

# STRUCTURES OF POWER

LAW AND GENDER ACROSS THE  
ANCIENT NEAR EAST AND BEYOND



*edited by*  
**Ilan Peled**



THE ORIENTAL INSTITUTE OF THE UNIVERSITY OF CHICAGO  
ORIENTAL INSTITUTE SEMINARS • NUMBER 12  
CHICAGO • ILLINOIS

# STRUCTURES OF POWER



# STRUCTURES OF POWER

LAW AND GENDER ACROSS THE  
ANCIENT NEAR EAST AND BEYOND

ILAN PELED, EDITOR

*with contributions by*

BRIAN MUHS, ILAN PELED, ADELE C. SCAFURO,  
THOMAS A. J. MCGINN, LAURA A. SKOSEY, LAURA  
CULBERTSON, MELINDA G. NELSON-HURST, GARY BECKMAN,  
EDWARD L. SHAUGHNESSY, TAL ILAN, *and* DAVID S. POWERS

*and response by*

JANET H. JOHNSON *and* MARTHA T. ROTH

Papers from the Oriental Institute Seminar

Structures of Power: Law and Gender  
Across the Ancient Near East and Beyond

Held at the Oriental Institute of the University of Chicago

March 6–7, 2015

THE ORIENTAL INSTITUTE OF THE UNIVERSITY OF CHICAGO  
ORIENTAL INSTITUTE SEMINARS • NUMBER 12  
CHICAGO • ILLINOIS

The University of Chicago  
The Oriental Institute, Chicago  
Oriental Institute Seminars 12

ISBN-13: 978-1-61491-039-8  
LCCN: 2017951887  
ISSN: 1559-2944

Printed by Books International USA  
© 2017 The University of Chicago  
All rights reserved. Published 2017.  
Printed in the United States of America

Publication of this volume was made  
possible through generous funding from the  
Arthur and Lee Herbst Research and Education Fund

*Series Editors:*

Thomas G. Urban, Charissa Johnson, and Leslie Shramer  
with the assistance of Alexandra Cornacchia

*Cover Illustration:*

Image left: Law Code; Code of Hammurabi,  
with Hammurabi worshiping before Shamash,  
Oriental Institute Museum. Susa, Iran.  
Old Babylonian period, 1792–1750 BCE (C478)

Image right: Lady Justice  
Design by Charissa Johnson

The paper used in this publication meets the  
requirements of ANSI / NISO Z39.48-1984.  
(Permanence of Paper)

# Table of Contents

Preface and Acknowledgments . . . . .	vii
INTRODUCTION	
Structures of Power: Law and Gender Across the Ancient Near East and Beyond . . . . . <i>Ilan Peled, The University of Chicago</i>	3
SECTION I: THE ANCIENT NEAR EAST AND BEYOND: FORMAL LAW AND INFORMAL CUSTOM	
1. Gender Relations and Inheritance in Legal Codes and Legal Practice in Ancient Egypt . . . . . <i>Brian Muhs, The University of Chicago</i>	15
2. Gender and Sex Crimes in the Ancient Near East: Law and Custom . . . . . <i>Ilan Peled, The University of Chicago</i>	27
3. Greek Sexual Offences and Their Remedies: Honor and the Primacy of Family. . . . . <i>Adele C. Scafuro, Brown University</i>	41
4. Roman Bigamy: The Impossible Sex Crime . . . . . <i>Thomas A. J. McGinn, Vanderbilt University</i>	61
5. Narrative Jurisprudence and Legal Reform: An Alternative Reading of China’s First Treatise on Penal Law (The <i>Hanshu</i> “Xing fa zhi” 《漢書·刑法志》) . . . . . <i>Laura A. Skosey, The University of Chicago</i>	87
SECTION II: THE ANCIENT NEAR EAST: LAW, ADMINISTRATION, AND ECONOMY	
6. Women and Household Dependents in Ur III Court Records . . . . . <i>Laura Culbertson, American Public University</i>	115
7. Spheres of Economic and Administrative Control in Middle Kingdom Egypt: Textual, Visual, and Archaeological Evidence for Female and Male Sealers . . . . . <i>Melinda G. Nelson-Hurst, Tulane University</i>	131
8. Females as Sources of Authority in Hittite Government and Religion . . . . . <i>Gary Beckman, University of Michigan</i>	143
SECTION III: BEYOND THE ANCIENT NEAR EAST: FAMILY AND KIN RELATIONS	
9. The Dowager v. the Royal Court: A Ninth-Century BCE Case of Family Law Recorded in Chinese Bronze Inscriptions . . . . . <i>Edward L. Shaughnessy, The University of Chicago</i>	155
10. Women’s Archives from Elephantine and the Judean Desert: Law Codes and Archaeological Finds . . . . . <i>Tal Ilan, Freie Universität Berlin</i>	171
11. From Nuzi to Medina: Q. 4:12b, Revisited . . . . . <i>David S. Powers, Cornell University</i>	181
SECTION IV: RESPONSE	
12. Law and Gender Across the Ancient Near East and Beyond . . . . . <i>Janet H. Johnson and Martha T. Roth, The University of Chicago</i>	213



## Preface and Acknowledgments

The conference and its subsequent published volume form the result of a long process of preparations and production. They would have never been made possible if it was not for the efforts and contribution of many people. It is my pleasure to acknowledge all those who contributed to the work, and I deeply apologize if I neglect to mention anyone: Gil Stein, former Director of the Oriental Institute, Steve Camp, the Executive Director, and Mariana Perlinac, Assistant to the Director — the “golden trio” of this institution; Christopher Woods, the academic patron and mentor of the Postdoctoral Program; Tom Urban, Leslie Schramer, and Charissa Johnson of the Publications Office of the Oriental Institute; as well as D’Ann Condes, Brittany Mullins, Adam Lubin, and Paul Ruffin, who each had tremendous contributions. I also wish to thank the session chairs and the respondents, who kindly agreed to spare some of their time and participate in the conference: Walter Farber, Janet Johnson, Martha Roth (the latter two acted as conference respondents as well), and David Schloen. Finally, of course, I thank the participants, who came to the conference from close by and from afar, and made their contributions to this volume. Karen Radner and Cornelia Wunsch were not able to submit their papers to this volume, but their participation in the conference was much appreciated.





## Introduction

# Structures of Power: Law and Gender Across the Ancient Near East and Beyond

*Ilan Peled, The University of Chicago*

This volume publishes the proceedings of the eleventh annual University of Chicago Oriental Institute Seminar. Though I hoped that the volume would reflect as closely as possible the conference itself, the two do vary slightly — mostly in terms of structure, but also in content. I still hope that this volume satisfies my most significant goal for the conference and its publication: to present a cross-cultural study of the intersection between law and gender relations in the ancient world, with a focus on the ancient Near East.

I begin with a clarification of the title chosen for the conference, which has been maintained in the book: “Structures of Power: Law and Gender Across the Ancient Near East and Beyond.” Law and gender, as explained below, is a vast and multifaceted topic which can be studied from manifold perspectives using multiple methodologies. My own view of this topic regards it as the reflection of the formation, perpetuation, and interactions of social structures that frequently come into conflict with each other. As such, gender constructs are used by mechanisms of social monitoring and control that can be viewed as structures of power. One such example is the sphere of jurisdiction and legislation.

It is beyond the scope of this book and its introduction to evaluate the broader framework of the modern study of law and gender. I should, however, make several general comments regarding this topic in order to put the current volume within its proper context, despite the immensity and chronological and methodological remoteness of that context.

One of the first modern scholars to discuss the categories of human sexuality and gender was the psychoanalyst Stoller, who established that biological sexual identity and psychological gender identity are distinct concepts. Based on his research of sexual and gender identities and biological and psychological disorders, Stoller concluded that gender identity is shaped by acquired psychological influences.<sup>1</sup> One of the milestones in the research on gender appeared a decade later, when Kessler and McKenna asserted that biological differentiation is a cultural construct, and distinctions between males and females are hardly universal.<sup>2</sup> This approach has been widely accepted by scholars of social and gender studies ever since. For example, the sociologist Giddens concluded that the category of sex reflects physical differences between males and females, while gender refers to psychological, social, and cultural differences between men and women; gender identity is a culturally constructed set of acquired patterns of behavior.<sup>3</sup>

Foucault claimed that gender constructs are formulated within a given society or culture as the result of varying power relations shaped by diverse discourses on sex.<sup>4</sup> Building on

---

<sup>1</sup> Stoller 1968.

<sup>2</sup> Kessler and McKenna 1978, pp. 29–30.

---

<sup>3</sup> Giddens 1997, pp. 91, 111.

<sup>4</sup> Foucault 1978, pp. 97–98.

these ideas, Scott envisioned gender as the essence of knowledge, something constructed by power struggles and cultural and social norms pertaining to sexual differences.<sup>5</sup> Significant to the present volume is Scott's characterization of gender: "Its uses and meanings become contested politically and are the means by which relationships of power — of domination and subordination — are constructed."<sup>6</sup> These views of "structures of power" are echoed in the title of the present volume.

When assessing sexuality and gender in ancient times, however, we must bear in mind that social conventions vary across space and time, and that modern theories should be used with caution when applied to ancient cultures. Scholars such as Foucault and Laqueur, for example, stressed the differences between ancient social conventions concerning gender and those of modern Western society. In their view, sexuality and gender constructs are formed within historical contexts and thus cannot be evaluated independently, regardless of the socio-historical realities in which they were produced.<sup>7</sup>

The study of the history of law usually does temporally not go beyond ancient Greece.<sup>8</sup> It is therefore important to mention, in this regard, Westbrook's assertion that the ancient Near East lies at the origins of "the two great modern Western legal systems, the Common Law and the Civil Law, and in consequence of modern law in general."<sup>9</sup> Modern research on the relationship between law and gender frequently centers on inequality, women's statuses and rights, the division of labor between the genders, health issues, and sexual crimes.<sup>10</sup> Such topics, however, are not always relevant to the study of ancient cultures. For example, a recent collection of essays on gender and law in Japan and its colonies<sup>11</sup> does not go back in time more than two centuries.

## 1. Law and Gender in the Ancient Near East

This volume treats several periods and cultures within and outside the ancient Near East. Though about half of the contributions deal with cases outside the ancient Near East proper, this introduction mainly focuses on Mesopotamia, as this is my field of expertise.

The research on ancient Near Eastern law and on gender in the ancient Near East are usually conducted separately. Ancient Near Eastern law has received much scholarly attention, focused primarily on the collections of rulings that we sometimes call, perhaps without justification, "law codes." The subject of gender in the ancient Near East has attracted increasing attention in recent decades. However, only a handful of attempts have been made to combine the the subjects of law and gender.

The image that appears on the cover of this volume is no doubt familiar to the reader: Lady Justice on one side, and the famous stele bearing the Law Code of Hammurabi on the other. These two iconic figures represent much of what this volume is about. Lady Justice holds a sword in one hand and the scales in another. Although she is often depicted blindfolded, justice, as we know, is rarely blind. On the Hammurabi stele we see the god Shamash, the Mesopotamian divine patron of justice, handing emblems of authority to an earthly king.

<sup>5</sup> Scott 1986, pp. 1054, 1067, 1070–72; 1988, p. 2.

<sup>6</sup> Scott 1988, p. 2.

<sup>7</sup> Foucault 1978; Laqueur 1990.

<sup>8</sup> See, for example, David and Brierley 1985, pp. 1–2.

<sup>9</sup> Westbrook 2003b, p. 1.

<sup>10</sup> See, for example, Kramer 1991 (editor), pp. 346–428, and Renzetti and Curran 2003, pp. 211–96. For a brief bibliography of relevant works, see Roth 1998, p. 173 n. 1.

<sup>11</sup> Burns and Brooks (editors) 2014.

In the ancient Near East, indeed, women were by and large excluded from the judicial process, though this process affected them no less than men. No woman could judge a legal case or participate in an assembly judging case, and only rarely would a woman act as a witness for legal decisions and transactions. A clear androcentric bias is thus apparent in the issue of law and enforcement of social norms in the ancient world. When law and gender do meet, they often collide. In this regard, we can talk of “structures of power”: institutionalized mechanisms that were utilized for social monitoring and control.

The question must be asked: Can we speak about law in the ancient world as we do about law in modern times? Did past societies perceive justice as we do today? Is it justified to speak of “codes of law” when referring to ancient collections of juridical directives? The hazard of anachronism is always present when cross-cultural investigation is undertaken. The ancient Near East hardly formed one homogenous historical and ethnic unit.

Much separates us as individuals, and, ultimately, as societies and cultures. At the same time, however, much unites us. One of the main aims of this volume is to establish a common ground and to bridge the centuries, millennia, and miles that separate the various fields of study represented in it.

## 2. Previous Research

As noted above, research on law and on gender in the ancient Near East has not been carried out in an interrelated manner thus far. Hence, in assessing previous research we are obliged to discuss them separately.

### 2.1. *Research on Ancient Near Eastern Law*

Research on ancient Near Eastern law may be divided into philological endeavors and thematic investigations. The former mainly involve the discovery, decipherment, and publication of the primary sources; the latter involve discussions of various aspects of these sources.

Critical editions of law collections and related texts from ancient Mesopotamia and Hatti have been published by several scholars. The most comprehensive compilation of these texts, published by Roth, includes editions of the Sumerian- and Akkadian-written law collections, alongside their English translations, and is supplemented by a contribution by Hoffner on Hittite laws.<sup>12</sup> The only addenda to this volume are Civil’s recent edition of the laws of Ur-Namma, which includes a new source,<sup>13</sup> and Hoffner’s comprehensive edition of the Hittite laws.<sup>14</sup>

Several important general and thematic discussions of law and jurisdiction in the ancient Near East have appeared in recent years. Levinson’s *Theory and Method in Biblical and Cuneiform Law* (1994) is a collection of essays on methodological approaches to biblical and ancient Near Eastern law, confronting some of the most fundamental questions pertaining to the nature of legal texts, unity versus diversity, and diachronic developments versus historical stasis. The four-volume compilation *Civilizations of the Ancient Near East* (1995), edited by Sasson, includes several discussions of legal matters in the ancient Near East, including Mesopotamia,

---

<sup>12</sup> Roth 1997. For previous editions of Mesopotamian law collections, see Roth 1997, pp. 249–54; for previous editions of the Hittite laws, see Hoffner in Roth 1997, p. 241.

---

<sup>13</sup> Civil 2011.

<sup>14</sup> Hoffner 1997.

