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FOREWORD: THE DEVELOPMENT OF ANCIENT NEAR EASTERN LAW

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The sphere of Ancient Near Eastern law is huge, covering more than three thousand years of history and vast expanses of territory. It is, accordingly, impossible to offer general insights into any sort of substantive law of the "Ancient Near East." The papers on Ancient Near Eastern law presented in this volume are equally resistant to capture by any overarching theory of Ancient Near Eastern law. On the other hand, each of the papers in this section reflects, in its own way, the influence of economic forces on the legal and economic systems of the societies under discussion. It may be that the discipline of law and economics, therefore, can offer additional insights, or at least useful lines of inquiry, relevant to the particular social system at issue in a given paper. In summarizing the papers on the development of Ancient Near Eastern law, this introduction will attempt, as appropriate, to suggest ways in which legal-economic analysis might further illuminate the questions under review by the various authors.

Raymond Westbrook's paper, "Slave and Master in Ancient Near Eastern Law,"¹ provides an overview of the law regarding the creation and termination of slave status, and the transfer and treatment of slaves by their masters, in the entire Near Eastern region from the 25th century B.C.E. to the 4th century B.C.E.—a remarkable achievement. Drawing on cuneiform contracts from various parts of the region and various time periods, Westbrook outlines what was apparently a fairly consistent law of slavery in the region. In reading Westbrook's account, one cannot help but be impressed by the fact that—once we abstract from the somewhat dehumanizing subject matter—the actual rules governing the institution of slavery in the Ancient Near East appear to have been quite rational. Viewing the slave as an article of commerce, the complex of rules Westbrook describes becomes quite readily understandable as a sort of uniform commercial code for this type of good, taking account of its unique properties (e.g., the fact that the master can bear children with the slave, the fact

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1. Raymond Westbrook, "Slave and Master in Ancient Near Eastern Law," 70 *Chicago-Kent Law Review* 1631 (1995).

that the slave has intelligence and can exercise independent judgment; the fact that the slave can run away, harm the master, and so on). Morality aside, the rules on slavery made economic sense within the context of the cultures in which they operated.

To take one small vignette from the wonderful richness of Westbrook's examples, consider the rule that a merchant who purchases a slave abroad and returns only to find the slave's true owners in his hometown must deliver up the slave to the owners free of charge if the slave is a native of the merchant's land, but may demand payment of his expenses if the slave is a foreigner. This rule allocates the risk of loss between the merchant and the true owner in a sensible economic fashion since the merchant would be on reasonable notice that the slave belongs to another if the slave is a native of the merchant's hometown.

Baber Johansen's paper, "Household Trade and Stock-Breeding: Spheres of Consumption and of Value Production in Muslim Fiscal Law,"² treats a topic in the Muslim law of the tenth to twelfth centuries in the context of a broader theory of structured complexity in jurisprudence. Johansen argues that Muslim law of this period reflected the attempt by jurists to delineate separate spheres of action, each with its own values and norms: household and family, commercial exchange, and cattle-breeding. Johansen argues that the segmentation of Muslim law into these discrete areas permitted a flexible evolution to occur, because changes in one domain did not automatically translate into changes in the other fields. Addressing Muslim tax law of the period in particular, Johansen demonstrates that the law distinguished between spheres of "basic needs" (which were not taxed) and of goods with an "increment value" (which were). Johansen observes that the legal categories of basic needs and increment value correspond to distinct spheres of the household and the marketplace. Within the sphere of increment value, the Muslim jurists distinguished the commercial exchange of commodities, on the one hand, from the incremental value of the herds realized by the owners of breeding stock, on the other.

Johansen's fascinating account rather convincingly demonstrates that, contrary to accepted views on the subject, Muslim law did distinguish quite sharply between these spheres of family, commerce, and stock-breeding. The law itself became quite conceptual and ramified,

2. Baber Johansen, "Household Trade and Stock-Breeding: Spheres of Consumption and of Value Production in Muslim Fiscal Law," 70 *Chicago-Kent Law Review* 1677 (1995).

as indeed would be inevitable in any attempt to systematize the realm of legal control into different spheres. The next step in the analysis might be to ask why the law drew such sharp distinctions in this regard. What functional benefits did the law achieve by treating these different spheres of action differently? Johansen suggests that the segmentation of Muslim law permitted more rapid adjustment of the legal system to changed conditions because changes in one subsystem would not automatically translate into changes in others. However, he does not really substantiate this argument, which appears to require a more detailed analysis in order to be convincing. For example, every legal system has to balance the values of flexibility and predictability, but not every system divides the function of legal control of human action into the sorts of segmented spheres described by Johansen. What (if any) were the features of the social systems of the times that might have made this sort of approach desirable?

