen as plausible. Indeed, one part of the double-headed charge against Stephen--and which led to his lynching after an abortive trial before the Sanhedrin--was precisely that Jesus was speaking “blasphemous words” against Moses (Acts 7.11) and the law (Acts 7.13), and changing the customs which Moses delivered to the Jews (Acts 7.14). The innocent-seeming question, but meant as a trap, to Jesus about the adulteress was full of danger to him.

Jesus’ response discomfited the scribes and Pharisees: “They, having heard, and convicted by conscience, went out one by one, beginning from the older to the very last” (John 8.9). Jesus, as elsewhere when faced with a legal issue, sidesteps the question.<sup>78</sup> In this instance his adversaries are defeated because Jesus, not responding directly to the question or giving a legal opinion, transfers the possible crime of the adulteress to the sin of her sinless husband who divorced her. It should be remembered that in Jewish law divorce proceeds from the husband.

It has long been recognized that there is a relationship of some kind -- connected with an attempt to make the law apply less unequally to women -- between our passage and rabbinic interpretation of the ancient ordeal of a wife whom a husband suspected of adultery which he could not prove.<sup>79</sup> Numbers 5.11ff. prescribed that the priest make a mixture of water and dust from the floor of the tabernacle, and have the woman drink it and swear an oath, and if she were unfaithful she would suffer a gruesome fate. The rabbis interpreted this to mean that only if the

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<sup>77</sup> Ibid., p. 590, referring to David Daube, “Biblical Landmarks in the Struggle for Women’s Rights,” *23 Juridical Review* (1978): pp. 177 ff.

<sup>78</sup> See, e.g., Mark 2.23ff. And 7.6ff., and the discussions in Alan Watson, *Jesus and the Law* (Athens, Ga., 1996), pp. 37ff., 55ff.

<sup>79</sup> See Daube, “Biblical Landmarks,” pp. 187ff., and the works he cites. An abridged and revised version is in David Daube, *Appeasement or Resistance* (Berkeley, 1987), pp. 29ff.

husband were guiltless would she suffer the fate from the curse.<sup>80</sup> Since Johanan ben Zaccai did away with the institution and this must have been before the destruction of the Temple in A.D. 70 (or Johanan's action would have been pointless), then the rabbinic debate and interpretation must have been earlier still.

This modification of the import of the curse will have been present to the minds of the onlookers who put Jesus to the test. The woman was to suffer only if the husband was guiltless. Jesus' reply was thus very much directed towards the sinfulness (in his view) of the husband who divorced. Jesus could only confute the Pharisees and scribes by the use of Scripture. He relied on the new rabbinic interpretation of Numbers 5.30f.: "And if the man is clear of sin, then the woman shall bear her sin."<sup>81</sup> On this view, if the man was not clear of sin, the woman would not bear her sin.

I have left aside to this point the answer to the basic question, "Where is the adulterer?" My reason is that his absence from the scene is the strongest evidence that the pericope as it stands is unrealistic. If she were caught in the act then so would he have been, and the penalty for both was the same. He, too, should have been brought before Jesus. His absence must be explained. My answer is that for the Pharisees there was no adultery, no catching in the act, and no adulterer. Their only interest was to test Jesus: would he say the woman was an adulteress to be stoned? Of course, no doubt, they could also have claimed the new husband was an adulterer. But why should they? There was no need for that for the purposes of the test.<sup>82</sup>

The trap set for Jesus by the question did contain a very particular danger. King Herod had married Herodias who was a divorcée, having been married to Herod's half-brother. Jesus' response to the adulteress would be interpreted as his response to Herodias. John the Baptist preached repentance for the remission of sin. The account in Mark 6.17ff. is instructive. Herod, we are told, imprisoned John "for Herodias' sake." John then specifically told Herod that it was not lawful for him to have his brother's wife, and Herodias hated John as a result. Consequently she had him beheaded. Jesus, who had been baptized by John would be seen as his follower, and would arouse the same suspicions in Herodias. Indeed, it appears from Mark 3.6 that the supporters of Herod were deeply hostile to Jesus even before the Pharisees were.<sup>83</sup>

We now see a further reason for the crowd melting away. No one would throw the first

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<sup>80</sup> Siphre on Number 5.31; Jerusalem Talmud Sotah 24a; Babylonian Talmud Sotah 74b. For details of the argument see Daube, "Biblical Landmarks," pp. 189f.