Hatti, Egypt, and ancient Israel. The most notable of these is Greengus' introductory survey "Legal and Social Institutions of Ancient Mesopotamia," which briefly discusses kingship and law, law collections, legislation and the legal process, social stratification, family, and economy. Matthews, Levinson, and Fryner-Kensky's collection of essays, *Gender and Law in the Hebrew Bible and the Ancient Near East* (1998), centers on the intersection between law and gender in the Hebrew Bible. It includes two contributions on the ancient Near East: Roth's essay on a homicide trial involving men and women; and Westbrook's essay on the female slave in Mesopotamia. Sassoon's monograph, *Ancient Laws and Modern Problems: The Balance between Justice and a Legal System* (2001), includes several discussions of aspects of ancient Near Eastern law collections from the late third to the early second millennia (Ur-Namma to Hammurabi), some of which are relevant to gender relations (family, rape, women in the laws). However, the chronological and geographical scope of this monograph is limited, and lacks discussions of Assyrian, Hittite, and first-millennium sources. By far the most authoritative and comprehensive study of ancient Near Eastern law to date is Westbrook's *A History of Ancient Near Eastern Law* (2003a). It includes discussions of numerous aspects of ancient Near Eastern legal systems, conveniently divided into geographical regions and chronological periods. This collaborative work focuses on administration and economic institutions but only rarely touches upon gender-related matters. The book's introduction (Westbrook 2003b) is the most comprehensive overview of ancient Near Eastern law written to date. Wilcke's *Early Ancient Near Eastern Law* (2003) was originally intended to be a chapter on the early periods of Mesopotamian law in Westbrook's volume, but eventually appeared as an independent book. We should also mention the first volume of Tetlow's *Women, Crime, and Punishment in Ancient Law and Society* (2004), a systematic and comprehensive investigation of women in the legal systems of the ancient Near East. This work focuses on women in the context of crime and punishment, and thus does not treat gender relations at large. The masculine element in the gender equation is largely lacking in this monograph, as are many aspects of gender relations that have nothing to do with crime and punishment.

## 2.2. Research on Gender in the Ancient Near East

The study of gender relations in the ancient Near East is a rapidly developing subject, and several important works have been conducted in this field in recent years. The most noteworthy of these include Frymer-Kensky's brief article, "The Ideology of Gender in the Bible and the Ancient Near East" (1989), one of the earliest discussions of gender in the Hebrew Bible and the ancient Near East. Bottéro's *Mesopotamia: Writing, Reasoning and the Gods* (1992; originally in French, 1987) includes a chapter dedicated to sexuality and gender in Mesopotamia ("'Free Love' and Its Disadvantages," pp. 185-98; originally in French, 1980), which deals with marriage, prostitution, homosexuality, and the cult of Inanna/Ištar. Henshaw's *Female and Male: The Cultic Personnel* (1994) is a lexical study of male and female cult attendants, with an emphasis on gender. Leick's often-quoted *Sex and Eroticism in Mesopotamian Literature* (1994) remains one of the most comprehensive works on the subject. Several important works have been published by Asher-Greve, including her article "The Essential Body: Mesopotamian Conceptions of the Gendered Body" (1997), in which she discusses sexuality, gender, and the human body in ancient Mesopotamia. Homoeroticism and same-sex relations have been investigated by Wold (*Out of Order*, 1998), Cooper ("Buddies in Babylonia," 2002), and Ackerman (*When Heroes Love*, 2005), while the gender-ambiguous cult attendants of Inanna/Ištar

have been investigated by Teppo (“Sacred Marriage and the Devotees of Ištar,” 2008), Asante (“Bad Girls and Kinky Boys?,” 2009), and, most recently and comprehensively, by Peled (*Masculinities and Third Gender*, 2016). Budin’s *The Myth of Sacred Prostitution in Antiquity* (2008) contains a comprehensive discussion of the so-called “Sacred Prostitution” in Mesopotamia, while Westenholz, in her article “Construction of Masculine and Feminine Ritual Roles in Mesopotamia” (2009), offers a detailed investigation of the construction of gender roles in Mesopotamian cult. Focusing on women in ancient Mesopotamia, Bahrani’s *Women of Babylon* (2001) is a landmark in the field, while one of the most recent contributions on this topic is Asher-Greve and Westenholz’s *Goddesses in Context* (2013), a study of Mesopotamian female deities. Both works analyze a combination of textual and visual sources. Several collections of essays focusing on gender-related topics have been published, the most elaborate of which is Parpola and Whiting’s *Sex and Gender in the Ancient Near East* (2002) — it includes the proceedings of the 47th Rencontre Assyriologique Internationale, which was dedicated to this topic. Another significant compilation is Bolger’s *Gender through Time in the Ancient Near East* (2008), which contains several essays that treat archaeological perspectives on the construction of gender roles.

### 2.3. Ancient Near Eastern Law: Current Debates

Current scholarly discourse on ancient Near Eastern law is characterized by debates and disagreements. I limit myself to discussing the most notable of these.

Does ancient Near Eastern law derive from one unified legal tradition, or from a culturally diverse origin? One of the most outspoken advocates of the single-origin approach was Westbrook, who argued that both biblical and cuneiform law collections are derived from one communal and coherent scribal environment, and that the various cultures of the ancient Near East shared similar norms, rules, and practices.<sup>15</sup> This view, however, has been contested, inter alia, by Greengus, who has suggested that Mesopotamian legal traditions were frequently oral rather than written, and hence their knowledge was preserved and passed on in a manner that did not support unification and coherency across the ancient Near East.<sup>16</sup> Lafont emphasizes that the oral background of cuneiform law collections was limited by the canonizing effect of writing, but this canonization did not contrast cultural particularisms, because legal traditions were adapted locally and were prone to undergo evolution and modifications.<sup>17</sup>

Another question pertains to the historical development of ancient Near Eastern legal systems. Westbrook assumed that such development, if it existed, was insignificant. He claimed that it is anachronistic to assume that development must occur over time. According to him, contrary to modern conceptions in an ever-changing world, which create demands for constant legal reforms, cuneiform law remained static over several millennia. Westbrook argued that variations between ancient Near Eastern law collections reflect degrees of thematic emphasis, rather than actual differences.<sup>18</sup> By contrast, Greengus, who agreed that cultural conservatism is a typical feature of “pre-industrial and pre-scientific societies,” claims that the evidence from the so-called Reforms of Uruinimgina — Old Babylonian royal edicts and Hittite laws, edicts, and diplomatic treaties — attest to substantial

<sup>15</sup> Westbrook 1988, pp. 1–8, and, less explicitly, 1994, pp. 32–36; but see differently in Westbrook 2003b, p. 2.

<sup>16</sup> Greengus 1994, pp. 77–84, 85–86.

<sup>17</sup> Lafont 1994, pp. 106–107.

<sup>18</sup> See most explicitly in Westbrook 1994, pp. 21–28, especially pp. 22–23.

changes and reforms in legal practices triggered by social dynamics across the ancient Near East.<sup>19</sup> Likewise, Otto supplied numerous concrete examples of reform within the law collections.<sup>20</sup>

Another fundamental question is whether ancient Near Eastern laws were indeed normative — that is, enforced and practiced in everyday life<sup>21</sup> — as some scholars presume.<sup>22</sup> The current tendency in scholarly circles is to assume that ancient Mesopotamian legal corpora should be evaluated in the context of scribal and literary background similar to that which produced lexical lists, omen series, and medical texts.<sup>23</sup> While it is true that the structural formation of what we refer to as “Mesopotamian law collections” resembles that of the aforementioned genres, law collections had a certain added value that lists, omens, and medical texts probably lacked, concerning their application in daily life. How much of that added value pertained to practical ways of life is open to debate. In spite of claims that there is no clear relation between the contents of the laws and other texts,<sup>24</sup> extra-judicial sources may be compared to the law collections in order to clarify the practical status of the laws.<sup>25</sup> We may refer to Westbrook’s comment regarding this: “Paradoxically, the most direct statement of a law may be a distortion, by reason of ideology, self-interest, or idealization. The more incidental a value judgment of the law in question is to the purpose of the source, the less it is likely to be biased in its report.”<sup>26</sup>

### 3. This Volume: Aims, Structure, and Contents

#### 3.1. Aims

This volume uses the sphere of legal institutions as a prism through which to consider gender relations in the ancient world, both in the Near East and beyond. As explained below, one of the main goals is to examine the way in which similar issues were manifested in different cultural and historical contexts, and to identify common denominators as well as particularities. The three themes discussed in this volume are examined through multiple historical-cultural examples. Understandably, such varied fields of research defy absolute coherence, since, even from an epistemological and methodological point of view, each has its own particularities and scholarly conventions. A special effort has been made, therefore, to make this volume as consistent as possible.

<sup>19</sup> Greengus 1994, pp. 62–71.

<sup>20</sup> Otto 1994, pp. 163–82 (examples from cuneiform law), 182–96 (examples from biblical law, within the context of ancient Near Eastern traditions). For a discussion of legal, economic, and social reforms in the ancient Mesopotamia, see Foster 1995.

<sup>21</sup> For a summary of this topic, see Claassens 2010.

<sup>22</sup> See, for example, Haase 1965, p. 22; Buss 1994; and Westbrook 2003b, p. 17.

<sup>23</sup> See, to name but a few: Kraus 1960; Westbrook 1985; 1988, pp. 2–3; and Bottéro 1992, pp. 156–84. For general literature on the subject, see, to name but a few: Renger 1995; Fitzpatrick-McKinley 1999; and the collection of essays in Lévy 2000.

<sup>24</sup> Generally noted in Roth 1997, p. 5; Roth herself (1997, pp. 5–7) seems to hold a different view, closer to my own, as explained here.

<sup>25</sup> See Peled, this volume.

<sup>26</sup> Westbrook 2003b, p. 6.

### 3.2. *Structure and Contents*

In order to explore and examine law and gender across space and time, the sections in this volume are not structured around specific periods or cultures, but rather are thematic. The volume deals with three distinct topics: “Formal Law and Informal Custom,” “Law, Administration and Economy,” and “Family and Kin Relations.” The cultural-historical scope of each section is different: the first section touches upon examples from both within and outside the ancient Near East, while the other two are dedicated exclusively to the ancient Near East (section 2) or to non-ancient Near Eastern examples (section 3).

The opening section, “The Ancient Near East and beyond: Formal Law and Informal Custom,” contains five essays that cover the ancient Near East, the classical world (Greece and Rome), and ancient China. It is the most culturally diverse section in the book. Despite this diversity, the essays in this section have one thing in common: they all examine the interface between formal law and daily practice, two domains that do not necessarily coincide.

Beginning with the early periods of the ancient Near East, Brian Muhs discusses ancient Egyptian texts that deal with the disposition of property in cases such as marriage, divorce, and death. These texts stipulate normative legal conduct, more often than not pertaining to gender. When we compare these texts to other sources of daily life in Egypt, however, a different picture emerges. In fact, the division of property frequently deviated from the gender-related directives of the disposition manuals. This suggests that individuals sometimes had an opportunity to negotiate between and among legal directives, social circumstances, and personal preference.

Remaining in the ancient Near East, the Mesopotamian and Hittite perspectives explored in the following chapter complement the Egyptian ones covered by Muhs. My chapter focuses on the relationship between laws about sexual crimes and the manner in which these laws were enforced. I conclude that formal law and informal custom did not perfectly correlate, and, for that reason, other social devices, such as purification rituals, were used to bridge this gap. At times, however, the gap was not bridged, and common practice in daily life did deviate from the directives of formal law, demonstrating the limits of legal authority in the ancient Near East.

We continue with the theme of sexual offences and their social remedies in the classical world. Adele Scafuro examines attitudes toward rape, seduction, and adultery in Greek Athens and Gortyn. She notes the existence of family remedies or settlements that were employed in such cases, instead of court rulings. Thus, the families of the culprit and the victim might engage in negotiation and circumvent formal legal institutions. These procedures were socially binding, no less effective than official laws.

Concluding the essays focusing on sex crimes, Tom McGinn assesses the act of bigamy in the Roman world. He notes that in Rome there was no official legal procedure for engagement or marriage, and therefore no legal prohibition of bigamy. Though monogamy was held in high esteem, it was a matter of social norm rather than of legal procedure. Adultery and fornication, on the other hand, were punishable by law, and their sanctions were asymmetrically applied to men and women. Bigamy, though not punishable by law, had harsh social sanctions.

In the ancient Near East, Greece, and Rome, acts were regarded as sex crimes because of the threat they posed to the familial structure. Sex crimes had economic implications, since women were usually regarded as the property of a governing male — either a father or husband. A similar attitude seems to have prevailed in the Hittite, biblical, and Athenian law



regarding one type of sex crime: a man who killed a rapist, adulterer, or seducer in flagrante delicto was legally exempt from punishment.

Finally, in her essay on ancient China, Laura Skosey presents yet another angle on the potential juncture between formal law and cultural norms by analyzing a historical document of jurisprudential content. The text in question is the “Treatise on Penal Law” of *The Book of Han*, which Skosey analyzes as a literary document. According to her analysis, women supplied a link between emotion and the just application of law. Such merciful humanity in early China can be evaluated as a feminine quality. Thus, human emotions and social conventions of what is regarded as feminine or masculine are intermingled with the realm of legal procedures and decision-making.

The second section, “The Ancient Near East: Law, Administration, and Economy,” includes three essays that cover a wide range of ancient Near Eastern periods and cultures. These essays relate to the roles and tasks performed by women in administrative and bureaucratic systems.

Again we begin with the earlier cultures. Laura Culbertson discusses the involvement of women and household dependents in the legal system of the Sumerian Ur III state. To that end, she uses the prism of court records generically known as di-til-la (Sumerian: “case closed”) and other texts, such as the law collection of Ur-Namma. Culbertson concludes that in this period women enjoyed a relatively higher degree of participation in legal procedure than in other periods of Mesopotamian history. On rare occasions, women used the legal system to promote their private and economic interests. Be that as it may, the extent of women’s involvement in the legal system depended on the social status of their household rather than on notions of gender equality or personal legal rights.

Melinda Nelson-Hurst examines the economy and administration in Egypt during the Middle Kingdom, focusing on gender variables in sealing practices. She views the correlation between titles and duties, and whether these varied between males and females who held similar offices. Her assessment is based on the combined evidence of textual and archaeological sources. She concludes that the responsibilities of men and women were similar. Both genders were in charge of luxurious property that belonged to high-ranking individuals. This, she suggests, indicates that women had prominent roles in elite administration, more than has been acknowledged by scholars.

Concluding this section, Gary Beckman explores the sources of authority of women in Hittite administration and cult. Not ignoring that this culture was highly patriarchal, he demonstrates that certain niches of authority were nevertheless reserved for women. In the domain of governance, female authority was restricted to the chief queen. She was also the highest-ranking female in the religious system, and this was the source of her authority in secular matters as well. As for religion and cult, women enjoyed a more significant role in these realms than in bureaucratic administration. Several female deities were held in high esteem, and assumed some of the highest ranks in the Hittite pantheon. On the mundane level, women participated in magic. Beckman suggests that these women received their authority from their status as midwives, since they mediated between the celestial and earthly worlds in a way that no man could.

The concluding section, “Beyond the Ancient Near East: Family and Kin Relations,” treats family laws and traditions outside the ancient Near East. As before, the diverse cultural spectrum represented in this section is organized chronologically.

Edward Shaughnessy analyzes an intra-lineage lawsuit from ancient China, reconstructed from three inscriptions on bronze vessels. The dispute involved several men and women, and the person who negotiated the solution was a female, the Dowager, who stood at the head of one familial branch. The Dowager's decision, however, was not final, and her son was required to receive its approval from the royal court. The Dowager's authority derived from her position as the widow of the previous male head of the family. It is noteworthy that such a significant status was open to a woman.

We conclude with two essays about the ancient Jewish and Islamic worlds. Tal Ilan discusses Jewish women's private archives from Elephantine and from the Judean Desert, separated by six centuries. These archives contained the legal documentation that women were required to possess in order to prove their right to possess property. Failing to do so might result in legal claims to their property by men, who were legal natural heirs. This essay provides a rare glimpse of women's daily life, and their legal status in Jewish society. Its striking conclusion is that identical practices existed in different Jewish societies, despite the more than half a millennium that separated between them.

