

Chicago-Kent Law Review

Volume 70

Issue 4 *Symposium on Ancient Law, Economics & Society Part I: The Development of Law in Classical and Early Medieval Europe / Symposium on Ancient Law, Economics & Society Part I: The Development of Law in the Ancient Near East*

Article 16

June 1995

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Recommended Citation

Bernard S. Jackson, *Modelling Biblical Law: The Covenant Code*, 70 Chi.-Kent L. Rev. 1745 (1995).
Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol70/iss4/16>

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MODELLING BIBLICAL LAW: THE COVENANT CODE

BERNARD S. JACKSON*

INTRODUCTION: THE "LEGAL MODEL" IN THE STUDY OF BIBLICAL AND ANCIENT NEAR EASTERN LAW

Making sense of those texts conventionally described as "biblical law" is no innocent matter: inevitably, we draw upon models of law, legal history, religious belief and practice, and much more, in any account we may give of the material. Methodological discussion which makes us more aware of these models, and offers a criticism of them, is therefore to be welcomed. It is in this spirit that I approach what I term below "Westbrook's revisionism," and in particular a recent article in which my friend Raymond Westbrook has launched a direct attack on the appropriateness of literary-historical methods in the study of what is generally regarded as the oldest biblical law collection, the "Covenant Code"¹ (which commences in *Exodus* 21:1,² almost immediately after the account of the giving of the Ten Commandments at Mount Sinai).

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1. Raymond Westbrook, "What is the Covenant Code?," in *Theory and Method in Biblical and Cuneiform Law: Revision, Interpolation and Development*, ed. B.M. Levinson (Sheffield: Sheffield Academic Press, 1994), 15-36 [hereinafter Westbrook 1994]. In preparing this article, I have not drawn on the very valuable responses by Levinson, Greengus, Buss, Lafont, Matthews, Morrow, Patrick and Otto deriving from a special session of the SBL Biblical Law Group in 1991, and published in the same volume. In many respects, the criticisms of Westbrook by these authors coincide with or complement those in Part I below. I take account of them in my forthcoming *Wisdom-Laws*.

2. Its terminus is a matter of controversy. It is part of a speech attributed to God which begins in *Exod.* 20:22 and ends at 23:19, but Westbrook, along with many others, recognises that it falls into two parts, the first of which "may more properly be described as a law code, in that its norms are justiciable in a human (as opposed to divine) court and carry sanctions enforceable by such a court." See Westbrook 1994, *supra* note 1, at 15. Where this first part ends, however, is not self-evident: there is no overt marker of it in the text. S. Paul, *Studies in the Book of the Covenant in the Light of Cuneiform and Biblical Law* (VTSup, 18; Leiden: Brill, 1970) [hereinafter Paul, *Studies*], identifies it at 22:16, but Westbrook sees the "code" as extending to 22:19, since the provisions of 22:17-19 "although religious in character, . . . are likewise amenable to normal human jurisdiction, with corresponding sanctions." I reject any such criterion of division, and discuss below (esp. in Parts III-IV) the literary development and ultimate structure of the document as a whole.

Westbrook's position may be summarised thus. The literary-historical approach, which seeks to trace, largely by sophisticated textual analysis, earlier stages of the law represented in the Covenant Code, and subsequent editorial changes made to it, wrongly relies on outdated models of legal development derived from nineteenth-century evolutionary studies. Not only are such models discredited; their application to the Covenant Code is inappropriate, given the genre of literature to which this document belongs. That genre is the ancient Near Eastern "scientific" literature, which is merely descriptive of the law: as an academic genre, it does not call for continual "amendment."³ In any event, the legal tradition in the ancient Near East was basically "static." Insofar as we do possess "legislative" documents, changes in the law are restricted to a small category of matters, and where this is reflected in the scientific literature (as in the Hittite Laws), the changes are recorded directly, and not by the kind of textual amendment suggested by many students of the Covenant Code.

Westbrook's criticism of the use of the evolutionary model is basically apt, though within the scope of a single article his application of it is necessarily "broad-brush," and I shall take issue with at least one of his examples. However, in applying to the Covenant Code the model of the ancient Near Eastern "law codes" (conceived now as primarily academic), Westbrook appears to me to fall into precisely that model which was itself opposed to the evolutionary model in the nineteenth century, namely diffusionism (and a somewhat crude version of it, at that). Moreover, Westbrook equivocates to some degree over the precise origins of and use made of this "academic" literature:⁴ he maintains that it is not "legislative" (like the royal "Edicts"⁵),

3. "The codes have a timeless quality, as perhaps befits an academic document." Westbrook 1994, *supra* note 1, at 24. Of the Hittite Laws, which explicitly record changes in penalties (e.g. §94, quoted by Westbrook: "If a free man steals in a house, he shall give (back) the respective goods; they would formerly give for the theft one mina of silver, now he shall give twelve shekels of silver."), Westbrook has commented: "Regular changes to keep abreast of developments in the law would not have been necessary if the text were merely academic." Raymond Westbrook, "Biblical and Cuneiform Law Codes," *Revue Biblique* 92 (1985), 247-264, at 256 [hereinafter Westbrook 1985]. In fact, the Hittite technique would be a strange way of updating a legal text, where the purpose was indeed practical: it leaves the record of the superseded law intact. Direct amendment, or interpolation, would seem far more likely methods if the aim were to update practice. Compare the U.K. series *Statutes in Force*. The very style of the Hittite "updating" would suggest that it is *history* (a form of wisdom) which forms the focus of interest of the author. Westbrook has changed his view also of the significance of differences in the two extant texts of the Hittite Laws. See Westbrook 1994, *supra* note 1, at 25-26, esp. n.29.

4. See Westbrook 1985, *supra* note 3; see also a somewhat more moderate position in his "Cuneiform Law Codes and the Origins of Legislation," *Zeitschrift für Assyriologie* 79 (1989), 201-222 [hereinafter Westbrook 1989].

5. Westbrook 1994, *supra* note 1, at 24-25.

i.e. “an authoritative source of law; the courts are bound to obey its precepts . . . the text is the exclusive source of the law,” but neither is it entirely academic, in that it

refers the court to the real authoritative sources . . . whether they be statute, precedent or custom . . . Its text has no independent value. Courts need not cite it or pay attention to its wording, since they are looking essentially beyond it to the source that it reflects.⁶

Westbrook appears to have in mind the model of leading textbooks in the Common Law, regarded as having, at best, “persuasive”⁷ rather than “binding” authority. He now⁸ sees the codes as having “functioned as consultative documents rather than authoritative legislation.”⁹ Perhaps the most significant of Westbrook’s arguments for the practical function of the ancient Near Eastern “law codes” is from the location of the discovery of the Middle Assyrian Laws. They were found at a “gate house,” from which Westbrook infers that they constituted a “legal library for judges.”¹⁰

6. Westbrook 1989, *supra* note 4, at 202.

7. Indeed, he uses the term “persuasive authority” to describe the use made of foreign models. Westbrook 1985, *supra* note 3, at 256.

8. In his 1985 article, Westbrook had set himself against the trend of modern scholarship (particularly since the seminal contributions of Kraus and Finkelstein in the 1960s) as regards the nature of the ancient Near Eastern collections, viewing the law codes as the (binding) law applied by judges in court. Now, however, it has been persuasively argued by Kraus and others that the law codes were essentially academic documents, which may accurately have described the law but did not prescribe it. See Westbrook 1985, *supra* note 3 (citing F.R. Kraus, “Was ist der Codex Hammurabi?,” *Genava* 8 (1960), 283-96; J. Bottéro, “Le ‘Code de’ Hammurabi,” *Annali della Scuola Normale Superiore di Pisa* 12 (1982), 409-44). They were, therefore, conduits of tradition rather than of change. Westbrook 1994, *supra* note 1, at 24.

9. Westbrook 1994, *supra* note 1, at 26 n.29. Even this is sufficient to indicate a need for periodic revision (unlike Westbrook’s conception of a purely academic book, *supra* note 3). Much therefore rests upon his claim that the legal tradition itself was basically static and unchanging. As for the Laws of Hammurabi, the basically unchanging text (disseminated over a period of approximately a millenium) is explained by the fact that this was a law-text which then became a school text, and thus came to circulate for non-practical, didactic purposes. Broadly stated, my conception of the biblical law texts is the reverse: didactic texts later became law-texts. For further comparative material, see B.S. Jackson, “From *Dharma* to Law,” *American Journal of Comparative Law* 23 (1975), 490-512.

10. Westbrook 1985, *supra* note 3, at 255 (following Weidner). In the same article, he describes the codes as “reference works” for judges, and he compares, in this respect, other forms of cuneiform scientific literature, such as omen texts. *Id.* at 257-58. But the nature of the decision which judges are called upon to make is different in kind from that of either diviners or doctors (if we wish to distinguish the two). Suppose a man comes along with a physical condition which the diviner, on checking his “reference work” of omens, finds does not fit with any existing category? He may simply say: “This is not significant.” The absence of the condition from the list shows that the phenomenon does not signify as an omen. Thus, the list which the diviner consults can be deemed to be comprehensive. There is a conventional closure rule which allows him to do this, while at the same time to send his customer away satisfied. The matter is quite different when two parties seek adjudication from a judge. If he looks up his list of precedents, and finds nothing in them, he can’t send the parties away with the advice: “You have not disclosed a legal problem. Go home.” The two parties still have a dispute, and the judge has to

As for the origins of these academic statements, they are not reflective of legislation, since legislation had a very narrow scope.¹¹ Rather, Westbrook regards "precedent" as the major source of law,¹² though accepting that custom played a major role in it:

Being reluctant to depart from present experience, cuneiform law was based essentially on precedent (for the most part, in fact, custom dressed up as precedent). Its legal science hesitantly expanded the scope of precedents by logical extrapolation, but this method could lead only to descriptive treatises that "discovered" the law, not to consciously new rules. These were the cuneiform law codes.¹³

Overall, Westbrook adopts a model of a legal system based on "sources of law," and the roles he attributes to these sources is highly reminiscent of the Common Law before legislation took on its modern importance. The underlying philosophical model is positivist, and the historical model is English: "Hammurabi" becomes a kind of Glanvill. The Biblical Covenant Code is seen as an example (albeit on the cultural periphery) of such cuneiform treatises, descriptive of precedents set by the courts, and used for reference in the courts for future cases (but only as a persuasive authority). Westbrook takes support for this from the biblical narratives of adjudication in the desert,¹⁴ but otherwise ignores the relationship of the Covenant Code to

resolve it in some way. Even the Laws of Hammurabi, and *a fortiori* the smaller collections, barely scratch the surface of the possible disputes which may arise.

11. Westbrook 1994, *supra* note 1, at 23-24. "Only three categories of reform are recorded in them: retrospective cancellation of debts, reorganization of the royal administration, and the fixing of prices (which in this context also means pecuniary penalties, including fixed limits on ransom)." *Id.*

12. In Westbrook 1985, *supra* note 3, at 261-64, Westbrook argued that biblical law is the result of decided cases, on the basis of the narratives of adjudication in the desert (discussed here in section V). But no such conclusion appears warranted from the narratives Westbrook considers. It has, indeed, been argued that the typical casuistic form of most of the laws in the Covenant Code is found also in the law resulting from the case of the daughters of Zelophehad. But the narrative itself stresses that after the decision God commanded Moses to proclaim the rules (going beyond the circumstances of the case in hand) for the future. Without such proclamation, no precedent would have been set for the future. Cf. B.S. Jackson, "Some Semiotic Questions for Biblical Law," *The Oxford Conference Volume*, ed. Abraham M. Fuss (Atlanta: Scholars Press, 1987), 1-25 (Jewish Law Association Studies III), at 6-9.

13. Westbrook 1989, *supra* note 4, at 218-19.

14. In Westbrook 1985, *supra* note 3, at 261-64, Westbrook also argued that the biblical law codes, derived from decisions in particular cases, themselves served as precedents for future application by the courts. Even if we take such stories as that of the case of the daughters of Zelophehad as showing that casuistically-formulated paragraphs like those which we find in the Covenant Code do originate from actual decisions (*but see supra* note 12), it does not follow that the records of such decisions, even as generalised in such casuistic norms, were used by future judges for the resolution of cases, in much the same way as modern judges use statutes. Ultimately, such a claim was made: the Covenant Code was written down in what is called *sefer habrit*, and incorporated in the present narrative in such a way as to stress that it formed part of the Sinaitic Covenant (and thus was continuing law, not merely *ad hoc* edict). But we can hardly

the practices of biblical literature. In so doing, I shall argue, he deprives himself of a rich source of alternative—and historically more authentic—models.

In short, Westbrook seeks to be critical of models of legal history, but not of models of law itself. But models of legal history *presuppose* models of law. In what follows, I review some of Westbrook's arguments, and then argue for a quite different model of law in the Bible, one which questions the assumptions of the "legal model," namely that:

- 1 Court adjudication is a normal method of dispute resolution;
- 2 The practice of adjudication necessarily involves the application of rules;¹⁵
- 3 The only kind of reading of "legal rules" is a "semantic" reading;

as well as more localised applications of that model, such as the view that the biblical texts endorse a system of precedent. When we see what are the alternatives to these assumptions—alternatives which I subsume under the term "wisdom-laws"—we may revisit Westbrook's historical critique, and offer both parallels to the sophisticated editing processes which literary-historical approaches have applied to the Covenant Code, and—just as important—reasons why the users of the biblical texts may have indulged in such practices.

take this very late claim regarding the status and use of these rules as representing the use of these documents at an earlier stage. It was not, as Westbrook would have it, that law-codes (so used by courts) came to be inserted in a different literary framework, and put to a different use. It was the reverse: wisdom, or "wisdom-law" documents, were made into law codes precisely by being incorporated into the present narrative framework.

15. The idea that the norms of the Covenant Code are actually instructions to judges, to be applied in particular cases (thus, that the Covenant Code is, in this respect, like a piece of modern legislation) has proved popular, and probably represents the dominant opinion. The principal dissent has come from Calum Carmichael, at first in a mild dissent ("A Singular Method of Codification of Law in the Mishpatim," *Zeitschrift für die alttestamentliche Wissenschaft* 84 (1972), 19-25, at 24), and more recently in a thoroughgoing attempt to view the Covenant Code as reflections on narrative: *The Origins of Biblical Law: The Decalogues and the Book of the Covenant* (Ithaca: Cornell University Press, 1992). In a number of articles, I have argued, for different reasons, against the view that we should interpret the Covenant Code in terms of the "legal model": see "Ideas of Law and Legal Administration: a Semiotic Approach," in *The World of Ancient Israel: Sociological, Anthropological and Political Perspectives*, ed. R.E. Clements (Cambridge University Press, 1989), 185-202; "Legalism and Spirituality: Historical, Philosophical and Semiotic Notes on Legislators, Adjudicators, and Subjects" in *Religion and Law: Biblical-Judaic and Islamic Perspectives*, eds. Edwin B. Firmage, Bernard G. Weiss & John W. Welch (Winona Lake: Eisenbrauns, 1990), 243-261; "Practical Wisdom and Literary Artifice in the Covenant Code," in *The Jerusalem 1990 Conference Volume*, ed. B.S. Jackson and S.M. Passamaneck (Atlanta: Scholars Press, 1992), 65-92 (Jewish Law Association Studies, VI). See further Part II below.

PART I. WESTBROOK'S REVISIONISM

A. *Westbrook's Attack on Evolutionism and Literary-Historical Approaches*

Westbrook lists as features of the nineteenth-century evolutionary model the attribution to early law of the following "primitive" features:

- a. law exists between families, clans or tribes, not between individuals;
- b. redress for individual wrongs took the form of feud between the groups to which the culprit and victim belonged;
- c. the courts acted as arbitrators between such groups, seeking to find a just settlement but without power to enforce their judgments;
- d. liability was strict, with no consideration of the culprit's intentions (so-called *Erfolgshaftung*).¹⁶

He claims that:

Propositions of this kind constantly recur in scholars' analyses of the Covenant Code, without discussion of the evidence for them; they are taken as axiomatic.¹⁷

Elsewhere he takes as bad methodology the categorisation of penalties for bodily injuries as the marker of the difference between the primitive and the advanced:

The earlier view was that a change from physical to pecuniary punishments marked the crucial development from feud to law.¹⁸ It was supported by the appearance of the former in Codex Hammurabi and the latter in the Hittite Laws. It was challenged when codes earlier than Codex Hammurabi were discovered, Codex Ur-Nammu and Codex Eshnunna, which contained only pecuniary punishments. The development was then said to be from civil law (pecuniary) to criminal law (physical).¹⁹

But this, he points out, was inconsistent with any linear, historical development:

A general development of ancient Near Eastern culture could not apply because the movement was not chronological—the Hittites retained the "older" system of civil law. For the same reason, there could be no question of a slow and imperceptible development (as opposed to deliberate reform). In any case, the Hittites undoubtedly knew the text of Codex Hammurabi, and Codex Eshnunna pre-

16. Westbrook 1994, *supra* note 1, at 20.

17. *Id.*

18. G.R. Driver and John C. Miles, *The Babylonian Laws, I* (Oxford: Oxford University Press, 1952), pp. 501-502.

19. Arthur S. Diamond, "An Eye for an Eye," *Iraq* 19 (1957), pp. 151-55.

dates Codex Hammurabi by about forty years only.²⁰ The answer was to make value judgments upon the civilizations in question: the Sumerians, Eshnunnans, and Hittites were more “primitive” than the Babylonians or the Assyrians.²¹ Such judgments, however, were based solely on this one difference in their respective law codes; our knowledge of those cultures would demand no such conclusion.²²

Rather than reject entirely evolutionary models of legal development, I have argued, we should seek to identify those phenomena to which evolutionary models may be applied, and those to which they are inappropriate.²³ I agree with Westbrook that individual legal rules and institutions are inappropriate. Ideal models of progression in such areas as concepts of liability (e.g. *Erfolgshaftung*) and penalties, when taken in isolation, are crude and unhelpful. But sometimes they are part of a larger picture, to which evolutionary models are not inappropriate. Features (a)-(c) in Westbrook’s list relate not to substantive rules, but to processes of dispute settlement. While such matters are themselves, as will be argued for the Biblical material, closely tied in with social values (such as notions of community and identity), it is not unreasonable to see a connection between them and the size of the communities to which they belong, as well as the growth of the internal organisations of such societies. Whatever view we may take of the status of the “legal model,” we cannot imagine that it is either universal (irrespective of social size and organisation) or that it is suddenly adopted, fully fashioned, in those societies in which it is found. Inevitably, it has a history, and the search for any regularities in such histories is not inappropriate.

20. G. Cardascia, “La Transmission des sources juridiques cunéiformes,” *Revue Internationale des Droits de l’Antiquité* 7 (1960), pp. 43-50.

21. Diamond, *supra* note 19, at 154-55. Cf. J. Finkelstein, “Ammisaduqa’s Edict and the Babylonian ‘Law Codes,’” *JCS* 15 (1961), pp. 96-99.

22. Westbrook 1994, *supra* note 1, at 23. I agree here largely with Westbrook’s alternative: “There is empirical evidence, however, that (in the guise of revenge and ransom) physical and pecuniary punishments could be two sides of the same coin, and on this basis we have argued elsewhere that the societies in question all enjoyed the same system of punishment throughout (citing his *Studies in Biblical and Cuneiform Law* (CahRB, 26; Paris: Gabalda, 1988), pp. 39-77). Where they differed was in the exact limits to be imposed on revenge and ransom—as represented in the codes by physical and pecuniary punishments respectively—and whether the latter was to take precedence over the former in the particular case. No evolution was involved, therefore, but an exercise of discretion that could vary from case to case, from court to court and from system to system.” *Id.* at 24. The relations between ransom and revenge are discussed at greater length in my *Wisdom-Laws*, forthcoming, chapter on homicide. See already my “Reflections on Biblical Criminal Law,” *Journal of Jewish Studies* 24 (1973), 8-38 at 21-26; *Essays in Jewish and Comparative Legal History* (Leiden: E.J. Brill, 1975), 41-50 [hereinafter Jackson, *Essays*].

23. B.S. Jackson, “Law and Language: A Metaphor in Maine, A Model for his Successors?,” in *The Victorian Achievement of Sir Henry Maine*, ed. Alan Diamond (Cambridge: Cambridge University Press, 1992), 256-93.

A second area within which a form of evolutionary theory is appropriate may be termed, broadly, "cognitive."²⁴ The development of legal technique, in respect of the drafting of both individual rules and larger units, may be expected to progress in ways not markedly different from those in which language develops in the individual;²⁵ in particular, we should be alert to those features of cognitive style associated, respectively, with oral and literate traditions.²⁶ The development of the wisdom tradition, I shall argue, manifests such traits, and is highly relevant to our approach to biblical law.

Consideration of one of Westbrook's examples of the application of unwarranted evolutionary assumptions for the purposes of literary-historical criticism shows how regularities in developments which may appear (when abstracted from their contexts) to relate only to individual rules or concepts in fact involve claims regarding the development of legal processes and legal cognition. The example is Daube's argument for the technique of *lex clausulae finalis*, as applied to the theft passage in the Covenant Code (*Exod. 21:37-22:3*, MT). Westbrook puts the matter thus:

Other scholars have drawn different conclusions from the logic of legal development. In considering the theft provisions of *Exod. 21.37-22.3*, Daube points out that the passage comprises three rules which are not in their logical order: (a) the thief who slaughters and sells, (b) the right to kill a thief breaking in, (c) the thief who has not yet slaughtered and sold.²⁷ The logical order would have been for (c) to precede (b).

The logical order was not followed, however, because originally the law consisted of the two provisions: (a) and (b), while (c) is a later amendment. It was appended and not inserted, as logic would require, because the law was too well known in its traditional order.

The reason for adding the later provision, according to Daube, was a development in the law of evidence. The original law contained a crude, objective test—theft was not proven until the stolen object had been used. Later, a more sophisticated test developed whereby the subjective intentions of the thief were considered. If it

24. On the relevance of cognitive developmental studies for law, see Jackson, *op. cit.*, 271-74; and in my *Making Sense in Law* (Liverpool: Deborah Charles Publications, 1995), ch.7.

25. B.S. Jackson, "Historical Aspects of Legal Drafting in the Light of Modern Theories of Cognitive Development," *International Journal of Law and Psychiatry* 3 (1980), 349-69; and (with some variations) in "Legal Drafting in the Ancient Near East in the Light of Modern Theories of Cognitive Development," *Mélanges à la mémoire de Marcel-Henri Prévost* (Paris: PUF, 1982), 49-66 [hereinafter Jackson, "Legal Drafting"].

26. See further Walter S. Ong, *Orality and Literacy: The Technologizing of the Word* (London and New York: Methuen, 1982), and in the legal context, Jackson, *Making Sense in Law*, *supra* note 24, at §2.4.

27. David Daube, *Studies in Biblical Law* (Cambridge: Cambridge University Press, 1947), pp. 74-101 [hereinafter Daube, *Studies*] (for this particular example, see pp. 89-95).

could be ascertained that he had the intention to misappropriate, then possession alone would be sufficient to establish theft.²⁸

Now Daube may have been a little loose in his use of the terms “objective” and “subjective” (though he put them within “scare-quotes”). But he is not to be fixed with the crude evolutionism which Westbrook suggests. First, it is clear that he regards the objective tests as (from the beginning) representing practical evidentiary tests of intention (a phenomenon which, as he rightly points out, still exists today²⁹). Secondly, he warns explicitly against any assumption “that the ‘subjective’ aspect of the matter was entirely neglected, was simply not seen, by the lawyers of the time.”³⁰ There is thus no suggestion by Daube of a primitive stage of *Erfolgshaftung*, when intention was not considered relevant to theft, followed by a period of Enlightenment, in which the relationship between intention and responsibility was suddenly perceived. Daube was far more concerned to explain a particular drafting technique, what he called the *lex clausulae finalis*: he required always some confirmation on material grounds that the last clause was later, not from “axiomatic” considerations of evolutionary theory (as Westbrook suggests), but rather from textual incompatibility or “if we know from other sources that its contents date from a different period or province.”³¹

As long ago as 1972, when I reviewed Daube’s account of this matter,³² I suggested that the historical significance of the drafting technique which he had identified³³ (and which still appears to me to be well-grounded) might in this case (and in some others) reside not so much in changes in legal conceptions (here, of what can count as good evidence of thievish intention) as in a trend to make the formulation of the law more complete and explicit—in short, a cognitive rather than a substantive reason. But then, the question arises (though hardly addressed by Westbrook) what was the purpose of any such “formulation of the law.” Daube assumed that the purpose of such (“objective”) rules was to make life easier for the courts. Even today, we find in some circumstances the use of somewhat arbitrary

28. Westbrook 1994, *supra* note 1, at 18.

29. See, e.g., the English Criminal Justice Act 1967, s. 8.

30. Daube, *Studies*, *supra* note 27, at 92.

31. *Id.* at 98.