<sup>81</sup> See Daube, *Appeasement or Resistance*, p. 30.

<sup>82</sup> There is, of course, a strong element of sexual discrimination: it is the woman, not the man, who is humiliated before Jesus. If we leave specifics out, then to produce the woman, not the man, is more dramatic. Adultery by a woman has always been regarded as more serious than adultery by a man.

<sup>83</sup> For the argument see Watson, *Jesus: A Profile*, pp. 23ff.

stone when the adulteress represented Herodias.<sup>84</sup>

One issue remains. For my thesis to have plausibility I must explain why the pericope never states that the adulteress, caught in the act, is in fact a remarried divorcée. The most plausible explanation is also the simplest. In the early traditions about Jesus there was recorded this episode. It presented problems that would be blurred in oral repetition. First, Jesus would appear more loving and forgiving if the context were generalized. Second, Jesus would not appear to be faced with an insoluble moral and legal dilemma of his own making if the context were generalized. Such a blurring may appear in Eusebius *Historia Ecclesiae* 3.39.17 when he cites Papias (who was bishop of Hierapolis in the first half of the second century) as having “expounded another story about a woman who was accused before the Lord of many sins, which the Gospel according to the Hebrews contains.” We have no other account of a woman being accused before Jesus so probably the episodes are the same. If so, John’s version of an accusation of adultery is blurred into an accusation of many sins.<sup>85</sup> The original version may well have been specific. The scribes and Pharisees may have brought the woman to Jesus and said, “Teacher, this woman was divorced and remarried, and so is caught in the very act of adultery . . .”

My approach also helps with a well-known difficulty. The episode is regarded as having existed in the early tradition and as giving the authentic voice of Jesus, even if the episode is not historically accurate. Quite so. The original version must indeed be early because the penalty for adultery was changed to strangulation in the early second century.<sup>86</sup> But then there is a problem with the fact that the pericope is not in the early manuscripts, and its location in John varies with the manuscripts that do contain it, and it even appears in Luke. This would suggest some discomfort with the episode, an unwillingness to ignore it yet a reluctance to accept it. But if my ‘Sitz in Leben’ of the pericope is acceptable the difficulty disappears. The pericope shows Jesus as having great magnanimity of spirit. He also won the debate with the Pharisees. He does in every debate. But here there is a difference from his other confrontations. His victory here was only in the short term. Even those who were not Pharisees would realize with a little reflection that Jesus was caught in a trap he himself had made. The law of Moses was quite explicit on the penalty for adultery. Jesus had widened the scope of adultery. He could not deny the death penalty for adultery – he does not – unless he renounced the Mosaic punishment or disclaimed his own stance on divorce or adopted the rabbinic interpretation of the ordeal in Numbers 5.11ff. His supporters sought to control the matter by removing the specifics of the case – a remarried divorced woman – to make him generally merciful: but they still felt discomfort, and were unsure of how to deal with the situation. The problem for the early Christians, separated now from Judaism, was the greater in view of their hostility to divorce, and their strict attitude to sex

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<sup>84</sup> We do not know where the episode took place. If it was supposed to occur outside the lands of Herod, the first stone-thrower would still be at risk.

<sup>85</sup> See, e.g., Morris, *John*, p. 779 n. 5.

<sup>86</sup> Daube, “Biblical Landmarks,” p. 188; Becker, *Jesus*, p. 166f.

outside of marriage.

I wrote above that Jesus' victory here was only "in the short term." But I need to be more specific. The problem for his response would appear only when early Christianity began to split from Judaism. Jesus' response was very correct and subtle according to the Pharisaic tradition. I have claimed elsewhere that though Jesus was contemptuous of Pharisaic teaching he could also at times use sophisticated legal argument.<sup>87</sup> Here, I believe, we have another example.

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<sup>87</sup> Watson, *Jesus and the Law*, pp. 103ff.