Lastly, David Powers discusses inheritance in the Islamic world and possible traces of Mesopotamian traditions found in it. He analyzes a complicated passage from the Qur'an that deals with women's inheritance rights and offers a new reading of it. This new reading suggests that the language of the ancient Mesopotamian Nuzi tablets dealing with adoption is similar to the language in a Qur'anic verse dealing with inheritance. The connecting threads between mid-second millennium BCE Nuzi and the Qur'an bridge about two millennia. The postulated continuity over this vast chronological period can be explained by assuming that there were connecting links along the chain — from first-millennium BCE Mesopotamia, for example. It is regrettable that, contrary to my intention, an essay dedicated to this topic was eventually not included in this volume.

#### 4. Closing Words

I wish to conclude with a comment on what I hope this volume might contribute to the scholarly world, as well as prospects for future study. The topic of law and gender is vast, and the present volume touches upon only three main themes. I hope, nonetheless, that the issues raised in this volume stimulate further research, and that many more investigations follow. Given the current state of research, this is a desideratum.

Ilan Peled, *Chicago, October 2015*

## Bibliography

- Ackerman, Susan  
2005 *When Heroes Love: The Ambiguity of Eros in the Stories of Gilgamesh and David*. New York: Columbia University Press.
- Asher-Greve, Julia M.  
1997 "The Essential Body: Mesopotamian Conceptions of the Gendered Body." *Gender & History* 9/3: 432–61.
- Asher-Greve, Julia M., and Joan G. Westenholz  
2013 *Goddesses in Context: On Divine Powers, Roles, Relationships and Gender in Mesopotamian Textual and Visual Sources*. Orbis Biblicus et Orientalis 259. Fribourg: Academic Press Fribourg.
- Assante, Julia  
2009 "Bad Girls and Kinky Boys? The Modern Prostituting of Ishtar, Her Clergy and Her Cults." In *Tempelprostitution im Altertum: Fakten und Fiktionen*, edited by Tanja S. Scheer, pp. 23–54. Berlin: Verlag Antike.
- Bahrani, Zainab  
2001 *Women of Babylon: Gender and Representation in Mesopotamia*. London: Routledge.
- Bolger, Diane R., editor  
2008 *Gender through Time in the Ancient Near East*. Lanham: AltaMira Press.
- Bottéro, Jean  
1992 *Mesopotamia: Writing, Reasoning and the Gods*. Chicago: University of Chicago Press.
- Budin, Stephanie L.  
2008 *The Myth of Sacred Prostitution in Antiquity*. New York: Cambridge University Press.
- Burns, Susan L., and Barbara J. Brooks, editors  
2014 *Gender and Law in the Japanese Imperium*. Honolulu: University of Hawai'i Press.
- Buss, Martin J.  
1994 "Legal Science and Legislation." In *Theory and Method in Biblical and Cuneiform Law: Revision, Interpretation, and Development*, edited by Bernard M. Levinson, pp. 88–90. Sheffield: Sheffield Academic Press.
- Civil, Miguel  
2011 "The Law Collection of Ur-Namma." In *Cuneiform Royal Inscriptions and Related Texts in the Schøyen Collection*, edited by Andrew R. George, pp. 221–86. Cornell University Studies in Assyriology and Sumerology 17. Bethesda: CDL Press.
- Claassens, Susandra J.  
2010 "The So-Called 'Mesopotamian Law Codes': What's in a Name?" *Journal for Semitics* 19/2: 481–98.
- Cooper, Jerrold S.  
2002 "Buddies in Babylonia: Gilgamesh, Enkidu, and Mesopotamian Homosexuality." In *Riches Hidden in Secret Places: Ancient Near Eastern Studies in Memory of Thorkild Jacobsen*, edited by Tzvi Abusch, pp. 73–85. Winona Lake: Eisenbrauns.
- David, René, and John E. C. Brierley  
1985 *Major Legal Systems in the World Today: An Introduction to the Comparative Study of Law*. 3rd edition. London: Stevens.
- Fitzpatrick-McKinley, Anne  
1999 *The Transformation of Torah from Scribal Advice to Law*. Journal for the Study of the Old Testament, Supplement Series 287. Sheffield: Sheffield Academic Press.
- Foster, Benjamin R.  
1995 "Social Reform in Ancient Mesopotamia." In *Social Justice in the Ancient World*, edited by Kaikhosrov D. Irani and Morris Silver, pp. 165–77. Westport: Greenwood Press.

- Foucault, Michel  
1978 *The History of Sexuality, Volume I: The Will to Knowledge (=An Introduction)*. New York: Pantheon Books.
- Frymer-Kensky, Tikva  
1989 "The Ideology of Gender in the Bible and the Ancient Near East." In *Dumu-e<sub>2</sub>-dub-ba-a: Studies in Honor of Ake W. Sjöberg*, edited by Hermann Behrens, Darlene Loding, and Martha T. Roth, pp. 185–91. Philadelphia: Samuel Noah Kramer Fund, University Museum.
- Giddens, Anthony  
1997 *Sociology*. 3rd edition. Cambridge: Polity Press.
- Greengus, Samuel  
1994 "Some Issues Relating to the Comparability of Laws and the Coherence of the Legal Tradition." In *Theory and Method in Biblical and Cuneiform Law: Revision, Interpretation, and Development*, edited by Bernard M. Levinson, pp. 60–87. Sheffield: Sheffield Academic Press.  
1995 "Legal and Social Institutions of Ancient Mesopotamia." In *CANE 1*, edited by Jack M. Sasson, pp. 469–84. New York: Scribner.
- Haase, Richard  
1965 *Einführung in das Studium keilschriftlicher Rechtsquellen*. Wiesbaden: Harrassowitz.
- Henshaw, Richard A.  
1994 *Female and Male: The Cultic Personnel: The Bible and the Rest of the Ancient Near East*. Princeton Theological Monograph Series 31. Allison Park: Pickwick Publications.
- Hoffner, Harry A., Jr.  
1997 *The Laws of the Hittites: A Critical Edition*. Documenta et Monumenta Orientalis Antiqui 23. Leiden: Brill.
- Kessler, Suzanne J., and McKenna, Wendy  
1978 *Gender: An Ethnological Approach*. New York: Wiley.
- Kramer, Laura, editor  
1991 *The Sociology of Gender: A Text-Reader*. New York: St. Martin's Press.
- Kraus, Fritz R.  
1960 "Ein zentrales Problem des altmesopotamischen Rechts: Was ist der Codex Hammu-rabi?" *Genava* 8: 283–96.
- Lafont, Sophie  
1994 "Ancient Near Eastern Laws: Continuity and Pluralism." In *Theory and Method in Biblical and Cuneiform Law: Revision, Interpretation, and Development*, edited by Bernard M. Levinson, pp. 91–118. Sheffield: Sheffield Academic Press.
- Laqueur, Thomas W.  
1990 *Making Sex: Body and Gender from the Greeks to Freud*. Cambridge: Harvard University Press.
- Leick, Gwendolyn  
1994 *Sex and Eroticism in Mesopotamian Literature*. London: Routledge.
- Levinson, Bernard M., editor  
1994 *Theory and Method in Biblical and Cuneiform Law: Revision, Interpretation, and Development*. Sheffield: Sheffield Academic Press.
- Lévy, Edmond, editor  
2000 *La codification des lois dans l'antiquité*. Paris: De Boccard.
- Matthews, Victor H.; Bernard M. Levinson; and Tikva S. Frymer-Kensky, editors  
1998 *Gender and Law in the Hebrew Bible and the Ancient Near East*. Sheffield: Sheffield Academic Press.
- Otto, Eckart  
1994 "Aspects of Legal and Reformulations in Ancient Cuneiform and Israelite Law." In *Theory and Method in Biblical and Cuneiform Law: Revision, Interpretation, and Development*, edited by Bernard M. Levinson, pp. 160–96. Sheffield: Sheffield Academic Press.
- Parpola, Simo, and Robert M. Whiting, editors  
2002 *Sex and Gender in the Ancient Near East: Proceedings of the 47th Rencontre Assyriologique Internationale, Helsinki, July 2-6, 2001*. Helsinki: Neo-Assyrian Text Corpus Project.

- Peled, Ilan  
2016 *Masculinities and Third Gender: The Origins and Nature of an Institutionalized Gender Otherness in the Ancient Near East*. Alter Orient und Altes Testament 435. Münster: Ugarit-Verlag.
- Renger, Johannes  
1995 "Noch einmal: Was war der 'Kodex' Hammurapi – ein erlassenes Gesetz oder ein Rechtsbuch?" In *Rechtskodifizierung und soziale Normen im interkulturellen Vergleich*, edited by Hans-Joachim Gehrke, pp. 27–58. Tübingen: Gunter Narr.
- Renzetti, Claire M., and Daniel J. Curran  
2003 *Women, Men, and Society*. 5th edition. Boston: Allyn and Bacon.
- Roth, Martha T.  
1997 *Law Collections from Mesopotamia and Asia Minor*. Second edition. Writings from the Ancient World 6. Atlanta: Scholars Press.  
1998 "Gender and Law: A Case Study from Ancient Mesopotamia." In *Gender and Law in the Hebrew Bible and the Ancient Near East*, edited by Victor H. Matthews, Bernard M. Levinson, and Tikva S. Frymer-Kensky, pp. 173–84. Sheffield: Sheffield Academic Press.
- Sasson, Jack M., editor  
1995 *Civilizations of the Ancient Near East*. New York: Scribner.
- Sassoon, John  
2001 *Ancient Laws and Modern Problems: The Balance between Justice and a Legal System*. Lingfield: Third Millennium Publishing.
- Scott, Joan W.  
1986 "Gender: A Useful Category of Historical Analysis." *The American Historical Review* 91/5: 1053–75.  
1988 "Introduction." In *Gender and the Politics of History*, edited by Joan W. Scott, pp. 1–11. New York: Columbia University Press.
- Stoller, Robert J.  
1968 *Sex and Gender: On the Development of Masculinity and Femininity*. New York: Science House.
- Teppo, Saana  
2008 "Sacred Marriage and the Devotees of Ištar." In *Sacred Marriages: The Divine-Human Sexual Metaphor from Sumer to Early Christianity*, edited by Martti Nissinen and Risto Uro, pp. 75–92. Winona Lake: Eisenbrauns.
- Tetlow, Elisabeth M.  
2004 *Women, Crime, and Punishment in Ancient Law and Society, Volume I: The Ancient Near East*. New York: Continuum.
- Westbrook, Raymond  
1985 "Biblical and Cuneiform Law Codes." *Revue biblique* 92: 247–64.  
1988 *Studies in Biblical and Cuneiform Law. Cahiers de la Revue biblique* 26. Paris: Gabalda.  
1994 "What is the Covenant Code?" In *Theory and Method in Biblical and Cuneiform Law: Revision, Interpretation, and Development*, edited by Bernard M. Levinson, pp. 15–36. Sheffield: Sheffield Academic Press.  
2003a (editor) *A History of Ancient Near Eastern Law. Handbuch der Orientalistik* 72. Leiden: Brill.  
2003b "Introduction: The Character of Ancient Near Eastern Law." In *A History of Ancient Near Eastern Law*, edited by Raymond Westbrook, pp. 1–90. Handbuch der Orientalistik 72. Leiden: Brill.
- Westenholz, Joan G.  
2009 "Construction of Masculine and Feminine Ritual Roles in Mesopotamia." In *Ehrenmord und Emanzipation: Die Geschlechterfrage in Ritualen von Parallelgemeinschaften*, edited by Bernhard Heineinger, pp. 73–98. Geschlecht, Religion, Symbol 6. Berlin: Lit Verlag.
- Wilcke, Claus  
2003 *Early Ancient Near Eastern Law: A History of its Beginnings*. München: Verlag der Bayerischen Akademie der Wissenschaften.
- Wold, Donald J.  
1998 *Out of Order: Homosexuality in the Bible and the Ancient Near East*. Grand Rapids: Baker Books.

Section I

The Ancient Near East and Beyond:  
Formal Law and Informal Custom



# Gender Relations and Inheritance in Legal Codes and Legal Practice in Ancient Egypt

*Brian Muhs, The University of Chicago*

## Abstract

Several ancient Egyptian texts describe procedures for disposing of property in the event of marriage, divorce, or death. One can debate whether these texts should be called legal manuals or legal codes, but, in any case, they appear to prescribe normative legal behaviors. These behaviors frequently differ according to gender. Other ancient Egyptian texts document the desired or actual disposition of property after marriage, divorce, or death. Some of these texts display the same gender distinctions as the legal manuals or codes; others make different distinctions, or none at all. The variety of dispositions raises the possibility that individuals negotiated between personal circumstances, and perhaps even preferences, as well as legal and social norms.

## Introduction

Some traditional structuralist views of pre-modern cultures assign highly normative effects to law and custom, and attribute most cultural change to foreign cultural contact and influence, as in Christopher Eyre's *Use of Documents in Ancient Egypt*, published in 2013.<sup>1</sup> In contrast, this article suggests that while ancient Egyptian laws and legal compilations privileged a narrow range of preferred gender behaviors, they were deliberately framed to permit at least some individuals to engage in a broader range of allowable gender behaviors, particularly with regard to inheritance. Furthermore, the article argues that, in practice, ancient Egyptians frequently took advantage of the broader range of allowable behaviors to respond to their individual circumstances, which could result in cultural change through cumulative individual agency, at least in theory. The article discusses the nature of and evidence for ancient Egyptian laws and legal compilations through time; it also examines examples of normative laws and flexible legal practice, first in the New Kingdom, and then in the Ptolemaic Period, when there were more intense foreign cultural contacts.

---

<sup>1</sup> Eyre 2013, pp. 1–5, 122–24, 351.



## Egyptian Laws and Social Norms

Egyptian laws were generally framed as deriving from the king or pharaoh, from the beginning of the Old Kingdom in the twenty–seventh century BCE to the end of the Ptolemaic Period in 30 BCE. Two types of laws can be distinguished: royal decrees and laws of pharaoh. Royal decrees (*wḏ-nswt*) are attested sporadically throughout Egyptian history, from the Old Kingdom through the Ptolemaic Period. They are often very specific, prohibiting specific activities with regard to specific institutions, and prescribing specific punishments for specific transgressions. With a few exceptions that seem to have had general application, such as the New Kingdom Decree of Horemheb, they might be better described as executive orders than laws.<sup>2</sup> Laws (*hp.w*), on the other hand, are not attested in the Old Kingdom.<sup>3</sup> There are oblique references to laws in the Middle Kingdom, between the twenty–first and eighteenth centuries BCE, but no texts of these laws have survived.<sup>4</sup> The first surviving quotations of laws of pharaoh (*hp.w n pr-ꜣ*) appear in the New Kingdom, between the sixteenth and eleventh centuries BCE.<sup>5</sup> They occasionally specify normative behaviors, sometimes different for each gender, but they rarely indicate specific punishments for transgressions. Laws of pharaoh may have been compiled in the subsequent Third Intermediate Period between the eleventh and seventh centuries BCE, or in the Saite Period between the seventh and sixth centuries BCE, but the oldest surviving copies of these compilations date to the Ptolemaic Period, between the fourth and first centuries BCE. The relationship between the laws in these later compilations and those quoted in the New Kingdom is unclear, however, so they are treated separately in this article.