It should be noted that the distinctions between family, commerce, and stock-breeding to which Johansen points appear to have arisen primarily in the area of tax law. This fact suggests the possibility that a functional explanation for the jurisprudence described by Johansen might be found in the needs and concerns of tax policy. Even today, tax law draws a sharp distinction between family and commerce. Productive activities within the household are generally not taxed; the spouse who stays at home to keep house and care for the children receives implicit compensation for the services provided, but the income is not taxed. If, on the other hand, the spouse went to the marketplace and earned a salary, part of which he or she paid over to an employee to care for the household, the income received by the spouse in the marketplace would be taxed. By like token, if someone receives money or other items of value from a relative in the form of a gift, the value received is not taxed, even if the gift is for all practical purposes contingent on the recipient providing services to the donor, whereas if money is received in the marketplace in explicit exchange for services, the amounts received will be taxed as income. The distinction between family and market is deeply entrenched in tax law today. There are good reasons of tax policy why this form of economic activity in the home is not taxed—for example, it would be extremely difficult to police a tax on intra-familial transfers of the sort described above, so that a tax on such transfers would be ineffective even if it were imposed. A law and economics perspective on ancient law suggests the possibility that analogous reasons of tax policy might explain some (although not all) of the importance of the family-mar-

ket dichotomy identified by Johansen as an important feature of Muslim law of the period he discusses.

Similarly, the discipline of law and economics might help explain the apparently mysterious distinction between stock-breeding and commercial exchange of commodities. It would appear that the main difference between stock-breeding and commercial exchange was the tax year to which animals exchanged in the course of stock-breeding were assigned. The details of the actual tax treatment are somewhat obscure, but it might be possible to identify a rationale for different tax treatment of items that acquire value gradually over time, as opposed to items that acquire value by virtue of exchange into higher valued uses. If the item is taxed on the basis of the increased value that it obtains over time, the tax will be assessed on a calendar rather than a transactional basis. If the item is transferred during a tax period, the law will need to devise some relatively clear-cut method for the parties to the transaction to allocate the tax burden among themselves in order to adjust the terms of their transaction (just as, in contemporary law, the property tax which is assessed on a calendar basis is allocated between the purchaser and seller of a home on a consistent basis that allows for certainty in commercial transactions). How the tax is actually allocated between buyer and seller is not as important as the fact that it is done on a consistent and reliable basis that allows the parties to the transaction clearly to understand the tax consequences of their deal. It is not completely clear from Johansen's paper that the special treatment of stock-breeding under Muslim tax law had to do with this allocation problem, but the possibility seems worth considering as a partial explanation of the interesting distinction between stock-breeding and commerce which Johansen identifies and analyzes here.

Neils Peter Lemche's paper, "Justice in Western Asia in Antiquity, or: Why No Laws Were Needed!,"³ advances the startling claim that "written law did not play any role in Western Asia, and the presence of such law material as we find in the Old Testament does not disprove [this] thesis." Lemche observes that no law codes have been unearthed in Syro-Palestine, and notes further that the evidence for the actual forensic usage of the major Mesopotamian codes, such as the Code of Hammurabi, is very weak. Lemche rejects the claim that these codes were genuine codes of law of the type that would be fol-

3. Niels P. Lemche, "Justice in Western Asia in Antiquity, or: Why No Laws Were Needed!," 70 *Chicago-Kent Law Review* 1695 (1995).

lowed in court; at most, they were school texts to be used in training judicial officials. Lemche argues that, aside from matters of state such as the collection of taxes, law in Western Asia was primarily local law—and the local law was for the most part, unwritten law, just as local law in traditional societies is administered without the aid of a formalized legal code even in modern times. Lemche ties this observation to the much broader thesis that ancient societies in Western Asia were forms of patronage societies, where the poor or disadvantaged looked for protection to some sort of powerful benefactor. Patronage societies had little need for written law, Lemche argues, because social relations would be adjusted between the patrons, and relations between patrons and dependent persons were ones of total inequality.