32. B.S. Jackson, *Theft in Early Jewish Law* (Oxford: Clarendon Press, 1972), 41-48 [hereinafter Jackson, *Theft*].

33. Daube, *Studies*, *supra* note 27, at 74-101, based on Roman as well as a biblical texts, and explained largely in cognitive and communicational, rather than general evolutionary terms: see esp. 76-77, on “laziness, undeveloped legal technique, writing on stone or the like, oral transmission of the law, and regard for tradition.”

tests in order to make dispute-resolution that much easier for the courts, even though we know that a more sophisticated approach to the issue would be preferable in an ideal world. But it is precisely because this phenomenon fits with—and no doubt is drawn from—the “legal model” that I suggest we should pause, and ask whether the evidence really does support our reading back of that model to the ancient sources. There is, as I argue below, an alternative: arbitrary, “bright-line” rules are used in order to *avoid* rather than facilitate institutional adjudication. They are designed to encourage private dispute settlement by the parties, without recourse to courts, what I call “self-executing laws.” It makes a great deal of sense, from the perspectives of legal history and legal anthropology, to see such “arbitrary” objective tests as originating in a period *before* institutionalised dispute-resolution was the norm. As the process of institutionalisation increased, of course, such rules could very readily be taken over into the forensic context. Indeed, the amateur judges at the city gates themselves had an interest in speedy, practical rules; they, too, had their daily lives to get on with.

B. Westbrook’s Diffusionist Alternative

Against a model which studies the Covenant Code for signs of internal historical development, Westbrook stresses the totality of individual, substantive parallels which it presents with the law codes of the ancient Near East, and adopts a diffusionist model for our overall understanding of it. He observes:

Thanks to cuneiform records, evidence for the history of law in the ancient Near East now extends back to the early third millennium. The very earliest records, however, already reveal a highly organized legal system, whose courts have full coercive power and whose individuals have the capacity to make contracts. . . . As is well known, the Sumero-Akkadian civilization that produced this legal system spread throughout Western Asia through the medium of cuneiform writing. Its influence is already attested in Syria in the third millennium, at Ebla, and legal documents drafted in Akkadian from Alalah and Hazor show that not merely the writing but the legal culture itself was established in Syria Palestine by the early second millennium.³⁴

The implications for Israelite law are clear. Any primitive stage must either have predated the second millennium (at the very least) or reflect early Israel’s total isolation from the surrounding

34. Westbrook 1994, *supra* note 1, at 20-21 (citing D.J. Wiseman, *The Alalakh Tablets* (London: British Institute of Archaeology at Ankara, 1953); William W. Hallo and Hayim Tadmor, “A Lawsuit from Hazor,” *Israel Exploration Journal* 27 (1977), pp. 1-11).

societies. The first is a chronological impossibility and the second, inherently improbable, is all the more so in the context of the Covenant Code.³⁵

If this means that because the “legal model” existed in the third millenium in parts of the Sumero-Akkadian civilization, and because the texts of the ancient Near Eastern law codes influenced those found in the Bible, therefore the “legal model” must be attributed also to the Biblical law codes, then it reflects a form of diffusionist theory that would have attracted criticism even in the nineteenth century. When a text from one legal system is received into another, the use made of the text in the recipient system will be a function of the needs, values and system of meanings of the latter, not the former.³⁶ Even a “bright-line” rule could be received from a system in which it functioned as an aid to adjudication, and used as a “self-executing” law in a system whose values and social organisation was different. More advanced legal systems can influence less advanced ones, without transforming them like magic into a more advanced stage: a more advanced system may influence the pace of change in a less advanced one, but it takes a very extreme form of diffusionism³⁷ to maintain (as Westbrook here appears to imply) that the effect of the advanced system is so transformative that it can completely obliterate all traces of the stage of development of the recipient system before the influence was brought to bear. The distinction drawn above between evolutionism in respect of individual rules and concepts,³⁸ and in respect of processes and cognitive ability is equally pertinent here. The recipient system adapts the borrowed rule to its own processes and cognitive style. How else can it make sense of it?

35. *Id.*

36. This is the answer to Westbrook’s observation that “[i]t is difficult to see how provisions that are so closely associated with an outside source can at the same time be the product of internal development from an earlier primitive version” (Westbrook 1994, *supra* note 1, at 21)—even if we were to accept the notion that such development as the literary-historical approach identifies is from “an earlier primitive” stage. A more sophisticated diffusionist model would insist that the recipient system accepts from the donor system only such “influences” as are compatible with its own system (or even, for some, stage of development).

37. Such as that of Alan Watson, *Legal Transplants: An Approach to Comparative Law* (Charlottesville, VA: University of Virginia Press, 1974).

38. This is certainly the emphasis in Westbrook’s diffusionist claims: “More than half of the Covenant Code’s provisions have some parallel in one or more of the cuneiform codes, whether in the form of the same problem addressed or distinction applied, a similar rule, or an identical rule.” Westbrook 1994, *supra* note 1, at 21.

But Westbrook is reluctant to contemplate *any* notion of diversity or change in the legal culture area of the ancient Near East.³⁹ To use such a model, he maintains, is anachronistic:

At first sight, it may seem obvious to assume that legal systems would change and develop considerably over hundreds, indeed thousands, of years. That, however, is an attitude derived from our own culture, where constant changes in technology, social structure, and ideology raise concomitant demands for reform of the law, demands which are met by the investment of considerable intellectual effort on the part of trained specialists.

The most striking feature of the cuneiform legal material, on the other hand, is its static nature. The basic pattern of contractual transactions found in Sumerian legal documents of the third millennium survives, differences of detail notwithstanding, throughout the cuneiform record. Some contractual terms, indeed, survive even longer, passing into Aramaic and Demotic documents.⁴⁰ Continuity is no less evident in the law codes, where the same rules, tests, and distinctions recur in codes separated by hundreds of years. Of course, there are also discrepancies between the codes, but discrepancies do not necessarily betoken a significant development in the law.⁴¹

Perhaps the changes in technology and social structure are significantly greater in modern societies than in the ancient Near East, but can we really deny—in the biblical context at least—the existence of ideological demands which prompted the investment of considerable intellectual effort? Does not the Bible attest the existence of competing strands of religious thought which prompted immense literary activity? What is anachronistic in the argument is the tacit assumption

39. Westbrook applies this also to the internal history of ancient Near Eastern law, denying in effect any significant cognitive growth:

From the mid third millennium to the end of the Bronze Age, the Near East saw no major advance in technology nor any radical change in social or political structure. Intellectual expression was dominated by Mesopotamian 'science,' a form of logic severely handicapped by inability to define terms, create general categories, or reason vertically from the general to the particular. A legal system cannot be more advanced than its social and intellectual environment: the social environment was hostile to change, while the intellectual environment lacked the tools to give legal expression to anything more than superficial reforms.

Westbrook 1994, *supra* note 1, at 27-28 (citing J. Bottéro, "Le 'Code' de Hammurabi," pp. 425-35, and Westbrook, *Studies*, pp. 2-5). In effect, this is an ethnocentric argument: the only significant intellectual development is that associated with Hellenism (see below). However, there are significant cognitive differences between the pre-Hammurabi collections and, for example, the Middle Assyrian Laws. See my articles cited in *supra* note 25. On the cognitive features of the Covenant Code, and its constituent sections, see sections III-IV below.

40. Westbrook 1994, *supra* note 1, at 22 (citing J. Muffs, *Studies in Aramaic Legal Papyri from Elephantine* (Studia et Documenta ad Iura Orientis Antiqui Pertinentia, 8; Leiden: Brill, 1969)). Of course, such terminological influence does not necessarily entail that the term received bears exactly the same meaning in the recipient system.

41. Westbrook 1994, *supra* note 1, at 21-22.

that law and religion can be separated in the Bible to at least the same extent as in the ancient Near East. Ideological demands certainly inform the history of the texts of biblical law, but they are the demands of competing religious ideologies—in our context, different conceptions of how divine justice may be made manifest in different adjudicatory and jurisdictional arrangements.⁴²

For Westbrook, however, the only possible engine of change is external influence, and for that, we must await the impact of Greek thought:

Beginning in the seventh century, the intellectual revolution documented in the Greek sources led to sweeping changes in the way that law was conceived and ultimately provided it with the intellectual tools for reforms to match the radical changes in social and political structures. The system that emerged remains the norm for us today. Its Near Eastern predecessor, on the other hand, was already a mature system when it first becomes accessible to us in Sumerian sources of the third millennium. The intellectual revolution that produced it lies further back in time, at a turning-point about which we can only speculate, whether it was the smelting of bronze, urbanization, or even the agricultural revolution. The common legal culture of the ancient Near East would not, then, have provided a framework for legal development in the Covenant Code.

The later biblical codes—the Deuteronomic and Priestly codes—share something of the intellectual ferment of contemporary Greek sources and thus some taste also of their new legal conceptions. The Covenant Code, on the other hand, although it cannot be dated with any confidence, looks back to the cuneiform codes of the second and third millennia.⁴³

Yet this argument is surely self-defeating. If the intellectual revolution documented in the Greek sources was indeed already beginning to be felt in the seventh century (before most of those with whom we associate that intellectual revolution had been born), then would this not in itself prompt a review of the (now backward-looking) Covenant Code? Or does Westbrook maintain that the present text of the Covenant Code was placed where it is within the Bible *before* that intellectual revolution? Either he must take an extremely conservative stance on the dating of the final editing of the Pentateuch, or he must maintain that later editors, affected by this intellectual ferment, incorporated an earlier, archaic code in its present position, without any review of its content and drafting. What possible reason could they have had to do so?

42. See particularly, Parts II.B and V, below.

43. Westbrook 1994, *supra* note 1, at 28.

C. *The Covenant Code and the Ancient Near East:
the Comparative Method and its Limitations*

Westbrook puts the issue of methodology in the study of the Covenant Code in terms of a stark choice: either we adopt the Roman model of legal development—and particularly the investigation of the literary history of the texts now found in Justinian's Digest—or we look to such models of textual amendment as are found in the ancient Near East. The Roman model is quickly rejected;⁴⁴ that leaves us with only one candidate—the ancient Near East, and in particular the two extant versions of the Hittite Laws. On the differences between these versions, Westbrook observes:

The important point about these changes, and the much more frequent additions and omissions in the later text, is that they are achieved without disrupting the logic of the provision or the thread of their discourse in any way. Were there no extant earlier version of the text, one would scarcely be aware from the later versions that it had ever existed, the presence of scattered archaisms in the language being the only indication. It would certainly be impossible to reconstruct anything of the earlier version. The assumption, therefore, that the process of editing the Covenant Code left tell-tale traces in the form of inconsistencies can only be justified by reference to a model far removed from it intellectually and culturally [viz., the Roman], while a model that stands in the same intellectual tradition supports no such conclusions.⁴⁵

He does allow, however, one concession as to the implications of the Hittite Laws for the literary history of the Covenant Code:

At most, the tendency that we have seen in the later version of the Hittite Laws, after the method of cuneiform science, to add new circumstances might justify concluding that in the Covenant Code as well certain rules subsidiary to a main problem, such as the distinction between a warned and unwarned ox in the case of ox goring ox, were secondary accretions.⁴⁶

So there we have our choice: Roman or Hittite. The Hittite is closer to the cultural milieu of the Bible; hence the Hittite must prevail. Yet the function of the comparative method, many rightly maintain, is not to reduce one system to the categories and methods of another, but rather to raise *hypotheses* which ultimately must be accepted or rejected on the basis of *internal* evidence. The nearest Westbrook comes to this is in the following observations:

44. *Id.* at 32-33, and with it (less justifiably) Koschaker's approach to the Laws of Hammurabi.

45. *Id.* at 35.

46. Westbrook 1994, *supra* note 1, at 35 (citing Schwienhorst-Schönberger, *Bundesbuch*, p. 121).

It could be argued that, the Hittite evidence notwithstanding, so special is the character of the biblical law and its role in the religious life of ancient Israel that its texts nonetheless acquired a canonicity that demanded more conservative editing. The Bible itself, however, attests to the contrary. There is a salient example within the Bible of the same law existing in an earlier and later version: the slave-release law of *Exod.* 21:2-6 and *Deut.* 15:12-18. The Deuteronomic version pays no respect to the earlier text, but changes the person of the verb and the identity of the slave and makes the transaction *ex latere venditoris* (from the seller's point of view) rather than *ex latere emptoris* (from the buyer's point of view).⁴⁷

Without accepting that *Deut.* 15:12-18 "pays no respect to" *Exod.* 21:2-6, the Hittite model is certainly apposite here, in the sense that "were there no extant earlier version of the text [viz. *Exod.*], one would scarcely be aware from the later version [viz., *Deut.*] that it had ever existed." Indeed, there is one further Biblical version of *Exod.* 21:2, which also has a different formulation, *Jer.* 34:14, if the same substance.⁴⁸ But the existence, within the Bible, of a technique of amendment by writing an entirely new version does not exclude the existence of other techniques, wherein the original version is subjected to textual amendment. Biblical scholars commonly associate the movement from the one type of technique to the other as reflecting the gradual canonisation of the texts—the process of attribution of sanctity, such that the text could no longer be simply replaced by another, but had to be preserved, even at the cost of subtle amendments.

This observation brings us to the crux of the methodological problem which Westbrook has posed. Our choice of comparative models is not confined to the Roman and the Hittite. The Bible itself is full of examples of what Westbrook calls the "conservative process of editing." The narrative sections of the Pentateuch—not least the narrative surrounding the Covenant Code itself—is replete with them. Westbrook seeks to wrench the Covenant Code from its place in biblical literature, and to view it exclusively in terms of a "legal model" (rightly or wrongly) attributed to the law codes of the ancient Near East. He writes:

Interpreters of the Covenant Code need to come to terms with the fact that it is part of a widespread literary-legal tradition and can *only* be understood in terms of that tradition.⁴⁹

47. Westbrook 1994, *supra* note 1, at 35.

48. "At the end of six years each of you must set free the fellow Hebrew who has been sold to you and has served you six years; you must set him free from your service." See further Jackson, *Wisdom-Laws*, forthcoming, chapter on Slavery.

49. Westbrook 1994, *supra* note 1, at 36 (emphasis supplied). He cites M. Malul, *The Comparative Method in Ancient Near Eastern and Biblical Legal Studies* (AOAT, 227; Neukirchen-

I shall, indeed, speculate about a stage at which the rules of the Covenant Code—and even major sections of it—may have circulated independently of its present narrative context. Even our understanding of that stage, one might argue, may legitimately be informed by hypotheses derived from other genres of biblical literature (just as Westbrook has sought to understand the Babylonian laws in terms of Babylonian omen texts⁵⁰). But much of the literary historical approach to the Covenant Code is directed towards changes prompted by the need to integrate the Code within a body of canonical texts now including other—potentially conflicting—material.⁵¹

Westbrook cannot accept the fact that the Covenant Code—whatever its pre-history—belongs to biblical literature. He concludes:

The starting point for interpretation must therefore be the presumption that the Covenant Code is a coherent text comprising clear and consistent laws, in the same manner as its cuneiform forbears. Apparent inconsistencies should be ascribed to the state of our ignorance concerning the social and cultural background to the laws, not necessarily to historical development and certainly not to an excess of either subtlety or incompetence on the part of their compiler.⁵²

This, apparently, notwithstanding evidence of subtlety elsewhere on the part of the biblical compilers. Various aspects of this subtlety will be observed in the sections that follow: for example, the links between the laws and the surrounding narrative, sophisticated patterns of arrangement (particularly, chiasmus), and thematic reiteration (in the laws themselves, as in the narratives about their revelation). In short, the “legal model” is an insufficient resource for our understanding of biblical law: law is here presented within a theological literature.

PART II. BIBLICAL LAW AND ITS USERS: THE COVENANT CODE AND THE WISDOM TRADITION

A. Wisdom-Laws and Their Development

The model of the Covenant Code which I oppose to that of Westbrook may be summarised in the following claims:

1. The Covenant Code discloses no essential difference in kind from the other biblical rule-collections. The *mishpatim* are neither

Vluyn: Neukirchener Verlag, 1990), pp. 140-43, arguing for a close literary dependence of the Covenant Code on the Mesopotamian law codes.

50. See *supra* note 8.

51. In this respect, the Roman model is indeed pertinent, notwithstanding the fact that we are not (in my view) here dealing with relations between texts which “were cited in court as binding authority.” Westbrook 1994, *supra* note 1, at 32.

52. *Id.* at 36.

“legal” as opposed to “ethical” or “hortatory”; nor are they essentially “secular” as opposed to “religious” or “cultic.” Rather, the Covenant Code, from the very earliest stage which we might speculatively infer, shares a similar character to the other collections, even though within its history we see differences in emphasis, in the interests which are reflected, in the audiences to which the material is directed, and in the communicative means used to address those audiences.

2. The common thread which links the various rule-collections in the Bible is not the concept of “law” but rather that of “wisdom.” But wisdom itself is no single, uniform phenomenon. It too has its history, which reflects different emphases and audiences at different stages, and which generates substantial variations in literary genre. Wisdom, I would claim, should be viewed as a value, not as a particular literary genre.
3. The history of biblical wisdom-law, as I shall now call it, is a history of increasing specialisation—a history which, incidentally, allows us to draw significant lines of both continuity and rupture with postbiblical developments, both Jewish and Christian.

All laws presented as such in the Pentateuch⁵³ are “wisdom-laws,” but to be understood within a developing concept of wisdom. They are wisdom, in the following senses. First, they are addressed to the individual citizen, rather than to institutions like courts.⁵⁴ Second, they emanate from “wisdom circles”—those circles usually being associated with, or enjoying the patronage of, the royal court. The distinction has sometimes been made between “popular wisdom” and scientific or didactic wisdom.⁵⁵ But such indications as we have of “popular wisdom” in the Bible are themselves mediated through literary channels, and probably reflect that conception of popular wisdom which those same court circles responsible for more sophisticated versions wished to propagate. The various Old Testament legal collections represent, in my view, wisdom presentations which represent different levels of sophistication, being designed for more and later less popular audiences.⁵⁶

53. As opposed to reflections of laws found in the narratives, for which the narrative thus claims historicity—claims which have to be assessed, on their merits, in each case.

54. Cf. R.N. Whybray, *Wisdom in Proverbs* (London: SCM Press, 1965), 14, stressing that wisdom as found in Proverbs is directed to the individual Israelite, rather than to Israel as a collectivity.

55. E.g. Whybray, *op.cit.*, at 22.

56. The view has not been lacking, contrary to the “legal model” which remains the dominant view, that Old Testament law is “people’s law,” not judges’ law: B. Gemser, “The Importance of the Motive Clause in Old Testament Law,” *Supplements to Vetus Testamentum* 1 (1953), 50-66, at 62.

B. *Wisdom Values in Dispute Resolution*

Of course, the style and vocabulary of the Covenant Code is quite different from that of what we normally term wisdom literature, particularly as represented by Proverbs. Of the legal collections, Weinfeld may be correct in suggesting that Deuteronomy, in particular, is to be most closely associated with wisdom as a literary genre. But it is not sufficient, as I suggested earlier, to view wisdom only in literary terms. It has its own values, which I shall now link to the values of the Covenant Code, even though the language and presentation is substantially different.

We are all familiar with the proverb (6:6):

Go to the ant, O sluggard Consider her ways, and be wise.

But how many recall the continuation? (vv.7-8):

Without having any chief, officer or ruler

She prepares her food in summer, and gathers her sustenance in harvest.

The bias here is anti-institutional. You don't need institutions to tell you how to behave, you can observe proper behaviour in nature.⁵⁷ Add to this the following passage from *Proverbs 25:7-9*, directed explicitly against the institutions of adjudication:

What your eyes have seen do not hastily bring into court.

For what will you do in the end when your neighbour puts you to shame?

Argue your case with your neighbour himself and do not disclose another's secret.

This passage comes from one of the two series within Proverbs which carry a specifically Solomonic by-line, and the view has been taken⁵⁸ that an early origin of these sections cannot be dismissed. If so, this takes us back to the early period to which the Covenant Code is often ascribed, though the argument I shall present would suggest that the Covenant Code at that period would not yet have been compiled into its present form.

It may be argued that the advice of Proverbs in this "Solomonic" passage—which in modern popular wisdom might be expressed: "Don't sue the bastards; some mud will stick"—actually presupposes that which I wish to deny, namely the actuality of the legal model. But here I must offer an important clarification. My argument is not that courts did not exist until much later as an adjudicatory agency;

57. I shall not pursue here the issue of "natural law" as reflected in such passages: see the articles of Bleich and Novak in *The Jewish Law Annual* 7 (1987).

58. E.g. Whybray, *supra* note 54.

rather it is that courts did not operate until perhaps the period of Ezra in the same way as do modern courts (or are popularly supposed to do), namely by the application of (mainly written) rules formulated in advance and handed down from on high. On the contrary, the evidence suggests that courts operated through some combination of common sense and intuitions of justice, tempered by local custom. Nevertheless, Proverbs counsels the Israelite to keep clear, and to argue the case out with one's neighbour in private. The converse of this is the wisdom emphasis on teaching within the household (e.g. *Prov.* 6:20-23).

The functioning of wisdom as an alternative dispute-resolution technique is illustrated in the story of the "wise woman" of Abel (2 *Sam.* 20:16-22), who succeeded in lifting the siege of the town by Joab, when seeking to put down the revolt of Sheba ben Bichri against David. The woman quotes an old saying:

They were wont to say in old time, 'let them but ask counsel at Abel' and so they settled a matter (v.18).

On this basis, she proposes to Joab that Sheba alone be surrendered (dead), and the siege be lifted. The dispute here is resolved not by war, but by practical wisdom—here embodied by the wise woman.

Gemser has observed the link between wisdom and legal practice in the context of a proverbial motive clause found within the Covenant Code: "And you shall take no bribe, for a bribe blinds the officials, and subverts the cause of those who are in the right" (*Exod.* 23:8), and cites evidence from other cultures of the use of proverbs as legal maxims for the actual resolution of disputes.⁵⁹

This, I suggest, is the context in which we should view the "arbitrary" character of many of the rules of the Covenant Code. To take just a few examples:⁶⁰

- the debt-slave has a fixed period of service, there can be no quibbling over whether the debt has been fully paid or not;
- in case of a relapse after an injury, either the victim was able to go out on his staff, in which case any subsequent death is not to be regarded as caused by the initial injury, or he is not;
- where injury is caused by a brawl, the need to identify the person who struck the particular blow is avoided by imposing collective responsibility (originally);

59. Gemser, *supra* note 56, at 64.

60. Discussed more fully in my "Practical Wisdom and Literary Artifice in the Covenant Code," in *The Jerusalem 1990 Conference Volume*, eds. B.S. Jackson and S.M. Passamaneck (Atlanta, Scholars Press, 1992), at 67-78, and in my forthcoming *Wisdom-Laws*.

- where my ox gores yours to death, we avoid debating whose animal started the fight, and haggling over the amount of damages, by dividing both the carcass of the dead ox and the market price of the survivor;
- where I kill an intruder to my premises, my act is justifiable if it takes place at night, not during the day;

and there are many other examples.