### The New Kingdom

In the New Kingdom, the laws of pharaoh were applied by local *knbt*-courts and by two great *knbt*-courts overseen by the viziers of Upper and Lower Egypt in, respectively, Thebes and Memphis. These courts received their instructions directly from pharaoh, according to the Decree of Horemheb.<sup>6</sup> Hieratic Ostrakon Deir el-Medina 764, dating to the thirteenth century BCE, may preserve a citation of one of the laws of pharaoh. It is not explicitly labeled as such, but it is formulated as an if-then statement like later laws of pharaoh, and it does seem to prescribe a normative pattern for dividing property in the event of a divorce.<sup>7</sup> This rule was probably intended to apply to common household property acquired by the husband and wife while they were married, because other sources suggest that husbands and wives owned outright any property that they inherited from their parents. One-third of the common household property was assigned directly to the children, but was entrusted to the husband rather than the wife.

Hieratic Ostrakon Deir el-Medina 764, lines 1–7:

If there are small children, make the property into three parts: one for the children, one for the man, one [for] the woman. If he will be in charge of the property of the children, give to him the two-thirds of all the property, while the one-third is for the woman.

<sup>2</sup> Vernus 2013.

<sup>3</sup> Jasnow 2003a, pp. 93–95.

<sup>4</sup> Jasnow 2003b, pp. 255–56.

<sup>5</sup> Jasnow 2003c, pp. 289–91.

<sup>6</sup> Kruchten 1981, pp. 148–61.

<sup>7</sup> Toivari-Viitala 2003.

Hieratic Papyrus Deir el-Medina 1945.97, dating to the twelfth century BCE, appears to illustrate this prescription. A woman uses a written transcript of her oral testament to assign unequal, non-normative shares of property to her normative heirs, her children. The woman Naunakhte claimed that only four of her eight children with her second husband took care of her in her old age, and thus only these four are fit to inherit from her.<sup>8</sup> Inheritance was frequently seen as conditional on care in old age and burial after death, and more than one inheritance dispute arose because one heir claimed that another did not contribute to the cost of the burial.<sup>9</sup> Naunakhte enumerates three categories of property: First, the household property of which she has the right to dispose of one-third, and her second husband two-thirds, which they presumably acquired together, and of which she assigns her one-third share to her good children. Second, the property that she inherited from her first husband, and from her father, which she owns outright, and which she assigns to her good children. Third and finally, the property of her second husband, which her husband owns outright, but which Naunakhte states will be inherited by all of their children, good and bad.<sup>10</sup>

Hieratic Papyrus Ashmolean 1945.97, col. i, 4–5; col. ii, 1–7; col. iii; col. iv, 1–3, 7–12; col. v, 1–2:

On this day a statement concerning her things was made by the citizeness Naunakhte before the following *knbt*-court: (*names of fourteen men*). She said: “As for me, I am a free woman of the land of Pharaoh. I brought up these eight servants of yours and gave them an outfit of everything (such) as is usually made for those in their situation. See, I am grown old and see, they are not looking after me in my turn. Whoever of them laid his hand on my hand, to him will I give my things. He who has not given to me, to him I will not give of my things.” List of the workmen and women to whom she gave: (*names of four children*). List of her children of whom she said: “They shall not enter into the division of my one-third but into the two-thirds of their father they shall enter: (*names of four other children*). As for these four children of mine they shall, <not> enter into the division of all my things. As for all the things of the scribe Kenherkhepeshef, my (first) husband, and also his landed property and this store-room of my father and also this emmer which I collected with my (first) husband, they shall not divide them. As for these eight children of mine, they shall enter into the division of the things of their father: one single division each.”

Written testaments could also be used to assign shares of property to non-normative heirs. For example, in Hieratic Papyrus Ashmolean 1945.96, from the eleventh century BCE, a woman states that her husband adopted her as daughter and heir and then donated all of his property to her, disinheriting his brothers and sisters.<sup>11</sup> Normally, brothers and sisters seem to have inherited from siblings who predeceased them if the siblings had no heirs of their own, but in the New Kingdom it may not have been uncommon to arrange for wives to inherit, since in the preceding example Naunakhte also received property from her first husband, Kenherkhepeshef, with whom she apparently had no children.<sup>12</sup>

Hieratic Papyrus Ashmolean 1945.96, lines 1–7 and 10–12:

Year 1, third month of Shemu day 20 under his majesty the king of Upper and Lower Egypt, Ramesses (XI) Khaemwese-miamun, the god, ruler of Heliopolis, given life to

<sup>8</sup> Černý 1945.

<sup>9</sup> Janssen and Pestman 1968, especially pp. 167–70.

<sup>10</sup> *Ibid.*, pp. 164–65.

<sup>11</sup> Gardiner 1940.

<sup>12</sup> Janssen and Pestman 1968, p. 166.

all eternity. On this day, proclamation to Amun of the king's accession, he arising and shining forth and making offering to Amun. Thereupon Nebnufer, my husband, made a writing for me, the musician of Sutekh, Nenufer (for Rennufer) and he made me for himself as a daughter, and he wrote for me with regard to all he possessed, he having no son or daughter apart from me: "As for all profit that I have made with her, I hand it over to Nenufer (for Rennufer), my wife. If my own brothers or sisters arise to confront her at my death tomorrow or thereafter and say 'Let my brother's share be given (to me)' [...] ... 'Behold, I have made the handing over to Rennufer, my wife, this day before Huirimu my sister.'"

Indeed, there are normative statements of pharaoh that seem to permit testators to engage in any ideationally allowable behaviors, though other normative statements of pharaoh suggest that there were limits (such as the statement that he who buries inherits). In Hieratic Papyrus Geneva D409 plus Papyrus Turin 2021, from the eleventh century BCE, a man stated before the vizier and the great *knbt*-court of Thebes that he wished to give his two-thirds of the household property that he acquired with his current wife *Ink-sw-ndm* to her, who was already entitled to the other one-third of it. He generously gives his two-thirds of the household property that he acquired with his former wife *T3-t3ty-ri3* to their children so they will not be disinherited.<sup>13</sup> Notice that the husband twice cites normative statements of pharaoh, probably laws: first, that every man should do what he wishes with his property, and second, that every woman should receive her *sfr*, whatever that is exactly. The second statement suggests that wills and testaments were expected to meet certain standards, even as the first statement seems to allow them to be ignored. We shall see that later legal compilations attempted to resolve such potential ambiguities.

Hieratic Papyrus Geneva D409 + Papyrus Turin 2021, col. ii, 8 – col. iii, 5:

Now behold I am come before the vizier and the officials of the *knbt*-court on this day in order to make known everything? which is divided among my children ... this plan which I make it for the citizeness *Ink-sw-ndm*, that woman who is in my house today. Pharaoh says, "Let every man do what he wishes with his things." I give all that which I have made together with the citizeness *Ink-sw-ndm*, the woman who is in my house, to her today, namely the 2 male slaves and 2 female slaves, total 4, and children, while the 2/3 is upon her 1/3, and I give these 9 slaves which fell to me in my 2/3 together with the citizeness *T3-t3ty-ri3* for my children and the house of father and mother belonging to them as well, (so that?) they are not without all that brought with their mother, when I would have given to them from the things I brought with the citizeness *Ink-sw-ndm*. Pharaoh says, "Give the *sfr* of every woman to her."

## The Ptolemaic Period

Following the New Kingdom, in the Third Intermediate Period between the eleventh and seventh centuries BCE, the authority of the kings were compromised by competing kings and princes, and legal disputes were increasingly adjudicated by priests.<sup>14</sup> Egypt was reunified and the authority of the kings was restored in the Saite Period in the seventh century BCE, but jurisdiction over the laws of pharaoh remained with courts associated with temples until the

<sup>13</sup> Allam 1973a, pp. 112–19; 1973b, pp. 320–27.

<sup>14</sup> Jasnow 2003d, pp. 777–80.

end of the Ptolemaic Period in 30 BCE.<sup>15</sup> No contemporary quotations of laws have survived from the Third Intermediate Period or the Saite Period, but later manuscripts from the early Ptolemaic Period in the third century BCE contain compilations or codifications of laws that may have been composed in the late Third Intermediate Period in the late ninth or early eighth centuries BCE,<sup>16</sup> or in the Saite Period in the late seventh or early sixth centuries BCE.<sup>17</sup> The surviving copies are all fragmentary, but Demotic Papyrus Cairo JdE 89127-30 + 89137-43, known as the Legal Manual or Code of Hermopolis, preserves rules for inheritance.<sup>18</sup>

For example, the Legal Manual or Code of Hermopolis clearly prescribes a normative inheritance pattern that privileged eldest sons. The eldest son should succeed his father as head of an undivided household, unless a younger brother protests, in which case the household is divided. There is, however, a huge exception: “without having written or ascribed shares to his children while he was alive.” The Legal Manual or Code thus indicates that the prescribed inheritance pattern is a default, which any testator could override by writing a testament.

Demotic Papyrus Cairo JdE 89127-30 + 89137-43, col. viii, 30–31:

If a man dies, he having lands, gardens, shares in the income of a temple and slaves, he having children (but) without having ascribed shares (*sh n tny*) to his children while he was alive, it is his eldest son who takes possession of his property.

Demotic Papyrus Cairo JdE 89127-30 + 89137-43, col. ix, 10–11:

If he (the eldest son) has a younger brother and he brings suit saying: “Let us be given a share (*my ti=w n=n tny*) of the property of our father,” it (sc. the property) is assigned (or divided) [into shares] according to the number of his (sc. father’s) children and the eldest son is given an extra share to complete two shares.

Indeed, the Demotic literary Papyrus British Museum 10508, known as the Instruction of Onchsheshonqy, from the second century BCE, explicitly suggests that birth order should *not* be the only factor determining who should be eldest son, implying that “eldest son” was a role as well as a biological fact.<sup>19</sup>

Demotic Papyrus British Museum 10508, col. x, 15:

May the kindly brother of the family be the one who acts as “elder brother” for it!

One of the implicit justifications for giving eldest sons an extra share of inheritance was that they were expected to arrange for the burials of their parents and to maintain their mortuary cults. If an eldest son failed to do this and other children did so, his parents could disinherit the eldest son if they were still alive, as Naunakhte did, or his siblings could claim the role of eldest son and the inheritance.<sup>20</sup> If there were no sons available to arrange for the burial and maintain the cult, a daughter could do it. Indeed, the Legal Manual or Code of Hermopolis prescribes that the eldest daughter should act as “eldest son,” as long as there were no brothers. And this is the default prescription, which any testator could presumably override with a written testament.<sup>21</sup>

<sup>15</sup> Manning 2003a, pp. 821–22.

<sup>16</sup> Pestman 1983, pp. 17–18.

<sup>17</sup> Lippert 2004, pp. 155–57.

<sup>18</sup> Mattha and Hughes 1975.

<sup>19</sup> Glanville 1955.

<sup>20</sup> See Janssen and Pestman 1968, pp. 167–70.

<sup>21</sup> Mattha and Hughes 1975.

Demotic Papyrus Cairo JdE 89127-30 + 89137-43, col. ix, 14–16:

... [If] a man dies having no male child, (but) having female children, his property is divided [according to the number of his] female children ... the female children that he has, except for an additional share [which they] give it to his eldest daughter [...], making in all two shares.

Testators could also arrange for non-family members to act as “eldest sons” and go to their tombs to maintain their mortuary cults in perpetuity, in return for a stipend from a mortuary foundation established for that purpose. The duty to maintain the cult, and the right to the associated stipend, were inheritable, because they were intended to function forever. Unlike most priestly offices, however, which descended patrilineally, the rights and obligations of mortuary priests were often inherited partly, and by both sons and daughters.<sup>22</sup> It has been shown elsewhere that daughters of mortuary priests often married the sons of other mortuary priests,<sup>23</sup> and Jan Johnson has argued that many daughters of mortuary priests allowed their husbands to go to their tombs and carry out their obligations on their behalf. Indeed, this was probably the social norm.<sup>24</sup> There is, however, at least one published donation contract or testament, Demotic Papyrus Louvre N. 3263, dated to 218 BCE, in which a father explicitly states that his daughter will go to her tombs, presumably to perform the mortuary cult.<sup>25</sup> This clause occurs in some other transfers of tombs,<sup>26</sup> but not all of them, raising the possibility that its inclusion in this contract was another deliberate attempt to use a written document to override social norms regarding gender behavior, as was explicitly permitted by the exception in the Legal Manual or Code of Hermopolis discussed previously.

Demotic Papyrus Louvre N. 3263, lines 6–8:

[I give to you] my half of my 2/3 of my half in it, and the place of the master Phibis the saint and every person relating to it, and the place of the mistress Tortominis and every person relating to it, and the place of the master Horos the man of Coptos and every person relating [to it, and the place of Panouphis? son of Petiesis?] the goldsmith and every person belonging to it, and the tomb of Psenminis the laundryman who uses heated water and every person relating to it, and the tomb of Harmonthis the skipper of the bark and every person relating to it, and the tomb of the people of Osiris ... [...] and the tomb of Tephnakthis the baker and every person relating to it, and you will go to the place of Panouphis son of Petiesis and? Harmonthis (son? of) Pachois? the skipper of the bark, and you will go to the hole [in] which the people of the master Phibis rest [...]

The Legal Manual or Code implies that testators could override the default normative inheritance pattern by ascribing/writing shares (*sh n tny*) to children and other heirs. Normative testators, such as fathers and eldest sons, who wished to assign non-normative shares of property to normative heirs, such as children and siblings, could use donation or division contracts, in which the testator says “I have given to you (the one-Nth share of) X” (*ti=y n=k/t (p: 1/N) X*). Egyptologists often refer to this type of document as a donation when complete properties are transferred,<sup>27</sup> and as a division when shares or fractions of properties are transferred;<sup>28</sup> this is a dubious distinction, though, because a complete property could in fact

<sup>22</sup> Pestman 1987, pp. 57–59.

<sup>23</sup> Muhs 2005b.

<sup>24</sup> Johnson 1998.

<sup>25</sup> Muhs 2010.

<sup>26</sup> Vittmann 1980 (P. Marseille 298 and 299, Thebes, 235 BCE).

<sup>27</sup> Lippert 2008, pp. 156–57.

<sup>28</sup> *Ibid.*, pp. 154–55.

represent a fraction of the testator's estate. Heirs who agreed to divide an estate used another kind of division, in which the heirs say "I have divided with you and you have divided with me X" (*pš=y irm=k/t, pš=k/t irm=y n X*).<sup>29</sup> A survey of twenty-seven donation and division contracts from the Ptolemaic Period reveals that the first parties or testators were always male, and that the second parties or beneficiaries were always children, siblings, or other heirs of the male first parties. Fathers donated properties to sons in fifteen examples,<sup>30</sup> and to daughters in four examples.<sup>31</sup> Elder brothers distributed properties to brothers in one example,<sup>32</sup> and to sisters in four examples.<sup>33</sup> An uncle donated properties to a niece in one example,<sup>34</sup> and relationships were unclear in two examples.<sup>35</sup> Women never appear to initiate such contracts as first parties, and wives never received them as second parties or beneficiaries.