Lemche's account might possibly be critiqued for being based on uncertain evidence; there is plenty of explicit legal material in the Old Testament that would seem unnecessary or superfluous if the society were solely based on patronage norms. Nonetheless, Lemche's account is both important and interesting for the potential light it sheds on biblical law and on the sociological background of the biblical period. As far as economic analysis is concerned, one might find additional support for Lemche's hypothesis about Ancient Israel being a patronage state if it could be grounded in some type of theory for why a patronage form of social organization might have served the interests of the society in which it is said to have operated, in light of the technological, social, and political constraints of the period to the extent we know them. Beyond this, Lemche's hypothesis that the law applied in Ancient Israel was essentially oral in character might find additional support if we can identify any biblical texts that appear to reflect an oral legal tradition.⁴

Klaas Veenhof supplies us with a fascinating account of certain aspects of Old Assyrian law in his paper, "In Accordance with the

4. Some of my own work has advanced the hypothesis, based on economic analysis, that a code of customary oral law would tend to evolve in definite and easily identified rhetorical forms—forms than can indeed be recognized in the biblical text, especially in the Book of Genesis. Geoffrey P. Miller, "Contracts of Genesis," *22 Journal of Legal Studies* 15 (1993); see also Geoffrey P. Miller, "Ritual and Regulation: A Legal-Economic Interpretation of Selected Biblical Texts," *22 Journal of Legal Studies* 477 (1993) (applying economic analysis to the understanding of certain early biblical texts as containing implicit rules regulating the conduct of animal sacrifice in Ancient Israel). For background on the legal-economic approach to biblical interpretation, see Geoffrey P. Miller, "The Legal-Economic Approach to Biblical Interpretation," *150 Journal of Institutional and Theoretical Economics* 755 (1994).

Words of the Stele': Evidence for Old Assyrian Legislation."⁵ Veenhof here considers another case of a society which, although well-developed socially and economically, has not yielded a law collection to the archaeologist's spade. This is not to say that evidence of law's influence is absent here; to the contrary, there are many records of legal documents and accounts of judicial proceedings. Yet, there are several intriguing references in the ancient record to the "words of the stele." Veenhof's analysis is informed by impressive economic sophistication, in that he imbeds his discussion of the texts within the broader framework of the economic and social conditions affecting the Anatolian traders whose texts are at issue. Although Veenhof recognizes that it is risky to speculate about the content of an Old Assyrian law written on an as-yet unknown stele, he does offer some thoughtful suggestions that appear to make sense in light of the commercial realities he is describing. This extremely interesting paper illustrates the valuable insights that sensitivity to the economic background can bring to the analysis of ancient texts.

Bernard Jackson's paper, "Modelling Biblical Law: The Covenant Code,"⁶ takes the form of an extended response to an earlier article by Raymond Westbrook, but actually goes beyond this to offering a great deal of original theoretical material. Jackson criticizes Westbrook's treatment of the Covenant Code in the Bible as lacking legal force—as a kind of legal textbook which perhaps had persuasive authority but which was not "law" in the strict sense of containing an authoritative command of a sovereign. The Ancient Near Eastern legal codes then come to appear as compilations of precedents in Westbrook's view. Jackson, in opposition, argues that the Covenant Code is similar to other law-collections in the bible, and that the common thread linking all the law codes is that of wisdom—these laws were addressed to the individual citizen rather than to courts or other institutions of state power, and they appear, in Jackson's view, to emanate from wisdom circles, circles which were associated with, or enjoyed the patronage of, the royal court.

Jackson sees the function of the wisdom-laws as being to operate, in a sense, as an alternative to an organized system of courts: as bright line rules that clearly establish liability in defined circumstances, thus allowing the parties to avoid litigation by settling among themselves

5. Klass R. Veenhof, "In Accordance with the Words of the Stele': Evidence for Old Assyrian Legislation," 70 *Chicago-Kent Law Review* 1717 (1995).