However arbitrary or objective are the rules designed to keep people out of court, there will always be occasions when fact-resolution seems virtually impossible. But wisdom itself has a solution. Divinely-bestowed wisdom was believed to be a special characteristic of kings.⁶¹ Recall *Proverbs* 16:10-11,

Inspired decisions are on the lips of a king; his mouth does not sin in judgment. A just balance and scales are the Lord's.

Again (*Prov.* 25:2):

It is the glory of God to conceal things, but the glory of kings is to search things out.

using the verb that was later to become technical for the cross-examination of witnesses, *hakirah*. This last, it should be noted, is the first item in one of the two small series of proverbs explicitly attributed to Solomon,⁶² and it is in precisely this intellectual context that we should interpret the famous "judgment of Solomon," in which he resolves what I dare to describe as a proverbially difficult issue of fact (*1 Kings* 3:16-28).⁶³

The story of the woman of Tekoah, whom Joab puts up to demonstrate to David the injustice of his behaviour to Absalom⁶⁴ also reflects this wisdom idea. The woman is described as a "wise woman"—like the one who resolved Sheba's rebellion.⁶⁵ At Joab's bidding, she goes to David pretending to be a widow who had two sons, one of whom had killed the other in a quarrel. She seeks David's protection against her kin, who are demanding the blood of the surviving brother. Her plea ends with a proverb (*2 Sam.* 14:7):

Thus they would quench my coal which is left.

David at first is taken in. He grants, eventually, protection to the surviving son (v.11). The woman then turns this judgment against David

61. Cf. Whybray, *supra* note 54, at 23.

62. *Prov.* 25:1, cf. Whybray, *supra* note 54, at 20-21.

63. See recently B.S. Jackson, "Envisaging Law," *International Journal for the Semiotics of Law/Revue Internationale de Sémiotique Juridique* VII/21 (1994), 311-334, at 322-324.

64. In a way not dissimilar from the story of Nathan's parable: the prophet on the one hand and the wise woman on the other behave in very similar ways.

65. Cf. Whybray, *supra* note 54, at 21.

himself: if he would protect the son who has killed his brother, he should also bring back Absalom from exile (v.14):

We must all die, we are like water spilt on the ground, which cannot be gathered up again.

The woman excuses her stratagem by flattering David in terms of the wisdom conception of the king's moral and intellectual capacity (v.17):

For my lord the king is like the angel of God to discern good and evil.

But now, David turns the tables on the woman. He had, indeed, been duped—but only for a moment. He realises, without more ado, that Joab was behind it, and he gets the woman to admit this. The story ends by stressing David's wisdom, just as it had begun by describing the woman as *hakhamah*. In admitting the instigation of Joab, the woman concludes: "But my lord has wisdom like the wisdom of the angel of God to know all things that are on the earth" (v.20).

Every society needs to construct an authorised source of ultimate knowledge. Here we have the wisdom solution. One may attach some historical credence to the setting. Before the bureaucracy has really developed, the handling of disputes is relatively simple. People should keep away from courts as far as possible, and they will be taught rules which assist them to do that; but when a matter arises which requires special powers of discernment, and especially if it involves people to whom the king owes a special interest—the widow, the poor (cf. *Prov.* 29:4)—then recourse is to the king, who will decide directly. As time went on, royal functions came to be devolved and diversified. But traces of the original conception survive very late. 2 *Chronicles*, for example, suggests that both King Hezekiah and King Josiah consulted God through an oracle directly (31:21, 34:3).

C. *Substantive Wisdom Connections*

This, then, is the level at which I believe we can assert the existence of a significant wisdom-orientation in the Covenant Code—the general value of private settlement as against institutional adjudication. But there are also a number of substantive connections between the Covenant Code and wisdom. I do not seek to overemphasise the links: one might expect some reflection of wisdom themes in almost any biblical literature. Ancient Israelite society was hardly so large and culturally advanced that we should imagine the existence of specialised scientific professions, each one protected against cultural influence from the others. The connections between the Covenant Code and wisdom to which I shall briefly draw attention are signifi-

cant if they indicate no more than this, that the Covenant Code developed in a context in which wisdom teachings were not unknown.

Take, first of all, the passage on straying and overburdened animals, which I argue in Part IV below fits in its present context, in *Exod.* 23:4-5, only because the general theme of that passage (which deals chiefly with perversions of justice) is enmity; and it is the enemy's ass that one is to return or to lift up. Compare with this *Prov.* 25:21, "If your enemy is hungry, give him bread to eat; and if he is thirsty, give him water to drink," and *Prov.* 10:12, "Hatred stirs up strife but love covers all offences." Beneficence to one's enemies is thus counselled not as an abstract moral ideal, but precisely because it will avoid strife, found paradigmatically in litigation.

A second example is the drafting of the law regulating the killer of an intruder (*Exod.* 22:1-2, MT). It presupposes an image of the thief as coming normally by night: the time (now, daytime) is mentioned only in *Exod.* 22:2, where the killing is treated as unjustified. Confirmation for the existence of the stereotype of the nocturnal thief comes from a wisdom source, *Job* 24:10.

Third, we may compare the equal ranking and protection apparently afforded to God and the political authorities in *Exod.* 22:27 (MT), "You shall not revile God, nor curse a ruler of your people," with *Prov.* 24:21, "My son, fear the Lord and the king, and do not disobey either of them."⁶⁶ In fact, the few references we find in the Covenant Code to institutional matters—other than the clear interpolations discussed in Part III—themselves reflect wisdom ideas. Thus, Gemser has compared *Exod.* 23:7, "Keep far from a false charge, and do not slay the innocent and righteous, for I will not acquit the wicked" with *Prov.* 17:15, "He who justifies the wicked and he who condemns the righteous are both alike an abomination to the Lord" (both passages specifically referring the matter to divine condemnation and judgment).⁶⁷

D. *Wisdom-Laws and Popular Teaching*

Yet there is another dimension to the wisdom tradition. It is not simply a set of practical instructions, an early example of the "What to do when . . ." genre of literature. Just as the Book of Proverbs is more than the sum total of the individual proverbs within it, so too the Cov-

66. See also Anthony Phillips, *Ancient Israel's Criminal Law* (Oxford: Blackwell, 1970), 42-43, 160 (identifying *nasi* in *Exod.* 22:28 with the king).

67. Gemser, *supra* note 56, at 65.

enant Code has a dimension beyond that of the solution of the individual, practical problem. I refer not to those deep, structural relationships which only a sophisticated analysis of the literary relations within the document might tease out, but rather to the didactic potential of the document in terms of those problems which immediately spring to mind from a naive reading of the text, and which become all the more acute when one brings the various passages into relation with each other. The very “arbitrariness” of many of the rules is itself a didactic resource in this context. The formulation of the rule seems designed specifically to draw forth from the audience an objection, which will then give rise to further discussion. Take the rule laid down for the payment of ransom, *kofer*, for the life of a free person killed by a goring ox. We are told that the *ba'al* of the animal shall pay “whatever is laid upon him” (*Exod.* 21:30). Can you hear the audience respond: “*Whatever (!) is laid upon him?*” To which the underlying presupposition would be offered as an answer: the owner is not in these circumstances allowed to try to bargain down the kin of the deceased, despite the unusual circumstances of the homicide, but nevertheless the kin of the deceased are expected not to abuse their rights. Or again: “When a man leaves a pit open, or when a man digs a pit and does not cover it, and an ox or an ass falls into it, the owner of the pit shall make it good . . .” (*Exod.* 21:33-34). Can you hear the audience respond—as have some modern scholars—“Even when the owner of the pit could not help himself?” That could lead very easily to an explanation of the underlying principle of liability, not in terms of conceptual categories, but by reference to comparable legal parables: the duty to enclose the roof with a parapet (surely a customary obligation long before it was taken up by Deuteronomy). These rules, I maintain, served as paradigms, not as statutory definitions. The discussion to which they would give rise would therefore be addressed not to linguistic questions comparable to our statutory interpretation—the “semantic” question whether a particular situation is “covered” by the meaning of the words—but rather to substantive analogies, whether the particular situation is sufficiently similar to the typical narrative image evoked by the words.⁶⁸

68. Examples are discussed in my commentary on the Covenant Code, in *Wisdom-Laws*, forthcoming, esp. at ch. 5. This approach provides the answer, for example, to the rabbinic objections to a literal understanding of the remedy of *Exod.* 21:35 (and discussed in my *Essays*, *supra* note 22, at 130-35): though the relative values of the two animals are not mentioned in the text, and thus an incident between two oxen of whatever value disparity would be equally “covered” by a semantic reading of the law, the narrative image evoked by the words cannot have been neutral as to values, since it was an image of actual oxen, not of oxen in the abstract, or

The written rules, we are told, were *taught* by the officials of Jehoshaphat (II.E, below). They are not said to have been “commanded.” Should we assume that only progressive educationalists in modern times have understood the interactional aspects of good teaching?

E. *Wisdom-Laws and the Literary Audience*

Wisdom itself came to be conceived in increasingly sophisticated terms. Its literary products became more specialised, directed toward narrower audiences. We thus get the development of a form of wisdom which may be described, in a sense different from that of the classical opposition, as “speculative,” rather than the “practical” wisdom with which we have been concerned thus far. It is likely that this development is associated with the change from speech to writing as the principal medium of transmission of wisdom—a change with profound implications not only for the audience to which wisdom was addressed, but also for its whole conceptual structure.⁶⁹ The need for writing in the context of diplomacy and administration no doubt provided the spur, and the model of the Mesopotamian and Egyptian scribes, whose functions are described by Weinfeld as “clerical, political and didactic,” was already at hand.⁷⁰ It was soon realised that writing could be used not only to communicate with others who could read, but also to ensure that an oral audience received precisely the teachings which those in authority desired, through the reading to them not only of proclamations but also of authorised wisdom. This is the context, as Weinfeld suggests,⁷¹ in which we find the Judaeans performing a religious-didactic function, as seen in the reading by the king’s officers (accompanied by Levites) of the *sefer torat adonai* in all the cities of Judah, when they were sent there “to teach” (2 Chron. 17:7-9). Weinfeld compares an inscription of Sargon: “To

propositions about oxen. If the typical narrative image is one of approximate equality of value, then a case in which the value of the surviving ox is so much less than that of the dead ox that the owner of the dead ox suffers the bulk of the loss (or even—where the cadaver is worth more than half the price of the surviving loss—the owner of the gorer is enriched) would not be regarded as simply being “covered” by the meaning of the words, but rather would be so remote from the narrative image that recourse to a different form of dispute resolution would be indicated. For the theory underlying this distinction between semantic and narrative readings, see my *Law, Fact and Narrative Coherence* (Merseyside: Deborah Charles Publications, 1988), esp. ch.4; and my *Making Sense in Law*, *supra* note 24.

69. See further Walter J. Ong, *Orality and Literacy*, 1982, and in the legal context, Jackson, *Making Sense in Law*, *supra* note 24, §2.4.

70. M. Weinfeld, *Deuteronomy and the Deuteronomic School* (Oxford: Clarendon Press, 1972), 162.

71. See *id.* at 163-64.

teach them (the natives of Assyria) the teaching of fearing God and king, I sent officers and overseers.” It was surely a natural development for such circles to begin to write also for each other, here adopting a more sophisticated approach than would be appropriate for popular teaching.

A number of features of the Covenant Code reflect such “speculative” wisdom. They are features which seem not to belong to the earlier stage of the history of this material, that of the individual paragraphs, but to have been added at later stages, some as late as the stage at which the Covenant Code was incorporated into its present narrative context.⁷² First, there is sophisticated literary patterning which by definition cannot precede the assembly of the intermediate units: for example, the arrangement of the first intermediate group after the introduction to the Covenant Code, *Exod.* 21:2-27, according to a chiasmic pattern.⁷³ Again, we encounter examples of word-play, which result from the compilation process. The root *beth-aleph-resh* is used in different senses in *Exod.* 22:4 and 22:5. Cassuto saw this as deliberate word-play and interpreted it as a mnemonic device, presupposing oral transmission.⁷⁴ But the word-play results from a juxtaposition which occurs in the process of compilation. The laws on depasturation (22:4) and fire (22:5) are *not* presented as part of a single paragraph: the second rule, for fire, commences as an independent unit, introduced by *ki*, not *im*. The word-play, I would suggest, is a literary device, designed for a sophisticated audience. The same can be said of the phonemic play in *Exod.* 22:9, dealing with liability of a shepherd. I have suggested that the original text had an *ayin*, meaning “without a shepherd.” A later hand altered the *ayin* to an *aleph*, to mean “with no-one seeing.” The focus thus came to be evidentiary

72. Even in Babylonia, Westbrook concedes, the so-called law-codes have a significant literary history. The legal material which forms their content is similar throughout the seven documents Westbrook considers, but that material is found within different literary frames. Some of the documents, for example, have prologues and epilogues, others lack them. Thus, some can be regarded (in their present form) as “royal apologia,” while others cannot. Westbrook infers from this that the legal corpora themselves originally existed as independent units with an independent purpose, and were then used for other purposes, by being incorporated within different literary frameworks. Westbrook 1985, *supra* note 3, at 250-51. He thinks that the Middle Assyrian Laws and the Hittite Laws most clearly manifest the original purpose, while the other five had been adapted either as royal apologia or as school texts, sometimes as both.

73. See *infra* Part IV.C. The existence of chiasmus in legal texts is vividly demonstrated by the law enunciated in the case of the blasphemer (*Lev.* 24:13-23), III.C, below. In my *Wisdom-Laws*, forthcoming, chapter on homicide, I discuss the chiasmic structure within *Numbers* 35:17-23.

74. Umberto Cassuto, *A Commentary on the Book of Exodus* (Jerusalem: Magnes Press, 1967), 284; and see B.S. Jackson, “A Note on Exodus 22:4 (MT),” *Journal of Jewish Studies* 27 (1976), 138-39.

difficulty, rather than such fault as consists in failing to look after the animal.⁷⁵ But a sophisticated audience would have recognised the skill, not least because of the juxtaposition of this law with another which states as a criterion that the "keeper is not with it" (*Exod.* 22:13), not to mention the various linguistic as well as substantive evocations which the bringing together of these paragraphs produce with the story of Jacob's shepherding.⁷⁶

When we reach the incorporation-stage, a whole gamut of expressed and implied cross-references emerges.⁷⁷ Though individual parts of it may have been perceptible to a popular audience, in its totality it seems to be "speculative wisdom," rather than popular teaching. Again, many of those provisions which reflect foreign influence seem to have originated in the process of compilation.⁷⁸ The story of Jethro's advice to Moses regarding the structure of the judicial system itself certainly presupposes the legitimacy of the use of foreign models in the legal sphere. Some⁷⁹ have supposed that the Israelite scribal class had contacts with its counterparts in other courts in the area.

More difficult to assess are the structural relations which I have identified between particular paragraphs: the relationship between the *eved* and *amah* paragraphs,⁸⁰ the opposition between normal and abnormal conduct, reflected particularly in the separation of the goring ox provisions from those on depasturation,⁸¹ but more generally informing the division of the "legal section" of the Code between the two "intermediate collections";⁸² the understanding that the thief, notwithstanding his crime, is an "insider" and should therefore be subjected, if he has not the wherewithal to pay, only to that form of slavery which is equally appropriate for "insiders."⁸³ I suspect that this particular facet of the material strikes us as more sophisticated than it really is, simply because of the cultural contingency, and therefore lesser familiarity to us, of the particular manifestations of the binary

75. Jackson, *Wisdom-Laws*, forthcoming, chapter on shepherding contracts.

76. Compare *Gen.* 29:13 with *Exod.* 22:12, *Gen.* 30:16, 18 with *Exod.* 22:14b.

77. See *infra* Part IV.

78. For example, the deposit law, the reinterpretation of the miscarriage paragraph, and indeed the shepherd's oath, all discussed in detail in *Wisdom-Laws*, forthcoming.

79. E.g. Whybray, *supra* note 54, at 17-18.

80. Argued in Jackson, "Biblical Laws of Slavery: a Comparative Approach," in *Slavery and other Forms of Unfree Labour*, ed. L. Archer (London and New York: Routledge, 1988), 86-101 (History Workshop Series), and in *Wisdom-Laws*, forthcoming.

81. Jackson, *supra* note 12, at 19-25.

82. See *infra* Part III.C.

83. Jackson, *Theft*, *supra* note 32, at ch.1; further, *Wisdom-Laws*, forthcoming, chapter on theft.

oppositional structures which are involved. Certainly, the use of comparable devices in the course of individual narratives (such as the transformation of insider/outsider in the Jacob/Laban narrative⁸⁴) might well have been designed to tickle the sensitivities of a popular audience.

None of this is to suggest that either the compilation of the Covenant Code or its incorporation into the Biblical narrative were prompted solely, or even primarily, for speculative ends. On the contrary, those engaged in these processes had practical aims in view, some of them concerned with the modification of practice (even if it was not judicial practice) on particular issues (such as individual as against collective responsibility following a brawl); elsewhere directed to larger questions, such as the advancement of particular jurisdictional claims. Insofar as the audience for the promotion of such aims itself became more educated, a means had to be adopted to clothe these claims with the veneer of wisdom, in its increasingly sophisticated form.

PART III. THE LITERARY HISTORY OF THE COVENANT CODE

A. Introduction

How far can we reach behind the final text of the Covenant Code, to trace the literary history of the document? What types of units, if any, existed before the finalisation of the present literary structure? And what kind of editorial activity is manifest in such earlier stages of the text as we can reconstruct? Two types of criterion are available: first, the literary characteristics of the Covenant Code itself and its relationship to other biblical norms of comparable content; second, such evidence as we have regarding the users of such normative texts, and their purposes.

Much of any attempt to reconstruct the literary history of the Covenant Code must be speculative. But the problems of the present text will not go away, *pace* Westbrook. In revisiting such questions, perhaps we can at least refine our criteria, even if substantive results remain contested.

I suggest that we can identify at least three and perhaps four stages in the literary development of these texts, representing progressive stages of collection. There are some traces—dim, I grant—of a stage when some, at least, of the paragraphs which make up the Cove-

84. Jackson, *Theft*, *supra* note 32, at 7-8.

nant Code existed in isolation, or in very small groups. A second stage sees the collection of such paragraphs into what I call "intermediate units." But what appears as a unit according to the final literary structure of the text does not necessarily represent an intermediate compilation in the sense for which I am here arguing.⁸⁵ Third, there is what I shall term the "compilation-stage," when the intermediate units are brought together. Finally, the "incorporation-stage"—the stage at which the collection was incorporated into the present narrative structure. Whether the compilation-stage and the incorporation-stages were distinct, and thus that something like the present Covenant Code existed independently before it was put into its present narrative place, is not clear. Some aspects, at least, of the final arrangement appear to depend upon the process of incorporation; thus, it is difficult to reconstruct how the Covenant Code might have looked at any such distinct compilation stage.

Exod. 21:2-27 and *Exod. 21:28-22:16*, I shall argue, represent two such separate intermediate units—less, in both cases, certain accretions due to later editorial activity. As for the dating and nature of the editorial activities, a complex picture emerges. Some items can be regarded as "Deuteronomic," while others are positively anti-Deuteronomic. But it is not possible to correlate such activity with Wellhausian source criticism. While some of the non-Deuteronomic editorial activity could well have been the work of priestly compilers at the incorporation-stage, there are other examples of such activity which must precede priestly material found elsewhere in the Pentateuch. And there is the evidence of Jeremiah on the slavery laws, which seems to suggest that the incorporation-stage had occurred already by the time he was writing.

The thesis that the Covenant Code existed as one or more collections of norms, before the "incorporation-stage," seems to me to be quite clear from the evidence of the narrative line of the Sinaitic pericope. Recall *Exod. 24:3-8*, where the story resumes⁸⁶ after the divine speech which had begun at *Exod. 20:22*, continued with the Covenant Code (*Exod. 21:1-23:18*) and concluded with the promises regarding

85. For example, the altar-pericope, *Exod. 20:22-26*, is argued in Part IV below to go with the first few paragraphs of the Covenant Code proper (*Exod. 21:2-17*), as a series recapitulating almost completely the sequence of the Decalogue. That is not to suggest that it existed earlier as an independent, "intermediate unit."

86. *Exod. 24:1-2* cannot be original. Moses is already with God at this point in the narrative. These verses anticipate a different tradition of revelation, one directly involving Aharon and his sons, which is taken up again in 24:9.

the angel who will guide the Israelites through the wilderness, and the conquest of the promised land (*Exod.* 23:20-33):

(3) Moses came and told the people all the words of the LORD and all the ordinances; and all the people answered with one voice, and said, "All the words which the LORD has spoken we will do." (4) And Moses wrote all the words of the LORD. And he rose early in the morning, and built an altar at the foot of the mountain, and twelve pillars, according to the twelve tribes of Israel. (5) And he sent young men of the people of Israel, who offered burnt offerings and sacrificed peace offerings of oxen to the LORD. (6) And Moses took half of the blood and put it in basins, and half of the blood he threw against the altar. (7) Then he took the book of the covenant, and read it in the hearing of the people; and they said, "All that the LORD has spoken we will do, and we will be obedient." (8) And Moses took the blood and threw it upon the people, and said, "Behold the blood of the covenant which the LORD has made with you in accordance with all these words."

Here, the narrator tells us that Moses first relates the words of God to the people orally, that they proclaim their acceptance of them, that he then writes them down, and finally reads out the written version in the context of a covenant ceremony. Although *devarim* (here translated "words") are mentioned four times in this passage, we hear of *mishpatim* only once, in the first verse of the pericope, where Moses relates all God's *devarim* and *mishpatim* (here translated "ordinances") to the people. This suggests strongly that the giving of *devarim* was incorporated in the narrative structure before the giving of the Covenant Code. And this terminological distinction, between *devarim* and *mishpatim*, corresponds exactly to the introductory formulae of the Decalogue on the one hand (*Exod.* 20:1, *devarim*⁸⁷) and the so-called Covenant Code (*Exod.* 21:1, *mishpatim*) on the other. The introductory formula of the Covenant Code probably derives from the same editorial hand which inserted "Covenant Code" in *Exod.* 24:3, since the manner in which he introduces that collection (*tasim lifneyhem*) echoes the terminology used to offer the first Sinaitic covenant (*vayasem lifneyhem*) in *Exod.* 19:7. The fact that the Covenant Code has its own introductory formula suggests that it already existed as a unit before it was incorporated into the present narrative, and thus that there were separate "compilation" and "incorporation" stages; otherwise, it would have been simpler to have added normative paragraphs to the account of the covenant in *Exod.* 19.