Nonetheless, non-normative testators, such as mothers, could also assign shares of property to their children using sales contracts, as could normative testators who wished to assign shares of property to non-normative heirs, such as wives.<sup>36</sup> Sales contracts used in this way often specify that the recipients or second contractors must in turn provide support in old age and/or burial for the sellers or first contractors.<sup>37</sup> Such requirements are also found in donation contracts,<sup>38</sup> and in sales may have constituted "payment" for the properties involved. Furthermore, at least one sales contract used to transfer tombs from a husband to a wife in this way includes an explicit statement that the wife will go to her tombs,<sup>39</sup> like the donation of tombs from a father to his daughter discussed previously.<sup>40</sup>

Exercise of ideationally allowable behaviors, rather than ideologically and legally preferred or normative behaviors, came at a cost, however. Avoidance of default inheritance patterns required use of a contract drawn up by a temple notary who charged a flat fee for the contract and a transfer tax of one-tenth of the price of the properties transferred.<sup>41</sup> The 10 percent transfer tax is not attested for every transfer, so it is possible that some transfers were only charged the flat fee. Use of the default inheritance pattern described in the Legal

<sup>29</sup> *Ibid.*, p. 155.

<sup>30</sup> Glanville 1939, pp. xxvii–xxxv (P. Strassburg 1, Thebes, 324 BCE); Hughes and Jasnow 1997, pp. 23–26 (P. Chicago Hawara 4 = P. OI 25262, Hawara, 292 BCE); Andrews 1990, pp. 89–92 (Cat. 40 = P. BM 10728, Thebes, 214 BCE); Thompson 1934, pp. 57–62 (P. BM 10591 vo, cols. v–vii, Siut, 181 BCE), 38–45 (P. BM 10575, Siut, 181 BCE); Parker 1964 (P. Boston MFA 38.2063B, Deir el-Ballas, 175 BCE); Botti 1967, pp. 83–88 (Papiro n. 9 = P. Turin 6069, Thebes, 134 BCE); Pestman 1993, pp. 127–30 (no. 34 = P. Berlin 3099, Thebes, 124 BCE), 131–32 (no. 35 = P. Berlin 3100, Thebes, 124 BCE), 133–34 (no. 36 = P. Berlin 5508, Thebes, 124 BCE); Lüddeckens 1998, pp. 169–75 (Urk. XVIa = P. Hamburg dem. 4, Hawara, 92 BCE), 176–83 (Urk. XVIIb = P. Hamburg dem. 8, Hawara, 92 BCE), 184–90 (Urk. XVIIa = P. Hamburg dem. 5, Hawara, 92 BCE), 191–99 (Urk. XVIIb = P. Hamburg dem. 6, Hawara, 92 BCE); Malinine 1967 (P. Moscow 123, Akhmim, 70 BCE).

<sup>31</sup> el-Amir 1959, pp. 1–6 (P. Phil. 1 = P. Cairo JdE 89361, Thebes, 317 BCE); Manning 1997, pp. 117–20 (P. Hauswaldt 13 = P. Berlin 11335, Edfu, 243–222 BCE); Muhs 2010 (P. Louvre N. 3263, Thebes, 215 BCE); Thompson 1934, pp. 65–67 (P. BM 10592, Siut, 181 BCE).

<sup>32</sup> Hughes and Jasnow 1997, pp. 63–70 (Appendix = P. Rendell, Hawara, 232 BCE).

<sup>33</sup> Martin 2009, pp. 170–84 (Text no. 9 = P. Leiden I 379, Memphis, 256 BCE); el-Amir 1959, pp. 82–85 (P. Phil. 18 = P. Cairo JdE 89371, Thebes, 241 BCE); Révillout 1880, pp. 278–87, 489 (P. Louvre 2425, Thebes, 227 BCE); Andrews 1990, pp. 55–57 (Cat. 18 = P. BM 10829, Thebes, 209 BCE).

<sup>34</sup> Andrews 1990, pp. 48–50 (Cat. 14 = P. BM 10827, Thebes, 270 BCE).

<sup>35</sup> el-Amir 1959, pp. 22–27 (P. Phil. 5 = P. Phil. 29-86-505, Thebes, 302 BCE); Griffith 1909, pp. 142–45, 275–76 (P. Rylands dem. 17, Pathyris, 118 BCE).

<sup>36</sup> Pestman 1987, pp. 59–60.

<sup>37</sup> Spiegelberg 1923.

<sup>38</sup> Glanville 1939, pp. xxvii–xxxv (P. Strassburg 1, Thebes, 324 BCE).

<sup>39</sup> Vittmann 1980 (P. Marseille 298 and 299, Thebes, 235 BCE).

<sup>40</sup> Muhs 2010 (P. Louvre N. 3263, Thebes, 215 BCE).

<sup>41</sup> Vleeming 1992; Depauw 2000, pp. 56–63; and Muhs 2005a, pp. 66–70.

Manual or Code, however, did not require written contracts and thus may have avoided all of these charges.<sup>42</sup> Privilege had its price, even in ancient Egypt.

## Conclusions

This article has presented several citations of ancient Egyptian legal prescriptions that identified preferred dispositions of property differentiated by gender, in both the New Kingdom and the Ptolemaic Period. It has also presented documents from both periods in which the desired or actual disposition of property differed from the preferred dispositions. Additionally, the article has argued that ancient Egyptian legal prescriptions implicitly and explicitly permitted such alternative dispositions. Together, this suggests that, at least in ancient Egypt, social norms (and perhaps ideological preferences, too) were negotiable and could be changed through the cumulative choices and actions of individuals, as well as through contact with foreign cultures. To what extent this occurred, however, is a subject for future research.

---

<sup>42</sup> Implicit in Manning 2003b, pp. 206, 218–19.

## Bibliography

- Allam, Schafik  
 1973a *Hieratische Ostraka und Papyri: Transkriptionen aus dem Nachlaß von J. Černý. Urkunden zum Rechtsleben im Alten Ägypten 1-Tafelteil.* Tübingen.  
 1973b *Hieratische Ostraka und Papyri aus der Ramessidenzeit. Urkunden zum Rechtsleben im Alten Ägypten 1.* Tübingen.
- el-Amir, Mustafa  
 1959 *A Family Archive from Thebes.* Cairo: General Organization for Government Printing Offices.
- Andrews, Carol A. R.  
 1990 *Ptolemaic Legal Texts from the Theban Area.* Catalogue of Demotic Papyri in the British Museum 4. London: British Museum Publications.
- Botti, Giuseppe  
 1967 *archivio demotico da Deir el-Medineh, Testo.* Catalogo del Museo egizio di Torino 1. Firenze: Felice Le Monnier.
- Černý, Jaroslav  
 1945 "The will of Naunakhte and the Related Documents." *Journal of Egyptian Archaeology* 31: 29–53.
- Depauw, Mark  
 2000 *The Archive of Teos and Thabis from Early Ptolemaic Thebes, P. Brux. dem. inv. E. 8252-8256.* Monographies Reine Élisabeth 8. Turnhout: Brepols.
- Eyre, Christopher  
 2013 *The Use of Documents in Pharaonic Egypt.* Oxford: Oxford University Press.
- Gardiner, Alan H.  
 1940 "Adoption Extraordinary." *Journal of Egyptian Archaeology* 26: 23–29 and pls. 5–7.
- Glanville, Stephen R. K.  
 1939 *A Theban Archive of the Reign of Ptolemy I, Soter.* Catalogue of Demotic Papyri in the British Museum 1. London: Trustees of the British Museum.
- 1955 *The Instructions of 'Onchsheshonqy (British Museum Papyrus 10508).* Catalogue of Demotic Papyri in the British Museum 2. London: Trustees of the British Museum.
- Griffith, Francis Ll.  
 1909 *Catalogue of the Demotic Papyri in the John Rylands Library, Manchester.* Volume 3. London: Bernard Quaritch; Manchester: Sherratt and Hughes.
- Hughes, George R., and Richard Jasnow  
 1997 *Oriental Institute Hawara Papyri. Demotic and Greek Texts from an Egyptian Family Archive in the Fayum (Fourth to Third Century B.C.).* Oriental Institute Publications 113. Chicago: The Oriental Institute.
- Janssen, Jac J., and Pieter W. Pestman  
 1968 "Burial and Inheritance in the Community of the Necropolis Workman at Thebes." *Journal of the Economic and Social History of the Orient* 11: 137–70.
- Jasnow, Richard  
 2003a "Egypt. Old Kingdom and First Intermediate Period." In *A History of Ancient Near Eastern Law*, edited by Raymond Westbrook, pp. 93–140. *Handbuch der Orientalistik* 72. Leiden: Brill.  
 2003b "Egypt. Middle Kingdom and Second Intermediate Period." In *A History of Ancient Near Eastern Law*, edited by Raymond Westbrook, pp. 255–88. *Handbuch der Orientalistik* 72. Leiden: Brill.  
 2003c "Egypt. New Kingdom." In *A History of Ancient Near Eastern Law*, edited by Raymond Westbrook, pp. 289–359. *Handbuch der Orientalistik* 72. Leiden: Brill.  
 2003d "Egypt. Third Intermediate Period." In *A History of Ancient Near Eastern Law*, edited by Raymond Westbrook, pp. 777–818. *Handbuch der Orientalistik* 72. Leiden: Brill.



- Johnson, Janet H.  
1998 "Women, Wealth and Work in Egyptian Society of the Ptolemaic Period." In *Egyptian Religion, The Last Thousand Years, Studies Dedicated to the Memory of Jan Quaegebeur*, edited by Willy Clarysse, Antoon Schoors, and Harco Willems, pp. 1393–1421. *Orientalia Lovaniensia Analecta* 85. Leuven: Peeters en Departement Oosterse Studies.
- Kruchten, Jean-Marie  
1981 *Le Décret d'Horemheb. Traduction, commentaire épigraphique, philologique et institutionnel*. Bruxelles: Editions de l'Université de Bruxelles.
- Lippert, Sandra L.  
2004 *Ein demotisches juristisches Lehrbuch. Untersuchungen zu P. Berlin 23757 rto. Ägyptologische Abhandlungen* 66. Wiesbaden: Harrassowitz.  
2008 *Einführung in die altägyptische Rechtsgeschichte. Einführungen und Quellentexte zur Ägyptologie* 5. Berlin: LIT Verlag.
- Lüddeckens, Erich  
1998 *Demotische Urkunden aus Hawara, Textband. Verzeichnis der Orientalischen Handschriften in Deutschland, Supplementband* 28. Stuttgart: Franz Steiner.
- Malinine, Michel  
1967 "Partage testamentaire d'une propriété familiale." *Revue d'égyptologie* 19: 67–85.
- Manning, Joseph G.  
1997 *The Hauswaldt Papyri*. Demotische Studien 12. Sommerhausen: Gisela Zauzich.  
2003a "Egypt. Demotic Law." In *A History of Ancient Near Eastern Law*, edited by Raymond Westbrook, pp. 819–62. *Handbuch der Orientalistik* 72. Leiden: Brill.  
2003b *Land and Power in Ptolemaic Egypt: The Structure of Land Tenure*. Cambridge: Cambridge University Press.
- Martin, Cary J.  
2009 *Demotic Papyri from the Memphite Necropolis*. Papers on Archaeology of the Leiden Museum of Antiquities, Egyptology 5. Turnhout: Brepols.
- Mattha, Girgis, and George R. Hughes  
1975 *The Demotic Legal Code of Hermopolis West*. Bibliothèque d'Étude 45. Cairo: IFAO.
- Muhs, Brian P.  
2005a *Tax Receipts, Taxpayers, and Taxes in Early Ptolemaic Thebes*. Oriental Institute Publications 126. Chicago: The Oriental Institute.  
2005b "The Girls Next Door. Marriage Patterns among the Mortuary Priests in Early Ptolemaic Thebes." *Journal of Juristic Papyrology* 35: 169–94.  
2010 "A Demotic Donation Contract from Early Ptolemaic Thebes (P. Louvre N. 3263)." In *Millions of Jubilees: Studies in Honor of David P. Silverman*, Supplément aux Annales du service des antiquités de l'Égypte, Cahier No. 39, edited by Zahi Hawass and Jennifer Houser Wegner, pp. 439–55. Cairo: Conseil suprême des antiquités de l'Égypte.
- Parker, Richard A.  
1964 "A Demotic Property Settlement from Deir el Ballas." *Journal of the American Research Center in Egypt* 3: 89–103.
- Pestman, Pieter W.  
1983 "Réflexions à propos du soi-disant Code de Hermoupolis." *Journal of the Economic and Social History of the Orient* 26: 14–21.  
1987 "'Inheriting' in the Archive of the Theban Choachytes (2nd cent. B.C.)." In *Aspects of Demotic Lexicography, Acts of the Second International Conference for Demotic Studies, Leiden, 19–21 September 1984*, edited by Sven P. Vleeming, pp. 57–73. *Studia Demotica* 1. Leuven: Peeters.  
1993 *The Archive of the Theban Choachytes (Second Century B.C.)*. *Studia Demotica* 2. Leuven: Peeters.

- Révillout, Eugene  
1880 *Chrestomathie démotique*. Paris: F. Vieweg, Libraire-Éditeur.
- Spiegelberg, Wilhelm  
1923 *Ägyptische Verpfändungsverträge mit Vermögensabtretungen*. Sitzungsberichte der Heidelberger Akademie der Wissenschaften, Philosophisch-Historische Klasse, Band 14. Heidelberg: C. Winter.
- Thompson, Herbert  
1934 *A Family Archive from Siut, Text*. Oxford: Oxford University Press.
- Toivari-Viitala, Jaana  
2003 "O. DeM 764: A Note Concerning Property Rights." *Göttinger Miszellen* 195: 87–96.
- Vernus, Pascal  
2013 "The Royal Command (*wꜥ-d-nsw*): A Basic Deed of Executive Power." In *Ancient Egyptian Administration*, edited by Juan Carlos Moreno García, pp. 259–340. *Handbuch der Orientalistik* 104. Leiden: Brill.
- Vittmann, Günther  
1980 "Ein thebanischer Verpfändungsvertrag aus der Zeit Ptolemaios' III. Euergetes: P. Marseille 298+299." *Enchoria, Zeitschrift für Demotistik und Koptologie* 10: 127–39 and pls. 12–15.
- Vleeming, Sven P.  
1992 "The Tithe of the Scribes (and) Representatives." In *Life in a Multi-Cultural Society, Egypt from Cambyses to Constantine and Beyond*, edited by Janet H. Johnson, pp. 343–50 *Studies in Ancient Oriental Civilization* 51. Chicago: The Oriental Institute.



# Gender and Sex Crimes in the Ancient Near East: Law and Custom

Ilan Peled, *The University of Chicago*\*

## Introduction

Categories of gender play a significant role in the everyday life of any given society. So do conventions of sexuality. Though clearly distinct from one another, the concepts of sex and gender are ever intermingled. Indeed, sex is always gendered. When a sexual act becomes a legal issue, it is a gendered issue. Thus, crimes bearing sexual nature obviously have much to do with gender relations, divisions, and hierarchies. In this essay I examine the intersection between two spheres of human life in the ancient Near East: the sphere of formal law, and that of everyday social conduct. The prism through which these spheres are examined is that of sexual offenses, as well as the place of gender factors within these offenses. The questions addressed by this essay are these: What did the laws decree, and what actually happened in practice? Do we find correlations between the spheres of law and custom, or were the laws merely theoretical, ideal directives that had very little to do with people's everyday life?