6. Bernard S. Jackson, "Modelling Biblical Law: The Covenant Code," 70 *Chicago-Kent Law Review* 1745 (1995).

privately; as paradigms that would give rise to discussion and debate; and as a form of practical instruction for the masses and more sophisticated literary products for an elite audience. Jackson offers a reconstruction of a process by which the Covenant Code might have been formed out of earlier, less complete material, and argues for a pre-Deuteronomic dating for the process of incorporation into a larger collection. Jackson supplements this very thoughtful material with a fascinating account of the relationship of the Covenant Code and the Decalogue or Ten Commandments.

Jackson's paper, while not economic in content, contains a good many insights that can easily be understood in economic terms. For example, Jackson observes that the "bright-line" rules found in the codes might actually have been devices to allow private parties to settle their disputes without the need to go to court, since if the law is clear, it will be less necessary to go to court to obtain a resolution—a proposition that is fundamental to much of the modern law-and-economic analysis of litigation.⁷

Finally, my own paper, "J as Constitutionalist: A Political Interpretation of Exodus 17:8-16 and Related Texts,"⁸ provides a functional interpretation of several related biblical texts, focusing primarily on the Bible's account of the wilderness battle between the Israelites and the Amalekites before the conquest of the Promised Land. I argue that this text is, in effect, a constitutional provision that allocated power among important institutions in the political society of Ancient Israel—specifically, the king, the bureaucracy, the priesthood, and the military. We can detect within the battle text a remarkable correspondence between the actors (Moses, Aaron, Hur, Joshua, the Amalekites), and the physical setting (Moses' hands, his rod, the hill on which he stands, the rock on which he sits, the altar he builds to commemorate the battle). I argue that each of these elements can be identified with institutions, sites, or objects that would have been familiar to participants in the royal court in Jerusalem. It was necessary for the authors of this text to convey the political message in symbolic terms because to do so projected the message back into a historical past deemed authoritative, and in particular to a time and place very close to the fundamental legitimating constitutional event in the na-

7. See George L. Priest and Benjamin Klein, "The Selection of Disputes for Litigation," 13 *Journal of Legal Studies* 1 (1984) (suggesting that uncertainty in the law increases the probability that a case will be brought to the courts for resolution).

8. Geoffrey P. Miller, "J as Constitutionalist: A Political Interpretation of Exodus 17:8-16 and Related Texts," 70 *Chicago-Kent Law Review* 1829 (1995).

tional epic, the theophany at Sinai. Retrojection into the past required the use of symbolism as well because within the scheme of the Israelite epic, the figure of the king could not explicitly be represented at the time of Moses because no king existed at this time.

I argue that the Amalekite pericope and its cognate texts contain etiological elements, but that these elements are quite different from etiology as commonly understood in biblical criticism; the purpose of identifying aspects of the story with elements known to the public at the time the story was created was not to provide a history or explanation for a particular known feature of the world, but rather to authenticate and legitimate a text by connecting it with recognizable elements of the external culture (such as the tradition of enmity between Israel and Amalek, which I argue predated the story of the wilderness battle). The probable interest group pushing for the inclusion of these texts in the national epic, I argue, was the official court bureaucracy, represented in the stories by the figure of Hur; the purpose of the text was to establish the powers of the bureaucracy in turf competition with other groups such as the military and the tribal elders.

This paper is not itself explicitly informed by economic reasoning. However, there is an implicit economic element at play here. My focus on symbolic interpretations arises out of an analysis of rhetorical forms in light of the constraints placed on such forms by the existence of an oral tradition.⁹ The symbolic understanding of biblical rhetoric, which lies behind the particular textual interpretations offered in this paper, is directly grounded in economic principles. Beyond this, the economic analysis of law stresses the importance of vested interests in the origin and development of particular rules,¹⁰ a stress that is reflected in the arguments contained in this paper.

Although, as noted at the outset, these papers can do no more than scratch the surface of the nearly inexhaustible richness of Ancient Near Eastern material, each in its own way offers sparkling insights into the remote past. The reader who takes the trouble to work through the sometimes unfamiliar terms and ideas will find herself or himself well rewarded in the end.

9. See Geoffrey P. Miller, "Contracts of Genesis," 22 *Journal of Legal Studies* 15 (1993).

10. See, e.g., Daniel A. Farber and Philip P. Frickey, *Law and Public Choice: A Critical Introduction* (1991) (general introduction to public choice theory, which stresses the role of interest groups in the creation of legislation).