87. Despite the later adoption of the feminine form, *aseret hadibrot*.

B. Individual Paragraphs

The concept of revelation of individual rules and instructions seems to have preceded that of the revelation of whole bodies of rules. We can see the historical process reflected in a number of narratives. In the story of the daughters of Zelophehad (Numbers 27), we have an oracular consultation to determine a specific case, followed by proclamation of a number of rules—in literary terms, a “paragraph” corresponding to those of the Covenant Code—all closely related in subject matter to the subject of the specific enquiry. The story is not unique in claiming piecemeal revelation of rules during the period of the desert wanderings.⁸⁸ That such a pattern was not invented for the purposes of revelational history is suggested by the account of David’s booty law, where we find a parallel structure of individual decision followed by later proclamation. After the defeat of the Amalekites, and the recovery from them not only of the booty they had taken from David’s city of Ziklag (including his two wives) but also of the livestock of the Amalekites, David is met with the argument that only the 400 warriors who had actually engaged the Amalekites should share the booty, to the exclusion of the other 200 warriors who had started the pursuit with them, but had been too exhausted to complete it, and had been left behind at the brook of Besor. David rules for equal shares. He responds to the proposal with a direct command: “You shall not do so”—*lo ta’asu khi* (I Sam. 30:23). He continues with the reasons: it was God who looked after us, by giving us victory over the Amalekites and endowing us with their flocks; the proposal would therefore be unfair. Then he gives his positive order: “Behold the share of he who goes down into the battle and of he who stays behind with the equipment shall be divided equally” (v.24). Then the narrator continues: “And it was so from that day onwards, and he established it as a statute for Israel, until this very day.” The pattern here is the same as that in the story of the daughters of Zelophehad. We have a complaint, followed by a decision, followed by the enunciation of a general and continuing rule.⁸⁹

88. Discussed further below, in Part V.

89. In the case of Zelophehad, the latter stage is given more prominence, through the reiteration of the terms of the decision as a general rule; indeed, the general rule, which Moses is commanded by God then to pronounce, goes beyond the circumstances which had actually arisen in the case of the daughters themselves, since we are told what is to happen even when there are no daughters. Here, in the case of David, we also have a degree of discrepancy between the decision in the particular case, and the general law that follows. In the preceding narrative, nowhere are we told that the reason for leaving the 200 men behind at the brook of Besor had been to look after the equipment; on the contrary, we are twice told that they were

The story of Josiah's discovery of the lawbook in the temple is very different: here we do have the concept of revelation of an entire body of laws, and with it a convergence of written law and covenant. That there was a covenant ceremony can hardly be doubted, although neither the version in Kings nor that in Chronicles gives us details of any accompanying ritual. The emphasis of the narrative is first on the discovery of the law-book, and then on actions directed by the king for its implementation: the covenant ceremony itself is recorded in a single verse (2 *Ki.* 23:3). Particularly significant are the terminological parallels with the pericope of *Exod.* 24:3-8. As in *Exod.* 24, there is first a public reading of the text—*vayikra be'ozneyhem et kol divrei sefer habrit hanimtsa bebeit adonai* (2 *Ki.* 23:2), with which we may compare *Exod.* 24:7, *vayikah sefer haberit vayikra be'oznei ha'am*—and then a commitment to observe the laws of this book: *lehakim et divrei haberit hazot, haketuvim al hasefer hazeh* (2 *Ki.* 23:3).⁹⁰ Unlike the ambiguous Pentateuchal terminology used when indicating the content of Israel's obligations, the narrator here makes it clear beyond even a lawyer's quibble that the rediscovered book (whatever it was) formed the content of the covenant obligations. Yet if the Josiah narrative takes us a long way towards a convergence of covenant and written law, there still remains an important element of what must surely have been the earlier pattern. Josiah at first seeks reassurance regarding the status of the new book, so he goes to the prophetess Huldah, to consult God, *lidrosh et adonai* (2 *Ki.* 22:13, 18).⁹¹ In the

left there because they were exhausted, with no hint on either occasion of any further reason. But in the general rule which David pronounces, the equal shares are to be between the warriors and those who stayed behind looking after the equipment. Interestingly, the version which is found in *Numbers* 31 differs in that it contains no suggestion at all that the division there ordained should be followed in the future. The instruction occurs in a narrative context in which there is real booty to be divided, the result of a campaign against the Midianites. The first instruction is given not by Moses but by Elazar the Priest, but nevertheless is described as *hukat hatorah* (31:21); this relates to the means of ritual purification of the booty. Then God tells Moses to count the booty, and divide it into two parts, between the warriors who went out to battle and all the congregation—not the same, we may note, as the instructions of David. Various deductions are to be made from the two halves, for the benefit of the priests and the Levites. The chapter goes on to give the results of the count, and of the consequent distribution (vv.32ff.). What we lack is any indication that such instructions are to be of continuing validity: God simply tells Moses to do something, and he does it. God does not tell Moses to “say to the people of Israel” that this is the rule which shall in future be observed.

90. This is not the place to consider further the literary relations between 2 *Ki.* 23 and *Exod.* 24. But we may note that in the Josiah story, there follows a catalogue of the foreign cults which Josiah suppressed, a real pandemonium. One detail perhaps recalls the incident of the golden calf in *Exodus*: the *Asherah* is burned and its dust is scattered.

91. The verb *darash* is also used elsewhere of individualised divine consultation, through a prophet or oracle (see Jackson, *Theft*, *supra* note 32, at 242), for example, in the procedure used by Moses to adjudicate all Israelite disputes before he accepted Jethro's advice that he had better things to do with his time (*Exod.* 18:15). Later, especially in Chronicles, the terminology was

Josiah story itself, we thus see the transition from individualised revelation to the promulgation of general rules.

There is, of course, a distance between revelation of individual laws, and revelation of entire corpora of law, corpora sufficient to be described by the biblical authors themselves as a *sefer* (book). We may expect the development to have been gradual. We do, indeed, have evidence of such a process of elaboration. What I have called above the "first Sinaitic covenant" (first in terms of the narrative of what happened at Sinai) is an agreement for special protection ("special people" status, *am segullah*) in exchange for loyalty to God: "if you will obey my voice and keep my covenant, you shall be my own possession among all peoples; for all the earth is mine, and you shall be to me a kingdom of priests and a holy nation" (*Exod.* 19:5-6).⁹² In the Decalogue itself, as argued below,⁹³ the first pentad spells out

used more generally for following God, as in the Covenant of Asa. But even *Chronicles* preserves an example of the earlier, more specific notion, in the consultation by Saul of a medium (1 *Chron.* 10:13-14), a sin held out as one of the causes of his death.

92. Comparable to the covenant relationship as described in the Abrahamic narratives, where loyalty is tested by the *akedah*. On only one of the several occasions where a covenant is mentioned (or implied) between God and Abraham is it linked with the obligation to obey laws—and on that occasion the law is specific (circumcision) and closely related to the narrative context (*Gen.* 17:1-14). At the very beginning of the Abraham cycle, we have the divine promise:

Go from your country and your kindred and your father's house to the land that I will show you. And I will make of you a great nation, and I will bless you, and make your name great, so that you will be a blessing. I will bless those who bless you, and him who curses you I will curse; and by you all the families of the earth shall bless themselves.

(*Gen.* 12:1-3). After the period of Abraham's residence in Egypt, and the separation from Lot, there is a reiteration of the promise, now related to possession of the land:

Lift up your eyes, and look from the place where you are, northward and southward and eastward and westward; for all the land which you see I will give to you and to your descendants for ever. I will make your descendants as the dust of the earth; so that if one can count the dust of the earth, your descendants also can be counted. Arise, walk through the length and the breadth of the land, for I will give it to you.

(*Gen.* 13:14-17). In *Gen.* 15:18, God's reiterated promise of the land (which Abraham had questioned) is explicitly presented as a covenant (the *berit ben habesarim*). The later reaffirmation of God's promise after the *akedah*, though not explicitly described as covenant, again links loyalty with future protection. The angel of the Lord tells Abraham:

By myself I have sworn, says the LORD, because you have done this, and have not withheld your son, your only son, I will indeed bless you, and I will multiply your descendants as the stars of heaven and as the sand which is on the seashore. And your descendants shall possess the gate of their enemies, and by your descendants shall all the nations of the earth bless themselves, because you have obeyed my voice.

(*Gen.* 22:16-18). We may note also the same themes in the account of Abraham's relations with his political rivals:

At that time Abimelech and Phicol the commander of his army said to Abraham, "God is with you in all that you do; now therefore swear to me here by God that you will not deal falsely with me or with my offspring or with my posterity, but as I have dealt loyally with you, you will deal with me and with the land where you have sojourned.

And Abraham said, "I will swear" (21:22-24).

93. See *infra* Part IV.C.

what is entailed in this obligation of loyalty, representing a progression from a simple affirmation to a small intermediate collection of norms. As has been widely noted, the narrative in Deuteronomy seems to limit the covenant at Horeb to the Decalogue. The idea that the covenant extended to a whole corpus of law seems to belong to the late stages of editing of the Pentateuch. We may note that these historical developments well exemplify the theory of Sir Henry Maine, that the idea of *themistes*, divinely inspired individual decisions, preceded "the conception of the deity dictating an entire code or body of law."⁹⁴

There is also internal evidence that some of the rules of the Covenant Code had an independent existence, even before the compilation stage. This, I take it, is presupposed by Daube's theory of the *lex clausulae finalis*. Several of the paragraphs of the Covenant Code display the characteristic of an addition made not in its strictly logical place, but at the end of a sequence. Daube provides persuasive argument that this is the case, for example, in the theft paragraph:⁹⁵ there is good reason to believe that the provision for the insolvent thief, and the last rule in the paragraph, represent successive additions to a previously independent text, rather than (as some modern translations presume) being the result of scribal error in the sequence of the clauses. Daube also argued that the goring ox provisions reflect a similar development: there was a paragraph consisting originally of the rules (or some of them) concerning an ox which kills a human being, then an ox (or an ass) which falls into a pit. Subsequently, a rule regarding an ox which kills another ox was added, but this was done at the end, rather than being interpolated in its more logical place.⁹⁶ My own view, here, is that the addition, if any, is restricted to verse 36, that being a second rule regarding an ox which kills another ox.⁹⁷ Yet even without the application here of the *lex clausulae finalis*, it is not impossible that these paragraphs, involving injury caused by oxen on the one hand and caused to oxen on the other, might have circulated together at some stage. We may compare a small Babylonian collection on the laws of rented oxen.⁹⁸

94. Sir Henry Maine, *Ancient Law* (London: John Murray, 1861), 10, cf. 14.

95. Discussed above, in I.A.

96. Daube, *supra* note 27, at 85-88.

97. Jackson, *Essays*, *supra* note 22, at 141-152.

98. Martha T. Roth, "The Scholastic Exercise: Laws about Rented Oxen (Sumerian Texts)," *Journal of Cuneiform Studies* 32 (1980), 127-46.

On the other hand, there is one paragraph of the Covenant Code which could not have circulated independently, at least in its present form. The paragraph on the *amah* commences (*Exod.* 21:7) with a cross-reference to the rule regarding the liberation of the *eved* in the seventh year: "When a man sells his daughter as a slave, she shall not go out as the male slaves do." In its present context, that is clearly a reference to the first rule of the *eved* paragraph: "When you buy a Hebrew slave, he shall serve six years, and in the seventh he shall go out free, for nothing." It could, of course, be argued that the rule on the liberation of the *eved* was so well-known that the *amah*-law could have circulated independently. But why would it have been formulated in this way, had it been an independent paragraph? It would hardly have been inconvenient to state explicitly that the woman does not go out in the seventh year (presuming that to be the meaning). There is, to be sure, another cross-reference in the *amah* paragraph, and here it is not to a rule found explicitly in the Covenant Code. Verse 9 says that if the purchaser of the *amah* designates her for his son, he shall deal with her *kemishpat habanot*—perhaps here best translated, "according to the rules applicable to daughters."⁹⁹ The expression is of interest, in showing that *mishpat* could be used with reference to well-known rules of a customary origin, and need not be restricted to rules resulting from either judicial decision or divine revelation.

C. *Intermediate Collections*

I turn now to the evidence for "intermediate compilations." We can discern the existence of two such within the "legal" material, namely *Exod.* 21:2-27 and *Exod.* 21:28-22:16. The two compilations appear as distinct on criteria of arrangement, language and theme.

I begin with arrangement. At first sight, even the "legal" section of the Covenant Code appears chaotic in its arrangement. First we have the slavery laws, then a collection of capital provisions expressed in the participial form (and clearly interpolated with later material), then a casuistic series in which fatal and non-fatal injuries are mixed. These various provisions are arranged neither in groups of fatal v. non-fatal injuries, nor in terms of the status of the offender or the victim. Certainly, the pattern of assault on a free man followed by assault on a slave is found in the ancient Near East, and goes some

99. RSV: "He shall deal with her as with a daughter." I have argued that this particular verse is secondary; see Jackson, *Essays*, *supra* note 22, at 152.

way towards explaining the sequence of material from *Exod.* 21:18 to *Exod.* 21:27. But on closer inspection, this hardly works. The final provision regarding assault upon a slave hardly correlates with the immediately preceding provisions regarding assault on free persons, those being the provisions relating to miscarriage. Indeed, one can see the point of Rofé's argument¹⁰⁰ that the whole of *Exod.* 21:22-25 is interpolated from a different source. For if we were to take that whole paragraph away, the provisions regarding the loss of the eye or the loss of the tooth of one's own slave would immediately follow upon the provisions regarding fatal injuries to one's own slave.

But there is, I would suggest, a different solution, one which links this intermediate compilation far more closely with literary patterns detectable elsewhere in the texts of biblical law. I believe that we have here a chiasmic structure, consisting of the following:

- A1 *Exod.* 21:2-11 Liberation of male and female slave
- B1 *Exod.* 21:12-17 Capital provisions
- C1 *Exod.* 21:18-19 Injuries from a brawl
- D *Exod.* 21:20-21 Fatal assault on one's own slave
- C2 *Exod.* 21:22-23 Brawl affecting a pregnant woman
- B2 *Exod.* 21:24-25 Talionic provisions
- A2 *Exod.* 21:26-27 Liberation of male or female slave.

It may be noted that the two B elements are correlated not (or not primarily) in terms of their content, but rather in terms of their form: they are the only sets of provisions which digress from the standard casuistic form. There may also be an element of thematic correspondence, in the sense that the first of the participial provisions invokes the death penalty for murder, which can be understood as an application of the talionic principle.¹⁰¹

The narrative of the blasphemer provides striking evidence that collections of disparate material, arranged in a chiasmic fashion, could be conceived as independently promulgated units. Here, the termini of the unit are fixed by the narrative: a speech of God, whose beginning and end are clearly specified. Within that unit, we have a chiasmic arrangement, encompassing the status of resident aliens,

100. Alexander Rofé, "Family and Sex Laws in Deuteronomy and the Book of the Covenant," *Beth Mikra* 68 (1976), 19-36 (Heb.).

101. It should also be noted that this hypothesis appears to presuppose that the talionic formula was interpolated before the compilation-stage. I say, "appears to presuppose," because there is an alternative. If we delete the talionic formula, we could still divide the miscarriage provisions, so that the injury to the fetus in verse 22, resulting as it does from a brawl, remains correlated with verses 18-19, while the participial provisions now become correlated with verse 24, ending as it does with the formula *nefesh tahat nefesh*.

homicide, non-fatal injuries, killing animals, and centering upon the talionic formula (*Lev. 24:13-23*):¹⁰²

- A1 13 And the LORD said to Moses,
 B1 14 "Bring out of the camp him who cursed; and let all who heard him lay their hands upon his head, and let all the congregation stone him.
 C1 15 And say to the people of Israel, Whoever curses his God shall bear his sin.
 D1 16 He who blasphemes the name of the LORD shall be put to death; all the congregation shall stone him; the sojourner as well as the native, when he blasphemes the Name, shall be put to death.
 E1 17 He who kills a man shall be put to death.
 F1 18 He who kills a beast shall make it good, life for life.
 G1 19 When a man causes a disfigurement in his neighbour, as he has done it shall be done to him,
 H 20 fracture for fracture, eye for eye, tooth for tooth;
 G2 as he has disfigured a man, he shall be disfigured.
 F2 21 He who kills a beast shall make it good;
 E2 and he who kills a man shall be put to death.
 D2 22 You shall have one law for the sojourner and for the native; for I am the LORD your God."
 C2 23 So Moses spoke to the people of Israel;
 B2 and they brought him who had cursed out of the camp, and stoned him with stones.
 A2 Thus the people of Israel did as the LORD commanded Moses.

Indeed, *Lev. 24:13-23* presents more than a purely formal parallel to our first "intermediate collection" (*Exod. 21:2-27*): many of the individual themes are common, as indeed may be the common underlying theme—that of the possible forms and incidents of quarrels. It is this which provides the narrative setting of the case of the blasphemer, which commences (v.10):

Now an Israelite woman's son, whose father was an Egyptian, went out among the people of Israel; and the Israelite woman's son and a man of Israel quarrelled in the camp.

The term "quarrelled" (*venagfu*) is the same as that which provides the narrative context for the case of the pregnant woman in C3 in the intermediate collection of the Covenant Code. Indeed, this may explain why a seemingly unconnected series of norms are promulgated in the wake of the decision on the blasphemer: in narrative (if not in semantic, or conceptual) terms quarrels are apt to lead to cursing, and

102. Cf. John W. Welch, "Chiasmus in Biblical Law: An Approach to the Structure of Legal Texts in the Bible," in *Jewish Law Association Studies IV. The Boston Conference Volume*, ed. B.S. Jackson (Atlanta: Scholars Press, 1990), 5-22, at 7-9 (and citing Thomas Boys, 1825, as having first identified (the major part of) this structure).

all sorts of injuries, to persons and bystanders (here of an animal variety, in the Covenant Code the pregnant woman).

No such chiasmic principle of arrangement appears to underlie the second intermediate compilation, which I take to begin with the laws of the goring oxen and to conclude with the shepherding rules. Here, the unity of the collection is based upon a common theme that runs through it: animal husbandry. Indeed, it is on the basis of these provisions that the view has been expressed that the Covenant Code presupposes a settled community. Certainly, as regards this particular section, it is not only a settled community, but one with fairly sophisticated agricultural practices. Not only do they keep animals; but they also use them for clearing fields.¹⁰³ The delicts in this section all involve risks inherent in agricultural activities: the keeping of oxen (*Exod.* 21:28-32, 35-36); the opening of pits, probably for watering purposes, or for storage (*Exod.* 21:33-34); cattle theft (the one offence here which does involve *dolus*); depasturation resulting from the use of animals to graze down shoots which are not to run to leaf; burning off rubbish (*Exod.* 22:5); sophisticated shepherding arrangements.¹⁰⁴

Calum Carmichael goes further, in suggesting that there are thematic connections between the laws in this group and the Jacob/Laban cycle:¹⁰⁵ the meeting at the well (*Gen.* 20:3), Jacob's dispute with Laban over the shepherding arrangements, involving both the extent of liability he assumed, and his status as a *sakhir*, the test for cattle-theft as applied by Jacob in his shepherding arrangements with Laban (*Gen.* 30:32-33); not to mention the later pursuit by Laban in the light of the theft by Rachel of the *teraphim*.¹⁰⁶ This is a theme worth further investigation, but I shall not rely upon it in the present argument.

This second intermediate collection does not begin with a new formula. But its opening may nevertheless be significant in terms of the final literary structure. The stoning of an animal is found also in the narrative of the preparations for the Decalogue, where a boundary is to be placed around the mountain, everyone breaching it being subject to stoning: "Whether beast or man, he shall not live"

103. *Exod.* 22:4, the law on depasturation. See further Jackson, *supra* note 74.

104. Not the romantic ideal of the lone shepherd, but rather the shepherd-contractor, who uses either his own slave labour or free hired labour in order to look after the animals of the owner. This and the other paragraphs are fully discussed in my forthcoming *Wisdom-Laws*.

105. Calum M. Carmichael, *The Origins of Biblical Law: The Decalogues and the Book of the Covenant* (Ithaca, NY: Cornell University Press, 1992), 140-158. However, Carmichael sees the connections with the Jacob cycles as going beyond the laws I have attributed to this intermediate collection.

106. See the discussion by Daube, *supra* note 27, at 205-12.

(*Exod.* 19:13). This could not have been significant, of course, at the pre-incorporation stage, but a compilation starting with this provision might have proved attractive in the context for this very reason,¹⁰⁷ just as the opening clause of the first intermediate collection deals with liberation from slavery. I may add that the use of a partially-concealed cross-reference in the opening rule of a legal collection appears again much later, as a technique used by Maimonides.¹⁰⁸

The semantics of slavery also provide support for the view that these two major sections of the Covenant Code were originally separate. In the first, *eved* throughout means debt-slave, as I have argued in relation to both the slavery and assault provisions.¹⁰⁹ But when we reach the law of the goring ox, we encounter a rule which states that a payment of thirty shekels must be made to the *adon* of the *eved*, where the ox has caused the death of that *eved* or *amah*. That could, of course, be regarded as an "arbitrary" sum, to save calculation of the amount of the debt which has not yet been paid off. But this is unlikely. The fact that the *eved* and *amah* are treated in the same way suggests that the former, just as the latter, is here assumed to be a permanent status. So *eved* has a different meaning in the second major collection. Two further points lend credence to this. In the second collection, we also hear about enslavement of the insolvent thief—into a form of slavery which the rabbis rightly interpreted as temporary, debt-slavery.¹¹⁰ But there, the term *eved* is not found, in either the nominal or verbal forms. Conversely, in the one place in the first collection where we do find an allusion to permanent slavery, we find it in an interpolated motive clause.¹¹¹

There is also reason to believe that some of the following sections of the Covenant Code also circulated as intermediate compilations at the pre-incorporation stage. In IV.F, I comment on the internal literary structure of *Exod.* 23:1-8, which is currently found separating the two parts of the "double-series" identified by Carmichael (IV.E). The internal unity of *Exod.* 23:1-8 is not dependent upon the overall narrative structure; it could have circulated separately. When we look at the first series of Carmichael's double-series, we see that at least the

107. Or the sequence of the original intermediate collection could have been adapted for this purpose, since it manifests no strong competing principle of internal arrangement (comparable to chiasmus).

108. B.S. Jackson, "Maimonides' Definitions of *Tam* and *Mu'ad*," *The Jewish Law Annual* 1 (1978), 170-72.

109. On slavery, see Jackson, *supra* note 80; on both, *Wisdom-Laws*, forthcoming.

110. Jackson, *Theft*, *supra* note 32, at 143-44.

111. *ki kaspo hu*, *Exod.* 21:21, discussed in *Wisdom-Laws*, forthcoming.

first three of its four main sections reflect one particular interest: that of the king. It commences with provisions to assist the alien, the widow and the orphan—expressing a common ancient Near Eastern tradition regarding the role of the king, which the Bible echoes in the narratives of the daughters of Zelophehad (*Num.* 27, 36) and the woman of Tekoah (2 *Sam.* 14).

D. *Final Compilation and Incorporation*

For evidence of editorial activity at the incorporation-stage, we may consider, first, the altar pericope in *Exod.* 20:22-26. It is tightly integrated into the narrative structure and includes immediate instructions for the here and now:

And the Lord said to Moses, "Thus you shall say to the people of Israel: 'You have seen for yourselves that I have talked with you from Heaven. (23) You shall not make gods of silver to be with me, nor shall ye make for yourselves gods of gold. (24) An altar of earth you shall make for me and sacrifice on it your burnt offerings and your peace offerings, your sheep and your oxen; in every place where I cause my Name to be remembered I will come to you and bless you. (25) And if you make Me an altar of stone, you shall not build it of hewn stones; for if you wield your tool upon it you profane it. (26) And you shall not go up by steps to my altar, that your nakedness be not exposed on it.'"

All of this, it should be noted, is an instruction which Moses is required to convey to the children of Israel; it is presented as a message separate from the Covenant Code, with its own introductory formula. Much of it is directly related to the ensuing narrative structure: the instruction to raise an altar is carried out in chapter 24. Moreover, the prohibition of silver or golden images points forward to the narrative of the golden calf. True, one cannot interpret the *whole* of this pericope in terms of *ad hoc* commands. But in this respect, the pericope follows precisely the same pattern observed elsewhere—most notably in the case of the daughters of Zelophehad—of a specific divine revelation, directed to an immediate historical problem, followed immediately by a small set of further rules, related closely in theme to the primary issue, but not themselves required for the particular case at hand. So it would be wrong to argue that this pericope has been accidentally separated from the main body of the Covenant Code. It belongs integrally to the narrative structure. And it contains a tantalising piece of evidence bearing upon the dating of the process. An altar of earth may be raised "in every place where I cause my Name to be remembered" (v.24). That is hardly compatible with the

centralisation of the cult characteristic of Deuteronomy. Does that mean that we have to date this whole narrative framework as pre-Deuteronomic? Not necessarily, perhaps. But it certainly creates an hypothesis in that direction, which we must assess in the light of other evidence.

Perhaps the most important piece of potentially confirmatory evidence for a pre-Deuteronomic date for the incorporation-stage consists in Jeremiah's reference to the law of the liberation of debt-slaves, which he claims to have been neglected, and which leads to a renewed *berit* entered into by King Zedekiah and the people to release their Hebrew slaves (*Jer.* 34). Jeremiah himself stresses that this is a matter of covenant *renewal*:

Thus says the Lord the God of Israel: I made a covenant with your fathers when I brought them out of the land of Egypt out of the house of bondage, saying, 'At the end of six years each of you must set free the fellow Hebrew who has been sold to you and has served you six years; you must set him free from your service.' (vv.13-14).