To start, it has to be noted that the scope of this essay is limited to the cuneiform world — Mesopotamia and Hatti — while ancient Egypt remains outside of the current discussion. This essay thus bears an unavoidable degree of generalization, maybe even over-simplification, since it covers a diverse range of periods and cultures, each of which naturally had its own particularities and peculiarities. That said, numerous cultural common denominators obviously prevailed between the various phases of Mesopotamian cultural history, and these indeed allow a substantial margin for this discussion. The sexual offenses hereby discussed are: adultery and rape, incest and kin relations, bestiality, and homosexual

---

\* The transliteration conventions used in this article are the following:

In Sumerian/Akkadian texts: LOGOGRAM OF AN UNKNOWN READING; Sumerian;<sup>determinatives</sup>; Akkadian.

In Hittite texts: SUMERIAN;<sup>DETERMINATIVES</sup> (except for: <sup>d</sup>, <sup>m</sup>, <sup>f</sup>); AKKADIAN; Hittite.

Sigla: [...]: restoration of broken text; ʾ...ʾ: restoration of partially broken text; [(...)]: restoration from a different manuscript; <...>: addition to text erroneously omitted by scribe; [o]: space for one sign in broken text; x: traces of illegible sign; ? : uncertain reading or restoration; :: double-wedge marker (“Glossenkeil”).

---

Abbreviations follow *The Assyrian Dictionary of the Oriental Institute of the University of Chicago*, volume U/W (2010), pp. vii–xxix; and *The Hittite Dictionary of the Oriental Institute of the University of Chicago*, volumes L–N (1989), pp. xv–xxviii; P (1994), pp. vii–xxvi; Š/1 (2002), pp. vi–viii; and Š/2 (2005). The following abbreviations are used for designating ancient Near Eastern law collections: LUN = Laws of Ur-Namma; LLI = Laws of Lipit-Ištar; LE = Laws of Ešnunna; LH = Laws of Hammurabi; HL = Hittite Laws; MAL = Middle Assyrian Laws. All are found conveniently in Roth 1997.

intercourse.<sup>1</sup> As is demonstrated below, each one of these behaviors was considered illicit — if at all — for rather different reasons. The very matter of being considered illicit, however, is far from being unequivocal, at least in some of the cases.

Our starting point in assessing sex crimes in ancient Near Eastern societies is the various law collections, among the most famous cuneiform inscriptions of all. Important editions, compilations, and discussions of these collections, published by, to name but a few, Martha Roth, Harry Hoffner, and Raymond Westbrook,<sup>2</sup> demonstrate the importance of these documents and the high potential of their study.

It is questionable, however, whether the laws were indeed known to all, practiced by all, and enforced upon all. Were the inhabitants of remote villages indeed subject to the laws formulated by the elite residing in the major cities? Did the king, as the ultimate judge, indeed decide in each case whom, according to the laws, should have been brought before him? This is highly doubtful. In what follows, I discuss a few case studies in which the intersection between formal law, as officially decreed, and everyday custom, as socially practiced, was materialized.

Generally speaking, in most references to sexual intercourse, the formulation of the laws portrays the male person as the active performer and initiator of the act, and the female person as the passive object of the act.<sup>3</sup> This is true, for example, for all cases of forbidden incest and kin-relations. Similarly, the few laws proscribing bestiality only mention males as possible culprits.

## Adultery and Rape

We begin our survey with the most notable, and probably best-studied, topic: the case of adultery and rape. These two felonies are usually discussed by modern scholars jointly, since, as the laws clearly show, ancient Near Eastern societies considered sexual intercourse between two non-married partners to be illicit. As a rule, the normative acceptable frame of sexual intercourse required the parties involved to be two individuals of opposing sex who were married to each other. Deviations from this clear pattern were usually not tolerated, and in most cases deemed illegal. The illicit act would have been considered a rape in the case that the female partner expressed objection and the sexual act was forced upon her. When consent was assumed, however, the status of the act was changed from rape to adultery or deflowering, depending on the marital status of the woman.

Interestingly, the apparent mechanism that stood behind the intolerance toward adultery and rape was socioeconomic rather than purely moral. All the pertinent law collections are unanimous in this regard, and demonstrate that any given woman was ever under the authority of a male figure — either her father or her husband. Rape and adultery, therefore, were

---

<sup>1</sup> I wish to clarify my use of the controversial and loaded terms “homosexual” and “homosexuality.” When used in this essay, they obviously bear fundamentally different significance than when applied to modern societies. Essentially, the social array of conventions, thoughts, and emotions that exists today toward same-sex relations is markedly different from those that prevailed among past human societies. Hence, and in order to avoid any unwarranted anachronism as much as possible, the use of these

---

terms in this essay is only meant to refer to same-sex relations (i.e., men who performed sexual intercourse with other men), disregarding any social, cultural, or judgmental significance these terms may otherwise possess. Ultimately, this is the basic meaning of the term, whether properly used or misused; for a brief discussion of these matters, see Nissinen 2010.

<sup>2</sup> Roth 1997; Hoffner 1997; and Westbrook 2003.

<sup>3</sup> Except for rare cases dealing with a fornicating wife, as in LUN §7.

regarded as a wrongdoing committed against the woman's legal owner, and the breaching of his right of property. The implications of deflowering a virgin girl are also to be understood in this light.

Gender relations and hierarchies play a significant role in these cases. Adultery only takes into consideration the marital status of the woman involved; whether the adulterer male was married or not is utterly irrelevant. The adulterer man is always perceived as the active party, the initiating subject of the act. The adulteress woman forms the passive party, the object of the act. The offended side of the adulterous act is always the woman's husband, who, in some of the cases, was legally entitled to cast punishment upon the two culprits. In various cases, the male culprit, whether a rapist or adulterer, was fined, and the compensation he was required to make went to the male governing figure of the woman: either her father, husband, or master (in the case of a slave woman).<sup>4</sup>

The above general comments are based on a variety of ancient Near Eastern law collections that all reflect an extremely consistent approach: LUN §§6–8, LE §§26, 28, and 31; LH §§129–132; HL §§197 and 198; and MAL §§12–18, 22–23, and 55–56. Significantly, the biblical attitude toward adultery and rape, as described in Leviticus 20:10 and Deuteronomy 22:23–26, expresses identical views, which in particular parallel the Hittite laws.

An interesting example from outside the laws themselves sheds some light on the question of whether the laws were enforced in practice. IM 28051, a Sumerian-written Old Babylonian text,<sup>5</sup> details a legal case in which a person named Erra-malik wished to divorce his wife, Ištar-ummī. The reasons for the husband's plea were his wife stealing from him, and, most significantly, the fact that he apparently caught her in the middle of an adulterous act:<sup>6</sup>

ugu lú-ka in-dab5  
su lú-ka gišnú-a  
in-kéš  
pu-úh-ru-um-šè in-fl

He caught her upon a man. He (then) tied her to the body of the man on the bed,  
(and) carried her to the assembly.

Erra-malik seems to have tied both paramours, and brought them before the local assembly for judgment. The male paramour's punishment was not specified in the document, probably because the text only pertained to the issue of the divorce. The adulteress wife's punishment, however, was specified: her nose was to be pierced and she was to be dragged across the city, probably naked, in a display of public humiliation.

This text seems to affirm that the spirit of the laws was indeed present in social practice. Though most law collections prescribe the death penalty for both paramours, the possibility of inflicting injury upon them was also available, depending on the betrayed husband's will. More specifically, MAL A §15 mentions the cutting off of an adulterous wife's nose:<sup>7</sup>

šum-ma mu-ut munus dam-su i-du-ak  
ù a-i-la i-du-ak-ma  
šum-ma ap-pa ša dam-šu i-na-ki-is  
lú a-na ša re-še-en ú-tar

<sup>4</sup> LUN §8, LE §31, and MAL §55.

<sup>5</sup> See editions in van Dijk 1963, pp. 70, 72, and Green-gus 1969, p. 34.

<sup>6</sup> IM 28051 obv. 12–15.

<sup>7</sup> MAL A:51–57.

ù *pa-ni-šu gab-ba i-na-qu-ru*  
 ù *šum-ma dam-s[u ú-uš-šar]*  
 lú *ú[-uš-šar]*

If the husband of the woman kills his wife, he shall also kill the man (=the adulterer). If he cuts off the nose of his wife, he shall turn the man into a eunuch, and they will completely mutilate his face. And if [he releases] his wife, [he shall] (also) re[lease] the man.

This directive leaves open the possibility of mutilating the adulteress wife’s nose, similarly to the piercing of Ištar-ummi’s nose in the aforementioned text IM 28051. The fact that the whole affair was brought for judgment before the local assembly was also in accordance with what the various law collections stipulated.

It is worthy of notice that IM 28051 is probably dated to the early Old Babylonian period, ca. 2000–1900 BCE. Hence, it probably predated LE and LH by a century or two, and was more or less contemporaneous with LLI, a collection also written in the Sumerian language, just like IM 28051. These chronological considerations place this text well within Mesopotamian, and especially Old Babylonian, legal traditions.

## Incest and Kin Relations

We move on to evaluate a different sex crime: the act of incest. Though family and kin relations played an extremely significant role in ancient Near Eastern social life, formal prohibitions on sexual relations within the nuclear and extended familial circles are not abundant. Only LH and HL address this topic.

Five laws of LH proscribe sexual union between a man and his daughter, daughter-in-law, mother, and stepmother. The punishment for the man varies between death and banishment, and in one case financial compensation, depending on the case.<sup>8</sup>

Eight laws of HL address various cases of forbidden and rarely permitted incestuous relations. The Hittite laws prohibited the coition of a man and his mother, daughter, son, stepmother,<sup>9</sup> free sisters and their mother at the same time,<sup>10</sup> sister-in-law,<sup>11</sup> stepdaughter, and mother-in-law.<sup>12</sup> Given the fact that the Hittite collection stipulated some fifteen laws to address sexual felonies, incest and kin relations seem to have formed the most significant sex-related issue dealt with by these laws.

Incest is rarely mentioned in Mesopotamian sources outside LH. One such rare reference appears in a literary composition, the so-called the “Theogony of Dunnu,”<sup>13</sup> where we read the following:<sup>14</sup>

[ki-tu] *a-na* <sup>d</sup>*ama-gan-dù dumu-šú pa-na iš-ši-ma*  
 a[l-k] *a-am-ma lu-ra-am-ka tab-bi-i-šu*  
<sup>d</sup>*ama-[gan-dù] ki-ta um-ma-šu i-hu-uz-m[a]*  
<sup>d</sup>*ha-ra[b a-ba-š]u i-du-uk[-ma]*

<sup>8</sup> LH §§54–158.

<sup>9</sup> This is true only while his father is alive; otherwise, it was permitted.

<sup>10</sup> Slaves or deportees were permitted.

<sup>11</sup> Both the sister of one’s brother or wife.

<sup>12</sup> HL §§189–95 and 200a.

<sup>13</sup> BM 74329; see edition in Jacobsen 1984, pp. 100, 102; translations in Lambert and Walcot 1965, pp. 65–66, and Dalley 2000, pp. 279–81.

<sup>14</sup> CT 46.43 obv. 8–19.

*i-na*<sup>URU</sup>*d[u-u]n-nu šá i-ra-am-mu uš-ni-il[-šu]*  
*ù*<sup>d</sup>*ama-gan-dù en-ta ša a-b[i-š]u [il]-qé[-e]*  
*d*<sup>d</sup>*a-ab-ba a-ha-as-su g[al-t]a [i-h]u-uz*  
*d*<sup>u<sub>8</sub></sup>*dumu d*<sup>d</sup>*ama-gan-dù*<sup>r</sup>*il'-li-kam[-ma]*  
*d*<sup>d</sup>*ama-gan-dù i-du-uk-ma i-na*<sup>URU</sup>*du-un-ni*  
*i-na*<sup>r</sup>*é'[-ki]-sè'-<ga> a-bi-[-š]u uš-ni-il[-šu]*  
*d*<sup>d</sup>*[a-ab]-ba<sup>r</sup> ama-[-š]u i-hu-uz*  
*ù*<sup>d</sup>*a-ab-ba ki-ta ama-ša ta-ni[-ir]*

[Earth] lifted her face to Sumuqan, his (=Earth's husband, Harab) son, and said to him: "Come! May I love you!" Sumu[qa]n married Earth, his mother. He killed Hara[b, h]is [father]. He laid [him] to rest in the city of Dunnu, which he loved. And Sumuqan [t]oo[k] the lordship of his father. [He m]arried Sea, his older sister. [But] Gaiu, the son of Sumuqan, came, and killed Sumuqan. He laid [him] to rest in the city of Dunnu, in the grave of his father. He married [Se]a, [h]is mother. And Sea sle[w] Earth, her mother.

The text continues with the reoccurring pattern of parricide and incestuous relations conducted by various primordial deities, presumably in order to symbolize the chaotic situation that existed prior to the establishment of order and civilization. Unfortunately, the fragmentary state of the text prevents any clear understanding of it. Various mythological episodes, omen texts, and dream reports mention the occasional occurrence of incestuous relations by deities and mortals.<sup>15</sup> The value of these hyper-realistic texts in reflecting historical social reality, however, is naturally to be taken with caution.

Hittite sources on incest are more telling with regard to the relation between law and custom. Interestingly, these sources exhibit certain discrepancies between the two. The highly detailed Hittite laws of incest surprisingly neglect to proscribe one type of immediate incestuous relations: those between a brother and his sister. This, however, does not mean that these relations were actually tolerated by the Hittites, since extra-judicial sources demonstrate how negatively such an act was perceived. In Šuppiluliuma I's treaty with his vassal king Huqqana, king of Hayaša,<sup>16</sup> the Hittite monarch mentioned that in Hatti a person having sexual intercourse with his own sister would be executed:<sup>17</sup>

*A-NA KUR*<sup>URU</sup>*ha-at-ti-ma-kán ša-a-ak-la-iš du-u[(q-qa)]-ri*  
<sup>r</sup>*ŠEŠ-aš-za<sup>n</sup> NIN-SÚ*<sup>MUNUS</sup>*a-a-an-ni-in-ni-ia-mi-in Ú-UL [(da-a-i)]*  
<sup>r</sup>*Ú-UL*<sup>r</sup>*-at a-a-ra ku-iš-ma-at i-e-zi a-pí-ni-iš-š[u-u-w]a-an-na ut-tar*  
*na-aš*<sup>URU</sup>*ha-at-tu-ši Ú-UL hu-u-iš-šu-u-iz-zi a-ki-pa-a[t-š]a-n*

In the land of Hatti an important rule is followed: a brother will not take (=sexually) his sister or his (female-)cousin. It is not right! However, he who does it — such a thing — he will not live in Hattuša, (but) will be killed here!

The forbidden relations are termed *natta āra*, "not right" or "inappropriate," a phrase that usually described social taboos and unacceptable deeds.<sup>18</sup> In the mythological text variously

<sup>15</sup> See Petschow 1976, pp. 149–50, including previous literature.

<sup>16</sup> CTH 42; see edition in Friedrich 1930, pp. 103–63, 172–75; translation in Beckman 1996, pp. 22–30.

<sup>17</sup> CTH 42, KBo 5.3 iii 28–31.