Does this indicate that by the time of Jeremiah, the six-year rule had already been incorporated within the narrative framework of the Sinaitic *sugya*, for it is precisely the implication of that incorporation that the slavery laws, together with all the rules that follow, are to be regarded as part of a covenant offered to and accepted by the people? If we adopt such a conclusion, we may see in Jeremiah's allusion striking confirmatory evidence of the early date, not only of the narrative framework itself, but also of the incorporation of the Covenant Code within it.

Sadly, however, the matter is more complicated. If there is an immediate literary source of Jeremiah's view that six-year release is a covenantal obligation, it is more likely—on linguistic grounds—to be the Deuteronomic version than the version of the Covenant Code.¹¹² Moreover, Jeremiah himself associates the liberation law not with the Sinai narrative but rather with the Exodus. He might well have been thinking of the "statute and ordinance" (*hok umishpat*) made at Marah (*Exod.* 15:25). This event is dated three days after the crossing of the Red Sea. The Mekhilta, the earliest rabbinic commentary on Exodus, dating from the late 2nd or early third century C.E., provides surprising confirmation of the existence of such a tradition. Commenting on *Exod.* 21:1,

112. Note, for example, the uses of *mikets* in *Deut.* 15, though in the context of the jubilee.

R. Judah says: *And these are the Ordinances (ve'eleh hamishpatim)*. These were commanded at Marah, as it is said: "There He made for them a statute and an ordinance" (*Exod. 15:25*).

The notion that a specific law—rather than a whole body of laws—was given on the occasion of a particular covenant (as in the circumcision command in one of the Abrahamic covenants¹¹³) may well, as argued above, precede the notion of incorporation of an entire code. This is implicit in the narrative structure of the Sinaitic *sugya*. The conclusion, therefore, seems to be that Jeremiah's presentation, though evidence that the duty of release after six years was already regarded as a covenantal obligation, is not evidence that that obligation was yet regarded as part of a larger body of law, all of which was given together at Sinai. If anything, the evidence of Jeremiah might be taken to suggest that that latter idea had not yet been reached.

Evidence that the incorporation stage was relatively late is found in some linguistic features of the divine procedures of adjudication in the passage which commences with deposit and goes on to deal with shepherding. Some such special procedure is mentioned on three occasions, in verses 7, 8 and 10. In each, the terminology is different. In the case of the shepherd, he takes an exculpatory oath, *shevu'at adonai*—which I have argued is not original to the passage and probably reflects Babylonian literary models.¹¹⁴ There is nothing to require us to conclude that this oath has to be taken either in court or under priestly jurisdiction. On the other hand, the deposit law uses the phrase *venikrav . . . el ha'elohim*, best interpreted as a reference to an oracular procedure, and is found in a number of narratives, such as that of Akhan.¹¹⁵ That whole pericope, I argue elsewhere, does not form part of the original compilation: the theme is not agricultural activity, and the concern for procedure—found here, but not in other equally difficult cases—appears arbitrary in the context. The verse that follows, *Exod. 22:8*, fits even less well into its context, not even being formulated in the casuistic manner. Here we have clear priestly terminology: *al kol devar pasha*, used as a generic heading preceding the various concrete items that follow: "For every breach of trust, whether it is for ox, for ass, for sheep, for clothing, or for any kind of lost thing . . ." Not only is the subject-matter of the dispute, *pasha . . . avedah*, reminiscent of the priestly version of the law of property offences (*Lev. 5:20-26*, MT), but the formulation of the procedure is

113. *Gen. 17:1-14*; see further *supra* note 92.

114. *Wisdom-Laws*, forthcoming.

115. See *infra* Part V.

very close indeed to that used in *Exod.* 18, in the advice Jethro gives to Moses as to the procedure to be adopted in difficult cases: "You shall . . . bring their cases to God" (*veheveita ata et hadevarim el ha'elohim*).¹¹⁶ The common terminology of *bo*, *devar* and *elohim* can hardly be accidental. This provides good evidence that the incorporation of laws within this narrative is due to priestly editors, and that it took place after the material had already been compiled into a number of intermediate collections.¹¹⁷

Another clue to the overall literary history is provided by the ban on the eating of the flesh of the homicidal ox, which *Exod.* 21:28 requires to be stoned. It is, I suggest, because of the concern for dietary regulation found in a later section of the Covenant Code, in *Exod.* 22:30, that a rule on the eating of the flesh of the goring ox was here included at all.¹¹⁸ The substance of the rule reflects a transformation of exactly the same oppositional structure as is found in the instructions to Noah in *Gen.* 9. In *Genesis*, dealing with the consequences of a legitimate killing by man of animals, the flesh may be eaten but the blood may not; in *Exodus*, dealing with the consequences of an illegitimate killing by an animal of a man, the blood may be taken but the flesh may not be eaten. The existence of both these cross-references mildly suggests that the bringing together of the various intermediate compilations formed part and parcel of the process of incorporating them in the present literary structure.¹¹⁹

116. Cf. Jackson, *Theft*, *supra* note 32, at 242-43.

117. It may be worth noting, in passing, that there are also two references to institutionally-based procedures in the first intermediate collection, which are widely regarded as additions to the text—purely on literary grounds, and without reference to the theory I have advanced regarding the non-judicial character of the Covenant Code as a whole. First, there is the addition to the homicide law in *Exod.* 21:13-14, specifically (a) God's promise to provide a place to which the non-premeditating murderer may flee (v.13)—although without here using the usual terminology of "cities of refuge"—and (b) the reference in the following verse to the power to drag the fugitive even away from "my altar," where he has unjustifiably sought refuge there, even though he committed the homicide with premeditation. (It is not easy to decide whether these verses were added before or after the compilation-stage. The formulation of asylum in terms different from the "cities of refuge" may speak for an early date; so, too, may some of the remaining inconsistencies in the first intermediate collection on the question of unpremeditated homicide. On the other hand, it might be argued that the very theme of unpremeditated homicide was suggested by material elsewhere in the collection, and that that provided the reason for interpolation of the participial provisions.) The second example is the reference to adjudication *befilim* in the context of payment of damages to the husband of the pregnant woman (*Exod.* 21:22).

118. Jackson, *Essays*, *supra* note 22, at 116.

119. If that is so, we may well assign the motive clause in the law defining the limits of discipline by a master over his *eved*, *ki kaspo hu* (*Exod.* 21:21), to the same hand.

Further evidence on the relative chronology of the incorporation of the collection comes from linguistic features of the interpolated section of the homicide law (*Exod.* 21:13-14):

But if he did not lie in wait for him, but God let him fall into his hand, then I (first person) will appoint for you a place (*makom*) to which he may flee. But if a man wilfully attacks another to kill him treacherously, you (second person plural) shall take him from my altar, that he may die.

It has often been noted that in their use of first and second person forms these verses depart not only from the participial forms within which they are enveloped, but also from the standard casuistic form of much of the rest of the Covenant Code. What has not, to my knowledge, been noted is the coincidence of first and second person forms with the altar law that immediately precedes the opening section of the Covenant Code. Recall that it begins (*Exod.* 21:22-24):

Thus you shall say to the people of Israel: "you have seen (second person plural) for yourselves that I have talked (first person) with you from heaven. You shall not make (second person plural) gods of silver with me (*iti*) nor shall you make for yourselves gods of gold. An altar of earth you shall make¹²⁰ for me . . . in every place (*makom*) where I cause my Name to be remembered I will come to you and bless you.

We may remark also upon the mixture of forms within the altar pericope, which only towards the end falls into anything like standard casuistic form. This connection between an interpolated passage of the laws and the surrounding narrative framework speaks either for a late date of incorporation (if we assume that the incorporation was facilitated by literary connections with what was already in the Covenant Code) or for a post-incorporation date for the interpolation. But the interpolation cannot be too late: the interpolated form of the homicide laws is itself subjected to further literary elaboration in the priestly code.

Other interpolations within the Covenant Code appear to come from a Deuteronomiac hand, and may represent an earlier stage of redactional activity. I have argued, for example, that *Exod.* 21:2 shows Deuteronomiac intervention in the description of the slave as *ivri*. The use of a second person singular verb in that same verse points in the same direction. A second person verb is used also in verse 23, in the phrase *venatatah nefesh tahat nefesh*. I have also argued, independently and on substantive grounds, that *venatatah* is a means of emphasising that payment should be made by the individual, despite the

120. Second person singular in the MT, but with second person plural variants.

fact that the offence was, in a sense, collective: injury to a pregnant woman caused by men fighting in a brawl; collective responsibility has here been replaced by individual responsibility.¹²¹ Both the substance of this particular law and its arrangement owe something to a Middle Assyrian parallel, and this too suggests a Deuteronomic writer or editor. On the other hand, the talionic formula itself, *ayin tahat ayin*, comes from the priestly version of the tradition (*Lev. 24:20*). It may not be implausible to attribute the compilation of the intermediate unit to a Deuteronomic hand, and to regard the interpolation of the talionic formula as coming from a priestly hand, perhaps at the incorporation stage itself.

One final set of editorial changes calls for comment. The goring ox provisions contain the verse: "If it gores a man's son or daughter, he shall be dealt with according to this same rule" (*Exod. 21:31*). When I first considered this verse, I viewed it as a purely systematising addition, and related it to the final provision of the goring ox laws (*Exod. 21:36*), which also begins with the conjunction *ow*, and which imports into the context of an ox goring another ox to death the issue of whether the ox had been known previously to be vicious (but using different terminology from that of *Exod. 21:29*).¹²² I still regard *Exod. 21:36* as systematising; very likely, the words *ow nishbah* in *Exod. 22:9* should be viewed in the same way. But the provision regarding the goring ox which causes the death of a son or a daughter might be viewed in a different way. The idea here may be to raise the status of a dependent son or daughter. We may note that *Exod. 21:9*, very likely an addition to the original formulation of the *amah* law, also uses a cross-reference to a different rule, through the term *kem-ishpat*: "If he designates her for his son, he shall deal with her as with a daughter." Now this addition to the *amah* paragraph must be substantive; it cannot merely be systematisation. That provides support for the view that *Exod. 21:31* is also substantive, not merely systematising. If so, we may conclude that *Exod. 21:9* and *21:31* reflect the first major stage of editorial activity, at the compilation stage, perhaps associated with D, while *Exod. 21:36* should be added to the list of activities of the P redactor, working primarily at the incorporation-stage.

121. Jackson, *Essays, supra* note 22, at 100, arguing that while "the fact of a change appears from the use of the second person, its substance may be contained in the singular number."

122. Jackson, *Essays, supra* note 22, at 152.

PART IV. THE LITERARY STRUCTURE OF THE "SINAITIC SUGYA"

A. *The Place of the Seduction Law and the Problem of Classification*

With the law of seduction, *Exod.* 21:15-16 (MT 16-17), we seem to have come to the end of the "Covenant Code," or at least to the end of that section of it conventionally regarded as "legal." Similarly, Shalom Paul describes *Exod.* 21:2-22:16 as the "formal legal corpus," and distinguishes *Exod.* 22:17-23:9 as "the moral and sapiential exhortations and the cultic calendar that follow the juridical corpus proper."¹²³ While conceding that the latter section represents "an integral part of the charter of this newly organized nation," he argues that it constitutes an "appendix" to the preceding section. This differentiation is based upon the following arguments: (1) the associative ordering of the formal legal corpus terminates with the law on seduction; (2) analogues to Cuneiform laws become very few; and (3) characteristic Israelite apodictic declarations and motive clauses begin to appear. We shall have reason to question the application of at least the first and last of these criteria: there are, moreover, principles of arrangement which span the whole document; and the criteria of both relationship to Cuneiform laws and form-criticism render at best very qualified results. Most significantly, there is not the slightest literary indication, on the face of the text itself, that a break is to be understood after the seduction law and before the normative material which follows it.

But even if we accept the conventional division of the Covenant Code into these two parts, questions still arise as to the placing of the seduction law here: right at the end. The text reads:

If a man seduces a virgin who is not betrothed, and lies with her, he shall give the marriage present for her and make her his wife. If her father utterly refuses to give her to him, he shall pay money equivalent to the marriage present for virgins. (RSV)

Views have differed as to whether we should classify this as family law or tort. The latter view is favoured by Anthony Phillips.¹²⁴ We have here an infringement of the property interests of the father, sounding in damages: the seducer is bound to pay the bride-price (*mohar*) of virgins whether or not he is required (at the option of the father) to marry the girl.¹²⁵ Such damages, Phillips argues, are enforceable in

123. Paul, *Studies*, *supra* note 2, at 43.

124. *Supra* note 66, at 112-12; *idem*, "Some Aspects of Family Law in Pre-Exilic Israel," *Vetus Testamentum* 23 (1973), 349-61, at 349, 351.

125. Cf. Weinfeld, *supra* note 70, at 284-85.

court (is the marriage too?), unlike the slavery provisions of *Exod.* 21:2-11, which Phillips regards as an example of “family law”—subject to the exclusive jurisdiction of the head of the household.¹²⁶ It was, according to Phillips, the theme (and purpose?) of the Covenant Code (that is, the first, “legal” half) to make more precise the distinction between crime and tort in relation to the prohibitions of the Decalogue, so as to clarify what was “criminal” and thus (alone) a breach of covenant law. The law of seduction is thus to be regarded as making it clear that a male seducer (presumably, even a married one) does not commit the crime of adultery, proscribed by the Decalogue, if he seduces an unbetrothed virgin. Phillips’ general hypothesis that the Decalogue represents (even the basis of) ancient Israel’s criminal law has attracted relatively little support. There are, however, some aspects of his theory with which I am in sympathy. In particular, there is a literary connection between the Decalogue and the Covenant Code, and that literary connection is expressive of basic covenantal ideas. But the distinction between “crime” and “tort”—or, to put the matter in terms closer to those endorsed by Jewish tradition itself, between “capital” matters (*dine nefashot*) and fines (*dine kenasot*) and/or monetary matters (*dine mamonot*)—bears at best a contingent relationship to this literary/theological connection. If clarification of the borderline between seduction and adultery were the crucial thing for the purposes of a covenantally-endorsed criminal law, why should the draftsman have left an area of uncertainty: namely, the situation where the woman concerned was neither betrothed nor a virgin?

The argument, contrary to Phillips, that the law of the seducer should be classified as family law, might be advanced by way of correction and development of an hypothesis of Shalom Paul. In common with others, he sees four basic groups within the “legal” section of the Covenant Code:

- (1) 21:12-27 laws pertaining to crimes committed by one man against another (and one instance of an act of God, v.13).
- (2) 21:28-32 laws pertaining to crimes committed by a man’s property (an ox) against another man.
- (3) 21:33-36 laws pertaining to damages caused by one man’s property (a pit or an ox) against another’s property (an ox).

126. Cf. H.J. Boecker, *Law and the Administration of Justice in the Old Testament and Ancient East* (London: SPCK, 1980), 108-09, and 139.

- (4) 21:37-22:16 laws pertaining to crimes committed by one man (directly or indirectly) against another's property and cases of force majeure.

He summarises these four categories as: (1) man against man; (2) property against man; (3) property against property; (4) man (and force majeure) against property. It may be noted that the law of the seducer is included in the fourth category. What is excluded, however, is the whole of the opening passage on slavery. This is categorised by Paul as an "introductory section . . . which determines the conditions whereby the respective parties are free to leave their owners, and which is structurally parallel to the introduction to the Decalogue where the freeing of the Israelites from their Egyptian taskmasters is given prime importance."¹²⁷ I agree, but only to this extent: that the placing of slave laws (perhaps, more accurately, "liberation laws") at the head of the collection does indeed re-establish the connection with the historic situation, to which the opening of the Decalogue also alludes. That falls far short of cutting the *eved* and *amah* paragraphs (which are, as it happens, amongst the most developed of the Covenant Code as regards drafting) out of the present literary structure, in an attempt to give them something like the role of a prologue.¹²⁸

On purely literary grounds, the solution to the problem which Paul has created for himself is to regard the matrix of man v. property as sandwiched within, or surrounded by, family law provisions—the slave laws at the beginning¹²⁹ and the seduction law at the end. In both, we may note, the theme of enforced marriage occurs. It is thus far from self-evident that the seduction law has to be classified as a tort against a property interest, thus focusing upon the *mohar* payable to a girl's father, rather than a marriage law, stating a situation in which a man has (as a result of a sexual delict rather than a debt) placed himself in a situation where a marriage may be enforced. Here, as in the slavery laws, a man may not engage in sexual intercourse with a (free) woman without offering her a permanent status. Our understanding of the place of the seduction law may thus derive not from generic classifications like "tort" or "family law," but

127. Paul, *Studies*, *supra* note 2, at 106-07. Elsewhere, he argues that the slave laws fall within domestic jurisdiction, and are not a public affair.

128. But see the general structure of the overall passage proposed by Paul, *Studies*, *supra* note 2, at 29, from which he hardly needs to regard the slave laws in this sense.

129. Recall the structural relationship which links the first and the second paragraphs, which indicates that the underlying concern is with family relationships in the context of slavery, rather than specific rules of liberation.

rather from a more specific thematic link—indeed, a value regulating sexual relations—which we have seen already in the slavery laws.

Even this amended version of Paul's view of the arrangement of the Covenant Code may be considered flawed to the extent that it still relies upon subsuming individual laws of the Covenant Code under one of the conventional groupings of laws derived from modern legal experience. We may think that such categories as "criminal law," "tort," "family law" are natural and universal. A moment's reflection shows that these categories appear natural to us only because they have been naturalised as part of our (culturally contingent) experience. We should not approach biblical law armed with some tacit presumption that these categories apply there too, unless evidence is forthcoming to the contrary. For methodological caution, we should even reverse that presumption: just because those categories are natural to us, we should presume that they do not apply to the biblical texts, unless there is evidence positively to show that they do. And when we examine the biblical texts in that kind of detached manner, we find not merely that they do not correspond to the classifications of legal material used by the biblical texts, but also that there is very little evidence—certainly in the Covenant Code—that laws are grouped at all in that kind of conceptual (abstract and general) framework.¹³⁰

B. Identifying the Literary Structure of the Covenant Code Within the Sinaitic Suga

Unless we have some principle of arrangement which will explain the structure of the rest of the collection in a way which confirms the independence of the "legal" and "non-legal" halves of the Covenant Code, it would appear entirely arbitrary to close one section at the end of the seduction laws. Indeed, there is disagreement even among those who do divide the collection between legal and non-legal sec-

130. I am inclined, myself, to see the arrangement in terms of those structural analyses of the texts which I have offered in relation to slavery (and similarly, here, in relation to seduction) and goring oxen. For the distinction between "natural" or "normal" activities on the one hand, and "unnatural" or "abnormal" on the other, goes beyond the distinction between goring and depasturation. The laws which follow that on depasturation also involve losses incurred in the course of a normal activity: agricultural burning, commercial deposit, shepherding. On the other hand, the laws which precede, and which include the goring ox, presuppose no such normal and acceptable activity: even the existence of debt-slavery is regarded, as we see clearly from the structure of the slave-laws, as abnormal.

tions as to the precise dividing line. Westbrook and others¹³¹ include within the former the three capital offences which immediately follow the seduction laws (*Exod.* 22:17-19, MT):

You shall not permit a sorceress to live.

Whoever lies with a beast shall be put to death.

Whoever sacrifices to any god, save to the Lord only, shall be utterly destroyed.

Westbrook is explicit in using the “legal model” as his criterion for the division:

It has long been recognized that the “Book of the Covenant” (*Exod.* 20.22-23.19) forms a separate entity that has been inserted into the surrounding narrative. While the whole entity consists of normative provisions, it is easy to recognize a further section within it which may more properly be described as a law code, in that its norms are justiciable in a human (as opposed to divine) court and carry sanctions enforceable by such a court. The section in question is usually taken to extend from *Exod.* 21.1 to 22.16, but I would include the provisions of 22.17-19 since, although religious in character, they are likewise amenable to normal human jurisdiction, with corresponding sanctions.¹³²

Even if we had not rejected this conception of the intended use of the laws of the first half of the Covenant Code, the precise location of these capital provisions would still fall to be explained. The thematic parallel suggested in Part IV.A between the seduction law and the slavery laws may here prove helpful. Just as the slavery laws are followed by a short sequence of capital provisions, so too is the seduction law. Such echoing, by thematic reiteration, forms a major principle of literary construction in the pericope as a whole, as will shortly be argued.

Whatever progress has been made in explaining the arrangement of the “laws” of the first half of the Covenant Code, the normal strategy in terms of the second half of the collection is to throw up one’s hands in despair, or resort either to a theory of primitive chaos or to one of purely accidental accretion. There is even less agreement on the precise limits of this second section of the Code than there is in relation to the first. Some regard it as terminating at *Exod.* 23:19; others include *Exod.* 23:20-33, which both promises success in the conquest and imposes obligations in respect of Israel’s relationships with

131. See the discussion by Boecker, *supra* note 126, at 140-41, of the views of Beyerlin (in *Festschrift H.-W. Hertzberg*, 1965) and Halbe (*Das Privilegrecht Jahwes*, 1975). Boecker sees the first half as ending with the seduction law.

132. Westbrook 1994, *supra* note 1, at 15.

the present occupants of the land.¹³³ Thus, one of the conditions I have suggested as necessary for any conclusion that the seduction law represents the closure of the first half of the code, namely that the second half should reveal an independent structure of arrangement, manifestly fails to be satisfied.

Even more open is the question of where the document whose literary structure we are investigating actually begins. If we limit ourselves to the "Book of the Covenant," we have to decide whether to begin with the altar law in *Exod.* 20:22, or rely upon the opening formula of *Exod.* 21:1. But the "Book of the Covenant" is the subject matter of the literary unit we are considering; it is not identical with that literary unit itself. In other words, we are looking at a literary unit which contains the story of the giving of the "Book of the Covenant" (*Exod.* 24:7), as well as the Decalogue and various other events. So what are the limits of the wider pericope with which we are concerned? On literary grounds, I would suggest that we have to go back at least as far as the arrival at Sinai (*Exod.* 19:1) and the subsequent covenant prior to the preparations for the theophany and the Decalogue, since they complement *Exod.* 23:20-33, which has been described as a "divine discourse of dismissal."¹³⁴ Yet we shall find that there is reason to go further back still, to include the story of Jethro's advice on the administration of justice, if we are to explain that complex of narrative and legal cross-references which forms the literary structure of the pericope before us.

The literary structure I am about to propose negates the conventional interpretation of the "second half" of the Code as "chaotic." My proposals integrate, partially modify, and develop some rather controversial views of Phillips and Carmichael. For it may be argued that the principal weakness of their views is not that they go too far, but rather that they do not go far enough. Specifically, Anthony Phillips sees Decalogue allusions in the first part of the Covenant Code. Most particularly, the early group of capital offences expressed in the participial form (*Exod.* 21:12, 15-17), dealing with homicide, kidnaping (using the usual verb for "steal," *ganav*), and offences against parents (striking them, cursing them), can hardly be an accidental combination given the close proximity of honouring parents, murder and theft in the Decalogue. But if there are allusions in the Covenant Code to some of the Decalogue provisions, why not to all of them? If

133. Phillips, *supra* note 66, at 158, 174 and ch. 16; Boecker, *supra* note 126, at 136.

134. Boecker, *supra* note 126, at 136.

only to some, why those? Carmichael has, in my view, made a significant contribution towards the literary analysis of the latter part of the Covenant Code by pointing to the existence of a “double series,” comprising *Exod. 22:20-30* (from the ban on the oppression of sojourners at the beginning to that on the eating of *terefah* at the end) and *Exod. 23:9-19*.¹³⁵ But this too does not go far enough. It leaves gaps before, between, and after. Here too, I accept the literary connection without agreeing with the view proposed for its significance. Carmichael takes the double series to be a mnemonic device, appropriate to oral transmission. I find this quite implausible.¹³⁶ What we have here is a complex literary device, one far more akin to the literary structure of the talmudic *sugya*¹³⁷—hence the title of this section.

The claims which I share with Phillips and Carmichael are the following:

- (1) connections may exist between concrete laws without subsuming them beneath modern classificatory rubrics: this is the significance of Carmichael’s double series;
- (2) there may be literary connections between specific laws and Decalogue injunctions (Phillips, but without endorsing the significance of the connection he suggests); and
- (3) there may be literary connections between “laws” and narratives.¹³⁸

To these methodological claims I would add an insistence that we examine the whole document to see whether their application assists us in understanding the internal structure of that document. Success in this, for me at least, will count in favour of the validity of the method. At the same time, we cannot be content with a deep structure which is entirely a matter of inference. There must be surface

135. “A Singular Method of Codification of Law in the Mishpatim,” *Zeitschrift für die alttestamentliche Wissenschaft* 84 (1972), 19-25; *idem*, *The Laws of Deuteronomy* (Ithaca: Cornell University Press, 1974), 62-65.

136. There is much work by psycholinguists in the Chomskyan tradition on the cognitive limits of the acceptability of multiple embedding. See my *Making Sense in Law*, *supra* note 24, at §§1.4, 4.3, 6.1.

137. Which Jacobs has shown to be the very antithesis of a verbatim report of an actual debate: see L. Jacobs, *The Talmudic Argument* (Cambridge: Cambridge University Press, 1984); *idem*, *Structure and Form in the Babylonian Talmud* (Cambridge: Cambridge University Press, 1991).

138. Carmichael has argued also for a narrative background to the Decalogue: *Law and Narrative in the Bible. The Evidence of the Deuteronomical Laws and the Decalogue* (Ithaca and London: Cornell University Press, 1985). In his choice of narratives, however, he seems to me to pose a major methodological problem. In seeking to associate the prohibitions of the first half of the Decalogue with the narrative of the golden calf, he cannot, in my view, accurately represent the intentions of the final editors of the Pentateuch, whatever the earlier history of these documents may have been. When we read a story, we relate what we are reading at the moment to what we have read before, not what (with the wisdom of hindsight) may appear subsequently. Thus, if there are literary allusions in the Decalogue, they have to be to the *preceding* narrative.

clues to the structure, and in particular to the groupings of laws and their literary allusions.

I believe that I have found one such major clue. Form-criticism has led us to think of clauses like "for you were strangers in the land of Egypt"—which happens to come in the first verse of both the opening provisions of Carmichael's double series, in *Exod.* 22:20 and 23:9—as "motive clauses." Debate then rages upon the classification of such motive clauses, their literary history, and their *Sitzen im Leben*. But the framework of the debate has already been fixed: these are "motive clauses." An examination of the present biblical corpus suggests the reason why the motive clauses appear where they do: the random incidence of motive clauses, why they are attached to some norms but not others, is never satisfactorily explained by form-criticism. It is these clauses which in fact provide the major clues to the literary structure of our passage, as well as to its wider significance. They serve as headings for groups of laws, which continually remind us of the narrative context within which the compilers wish the laws to be understood.

My solution to the literary structure of the Covenant Code involves the following proposals, which I shall very shortly detail. The *sugya* involves not just one double-series but two. The first sequence of the first double series is in fact the Decalogue itself (A). The second sequence commences almost immediately thereafter (C), continues with the altar law, and probably then runs out. We then have the two intermediate collections identified in Part III.C above (D-E); shortly thereafter, the commencement of the first sequence of Carmichael's double series (G) and later the second (I). That leaves two gaps between the major elements (F and H, of which the former has already been identified as an aborted thematic reiteration of D, and the latter, H, has an internal thematic coherence of its own.).¹³⁹

- A. 20:2-17 Decalogue (commencing with an historical allusion, to the Exodus)
- B. 20:18-21 Narrative of separation of people from direct divine revelation
- C. 20:22-20:26 Aborted thematic repetition of the Decalogue (commencing with an historical allusion, to the narrative of revelation)
- D. 21:1-21:27 First intermediate collection (identified by initial historical allusion, to the Exodus, and internal chiasmic arrangement)

139. See *infra* Part IV.E.

- E. 21:28-22:14 Second intermediate collection (identified by initial historical allusion, to the narrative of revelation in B, and internal thematic coherence)
- F. 22:15-19 Seduction and capital provisions (aborted thematic reiteration of D)
- G. 22:20-30 First sequence of Carmichael's double series (identified by initial historical allusion, to the Exodus)
- H. 23:1-8 On litigation and enmity
- I. 23:9-19 Second sequence of Carmichael's double series (identified by initial historical allusion, to the Exodus)

These proposals, taken together, entail the view that the Decalogue cannot be separated from the Covenant Code, nor can the Covenant Code be divided up into two halves, as is conventionally done. Most of the series with which we are concerned commence with an historical allusion—sometimes explicit, elsewhere clearly implicit. I shall argue further that we can identify the significance of this literary structure. It has both a formal and a substantive meaning. The formal meaning is to be related to the practice of reiteration.¹⁴⁰ The substantive significance of the literary structure of the Sinaitic *sugya* turns out to be one concerning Israel's identity, with the universalist and particularist tensions of the preceding narrative transformed into the language of both ethics and law.¹⁴¹ The literary structure thus contributes to our understanding of the categories within which these laws should be understood. This, I would suggest, is the alternative to the imposition of our own categories, not only "family law," "property," "tort," and "crime," but also—and perhaps even more importantly—"law," "ethics," "ritual," and even "cult."¹⁴²

C. *The "Ten Commandments" and its Thematic Reiteration*

The name "Ten Commandments" is, of course, problematic in both its aspects. Different denominational traditions have counted

140. I argue in *Wisdom-Laws*, forthcoming, that this is crucial to our understanding of the narratives concerning covenant and law and the historical figures who reiterate each other's role in relation to them. On the latter, see B.S. Jackson, "The Prophet and the Law in Early Judaism and the New Testament," *Cardozo Studies in Law and Literature* 4/2 (Fall 1992), 123-166, reprinted in *The Paris Conference Volume*, ed. S.M. Passamanek and M. Finley (Atlanta: Scholars Press, 1994), 67-112 (Jewish Law Association Studies, VII).

141. See *infra* Part IV.F.

142. To be fair, modern scholarship does question the pertinence of some of these categories. See particularly J. Blenkinsopp, *Wisdom and Law in the Old Testament* (Oxford: Oxford University Press, 1983), 90; Boecker, *supra* note 126, at 137, approving Paul, *Studies, supra* note 2, at 37. On the Book of the Covenant as reflecting the need of Israel to differentiate itself in terms of its religious identity from the Canaanites, cf., most recently, Boecker, *supra* note 126, at 142-43.

the "ten" in different ways. In fact, the number "ten" is not mentioned at all in the Exodus version of the Decalogue; it occurs in the Book of Exodus only in 34:28, the reference to the "ritual decalogue" of that chapter. It is only in Deuteronomy that the tradition of "ten" is applied, in historical retrospect, to "the Decalogue" (*Deut.* 4:13, 10:4). The designation "commandments," as Carmichael rightly stresses,¹⁴³ has even less biblical warrant. The *devarim* are simply "words"—more accurately, perhaps, in the light of modern linguistic concepts, "utterances." On the other hand, the tradition that there were two tablets is found in the narrative first in *Exod.* 24:12, where Moses is commanded to ascend the mountain, in order to be given the tablets of stone (here said to contain *hatorah vehamitsvah*, which have been written there for the instruction of the people). After Moses broke the first set of tablets, in anger at the sin of the golden calf, he is ordered to prepare two further blank tablets, on which God himself promises to write "the words that were on the first tables, which you broke" (*Exod.* 34:1). Moses does this, and ascends the mountain with them. We then have the ritual decalogue, but the narrative concludes in an inconsistent manner. Verses 27-28 imply that what was written on the second tablets was the ritual decalogue, and that they were written by Moses—not, as were the originals, by the finger of God.

What is important for present purposes is that the original decalogue was certainly conceived to have been written upon two tablets. That implies an internal division of the material, into two groups. Where does that division come? Generally, the division has been based on mere inference from the nature of the subject matter and (even more dubious) an assumption that the "ten" (however identified) should be divided into two groups of five. Centuries of ecclesiastical and indeed synagogal art, premised upon such assumptions, have made us assume that the second group necessarily begins with the prohibition of murder. It is, indeed, easy enough to count five from there, however difficult it may be to compress the preceding material into five commandments. But this division has one severe disadvantage: the length of the material in the second pentad is considerably smaller than that in the first, even allowing for a much greater degree of secondary elaboration in the first tablet. I would suggest that the original conception of the division into two groups is in fact signified by a clue in the text, one whose significance has been—to my knowledge—universally overlooked. There are two historical allusions in the text of

143. Carmichael, *supra* note 138, at ch.12.

the Decalogue. The first occurs at the very beginning, thus at the head of the first group (however one divides the text): "I am the Lord your God, who brought you out of the land of Egypt, out of the house of bondage" (*Exod.* 20:2). Jewish tradition, incidentally, has always regarded this as the first of the "commandments," and not as an historical preamble. We then have provisions relating to monotheism, idolatry, the divine name, and the sabbath day. And then, in verse 11, a second historical allusion, conventionally categorised as a "motive clause." But the opening word, *ki*, does not have to be translated "for" or "because." It may be a deictic, rather than a connective expression: "*Behold*, in six days the Lord made heaven and earth" The Deuteronomic version, we may recall, substitutes a further allusion to the Egyptian slavery:¹⁴⁴ the sabbath is taken as a symbol of freedom, denied the Israelites in Egypt, but now available to them (*Deut.* 5:15). And the opening injunction of the Exodus version, "Remember . . . the sabbath day" is transformed in Deuteronomy into an injunction to "Observe the sabbath day," with the duty of remembrance now presented not as a motive (there is in Deuteronomy no *ki*, or anything comparable), but rather as a supplementary duty, "You shall remember," *vezakharta*.¹⁴⁵

My suggestion, therefore, is that the Exodus Decalogue reveals the two groups destined for the two tablets as each headed by an historical allusion: redemption from Egypt in the first, creation of the world in the second, and thus that the injunction to obey parents comes in the second group, rather than concluding the first. We shall see further examples, throughout the *sugya*, of groups of laws each introduced by historical allusions. And we shall find that these allusions are by no means arbitrary: they indicate the substantive significance of the literary structure as a whole.¹⁴⁶

In arguing that the Decalogue falls into two groups, I am not claiming that these constitute a "double series" in the sense intended by Carmichael. A double series in this sense means that the sequence of the second series recapitulates that of the first, through thematic and sometimes linguistic allusions. In this sense, the Decalogue as a whole constitutes a first series, to which the passage beginning *Exod.* 20:22 corresponds. The latter starts with an historical allusion.

144. Deuteronomy does, it seems, understand the historical allusion as a motive clause, but it regards the creation allusion as an inappropriate motive for Israel's duty to observe the sabbath.

145. The command here expressed by the future tense, rather than the imperative mood.

146. To support this argument, it may become necessary to regard as secondary v. 11b, "Therefore the Lord blessed the sabbath day and hallowed it."

Moses is commanded to tell the people of Israel: "You have seen for yourselves that I have talked with you from heaven" (*Exod.* 20:22). Notice, incidentally, how well integrated this is into the narrative sequence. The Decalogue had begun by referring to the last most significant historical event, the Exodus. The second series refers to the last most significant event at its moment of narrative time. And indeed, the narrative event to which it refers is to be found in the small narrative fragment immediately after the Decalogue, *Exod.* 20:18-21, which commences: "Now when all the people perceived the thundering and the lightning and the sound of the trumpet and the mountain smoking . . ." The first command of the second series, "You shall not make gods of silver to be with me, nor shall you make for yourselves gods of gold" (*Exod.* 22:23) re-echoes the first prohibition of the Decalogue: "You shall have no other gods before me" (*Exod.* 20:3). The second injunction of the second series provides the positive correlate to the decalogue prohibition of making graven images or likenesses of anything (including God) that is in heaven above, or in the earth beneath (*Exod.* 20:4). The Decalogue tells the Israelites how God is *not* to be worshipped; the second injunction of the second series, provides that worship is to be conducted through sacrifice on an altar of earth (*Exod.* 20:24). The thematic allusions continue in the next pair. The Decalogue has: "You shall not take the name of the Lord your God in vain . . ." (*Exod.* 20:7); the second series again provides the positive correlate: God's name is to be remembered in the context of this, the prescribed cult. Whereas taking the name of the Lord in vain leads explicitly to divine punishment according to the Decalogue ("For the Lord will not hold him guiltless who takes his name in vain"), the legitimate mentioning of God's name in the context of the cult is a source of blessing ("In every place where I cause my name to be remembered I will come to you and bless you") (*Exod.* 20:24).

At this point, we have two options. Either we see the thematic reiteration of the Decalogue as aborted at this point, and an entirely new section—our first intermediate collection (D in the structure outlined in IV.B, above)—commences; or we may view D as continuing (but even so not completing) the thematic reiteration of the Decalogue. In that event, D fulfills two functions: it both continues the reiteration commenced in C, and stands as an independent unit. I incline to the former solution, but the argument for the second still deserves to be rehearsed.

The next item in the Decalogue is the sabbath law. Here, the allusion in the second series is less direct, but still—I would suggest—

persuasive, in the light of the rest of the evidence. Just as the Israelite, together with his *eved* and *amah* (the first time they are mentioned in the text of the Decalogue) are to rest on the seventh day, so too the *eved* is to go free in the seventh year. If such a connection strikes us as somewhat remote (based on a combination of thematic parallels: introduction of the term *eved*, the number 7, and the idea of cessation of work) we should recall that the earliest interpreter of our text, in providing the Deuteronomic version, saw fit to link explicitly the themes of sabbath rest and liberation from slavery.

The Decalogue follows with the duty to honour parents. The situation of the *amah* might well be thought to exemplify that duty of obedience in full measure: here, unlike the manner of introduction of the law concerning the *eved ivri*, the law commences: "When a man sells his daughter as a slave" (21:7). We may recall that this right to sell one's children into slavery was a recognised incident of the Roman *patria potestas*. The Decalogue then follows with murder, adultery, and theft. The point we have now reached in the Covenant Code is the collection of participial provisions concerning murder, kidnapping, assault and cursing of parents (21:12-17)—the very evidence which Phillips uses to suggest a literary connection between the Covenant Code and the Decalogue. The second series then runs out at that stage.

D. The Second "Double-Series"

The second double series is the one already identified by Carmichael: it comprises first *Exod.* 22:20-30 and second *Exod.* 23:9-19.

- A Both begin with the same historical allusion: "You shall not wrong a stranger or oppress him, for you were strangers in the land of Egypt" (*Exod.* 22:20, MT); "You shall not oppress a stranger; you know the heart of a stranger, for you were strangers in the land of Egypt" (*Exod.* 23:9).
- B As the second item in the two lists, Carmichael pairs *Exod.* 22:24-26, protection of the poor from loans at interest and from oppressive pledging, with *Exod.* 23:10-12, seventh year release of the land's produced for the poor and sabbath rest for the bondmaid's son and for the sojourner. These may appear rather different matters. But that depends on the basis of our classification. If we apply modern types of legal classification, we would put the material from the first list under some rubric such as "creditor and debtor" or perhaps "security, pledge," while we would regard the latter as "agricultural law" and "labour law." These sound like purely technical legal concepts. It could well be argued, however, that they reflect the dominance of underlying property relationships. Any

form of classification reflects value judgments, what we regard as significant likenesses. Suffice it to say that classification of laws by their content is not the only possible form of legal classification. The second items in this double series are justifiably linked if we take as the basis of classification not substantive rules or concepts, but rather the underlying purpose, namely the protection of the poor. That is evident enough in the first sequence, where the rules concern loans at interest and oppressive pledging. But it also appears from the face of the corresponding item of the second sequence, where the field is to lie fallow in the seventh year "that the poor of your people may eat" (*Exod.* 23:11); similarly the reason given for the cessation of work on the seventh day is not that "you" (the free Israelite) shall rest, but rather "that your ox and your ass may have rest, and the son of your bondmaid, and the alien, may be refreshed" (*Exod.* 23:12).

- C The third item in the double series is reviling God and cursing the ruler (*nasi*, *Exod.* 22:28) and (once again) the logical correlates of that: the positive duty of obedience to God, and avoidance of mentioning (swearing by) other gods, thereby affirming their validity (*Exod.* 23:13).
- D-E The next two items in both lists (which I would not necessarily divide up in the way that Carmichael does) relate to agricultural offerings: the first fruits of the harvest, the vine, oxen, sheep and indeed the first-born son (*Exod.* 22:28-29, MT); agricultural offerings in the context of the three pilgrimage festivals (*Exod.* 23:14-19a).
- F In both lists, the series concludes with a dietary law: the ban on torn animals, *terefah*, in the first series (*Exod.* 22:30, MT), the ban on seething a kid in its mother's milk (*Exod.* 23:19) in the second.

At that point, the uninterrupted sequence of normative provisions comes to an end. God continues with the promise to send an angel to guide the Israelites in the conquest (*Exod.* 23:20). The end of that promise (v.33) signals the conclusion of what, according to the present literary structure, was a single divine speech to Moses, which had begun in *Exod.* 20:22. The character of this final section echoes that of the first section of the speech, which contains the "altar law," before the formal commencement of the Covenant Code. It echoes it in that it lays down rules particularly apposite for the immediate historical situation, answering immediate questions regarding how Israel is to worship God (answer: by building an altar, which is done in chapter 24), and how they are to proceed in their relations with the nations to be conquered, and the gods they worship.¹⁴⁷

147. No great harm is done by referring to these passages as a "prologue" and an "epilogue," provided that we realise that these terms have a purely literary value, and that there is no neces-

E. *Exodus 23:1-8 and the Conceptualisation of Litigation*

The account I have given thus far of the literary structure of the *sugya* leaves one remaining hole to be filled. There is a gap between the end of the first sequence of the second (Carmichael's) double series (G), and the second sequence of that doublet (I). The first part ends at the end of chapter 22; the second begins in verse 9 of chapter 23. What of the intervening passage, (H), *Exod.* 23:1-8? It seems, at first sight, a curious collection. Its main theme is the perversion of justice. The first three verses prohibit false testimony, whether as a result of conspiracy, popular pressure, or partiality to the underdog, while the last three verses seem directed towards the judge, counselling him to do due justice to the poor, and to take no bribes. But between those two groups of injunctions, we have what are sometimes categorised as "humanitarian" provisions: the duty to bring back an enemy's straying ox or ass, and to assist him in lifting up an ass which is lying down under its burden (*Exod.* 23:4-5).¹⁴⁸ There are thus two literary questions to be answered in respect of this passage. First, what internal principle, if any, gives it its unity? Secondly, what is the relationship of the unit as a whole to the wider literary structure? As regards the first, the passage once again shows the non-necessary status of those classifications which often strike us as most natural. The "humanitarian" provisions have that significance only if we focus upon the interests of the animals, to the exclusion of other elements of the text. What is remarkable, in this context, is the fact that both apparently "humanitarian" provisions posit a context of enmity between the owner of the animal and the person upon whom the duty is imposed. The command is not to return *any* straying ox or ass, or to assist with the uplifting of *any* overburdened animal: it is, in the first case, "your enemy's ox or his ass"; in the second, "the ass of one who hates you." We are not to conclude that the author of the text would have restricted the duties to those cases. Nevertheless, the selection of that particular instance of humanitarian behaviour to animals as the

sary link between the content of the biblical prologues and epilogues, and their counterparts in ancient Near Eastern literature.

148. One might think that this is a literary unit crying out for the application of Daube's theory of amendment by addition at the end, what he calls the *lex clausulae finalis*, indicating that the unit originally comprised the two elements regarding false testimony and the humanitarian provisions, while the third, thematically far closer to the first, was subsequently added. But we are here concerned with the final literary structure, rather than the preceding literary history. On the wider literary-historical question, see Phillips, *supra* note 66, at 158, approving I. Lewy, "Dating of Covenant Code Sections on Humaneness and Righteousness," *Vetus Testamentum* 7 (1957), 322-26, regarding this section, together with *Exod.* 22:20-26, as a later addition, but for rather inadequate reasons.

one for inclusion, as opposed to the class in general, is significant. And this supplies the clue to the internal structure of the unit. Enmity is presupposed also in the context of litigation. The message of the literary structure, taken as a whole, is that enmity must neither avert the administration of justice, nor interfere with the observance of ethical behaviour. We might even read into this a further implication, germane to our search for the character of the norms in general: litigation is not conceived of as the normal manner of resolving disputes—the typical situation in which it is envisaged is one not merely of dispute, but of enmity. Enmity, we might say, is here conceived as the source of litigation; in our society, it is the result.

What of the relationship of *Exod.* 23:1-8 to the literary structure as a whole? Two views are possible: either it has been inserted into an already-existing double series (G+I), or it originally concluded the Covenant Code, the second sequence of Carmichael's second series, and the subsequent passage regarding the conquest, being added at a later stage. The former appears the more likely: H is thematically related to the theme of another passage on the margins of the *sugya*, namely the narrative of Jethro's advice to Moses on the administration of justice (*Exod.* 18:13ff.), which immediately precedes the narrative of the arrival of the Israelites at Sinai (*Exod.* 19:1). This may suggest that it was the same hand which added both the Jethro story and *Exod.* 23:1-8 to the original structure of the Sinaitic *sugya*.

*F. The Meaning of the Structure: Insiders and Outsiders
in the Sinaitic Narrative, the Decalogue, and the Covenant
Code*

I turn to the substantive significance of the literary structure. And for this purpose, the ambiguous status in it of the Jethro story and the pericope on the administration of justice assumes added importance. In literary terms, they are both inside and outside the main structure of our *sugya*. In content, too, the opposition between insiders and outsiders receives in this pericope the first of a number of manifestations which I suggest constitute the main substantive theme of the whole *sugya*. For advice regarding the administration of justice is received from an outsider, Jethro. Next comes the arrival at Sinai, and the covenant which is immediately offered. It starts, as we have noted, with an historical allusion to the exodus: "You have seen what I have done to Egypt . . ." (*Exod.* 19:4). In exchange for Israel's observing the covenant, God promises that "You shall be my own posses-

sion¹⁴⁹ among all peoples . . .” We are thus to witness the transformation of Israel’s identity: from a slave people, entirely subject to the jurisdiction of others, through an independent people, to whom others may give advice on jurisdictional matters, to a people whose identity is defined in terms of its special relationship with God. The Decalogue continues this concern. The identity of Israel is to be established on two levels: that which is peculiar to it (to be defined in terms of the *ius divinum positivum*), and that which it shares as part of the shared history of all mankind.¹⁵⁰ I suggest that the two groups within the Decalogue, according to the division proposed in Part IV.C, reflect just this kind of concept. And the two historical allusions which head the two sections reflect these two dimensions of Israel’s identity. The first section is headed by the allusion to Israel’s particular history, the exodus from Egypt, and contains *ius civile*—provisions mostly concerning religious practices: monotheism, the ban on images, the ban on idolatry, misuse of the divine name, the sabbath (this last, to this very day, being regarded as a mark of the religious distinctiveness of Jews). Then we have the allusion to universal history, the creation of the world, at the beginning of the second group. What follows within it is *ius gentium*, matters having no connection whatsoever with Israel’s religious practices, but reflecting an ethic which may be assumed to have universal claims: honouring parents, the proscription of murder, adultery, theft, false witness (this last comes close to the concerns already identified with a non-Israelite, Jethro), coveting.

Just as the distinction between *ius civile* and *ius gentium* in Roman law had a practical as well as a speculative meaning, referring to legal relations within Rome between citizens and non-citizens (insiders and outsiders within the jurisdiction of the Roman state), so too we find further transformations of the insider/outsider opposition in the content and arrangement of the norms that follow. The paragraphs up to and including the law of the seducer presuppose the activities of insiders.¹⁵¹ But after the law of the seducer, matters change. The small group of capital offences at *Exod. 22:17-19* are

149. RSV, *segullah*, more literally translated “peculiar treasure”—AV.

150. The Romans, we may recall, were very much alive to this distinction. Part of the law of each nation consisted of rules peculiar to itself, its *ius civile*, while the rest was common to all mankind, *ius gentium*. See further B.S. Jackson, “The Literary Presentation of Multiculturalism in Early Biblical Law,” *International Journal for the Semiotics of Law / Revue Internationale de Sémiotique Juridique* VIII/23 (1995), 181-206, esp. 184-193.