<sup>18</sup> For a study of this term, see Cohen 2002.



known as “The Zalpa tale” or “The queen of Kaniš and her sons,”<sup>19</sup> this act was regarded similarly:<sup>20</sup>

*ma-a-an* <sup>URU</sup>*ne-e*-ša *pa-a-ir*  
 [n]u-uš-*ma-aš* DINGIR<sup>DIDL</sup>-eš *ta-ma-i-in ka-ra-a-ta-an da*-<sup>r</sup>*i-ir*<sup>n</sup> nu AMA-ŠU-NU  
 [a-pu-u-u]š *na-at-ta ga-ni-eš-zi nu-uz-za* DUMU.MUNUS<sup>MEŠ</sup>-ŠA<sup>1</sup> A-NA  
 DUMU.NITA<sup>MEŠ</sup>-ŠA *pa-iš*  
 [ha-an-te-e]z-*zi-aš* DUMU<sup>MEŠ</sup> *né-ku-uš-mu-uš na-at-t*<sup>a</sup> *ga*<sup>n</sup>-*ni-eš-šir ap-pé-ez-zi-ia-ša-aš-ša-an*  
 [o o o o]x-uš-*za né-e-ku-šum-mu-uš da-aš-ke-e-u*<sup>r</sup>-*e-ni*<sup>i</sup> [n]u *le-e ša-li-ik-tu-ma-ri*  
 [na-at-ta]<sup>r</sup> *a-a-ra nu kat-ti-iš-mi še*<sup>r</sup>[-e-še-er...]

When they went to the city of Neša, the gods put on them a different appearance, so that their mother will not recognize [the]m. And (thus) she gave her daughters to her sons. The [eld]er brothers did not recognize their sisters, but the youngest [exclaimed: “we should not] take (=sexually) our sisters! We should not penetrate<sup>21</sup> (them)! (It is) [not] right!” But [they] s[lept] with them.

The restoration of the last sentence in the above passage is somewhat controversial, and the actual occurrence of the incestuous relations is open for debate.<sup>22</sup> Be that as it may, it is beyond doubt that the above passage portrays brother-sister union as a social taboo, whether that taboo was indeed broken or not.

Perhaps most significantly, the magical ritual CTH 445<sup>23</sup> was conducted at the occurrence of incestuous relations between a man and either his daughter, sister, or mother. Only the colophon of the text has survived, but it is sufficient to show that the text explicitly labeled the acts as *hurkel*, “abomination,” a term that in the laws designated the harshest sexual offenses, punishable by death.<sup>24</sup> The colophon reads as follows:<sup>25</sup>

DUB.1.KAM QA-TI  
*ma-a-an UN-aš hur-ki-il i-ia-zi*  
*nu-za* DUMU.MUNUS-ŠU NIN-ŠU AMA-ŠU *da-a-i*

First tablet, complete. If a person commits an abomination, (as) he takes (=sexually) his daughter, his sister (or) his mother...

The fragment 827/z<sup>26</sup> also described a purification ritual following incest:<sup>27</sup>

*ma-a-an UN-aš IT-TI AMA*[-ŠU...]  
*na-aš-ma ha-aš-ša-an-na-aš-ši* [...]  
*na-aš ma-a-an EGIR-zi-iš* [...]  
 UN-aš *ku-iš wa-aš-da-i n*[a...]

<sup>19</sup> CTH 3; see edition in Otten 1973, pp. 6–13; translation in Hoffner 1998, pp. 81–82.

<sup>20</sup> CTH 3, KBo 22.2 obv. 15–20.

<sup>21</sup> For *šalik*, see CHD Š, pp. 100, 103, s.v. “*šalik(i) 3c*”; for the meaning of this term in the Hittite laws of sexuality, see Peled 2010b, p. 255–56.

<sup>22</sup> Hoffner (1998, p. 82), for example, restored it differently, assuming that the sin was not performed: “The older sons didn’t recognize their sisters. But the youngest [objected:] “Should we take our own sisters in marriage? Don’t do such an impious thing! [It is

surely not] right that [we should] sleep with them.” Grammatically, however, and in my opinion also contextually, this translation is less probable.

<sup>23</sup> See edition in Hoffner 1973, pp. 88–89.

<sup>24</sup> For literature on the term *hurkel*, see Peled 2010b, p. 254 n. 23; for the meaning of this term in the Hittite laws of sexuality, see Peled 2010b, pp. 254–55.

<sup>25</sup> CTH 445, IBoT 2.117 iv 1’–3’ // KBo 12.115 rev. 1’–3’.

<sup>26</sup> See edition in Hoffner 1973, p. 89.

<sup>27</sup> CTH 445.C, 827/z 1–9.

nu URU-aš hu-u-ma-an-za an-d[a...]  
 a-pé-da-ni URU-ri EGIR-a[n<sup>2</sup>...]  
 MUNUS.ŠU.GI a-ni-ia-ta-x[...]  
 i-ia-an-zi n[a-x]...  
 nu LÚ<sup>d</sup>U x[...]

If a person [sins?] with [his] mother [...] or his blood-relatives [...] And he, if low-ranked [...] The person who sins [...] And all the town in[...] to that town [...] The “Old-woman”, the ritual [...] they perform [...] And the man of the Storm-god [...]

It is unclear whether this fragment belonged to the very same text as CTH 445, or whether the two belonged to separate rituals.

## Bestiality

The next sexual felony we discuss is the complicated misdemeanor of bestiality. Almost all ancient Near Eastern law collections ignore this behavior. HL, and similarly, though much more laconically, the biblical laws,<sup>28</sup> are the only ones who address bestiality at all. Four laws of HL prohibit copulation with various animals and prescribe the death penalty for breaching these prohibitions.<sup>29</sup> Several non-juridical sources, such as the myth of “The Sun-god, the Cow and the Fisherman,”<sup>30</sup> demonstrate that a similarly negative attitude prevailed among the Hittites. The fear of unwillingly being engaged in bestial relations with a stallion may have been alluded to in one of queen Puduhepa’s dream reports,<sup>31</sup> as we read in the following:<sup>32</sup>

[ANŠE.KUR.RA<sup>M</sup>]EŠ<sup>7</sup>-ia-wa(-)ṛ mu ku-wa-at-qa<sup>ṛ</sup> 33  
 [o]-x :tar-ši-en-ti nu<sup>l</sup>(TAR)-za MUNUS.LUGAL  
 kat-ta iš-ha-ha-at  
 nu-wa taš-ku-pí-iš-ki-u-wa-an ṛ ti<sup>ṛ</sup>-ia-ṛ nu<sup>ṛ</sup>-un  
 nu-mu-kán<sup>LÚ.MEŠ</sup>KAR-TAP-PU pa-ra-a  
 :ha-ah-re-eš-kán-zi  
 nu-mu-kán im-ma u-ni-uš ANŠE.KUR.RA<sup>MEŠ</sup>  
 a-wa-an ar-ha pé-e-hu-te-ṛ er<sup>ṛ</sup>  
 :tar-ši-it-ta-ia-wa-mu ṛ Ú<sup>ṛ</sup>-UL  
 ku-iš-ki ša-ra-a-ia-mu-kán Ú-[U]L  
 ku-iš-ki še-e-hu-ri-ṛ ia<sup>ṛ</sup>-[a]t

And [the horse]s<sup>7</sup> [...] would trample [on me<sup>2</sup>...] (I), the queen, sat down and started wailing. The charioteers were laughing at me. They indeed led the horses away from me. No one trampled on me, no one urinated on me.

The significance of the horses trampling and urinating on the queen as a metaphor for bestial intercourse is merely conjectural, but cannot be overruled.

<sup>28</sup> Exodus 22:18, Leviticus 20:15, 16.

<sup>29</sup> HL §§187–88, 199, and 200a

<sup>30</sup> CTH 363; see edition in Friedrich 1950, pp. 224–33; translation in Hoffner 1998, pp. 85–87.

<sup>31</sup> See editions in Werner 1973; van den Hout 1994; and, most recently, Mouton 2007, pp. 272–78.

<sup>32</sup> CTH 584, KUB 31.71 obv. ii 1’–11’.

<sup>33</sup> This restoration follows van den Hout 1994, p. 309. Based on the photograph of the tablet, as appears in the Mainz Photoarchiv (<http://www.hethport.adw-mainz.de/fotarch/index.php>; accessed June 27, 2017), this restoration seems highly probable.

The purification magical ritual CTH 456.5<sup>34</sup> was explicitly meant to make amends for bestial relations of a man with a sheep or a goat, as its introductory passage states:<sup>35</sup>

[*ma-a-an LÚ-a*]š UDU-*i na-aš-ma* UZ<sub>6</sub>-*i* GAM w[*a*]-*aš-t[a-i]*

[If a ma]n s[i]n[s] with a sheep or a goat...

Even in this text gender categorization is apparent, because the animal was probably being treated in the ritual as symbolizing a divorced wife: it was veiled, banished from town, and given back its dowry, just as a husband would do when divorcing his wife.<sup>36</sup> It has also been suggested that the so-called “ritual of Zuwi”<sup>37</sup> served a similar purpose, by aiming at counteracting the ill-perceived outcome of bestiality.<sup>38</sup> These magical rituals reflect a certain deviation from the directives of the laws, as the latter ones decreed the death penalty for almost all cases of bestiality, while the rituals formed a softer social custom, purifying the perceived abomination rather than executing the human culprit.

As previously noted, Mesopotamian laws remained silent with regard to bestiality. Outside the laws, however, we do encounter several references to the act. In the realm of mythology, it was suggested that Enkidu was engaged in bestial acts prior to having been civilized through sexual congress with the human prostitute, Šamhat.<sup>39</sup> The omen series *šumma izbu*, “If an anomaly...,” presents numerous examples for women giving birth to various animals.<sup>40</sup> Dream reports mention humans consuming animal urine and feces, and being engaged in bestial intercourse.<sup>41</sup> The following shows an explicit reference:<sup>42</sup>

diš lú *ana ú-ma-mi* du-*ik* x[...]

*ana igi-šu* du-*ak*

If a man goes to a wild animal: [his house?] will become prosperous.

The interpretation of this passage as referring to bestiality lies in the assumption that the phrase “to go to an animal” is a euphemism for bestial relations. Indeed, the verb *alāku*, “to go,” is known to have been used for this purpose, and the phrase *ana ... alāku*, “to go to...,” is understood as having designated the performance of sexual intercourse.<sup>43</sup>

Various šà.zi.ga incantations and rituals<sup>44</sup> mention animal sexuality in order to arouse human male sexual potency. Animal imagery was apparently used in these cases because animal sexuality was admired, and occasionally real animals were used throughout the performance of the ritual. The animals were addressed and encouraged to mate with each other, and occasionally even to mount the female practitioner, in order to excite the impotent male patient. The following is one of the most explicit examples:<sup>45</sup>

*lim-gu-ug anše-ma* munus.anše *li-ir-kab*

*lit-bi da-áš-šú li-ir-tak-ka-bu ú-ni-qí* x

<sup>34</sup> See edition in Hoffner 1973, pp. 86–87.

<sup>35</sup> CTH 456.5, KUB 41.11 2’.

<sup>36</sup> Hoffner 1973, p. 88.

<sup>37</sup> See edition in Giorgieri 1990.

<sup>38</sup> Hutter 2000.

<sup>39</sup> Hoffner 1973, p. 82, following Baab 1962, p. 387.

<sup>40</sup> Leichty 1968.

<sup>41</sup> Oppenheim 1956, pp. 257–58, 265–66, 273.

<sup>42</sup> MDP 14, pp. 50–59 rev. iii 8’–9’.

<sup>43</sup> CAD A/1, p. 321, s.v. “*alāku* 4c.”

<sup>44</sup> Biggs 1967.

<sup>45</sup> KAR 236:3–10.

ina sag<sup>giš</sup>nú-ia lu ra-ki-is da-áš-<sup>7</sup>šú<sup>7</sup>  
 ina še-pit<sup>giš</sup>nú-ia lu ra-ki-is pu-ha-lu<sub>4</sub>  
 šá sag<sup>giš</sup>nú-ia ti-bá-a ra-man-ni  
 šá še-pit<sup>giš</sup>nú-ia ti-bá-a hu-ub-<bi>-ba-an-ni  
 ú-ru-ú-a ú-ru munus.ur ú-šar-šú ú-šar ur.ku  
 gim ú-ru munus.ur iṣ-ba-tú ú-šar ur.ku

May the donkey swell up! May he mount the jenny! May the buck get an erection!  
 May he repeatedly mount the female-kid! At the head of my bed, indeed, a buck is  
 tied! At the foot of my bed, indeed, a stag is tied! The one at the head of my bed: get  
 an erection! Make love to me! The one at the foot of my bed: get an erection! Caress  
 me! My vagina is the vagina of a bitch! His penis is the penis of a dog! Like the vagina  
 of a bitch seizes the penis of a dog (may my vagina seize his penis)!

It is certainly possible that no bestiality per se was intended or practiced, and the practitioner only meant to excite the mind of the patient by verbal imagery. It is nonetheless significant that bestial relations were considered to have been sexually arousing for men, as evident in these ritual passages.

## Homosexual Intercourse

We conclude our survey with a discussion of the attitudes toward homosexual intercourse among ancient Near Eastern societies. Modern research on this topic was heavily influenced by biblical studies, which may have resulted in a certain anachronistic bias. The Bible is very clear in its approach to same-sex relations: in Leviticus 18:22 and 20:13, these are severely condemned and appear to be punishable by death. This, however, was hardly the case in other parts of the ancient Near East. To begin with, all law collections are completely silent with regard to homosexuality. This homogenous and consistent picture has only one exception, MAL A §20:<sup>46</sup>

šum-ma lú tap-pa-a-šu i-ni-ik  
 ub-ta-e-ru-ú-uš  
 uk-ta-i-nu-ú-uš  
 i-ni-ik-ku-ú-uš  
 a-na ša re-še-en ú-tar-ru-uš

If a man sodomizes his fellow man, (and) they indict him, (and) they prove him (=his guilt): they shall sodomize him, (and) they shall turn him into a eunuch.

This law banned homosexual intercourse, but was likely aimed at homosexual rape rather than homosexual relations.<sup>47</sup> In this regard, it probably did not reflect any real negative attitude toward homosexuality.

The almost complete lack of official laws pertaining to homosexual relations compels us to shift our attention yet again to extra-judicial sources. Here the evidence is a bit more lucid. The relationship between Gilgameš and Enkidu has long been regarded by many as having

<sup>46</sup> MAL A:93–97.

<sup>47</sup> Bottéro and Petschow 1972–1975, pp. 461–62; Greenberg 1988, p. 126; Guinan 1997, p. 470; and

Lafont 2003, p. 557. For a different view, see Lambert 1992, p. 147, and Wold 1998, p. 45.

some homoerotic tones.<sup>48</sup> Further, the series of omens *šumma ālu*, “If a city...,” mentions homosexual relations performed between a man and various other male figures: a social peer, a cult attendant (*assinnu*), a palace personnel (*girseqû*), and a house-born-slave (*dušmû*).<sup>49</sup> The pertinent entries read as follows:<sup>50</sup>

diš na *ana* gu-du *me-eh-ri-šú* te na-bi *ina* šeš<sup>me</sup>[-šú] ù *ki-na-ti-šú a-šá-re-du-*  
*tam du-ak*  
 diš na *a-na as-sin-ni* te *dan-na-tu du*<sub>8-šu</sub><sub>11</sub>  
 diš na *a-na gîr-sè-ga* te *ka-la mu* 1<sup>kám</sup> *tam-ṭa-a-tum šá gar*<sup>meš</sup>-šú *ip-pa-ra-sa*  
 diš na *ana du-uš-mi-šú* te *ki-kal dib-su*

If a man approaches his social peer anally, that man will become foremost among his brothers and colleagues... If a man approaches (sexually) an *assinnu*, hardships will be loosened from him. If a man approaches (sexually) a *girseqû*, for an entire year the losses that beset him will be kept away. If a man approaches (sexually) his house-born-slave, hardship will seize him.