151. This is stressed particularly important in two contexts—the law of slavery (and the interpretation of *eved ivri*), and the collective image of thieving (discussed further in *Wisdom-Laws*, forthcoming).

ones all of which were associated in the Israelite mind with the practices of foreign peoples: idolatry (of course), witchcraft, and bestiality. And the sequence which commences Carmichael's double series (*Exod.* 22:20) puts relations with the *ger*, the resident alien (the outsider who is inside the community) right up front: "You shall not wrong a stranger or oppress him, for you were strangers in the land of Egypt." Israel's particular historical experience, one in which they were treated as outsiders within Egyptian society, is taken as a negative model as to how they should treat outsiders within their own community. The same, of course, is true of the opening laws of the second sequence of this final double series. The opening provision is almost identical to that of *Exod.* 22:20: "You shall not oppress a stranger; you know the heart of a stranger, for you were strangers in the land of Egypt." The provisions that follow, as we have seen, relate in both sequences to the poor, and in *Exod.* 23:12 the sabbath law is explicitly extended to the *ger*, here echoing the Decalogue (*Exod.* 20:10). The placing here of measures to protect the poor is surely not accidental. The poor could easily become enslaved—the setting of the first two paragraphs of the Covenant Code—and slavery was associated with the status of being an outsider within Egypt. This thought association was by no means fanciful, given the narrative tradition concerning the circumstances in which the Israelites came to be enslaved in Egypt—having taken refuge there, as resident aliens, in flight from famine. The detailed connections between the rest of the second double series and the status of an outsider are not always as obvious. But the whole collection does conclude with a famous dietary law: the ban on seething a kid in its mother's milk (*Exod.* 23:19), which has long been thought to be a reaction to Canaanite ritual.¹⁵²

PART V. SPECIAL PROCEDURES AND JURISDICTIONAL CLAIMS

In Parts II-IV, I have sought to provide evidence to support the alternative model, that of "wisdom-laws," which I oppose to Westbrook's advocacy of a traditional "legal model" for our understanding of the Covenant Code: on the one hand, there is both internal and external evidence of a preference for a different dispute resolution process; on the other, we find elsewhere in the Bible evidence of the same types of literary activity which seem to inform the development

152. Others have viewed the cultic laws of the Covenant Code as in general being of an anti-Canaanite nature: Blenkinsopp, *supra* note 142, at 82; cf. Phillips, *supra* note 66, at 121, on the interpretation of bestiality, *Exod.* 22:18, as a condemnation of Canaanite ritual, rather than a sexual crime related to the Decalogue prohibition of adultery.

of the cognitive structures of the final text. Yet even if the argument for self-executing laws is accepted, we still have, both within the Covenant Code and elsewhere, references (express and implied) to formal adjudication, and an account must be given of their relationship to the wisdom-law tradition.

A. *“Special” Divine Procedures in the Covenant Code and the Laws of Hammurabi*

We may usefully commence with the historical development of what may loosely be called “divine procedures” (that is, special processes of adjudication directly invoking divine assistance), and the choice of cases subjected to such procedures according to biblical law. The most explicit references to particular cases of adjudication in the Covenant Code are of this nature: the case of the suspected depositee (*Exod. 22:7*) and the shepherd’s oath (*Exod. 22:10*). An unhealthy consensus has grown up regarding the incidence of such procedures. That consensus may be summarised in what I shall call the “functional” view. This claims that “divine procedures” are invoked only when there is a functional need for them, thus in cases which by their very nature are likely to present difficulties—not only of fact determination, but sometimes also of legal uncertainty—to purely human, rational adjudicatory agencies. Implicit in this consensus is the view that divine procedures were reserved for this type of case from the period represented by our earliest sources. The cases of the depositee and the shepherd are seen as falling into this pattern.

There are, however, other ways of viewing the material. One such I shall call the “special interest” view. This is to the effect that “divine procedures” are used where there exists some particular “divine interest” in the subject matter.¹⁵³ The case of Akhan is a good example. Contrary to divine instructions (*Josh. 6:18*), Akhan stole some of the loot from the victory at Jericho, which had been accorded the status of *herem*—“devoted” to God. His sin caused divine displeasure, resulting in the subsequent defeat of the Israelites at Ai. God then commanded Joshua to use a divine procedure for identification of the culprit (*Josh. 7:14*), which Joshua then performed. Each tribe was “brought near” (v.16), and the tribe of Judah was “taken”; the families of the tribe of Judah submitted to the same procedure, and

153. The “special interest” model of jurisdiction may appear strange to those more familiar with cultures where jurisdiction is associated with impartiality, but we find many parallels elsewhere. We need think only of the gradual growth of royal jurisdiction in England. Jurisdiction grows out of interest, not disinterest.

that of the Zerahites was “taken”; the head of each household within this (extended) family was brought near, and Zabdi was taken; finally, each man within that household was brought near, resulting in the identification of Akhan. The precise nature of the procedure denoted in the narrative by the verbs *karav* and *lakhad* need not here detain us; I have argued elsewhere that it was a sacred oracle, rather than the use of sacred lots or some form of ordeal.¹⁵⁴ What is important for present purposes is the fact that some form of special divine procedure was used. But why? The case was not one which precluded the use of ordinary evidentiary tests. We do not even have to rely upon the vagaries of eye-witness testimony, identification and subsequent recall of the act of taking. There existed the possibility of finding “real” evidence, in the form of the guilty party’s “hot possession” of the property. Indeed, after Akhan was identified by the special procedure, he confessed that the property was hidden under the earth inside his tent (v.21), and Joshua then arranged for a formal “finding” of the property (vv.22-23):

So Joshua sent messengers, and they ran to the tent; and behold (*vehine*), it was hidden in his tent with the silver underneath. And they took them out of the tent and brought them to Joshua and all the people of Israel; and they laid them down before the Lord.

Thus, a purely human search procedure could have been used. Such is not unknown in the case of sacred property—although the cases we have¹⁵⁵ all differ from the case of Akhan in that the search was directed towards someone already identified as a suspect. But this difference is not as substantial as might appear at first sight. It would not have been difficult, in the circumstances of Akhan’s case, to narrow the field considerably through the use of hearsay evidence in order to determine who—in the first instance at least—should have his tent searched. The conclusion remains that the use of a divine procedure in the case of Akhan is not fully explicable by the “functional” model. At the very least, we have to add the fact that the property was *herem*, “devoted” to God. God thus had a special interest in this particular case; hence the divine involvement in the adjudicatory procedure. Similarly, Saul’s use of the oracle after Michmash (I *Sam.* 14:36ff.) relates not only to a decision whether or not to pursue war, but also to adjudication upon the effect of a curse (involving use of the divine name). Again, the use of the oracle in the choice of Israel’s first king

154. Jackson, *Theft*, *supra* note 32, at 233-36.

155. Laban’s teraphim, Joseph’s divining cup, and Micah’s image: see Daube, *supra* note 27, at 202-20.

(I *Sam.* 10:20-23) involves divine legitimation of a partial transfer of divine authority.

Let us consider next the law of the Covenant Code on deposit (*Exod.* 22:6-7):

If a man delivers to his neighbour money or goods to keep, and it is stolen out of the man's house, then, if the thief is found, he shall pay double. If the thief is not found, the owner of the house shall come near to God, to show whether or not he has put his hand to his neighbour's goods. (RSV)

The nature of the divine procedure is not here explicit. Much scholarly ink has been spilled in debating whether the procedure is an oracle, an oath or a type of ordeal.¹⁵⁶ The matter can hardly be determined with any certainty. I incline to the view that the verb *karav* indicates an oracular procedure, as is clear for its use describing the procedure adopted to resolve the case of the daughters of Zelophehad (*Num.* 27:1,5,7). But that does not dispose of all the problems of this particular verse.

First, the legal consequence of whatever determination of the facts is made by the divine procedure is not explicitly stated. This stands in stark contrast to the formulation of the oath procedure in the case of the shepherd (*Exod.* 22:10), as the text presently stands. It also contrasts with the Old Babylonian texts where an exculpatory oath at a sanctuary is to be taken—texts which we shall presently have occasion to review. The elliptical character of the present text speaks against the view of those who regard the procedure in this case as an oath. Even Cassuto, who does take the procedure to be an oath,¹⁵⁷ concedes that the clause *im lo shalah yado bimlekhet re'ehu* cannot be regarded as the text of the oath. He therefore has to understand the verse as meaning that the deposittee takes an oath and is therefore exempt from payment “if it is true that he did not put his hand to his neighbour's goods.” Indeed, Cassuto has to apply the same very artificial interpretation to the same phrase where it occurs in verse 10, in the context of the (here explicit) exculpatory oath of the suspected shepherd.

The second problem is the expression *melekhet*. It occurs elsewhere three times. In *Gen.* 33:14 and I *Sam.* 15:9 it refers to possessions of herds and flocks (BDB), not “property” in general; it is only in the late 2 *Chron.* 17:13 that it receives this more general meaning. Given the very different descriptions of the procedures in the Cove-

156. For the older literature, see Jackson, *Theft*, *supra* note 32, at 237 n.1.

157. *Exodus*, *supra* note 74, at 286.

nant Code's laws on the depositee and the shepherd, it is hardly likely that the same procedure was contemplated in each. That being so, the common formula *im lo shalah* . . . is likely to have been copied from one to the other by a later hand. The semantic field within which *melekheth* occurs suggests that it is more likely to have been original to verse ten, the law of the shepherd, than the law of the depositee.

There is one further difficulty with the law of the depositee. It represents the only example in the Covenant Code of a drafting technique which I have termed—slightly expanding a conception of Yaron—the “split protasis.”¹⁵⁸ That form of drafting is far more common in later biblical collections.

Why should some form of divine procedure have been thought appropriate in this case—whether by the original author or, as seems more likely, by a later editor? Usually, the answer is taken to be obvious. It is a clear example of the operation of the “functional” model. In the past, I have myself subscribed to this view. The owner asks a depositee to look after some silver. When its return is requested, the depositee claims that it has been stolen. If the thief can be found, well and good; the thief is liable, and the depositee cleared of suspicion. But what if no thief can be found? There are two possibilities. Either the silver was in fact stolen, and the depositee is innocent. Or the silver had never in fact been stolen: the depositee had himself misappropriated it, and falsely claimed it to have been stolen in order to conceal his crime. How does the law decide between these two possibilities? The situation is one where the normal criteria of guilt are inconclusive. Since the owner had himself delivered the silver to the depositee, there can be no evidence of an illegal taking. The property, quite simply, has disappeared. The depositee says it has been stolen, but the normal evidence of theft (sale or “hot possession”) is missing. Once, and only once, this point is reached, the bible regards the situation as one inherently beyond the ability of human judges to decide.

Such a functional explanation of the procedure appears to be confirmed by the circumstances that give rise to the shepherd's exculpatory oath in the next paragraph. Here too, a form of divine justice is invoked, but only where the loss of the animal is alleged to have occurred “without anyone seeing it” (*Exod.* 22:9). But further reflection on the case of the suspected depositee leads one to question the adequacy of the functional interpretation. Surely the first step, in such a case, would be to search the depositee's premises. If the deposit is

158. Jackson, “Legal Drafting,” *supra* note 25, at 58-60.

found there, when the depositee has already claimed it has been stolen, then clearly the depositee has sought to misappropriate it.¹⁵⁹ Only if the deposit is not found in the depositee's premises would we have a case of real evidentiary difficulty, such as might justify the use of a divine procedure: the depositee claims that the property has been stolen, but in fact he has disposed of it (under whatever title) to a third party, and that third party has not been identified. Yet even if proof of the depositee's disposal of the property to a third party presents inherent evidentiary difficulties, the depositee has on his own admission failed to prevent a theft—a circumstance which clearly does ground liability in the case of the shepherd (*Exod.* 22:11).

In the Laws of Hammurabi, the mere disappearance of the deposit is not in itself sufficient to bring a divine procedure into play: if the depositee were to claim that it was the deposit alone (without property belonging to the depositee) which had been stolen, this in itself was taken to indicate misappropriation on his own part.¹⁶⁰ It is only in such circumstances of "joint loss" that the depositee is allowed to take an exculpatory oath. It seems particularly significant that the criterion of joint loss is used not only in the Laws of Hammurabi, but also in the (generally less advanced) Laws of Eshnunna. The fact that the biblical text ignores this criterion altogether is one reason to doubt the "functional" explanation of the divine procedure in this case.

There are also more general considerations. Even if we accord the functional model some explanatory power, it cannot do the whole job. For we have to explain why choices appear to have been made to use a divine procedure in some cases of apparent evidentiary difficulty, but not in others. Why not use it, for example, to determine which of two animals (neither of which had previously been "warned") was to blame for an incident in which one of them was killed (*Exod.* 21:35)? Why not use it to determine difficult questions of causation, as where the victim of an assault dies a few weeks later, after some signs of recovery (*Exod.* 21:18-19)? Why not use it in all

159. It would appear inappropriate, in this context, to pose more technical questions: whether some *contractatio* is required, and whether in its absence the depositee could be convicted of attempting to misappropriate the property.

160. LH §125. Such an implication would remain even if we accept Koschaker's reconstruction of the original, according to which the depositee is not liable if he has lost property of his own along with property of the depositor. Westbrook 1994, *supra* note 1, at 33-34, concedes that this is the one case where Koschaker's (literary-historical) approach "is generally thought to have been vindicated . . . by the subsequent discovery of Codex Eshnunna, paras. 36-37, containing an earlier, more primitive rule," but claims that "all such comparisons, however, rely on translations that disregard certain difficulties in the text" and indicates an article in rebuttal, to appear in *JCS*.

cases of "hot possession," since there is always the possibility that the real thief, fearing detection, might seek to "plant" the stolen property on an innocent person? We have seen that in all these cases, the Covenant Code uses what I call "arbitrary" tests—ones capable of being used by the parties in a self-executing manner, and which will do (rough) justice in the majority of cases, the remaining cases of injustice being the price that is paid for the advantage of efficient processing of the more typical cases. If so, why not adopt a similar approach to the case of the deposit? Why not hold him liable where he alleges an (unproven) theft of the deposited property alone, and exempt him where his own property is also taken (the situation, as Koschaker argues, in the original text of the Laws of Hammurabi)? Similarly, as argued above, the shepherd was liable even for the death or mutilation of the animal by wild beasts, if he did not have someone on hand to look after the animals at the time; if he did, he was exempt.

In arguing in this manner, we see that the explanation of these cases of divine procedures becomes a central issue for the understanding of the nature of the collection as a whole, and—as I shall suggest presently—for the identification of the circles responsible for its literary history. For "divine procedures" would appear on this understanding not to be a functional supplement to a regular system of adjudication but rather an example of the use of adjudication in preference to the model of practical wisdom, based upon self-execution.

But we still must try to explain why divine procedures were regarded as appropriate in these particular cases—even if by subsequent editors of our text. If the functional model does not provide a sufficient explanation, what other factors might be involved? Let me suggest now that we may detect traces, even here, of what I called earlier the "special interest" model. Whereas in the Laws of Hammurabi deposit is clearly a purely secular institution, a form of contract constituted by witnesses and a written contract,¹⁶¹ strong moral and theological overtones are attributed to it early in the Jewish tradition. Both Philo and Josephus see the relationship between depositor and deposit? as no mere, ordinary commercial relationship, but rather as involving an element of sanctity. Philo describes the receiver as ac-

161. As is made abundantly clear by §§122-123 of the collection:

If a man wishes to give silver (or) gold or anything whatsoever to a man for safe custody, he shall show anything whatsoever that he gives to witnesses, he shall draw up a contract and (thus) give (them) for safe custody. If he has given (them) for safe custody without witnesses or a contract and those with whom he gave them contest (them), that case affords no cause of action.

cepting "something sacred" (*labon hos hieron chrema*). He commences his treatment of deposit with the following observations:

The most sacred (*hierotaton*) of all the dealings between man and man is the deposit on trust, as it is founded on the good faith of the person who accepts it. Formal loans are guaranteed by contracts and written documents, and articles lent openly without such formality have the testimony of the eye-witnesses. But that is not the method of deposits. There a man gives something with his own hands secretly to another when both are alone. He looks carefully all round him and does not even bring a slave, however loyal, with him to act as carrier, for the object which both of them evidently pursue is that it should be impossible to show what has happened. The one wishes that nobody should observe his gift, the other that no one should know of his acceptance. And this unseen transaction has assuredly the unseen God as its intermediary, to whom both naturally appeal as their witness, one that he will restore the property when demanded, the other that he will recover it at the proper time (*DSL* iv.30-33).

Josephus is to similar effect:¹⁶²

Let the receiver of a deposit esteem it worthy of custody as of some sacred and divine object (*hosper hieron ti kai theion chrema*), and let none venture to defraud him that entrusted it to him, neither man nor woman, no not though he might gain of untold gold, in the assurance of having none to convict him. For by all means, from the mere knowledge that he has of his own conscience, ought everyone to act aright—let him be content with that for witness and do all that will bring him praise from others—but chiefly from his knowledge of God, whose eye no criminal escapes. (*Ant.* iv. 285-286)

This idea turns out not to be confined to the Jewish tradition. Driver has noted that deposit of money or goods is regarded by the Bedouin Arabs as a secret trust.¹⁶³ But it would be rash to take such Bedouin evidence as justifying the reading back of the Hellenistic conception right into the early biblical period—however much the Hellenistic Jewish writers here differ, in their conception of the *parakatatheke*, from the purely secular conception of the institution which we find in the papyri, where documents evidencing the deposit in a manner comparable to the requirements of the Old Babylonian sources are to be encountered.¹⁶⁴ The real significance of the Hellenistic Jewish sources, for present purposes, lies in the prominence they give to the sacred character of deposit, which may very well represent their own

162. Cf. Thackeray, in the Loeb edition, p.613 note d; there may well here be literary dependence.

163. S.R. Driver, *The Book of Exodus* (Cambridge: Cambridge University Press, 1918), 226, citing Cook and Doughty.

164. R. Taubenschlag, *The Law of Greco-Roman Egypt in the Light of the Papyri* (Warsaw: Panstwowe Wydawnictwo Naukowe, 1955), 349-352, for the documentation and older literature.

response to the very question we are posing: why in these particular cases (but not others) should divine procedure be used? This is not to suggest that they invented the idea of sanctity of deposit; it is sufficient that they used it. Whether the idea does go back to the early biblical period may be doubted. Indeed, the deposit paragraph may well have formed no part of the original collection. It interrupts a sequence of paragraphs all dealing with normal agricultural activities: cattle-farming (including the theft of cattle), agriculture, and shepherding. Moreover, we have noted one drafting peculiarity of the paragraph, namely the existence there—but not elsewhere in the Covenant Code—of a “split protasis.” We shall have occasion presently to speculate as to the source of the addition.

In the paragraph on shepherding,¹⁶⁵ too, there is a hint of the “special interest” model. The situation regulated by the law is one where the animal has died or been “broken” (*nishbar*), or (as the text now stands) “driven away” (*nishbah*). The (natural) death of the animal appears to have been conceived as a “special interest” of God: we find a similar association of divine providence with bodily integrity in *Psalm* 34:19-20, where the same verb, *shavar*, is used:

Many are the afflictions of the righteous; but the Lord delivers him out of them all. He keeps all his bones; not one of them is broken (*nishbarah*). (RSV translation).

The “special interest” in this case thus resides in the role of providence in the fate of the animal. Some support for this perhaps unlikely-sounding suggestion comes from the Laws of Hammurabi. We find there three paragraphs dealing with the liability of a herdsman. The first, LH 265, deals with cases of *dolus*: the herdsman “feloniously alters the brand (on the cattle or sheep) and sells (them).” The third, LH 267, deals with a case of carelessness (Bab. *egum*), but it is resolved by an application of the principle of *res ipsa loquitur*, rather than resort to a divine procedure:

If the herdsman has been careless and lets an infection (?) break out in the field, the herdsman shall make good the loss caused by the infection (?), which he has let break out in the fold (with) cattle or sheep and give (them) to their owner.

It is in the second paragraph of this group, LH 266, that we find recourse to a divine procedure, even though this appears to be a

165. In *Wisdom-Laws*, I argue that the original paragraph made no use of a divine procedure, the oath being added by a later hand. The question would still arise, however, why the later editor considered that such an amendment was appropriate.

straightforward case of accident, without any suggestion of evidentiary difficulty:

If the finger of a god touches or a lion kills (a beast) in the fold, the herdsman may purge (himself) before a god and the mischief in the fold shall fall on the owner of the fold.

Taking these three provisions together, the “special interest” model appears to fit better than the functional; it is a case of “special interest” because accident is conceived, indeed described, as an “act of God.” The same pattern is found in the liability of the hirer of a domestic animal, where (unlike the paragraphs we have just considered) a distinction is drawn between accident resulting from the act of a wild beast, and “act of God”:

244 If a man has hired an ox (or) an ass and a lion kills it in the open country, it is the owner’s (risk).

245 If a man has hired an ox and causes its death by neglect or by striking (it), he shall replace ox by ox to the owner of the ox.

249 If a man has hired an ox and a god has struck it and it dies, the man who has hired the ox may take an oath by the life of a god and he then goes free.

This is not to suggest that “special interest” in this sense explains *all* uses of divine procedures (here, mainly oaths) in the Laws of Hammurabi.¹⁶⁶ Taken as a whole, the special procedure cases in the Laws of Hammurabi seem to show the same kind of mixture of “special interest” and “functional” considerations which we have identified in the Bible. Neither model, it should be stressed, is to be regarded as a principle which operates consistently and mechanically throughout all the relevant cases.¹⁶⁷ Inconsistencies do occur, as where the death of a domestic animal at the hands of a lion is equated with “act of God” in the provisions on the herdsman, but not in those dealing with hired oxen.

I turn now to the third occurrence of a “divine procedure” in the Covenant Code, which we find in *Exod.* 22:8:

166. LH 120 (see Driver and Miles I.235) would be difficult to explain in this way, although another example in this context, LH 126, is less so, since it involves an accusation against, and therefore a special interest of, the “district” (*babum*), which may suggest (*arguendo* from Driver and Miles I.245) that the deposit had been made in a temple.

167. I have myself been guilty of elevating the “functional model” to the status of an all-embracing explanation. In 1979, I wrote: “Moreover, divine legal activity is deployed in no arbitrary fashion. It is brought to bear only where there is a special need, arising from the limits of human capacity . . . Every situation for which it (divine justice) is prescribed involves special evidentiary difficulty . . .” B.S. Jackson, “The Concept of Religious Law in Judaism,” *Aufstieg und Niedergang der römischen Welt* (Berlin: W. de Gruyter, 1979), Bd. II.19.1, 39, 42. I now think the matter is far more complicated.

For every breach of trust (*pasha*), whether it is for ox, for ass, for sheep, for clothing, or for any kind of lost thing, of which one says, 'This is it,' the case of both parties shall come before God; he whom God shall condemn shall pay double to his neighbour. (RSV)

This is commonly regarded as an addition to the original Covenant Code, principally because of its generalising tendency, combined with its departure from the normal casuistic form.¹⁶⁸ We shall consider presently its place in the history of jurisdictional development. For the moment, we must ask what significance it would have had for the compiler of the Covenant Code.

The language of the verse has some peculiarities which distinguish it from the more specific cases of both the depositee and the shepherd. First, the result of the divine procedure is expressed in such a way as to suggest that its object is to identify a culprit from more than one possible suspect: "He whom God shall condemn," *asher yarshi'un elohim*. The phrase *ki hu zeh*, given the grammatical context, should be rendered not "This is it," but rather "This is he." Secondly, the situation is introduced as one of *pasha*. This may or may not be an indicant of a later, priestly hand. But we would be wrong to dismiss the term as mere theological rhetoric, as in the traditional translation "For every matter of trespass" (RV). The RSV "breach of trust" is quite apposite. The term *pasha* is used in three other passages in connection with property offences. In all three, the context is a family dispute: Laban's accusation that Jacob or a member of his family had stolen his household gods (*Gen.* 31:36), the kidnapping of Benjamin (*Gen.* 50:17), and the image presented in *Proverbs* 28:24 of one who "robs his father or his mother and says, 'that is no transgression' (*eyn pasha*)." The term thus appears to connote a special relationship between the parties to the dispute. If we apply this to *Exod.* 22:8, we might find an anticipation of the Hellenistic understanding of the deposit law, as itself involving a special relationship, a sacred trust.

B. Hierarchical Models

The relationship between our two, sometimes overlapping, models of divine adjudication (the functional, and the special interest models) may be clarified by relating them to their institutional context, and to the history of the jurisdictional claims¹⁶⁹ which we encounter in the biblical texts. Any model of jurisdiction has to provide answers to three types of question. The first is: who exercises jurisdiction? In

168. See further Jackson, *Theft*, *supra* note 32, at 101, 101 n.4 (for literature) and 236-244.

169. How far they correspond to realities is almost impossible to judge.

biblical terms, the answers may be: local elders, royal judges, or priests. Secondly, what is the extent of the jurisdiction of any of these adjudicatory agencies? Do they each deal with *any* cases brought to them (the limits of their jurisdiction perhaps being territorial), or do they deal only with certain types of case, referring others to alternative jurisdictions? Thirdly, what means do they use to resolve the cases brought to them? Again, in biblical terms there appear to be at least three possible answers: the use of a divine oracle, the use of rules of law, the use of intuitions of justice.

A hierarchical model of jurisdiction (reflective of the modern "legal model") would claim that these questions must be answered at two different levels. There is a lower level, where the adjudicatory agencies are local—typically, city elders; they do not deal with all cases, but only with cases which we may call "easy"; and they deal with them by the application of pre-determined rules of law. There is a higher level of jurisdiction, where the adjudicatory agencies are central (including priests); which deal with the difficult cases which are referred to them, and which resolve them by means of divine procedures. This model is "functional," in the sense that it correlates the institutions of adjudication with what are presented as inherent and practical difficulties of adjudication. Logically, however, it would be possible to take almost any combination of the variables which I have identified within the three types of issue. We could have local institutions dealing with all cases, resolving them not by application of rules of law, but either by intuitions of justice or oracular consultation. Or we could have something more consistent with the "special interest" model of divine procedures. Divine procedures might be used—perhaps at the local level—in order to resolve questions which were perceived as presenting a particular divine interest, while other questions might be dealt with by secular agencies, using other means (rules of law, or intuitions of justice). I sketch these various possibilities as a preliminary to a re-examination of the biblical texts on jurisdiction, in order that we may view them afresh, with an unbiased eye, and thereby identify precisely what jurisdictional claims are being made by each one, and how they relate to such adjudicatory rules as we have encountered in the Covenant Code, and to the narratives of the actual exercise of jurisdiction.

C. "Ordinary Adjudication"

Four biblical passages present us with jurisdictional models. The differences and interrelationships between them are of some interest. I start with the "reform" of Jehoshaphat (II *Chron.* 19:5-11). Jehoshaphat was king of Judah for some twenty-five years in the middle of the 9th century. The system he introduced was certainly "hierarchical" in one sense, but still differs considerably from the classical "functional" model. In one respect it reflects a centralising tendency. Jehoshaphat himself appoints the local as well as the central judges, but it should be noted that he is said to have directed his attention only to the "fortified cities of Judah"—reflecting the special military interests of the king. These local judges, once appointed, are not tied into some centralised system of adjudication, by being subjected to general rules passed on from on high. Rather, they are given a general authority, to judge according to their intuitions of justice, which are taken to be divinely inspired:

He appointed judges in the land in all the fortified cities of Judah, city by city, and said to the judges, 'Consider what you do, for you judge not for man but for the Lord; He is with you in giving judgment. Now then, let the fear of the Lord be upon you; take heed what you do, for there is no perversion of justice with the Lord our God, or partiality, or taking bribes.' (vv. 5-7)

It is worth stressing that secular judges, appointed by the king, are here conceived to exercise a form of adjudication inspired by God (*ve'imakhem bidvar mishpat*). There is no suggestion that the judges must be priests or Levites, in order to fulfil this role. When we turn to the higher level of the hierarchy, the central level located at Jerusalem, Levites and priests are indeed given jurisdiction (together with "heads of families of Israel"), but they are appointed by Jehoshaphat. It is he who defines their jurisdiction:

Whenever a case comes to you from your brethren who live in their cities, concerning bloodshed, law or commandment, statutes or ordinances, then you shall instruct them, that they may not incur guilt before the Lord and wrath may not come upon you and your brethren (vv.9-10).

The initiative, it should be noted, is to come from below, and we are not told that it must be the result of some legal difficulty which was encountered by the local courts, as the functional model of the hierarchical legal system would imply.¹⁷⁰ Moreover, we get a clear hint of

170. It is very likely that the reference to "bloodshed, law or commandment, statutes or ordinances" reflects an attempt by the Chronicler to harmonise this model with later conceptions.

the importance of the “special interest” model at the central level. Jehoshaphat instructs:

And behold, Amariah the chief priest is over you in all matters of the Lord, and Zebadiah son of Ishmael, the governor of the house of Judah, in all the king’s matters (v.11).

Commentators have noted the similarity between this historical account and the normative provisions of *Deut.* 16 and 17. There are indeed similarities, but there are also significant differences, which ought not to be overlooked. First, Deuteronomy’s instruction to appoint local judges refers to “all your gates” (*Deut.* 16:18); there is no restriction here to fortified cities. Secondly, the jurisdiction of the higher level of the hierarchy—the “Levitical priests, and the judge who is in office in those days” (*Deut.* 17:9) is conceived on the functional model—cases which are too difficult for the local judges. But the means of adjudication to be used by those local judges is simply their intuitions of justice—*mishpat tzedek*—here without any explicit hint of divine inspiration which we find in the account of Jehoshaphat’s reform. If, as is common, we take these two sources to represent stages in the development of the Deuteronomic movement, we can see some centralising tendencies. The system in *Deut.* 16-17 now encompasses all cities, not just the fortified cities, and there is a general principle of adjudication: *any* difficult cases can and should be referred to the authorities in Jerusalem. There is a hint that the Levitical priests exercise such jurisdiction through some process of divine consultation: a warning is given against “not obeying the priest who stands to minister there before the Lord your God” (*Deut.* 17:12). Both here and in verse 9 there seems to be a somewhat uneasy combination of jurisdiction between the Levitical priests and “the judge”: certainly, such a division in jurisdiction as we encountered in Jehoshaphat’s reform, based upon the “special interest” model, is here absent. The Levitical priests appear to have increased their jurisdiction, as compared with the situation under Jehoshaphat; the role of “the judge” at the central level is unclear. Yet the centralising tendency which we here observe lacks one important feature of the classical functional model: the levels in the hierarchy are linked only when, at the initiative of the local court, a case of difficulty is perceived. But that difficulty does not necessarily result from interpretation or application of general rules of law. Rather, it arises from difficulties in deciding cases on the basis of intuitions of justice.

D. Jethro's Model

This last element of the functional model does, however, make an appearance in Exodus 18, the story of Jethro's advice to Moses, and the latter's reorganisation of adjudicatory practice in the desert, before the children of Israel had reached Sinai. The account which Moses himself gives of it is as follows:

Because the people come to me to inquire of God (*ki yavo elai ha'am lidrosh elohim*) when they have a dispute, they come to me and I decide between a man and his neighbour, and I make them know the statutes of God and his decisions (*vehoda'ti et hukey ha'elohim ve'et toratav*).

Our predisposition to look at this narrative through the spectacles of the "functional" model inclines us to concentrate upon the fact that Moses originally attempts to deal with all disputes personally, whereas Jethro persuades him to introduce a system of delegation, under which Moses restricts his activities to "difficult" cases. That is certainly one important element of the narrative, one which coincides with the norms in *Deut.* 16 and 17, if not so closely with Jehoshaphat's reform. But we should ask also: *how* was Moses conceived to have adjudicated on these cases according to the original system, and how are the delegates to proceed under the new system? The terminology clearly suggests that Moses was adjudicating by means of oracular consultation. It was done on a case-to-case basis. As a result of each case, a general rule was made known *ex post facto*.

It is clear that Moses was dealing with *all* cases by oracular consultation.¹⁷¹ The fact that the advice comes from Jethro, himself a "priest" of Midian (*Exod.* 18:1), again suggests a model according to which all jurisdiction was exercised on a priestly basis. The objection which Jethro offers to this system is not one of principle. Divine procedure, involving direct revelation addressed to each individual case, is no doubt the ideal. But in practice, it is too heavy a burden for Moses to bear. It was only because of the practical difficulties of handling such a caseload that delegation was introduced.¹⁷²

Let us now consider the system which Jethro suggests:

You shall represent the people before God, and bring their cases to God (*heyeh atah la'am mul ha'elohim veheveta ata et hadevarim el ha'elohim*); and you shall teach them the statutes and the decisions,

171. See particularly *Exod.* 18:15, *ki yavo ha'am lidrosh elohim*.

172. The occasional use of *elohim* to mean "judges" (see literature in Jackson, *Theft*, *supra* note 32, at 241 nn. 1-2, noting the identification made by the early rabbinic commentaries, as well as some modern authors) could well have been inspired by the idea that ultimately all jurisdiction was divine.

and make them know the way in which they must walk and what they must do. Moreover choose able men from all the people, such as fear God, men who are trustworthy and who hate a bribe; and place such men over the people as rulers of thousands, of hundreds, of fifties, and of tens. And let them judge the people at all times; every great matter they shall bring to you, but any small matter they shall decide themselves; so it will be easier for you, and they will bear the burden with you. (*Exod.* 18:19-22)

In the version of the hierarchical model that Jethro proposes, the original functions of Moses—both oracular consultation and teaching—are retained, but they are now reserved for “every great matter” (*kol hadavar hagadol*). From this formulation, it is not entirely clear whether the division of jurisdiction is based upon the “functional” or the “special interest” model. The terminology could suggest either, although the greater proximity here of adjudication and teaching no doubt speaks in favour of the functional model.

On what basis are the delegate judges—secular judges, based upon the administrative units of the army—to decide the cases? We are not told explicitly that they are to judge in accordance with the *hukim and torot* which are pronounced (in the new system as in the old) as a result of oracular consultation in individual cases. Certainly, there is no suggestion that they are given written texts embodying such general rules, in order to apply them to the cases that come before them. At best, the secular judges receive the same teachings as the rest of the people, and may be expected to take account of them in their adjudicatory activities. This is a major step on the road towards a unified legal system, one in which the higher levels of the hierarchy seek to control what is done (in their name) by the lower levels. But we still have a long way to go before we reach that conception of a unified legal system represented by the claim that inferior courts apply written, general rules enunciated by higher authorities. Ultimately, the priestly compilers of the Pentateuch were to discover precisely that strategy. Indeed, the placing of the narrative in its present context, immediately before the giving of the *Torah* at Sinai, could be taken to suggest there are now general norms available for adjudication (the “statutes and the decisions”); there was no longer any need to resort on every occasion to oracular consultation.

The account of this same reorganisation given by Moses at the beginning of his first speech in Deuteronomy reads as follows:

At that time I said to you, ‘I am not able alone to bear you; the Lord your God has multiplied you, and behold, you are this day as the stars of heaven for multitude . . . how can I bear alone the weight and burden of you and your strife? Choose wise, under-

standing, and experienced men, according to your tribes, and I will appoint them as your heads.' And you answered me, 'The thing that you have spoken is good for us to do.' So I took the heads of your tribes, wise and experienced men, and set them as heads over you, commanders of thousands, commanders of hundreds, commanders of fifties, commanders of tens, and officers, throughout your tribes. And I charged your judges at that time, 'Hear the cases between your brethren, and judge righteously between a man and his brother or the alien that is with him. You shall not be partial in judgment; you shall hear the small and the great alike; you shall not be afraid of the face of man, for the judgment is God's; and the case that is too hard for you (*asher yikskeh mikem*), you shall bring to me (*takrivun elai*), and I will hear it.' (*Deut.1:9-17*).

We have here the same system of delegation, to officers whose jurisdiction is based upon the administrative units of the army. And here, it is quite clear that the division of jurisdiction between Moses and the delegates is based upon the "functional" model, the cases to be referred to Moses being the "difficult" cases. But there, the similarities with the account in *Exod. 18* end. The innovation is here attributed to a discussion between Moses and the people, no mention whatsoever being made of Jethro.¹⁷³ The manner of appointment of the delegates is also entirely different. Jethro's suggestion had been that Moses make the appointments himself, purely on the basis of character. Here, in *Deuteronomy*—despite the centralising character of the book so often stressed by modern scholars—Moses agrees to endorse the nominations of the people themselves, and these nominations are to be made on a tribal basis. True, this account places a Deuteronomic gloss upon the qualifications of the tribal heads so to be appointed, by describing them as "wise and experienced men" (*hakhamim vidu'im*). But it remains the fact that Moses is to make the appointments—and he states that he did so—on the nomination of the tribes. Equally significant is the difference between the two accounts as regards the manner of adjudication under the new system. There is still a hint, in the terminology of *karav*, that Moses will use a form of divine procedure. But there is no suggestion here that the judges appointed to hear cases at the lower jurisdictional level are to do so on the basis of general norms. *Deut. 1* is much closer to the accounts of adjudication

173. It is of some interest that the reorganisation in *Exod. 18* is attributed to the advice of a foreigner. The suppression of this in *Deut.* suggests that it was regarded as problematic even within biblical times. There must, then, have been some particularly good reason for the preservation of the account in *Exod. 18* by the final editors of the Pentateuch. I suggest that we may infer that the legitimacy of looking to foreign models—perhaps particularly in relation to adjudicatory practices—was a live issue, and that there were circles which wished to legitimate such recourse to foreign models.

attributed to Jehoshaphat and reflected in *Deut.* 16: the local judges are merely bade to avoid partiality, since “judgment is God’s” (*ki hamishpat lelohim hu*, v.17). Unlike *Exod.* 18, the teaching of general rules makes no appearance in this account; as in both *Deut.* 16-17 and the description of Jehoshaphat’s reform (*2 Chron.* 17 and 19), the adjudicatory and teaching functions are kept entirely separate. We need not decide, for present purposes, the precise literary relationship between *Exod.* 18 and *Deut.* 1. It suffices that we take careful note of the very different jurisdictional interests and claims advanced in these various passages.

E. *The Range of Competing Jurisdictional Claims*

Let me summarise what these claims appear to be. First, competing practical interpretations are given of the common ideology that “all justice is divine.” *Exod.* 18 suggests that, in an ideal world, all adjudication should take the form of oracular consultation—naturally conducted by experts—so as to acquire the most direct divine answer on the particular dispute. When this becomes impractical, resort is to be had to teaching. The local judges are not to rely upon their own intuitions of justice, but are to rely on the precedents of past oracular consultations. On the other hand, both the Deuteronomic sources and the account of Jehoshaphat’s reform take the view that the intuitions of justice of appropriately-appointed local judges satisfy the ideal of divine justice.

Similar concerns inform the exercise of jurisdiction at the central level of the hierarchy. Once again, *Exod.* 18 shows the strongest endorsement of oracular procedures. The other sources are less clear on this point, but there is a hint in Jehoshaphat’s reform that central jurisdiction is divided between “matters of God” and “matters of the king,” and we should not exclude the possibility that this jurisdictional division also entailed differences in adjudicatory procedures.

Secondly, competing claims are made regarding the manner of appointment of the local judiciary, and the personnel who may be so appointed. Jehoshaphat, as king, is recorded as having made these local appointments—but we should not draw too wide conclusions from this, since the scope of his reform extends only to the “fortified cities.” No such restriction applies to *Exod.* 18, where it is Moses (thus representing future central authority) who is to appoint the local judges, and who is to do so without reference to tribal criteria. This is certainly compatible with the desire of priestly interests to retain a

maximum of control over the judicial system. By contrast, *Deut.* 1 explicitly, and *Deut.* 16:18 implicitly (“You shall appoint judges and officers in all your towns . . .”), claim that the local appointments are to be made locally, at the tribal level, and that they are to reflect, *inter alia*, the tribal structure. There is insufficient evidence to compare the claims made in relation to the capacity to appoint the central judges: Jehoshaphat has the king do this (appointing the Levites, priests and heads of families), but there is no comparable indication in the other sources.

Thirdly, the different models of the division of jurisdiction may be correlated with the three rival centres of jurisdictional power: the king, the local authorities, and the priesthood. The priesthood sees all adjudication as in principle within its jurisdiction, ideally subject to special, expert procedures. The king is particularly concerned to protect special royal interests, but at the same time is prepared to recognise special interests of the priesthood. The local authorities seek to retain a maximum of jurisdiction, but are willing to surrender difficult cases for resolution elsewhere. It should be stressed, in all this, that we are dealing here with no more than jurisdictional claims. If our “internal” analysis of the character of the norms of the Covenant Code is sound, then we may suspect that—then as indeed today—only a small minority of cases ended up with any type of formal adjudication. The balance of the Covenant Code suggests that, for the author or compiler of that collection at least, *any* form of adjudication was the exception rather than the rule. The limited character of Jehoshaphat’s reform suggests a transitional phase between self-executing laws and a general system of adjudication. The narrative of *Exod.* 18 presents the reverse claim: a vision of queues of litigants all waiting for formal adjudication. Then, as now, it is likely that someone had an interest in it.

F. *The Narratives of Desert Adjudication*

Our understanding of the narratives of adjudication in the desert may be assisted by placing them in the context of the competing jurisdictional claims which have here been sketched. In all of them, a divine procedure is used. Mosaic authority is thereby being claimed for a particular kind of priestly jurisdiction: all of these cases involve (first instance) oracular determination—a jurisdictional claim which *Exod.* 18 ultimately cedes, but purely on grounds of practicality. All of them are presented as cases of law-uncertainty, which may be

viewed as falling within the “functional” model. But arguably, there were also special interests involved in each of them.

The procedure followed in the case of the daughters of Zelophehad (*Num.* 27, 36) is remarkably similar to that attributed to Moses before Jethro’s intervention, in *Exod.* 18. The daughters approach Moses and the other central priestly and secular authorities—Elazar the Priest, the “Leaders” (*nesi'im*) and the “congregation” (*edah*). The approach is made directly: there is no indication that their case was referred by a court lower down the hierarchy. Moses “brings near” their case before God (*Num.* 27:5)—on the grounds that there existed a (perceived) gap in the (customary) law of inheritance. There is legal uncertainty: the functional model of divine procedure is applicable. But this coincides with a special interest, the divinely-appointed distribution of the land of Israel—as becomes particularly clear in the sequel, where a question arises as to the marriage capacity of the daughters, once they have inherited (*Num.* 36). God pronounces a verdict in their favour (v.7), but then commands Moses to proclaim a set of general rules (going beyond the particular circumstances of the case of the daughters) to the children of Israel (vv. 8-11). Thus, here as in *Exod.* 18, we have the teaching of general norms after an oracular consultation, the latter designed in part to provide precedents for the future.

What claim is thus being advanced? Perhaps the message is that the end result of a case may be the promulgation of generally-applicable rules, *provided* that the initial decision is made by oracular means. Such generally-applicable rules were a response to a case of legal difficulty. The daughters were complaining not at the uncertainty, but rather at the apparent injustice of the current rules for distribution of the estate of the deceased. These rules were, apparently, customary until that date. The claim is thereby made that divine procedures are available to challenge customary law—precisely that kind of law which we may expect to have been applied by the local elders, whose jurisdiction is still endorsed by *Deuteronomy*—and that such divine procedure should be operated by the central authorities. Of course, this narrative occurs after the Sinaitic covenant, unlike the narrative of Jethro. That, too, is significant. Such procedures, it is being claimed, may legitimately continue; they have not been superseded by (what is now seen as) the revelation of law as part of the covenant.

The cases of the blasphemer (*Lev.* 24:10-16) and the Sabbath-breaker also advance jurisdictional claims. But here, it is not a question of supplementation of the Sinaitic law by approval (or not) of

extraneous (customary) law; it is a question of the interpretation of covenantal law itself. Blasphemy was clearly a breach of covenantal law, as expressed in the Decalogue prohibition of taking God's name in vain (and the ban on cursing God in the second half of the Covenant Code¹⁷⁴). But no institutional sanction had there been stated. The offender is therefore put in custody, "till the will of the Lord should be declared to them" (*Lev. 24:12*). Oracular consultation is used in order to determine an institutional sanction. A general claim is thus being advanced: oracular consultation (followed by the teaching of a more general norm) is the proper procedure for determination of such questions regarding the manner of implementation of covenantal law. The invocation of a divine procedure may reflect the special interest of God in the enforcement of covenantal obligations, even apart from the obvious divine interest in the offence of blasphemy.

It may well be the background of a covenantal obligation, embodied in the Decalogue, which explains the use of a similar procedure in the case of the sabbath breaker. There, a man was found

gathering sticks on the sabbath day. And those who found him gathering sticks brought him to Moses and Aaron, and to all the congregation. They put him in custody, because it had not been made plain (*ki lo forash*) what should be done to him. And the Lord said to Moses, "The man shall be put to death" (*Num. 15:32-36*)

God gives Moses the answer: the specific penalty is stoning by the whole congregation, and this is subsequently done (vv.35-36). In this case the narrative lacks the final element which we have observed in *Exod. 18*, the case of the daughters of Zelophehad, and the case of the blasphemer: there is no mention of a command to instruct the people in terms of a general norm for the future.

There is one further instance of desert adjudication. *Num. 9:6-14* has Moses consult an oracle to decide the case of persons who were unable to keep the Passover on the appointed day.¹⁷⁵ An even more radical claim is here being made: priestly jurisdiction may be used even to seek suspension or modification of existing covenantal law.

CONCLUSION: WISDOM, ADJUDICATION, AND THE COVENANT CODE

The minimum claim of this paper is that, despite our rejection of the "legal model" for the Covenant Code, we can still justify the appli-

174. *Exod. 22:27. Lev. 24* uses the same terminology of "curse."

175. Cf. Westbrook 1985, *supra* note 3, at 263.

cation to it of literary-historical methods. We can satisfy one of the criteria which Westbrook himself indicates: namely, the existence of ideological demands prompting the investment of considerable intellectual effort on the part of trained specialists. At a didactic level, there was sufficient interest in the literary presentation of the law, and the messages which could be communicated by (to us) sophisticated literary techniques; at a practical level, there were competing jurisdictional claims.

I shall not, here, attempt any definitive account of the history of the Covenant Code which results from these considerations. Suffice it to conclude with a number of plausible hypotheses, which may repay further study.

1. Despite the survival of wisdom-law values, there was an historical trend away from self-executing laws and towards adjudication of various kinds, ultimately (i.e. at the incorporation stage) based upon the rules ascribed to covenantal law.
2. Wisdom-law values are particularly prominent before the final compilation of the Covenant Code.
3. Adjudicatory values are reflected in various late elements in the Covenant Code, particularly the litigation pericope (*Exod.* 23:1-8) and the generalisation from the deposit law (*Exod.* 22:8), but whereas the former may reflect Deuteronomic concepts of intuitive justice, the latter advances the claims of priestly, oracular jurisdiction.
4. The competing jurisdictional claims were resolved in part in the final text by a "functional" compromise between wisdom-laws and the competing, formal methods of adjudication.
5. The compilation processes of the Covenant Code evince an interest in underlying values, and central concern with questions of identity.
6. Such concerns are reflected particularly in the close links, deliberately manipulated, between law and narrative.
7. The techniques of the compilers and editors, though sophisticated, were far from perfect. Indeed, there is some evidence of the kind of trial and error exercises that we may associate with advanced scribal schools.