These passages speak for themselves. As before, however, the hyper- or even un-realistic nature of all of these texts allows for many speculations as to their meaning. None of these speculations should be taken as compelling evidence for social reality, though of course they cannot be ignored.

Faint traces of negative attitudes toward receptive homosexuality can probably be found in several non-legal Hittite sources: the magical rituals of Anniwiyani,<sup>51</sup> Paškuwatti,<sup>52</sup> and Zuwi,<sup>53</sup> and the semi-fictional text of “The siege of Uršu.”<sup>54</sup> The rituals, it was variously suggested, were meant to treat persons that were found to be engaged in receptive homosexual intercourse in order to shift them back to assume penetrative sexual behavior.<sup>55</sup> In “The siege of Uršu” we find passages that might hint to passive homosexuality as being scorned.<sup>56</sup>

The Hittite law collection, on the other hand, is no more revealing than any of its Mesopotamian counterparts, and completely ignores this issue. This stark discrepancy between the silence of formal law and the loud assertiveness of social practice may be suggestive. The Hittite case supplies us with a vivid demonstration of the coexistence of conflicting conventional arrays. In the case of bestiality, we have noticed that the harsh formal law may have occasionally been modified and moderated in actual practice. In the case of homosexual intercourse, by contrast, we saw that the lack of formal legislation did not necessarily reflect a lack of social norms. These could have been enforced even without the application of a formal legal system.

## Conclusions

Several formal law collections from across the ancient Near East were formulized in order to establish the monitoring, moderation, and control of gender relations. It seems, however, that

<sup>48</sup> Kilmer 1982; Leick 1994, pp. 266–68; Walls 2001, p. 56; and Cooper 2002, pp. 73–74.

<sup>49</sup> *šumma ālu* Tablet 104; see edition in Guinan 1997, p. 479 nn. 40–43.

<sup>50</sup> CT 39.44:13, 45:32–34.

<sup>51</sup> CTH 393; see editions in Sturtevant and Bechtel 1935, pp. 100–26, and Bawanypeck 2005, pp. 51–70.

<sup>52</sup> CTH 406; see edition in Hoffner 1987.

<sup>53</sup> CTH 412; see edition in Giorgieri 1990.

<sup>54</sup> CTH 7; see edition in Beckman 1995.

<sup>55</sup> For discussions of the relation of these texts to passive homosexuality, see Peled 2010a; 2010c, pp. 624–26 (for “Anniwiyani’s Ritual”); Miller 2010 (for “Paškuwatti’s Ritual”); and Puhvel 1986 (for “Zuwi’s Ritual”).

<sup>56</sup> Peled 2010a, pp. 77–78.

there was much room for negotiation between the spheres of formal law and informal custom. The evidence presented in this essay suggests that the two coexisted almost harmoniously, rather than in conflict with one another. Even if the formal laws were indeed known and enforced across the nation, they could hardly encompass all possible legal cases and felonies. There was an omnipresent need for other social devices and mechanisms to be employed for the constant shaping and restructuring of gender relations. These devices reflected the practical social customs of common men and women, and not necessarily the official laws decreed by the central ruling elite.

## Bibliography

- Baab, Otto J.  
1962 "Bestiality." *Interpreter's Dictionary of the Bible* 1: 387.
- Bawanypeck, Daliah  
2005 *Die Rituale der Auguren*. Texte der Hethiter 25. Heidelberg: Winter.
- Beckman, Gary M.  
1995 "The Siege of Uršu Text (CTH 7) and Old Hittite Historiography." *Journal of Cuneiform Studies* 47: 23–34.  
1996 *Hittite Diplomatic Texts*. Writings from the Ancient World 7. Atlanta: Scholars Press.
- Biggs, Robert D.  
1967 *ŠÀ.ZI.GA: Ancient Mesopotamian Potency Incantations*. Texts from Cuneiform Sources 2. Locust Valley: J. J. Augustin.
- Bottéro, Jean, and Hebert P. H. Putschow  
1972–1975 "Homosexualität." *Reallexikon der Assyriologie* 4: 459–68.
- Cohen, Yoram  
2002 *Taboos and Prohibitions in Hittite Society: A Study of the Hittite Expression Natta Āra ('not permitted')*. Texte der Hethiter 24. Heidelberg: Winter.
- Cooper, Jerrold S.  
2002 "Buddies in Babylonia. Gilgamesh, Enkidu, and Mesopotamian Homosexuality." In *Riches Hidden in Secret Places: Ancient Near Eastern Studies in Memory of Thorkild Jacobsen*, edited by Tzvi Abusch, pp. 73–85. Winona Lake: Eisenbrauns.
- Dalley, Stephanie  
2000 *Myths from Mesopotamia: Creation, the Flood, Gilgamesh, and Others*. Revised edition. Oxford: Oxford University Press.
- van Dijk, Jacobus  
1963 "Neusumerische Gerichtsurkunden in Bagdad." *Zeitschrift für Assyriologie* 55: 70–90.
- Friedrich, Johannes  
1930 *Staatsverträge des Hatti-Reiches in hethitischer Sprache (Teil 2)*. Mitteilungen der Vorderasiatisch-Ägyptischen Gesellschaft 34/1. Leipzig: Hinrichs.  
1950 "Churritische Märchen und Sagen in hethitischer Sprache." *Zeitschrift für Assyriologie* 49: 213–54.
- Giorgieri, Mauro  
1990 *Il rituale di Zuwi (CTH 412)*. MA thesis, University of Pavi.
- Greenberg, David F.  
1988 *The Construction of Homosexuality*. Chicago: University of Chicago Press.
- Greengus, Samuel  
1969 "A Textbook Case of Adultery in Ancient Mesopotamia." *Hebrew Union College Annual* 40: 33–44.
- Guinan, Ann K.  
1997 "Auguries of Hegemony: The Sex Omens of Mesopotamia." *Gender & History* 9/3: 462–79.
- Hoffner, Harry A. Jr.  
1973 "Incest, Sodomy and Bestiality in the Ancient Near East." In *Orient and Occident. Essays Presented to Cyrus H. Gordon on the Occasion of His Sixty-Fifth Birthday*, edited by Harry A. Hoffner Jr., pp. 81–90. *Alter Orient und Altes Testament* 22. Kevelaer: Butzon & Bercker.  
1987 "Paškuwatti's Ritual against Male Impotence." *Aula Orientalis* 5: 271–87.  
1997 *The Laws of the Hittites: A Critical Edition*. Documenta et Monumenta Orientis Antiqui 23. Leiden: Brill.  
1998 *Hittite Myths*. Second edition. Writings from the Ancient World 2. Atlanta: Scholars Press.
- van den Hout, Theo P. J.  
1994 "Traume einer hethitischen Königin: KUB LX 97 + XXXI 71." *Altorientalische Forschungen* 21: 305–27.

- Hutter, Manfred  
2000 "Tiere als Materia Magica im Ritual der Zuwi (CTH 412)." In *The Asia Minor Connexion: Studies on the Pre-Greek Languages in Memory of Charles Carter*, edited by Yoël L. Arbeitman, pp. 95–106. Orbis Supplementa 13. Leuven: Peeters.
- Jacobsen, Thorkild  
1984 *The Harab Myth. Sources from the Ancient Near East 2/3*. Malibu: Undena Publications.
- Kilmer, Anne D.  
1982 "A Note on an Overlooked Word-Play in the Akkadian Gilgamesh." In *Zikir Šumim: Assyriological Studies Presented to F. R. Kraus on the Occasion of His Seventieth Birthday*, edited by Govert Van Driel, Theo J. H. Krispijn, Marten Stol, and Klaas R. Veenhof, pp. 128–32. Studia Francisci Scholten memoriae dicata 5. Leiden: Brill.
- Lafont, Sophie  
2003 "Middle Assyrian Period." In *A History of Ancient Near Eastern Law*, edited by Raymond Westbrook, pp. 521–63. Handbuch der Orientalistik 72. Leiden: Brill.
- Lambert, Wilfred G.  
1992 "Prostitution." In *Außenseiter und Randgruppen. Beiträge zu einer Sozialgeschichte des Alten Orients*, edited by Volkert Haas, pp. 127–57. Xenia 32. Konstanz: Konstanz University Press.
- Lambert, Wilfred G., and Peter Walcot  
1965 "A New Babylonian Theogony and Hesiod." *Kadmos* 4/1: 64–72.
- Leichty, Erle V.  
1968 *The Omen Series šumma izbu. Texts from Cuneiform Sources 4*. Locust Valley: J. J. Augustin.
- Leick, Gwendolyn  
1994 *Sex and Eroticism in Mesopotamian Literature*. London: Routledge.
- Miller, Jared L.  
2010 "Paskuwatti's Ritual: Remedy for Impotence or Antidote to Homosexuality?" *Journal of Ancient Near Eastern Religion* 10/1: 83–89.
- Mouton, Alice  
2007 *Rêves hittites: contribution à une histoire et une anthropologie du rêve en Anatolie ancienne. Culture and History of the Ancient Near East 28*. Leiden: Brill.
- Nissinen, Martti  
2010 "Are There Homosexuals in Mesopotamian Literature?" *Journal of the American Oriental Society* 130/1: 73–77.
- Oppenheim, A. Leo  
1956 *The Interpretation of Dreams in the Ancient Near East. With A Translation of an Assyrian Dream-Book*. Transactions of the American Philosophical Society, New Series 46/3. Philadelphia: American Philosophical Society.
- Otten, Heinrich  
1973 *Eine althethitische Erzählung um die Stadt Zalpa. Studien zu den Boğazköy-Texten 17*. Wiesbaden: Harrassowitz.
- Peled, Ilan  
2010a "Expelling the Demon of Effeminacy: Anniwiyani's Ritual and the Question of Homosexuality in Hittite Thought." *Journal of Ancient Near Eastern Religions* 10/1: 69–81.  
2010b "'Amore, more, ore, re...': Sexual Terminology and the Hittite Law." In *Pax Hethitica: Studies on the Hittites and their Neighbours in Honour of Itamar Singer*, edited by Yoram Cohen, Amir Gilan, and Jared L. Miller, pp. 247–60. Studien zu den Boğazköy-Texten 51. Wiesbaden: Harrassowitz.  
2010c "The Use of Pleasure, Constraints of Desire: Anniwiyani's Ritual and Sexuality in Hittite Magical Ceremonies." In *Acts of the VIIth International Congress of Hittitology, Çorum, August 25–31 2008*, edited by Aygül Süel (Ankara), pp. 623–36.



- Petschow, Herbert P. H.  
 1976 "Inzest." *Reallexikon der Assyriologie* 5: 144–150.
- Puhvel, Jaan  
 1986 "Who were the Hittite hurkilas pesnes?" In *o-o-pe-ro-si. Festschrift für Ernst Risch zum 75. Geburtstag*, edited by Annemarie Etter, pp. 151–55. Berlin: de Gruyter.
- Roth, Martha T.  
 1997 *Law Collections from Mesopotamia and Asia Minor*. Second edition. Writings from the Ancient World 6. Atlanta: Scholars Press.
- Sturtevant, Edgar E., and George Bechtel  
 1935 *A Hittite Chrestomathy*. William Dwight Whitney Linguistic Series. Philadelphia: Linguistic Society of America, University of Pennsylvania.
- Walls, Neal H.  
 2001 *Desire, Discord and Death. Approaches to Ancient Near Eastern Myths*. American Schools of Oriental Research Books 8. Boston: American Schools of Oriental Research.
- Werner, Rudolf  
 1973 "Ein Traum einer hethitischen Königin." In *Festschrift Heinrich Otten: 27. Dez. 1973*, edited by Erich Neu and Christel Rüster, pp. 327–30. Wiesbaden: Harrassowitz.
- Westbrook, Raymond, editor  
 2003 *A History of Ancient Near Eastern Law*. Handbuch der Orientalistik 72. Leiden: Brill.
- Wold, Donald J.  
 1998 *Out of Order: Homosexuality in the Bible and the Ancient Near East*. Grand Rapids: Baker Books.

# Greek Sexual Offences and Their Remedies: Honor and the Primacy of Family

*Adele C. Scafuro, Brown University\**

## Introduction

The evidence for sexual offences in the Greek world is disparate. First, mention must be made of the inscription known as the Great Code (henceforth “GC”) from the city of Gortyn in Crete; it dates from the early to mid-fifth century<sup>1</sup> and was originally inscribed in twelve columns upon a curved wall, possibly belonging to a roofed portico;<sup>2</sup> its second column conveys regulations and remedies for sexual offences. Secondly, there is the evidence from Athens: (a) Literary “fragments” from various later authors permit a fragile reconstruction of the laws of Solon from the early sixth century which includes regulations on sexual relations.<sup>3</sup> (b) Paraphrases of laws about sexual offences appear in the ca. 100 extant forensic speeches of the late fifth and fourth centuries,<sup>4</sup> and sometimes documents purporting to be laws have been inserted into the manuscripts; many scholars consider the paraphrases more reliable than the documents — in any case, the latter must always be assessed for their authenticity.<sup>5</sup> (c) An important account of the fourth century court system, together with snippets of laws and remedies, appears in [Arist.] *Athenaiōn Politeia* (*Constitution of the Athenians*, abbreviated *AP*). (d) Other Athenian literary sources, especially Comedy (Old and New), provide much

---

\* I am grateful to Ilan Peled for his kind invitation to speak at the conference “Structures of Power: Law and Gender across the Ancient Near East and Beyond” at the Oriental Institute in March 2015; as one belonging to the “Beyond,” I thank him especially for his skill in creating a comfortable fit. I am also grateful to Michael Gagarin and Paula Perlman for allowing me access, ahead of publication, to their excellent new text, translation, and commentary on the laws of ancient Crete. All references to the text of the Gortyn Code (“GC”) come from this volume and appear as “G-P”; I have also used G-P’s translation and frequently advert to the notes (where reference is given to “G-P 2016”). Maffi 2003 provides an excellent discussion of recent bibliography on the GC. Translations from other texts here are usually modified versions from the Loeb Series of translations. Abbreviations used for ancient authors and their works are usually in accord with the third edition of the *Oxford Classical Dictionary*; square brackets around an author’s name

---

indicate that the work associated with the name is pseudonymous (e.g., [Arist.] *AP* = the pseudonymous author of the *Athenaiōn Politeia*, *Constitution of the Athenians*). Abbreviations for periodicals are in accord with *L’Année philologique*.

<sup>1</sup> All dates in this essay are BCE unless explicitly noted as CE.

<sup>2</sup> G-P 2016, p. 335.

<sup>3</sup> Collections of texts, translations, and commentaries in Ruschenbusch 1966 (only texts); Bringmann and Ruschenbusch† 2010; and Leão and Rhodes 2015.

<sup>4</sup> For a brief description of the ca. 100 speeches in the extant corpus of the ten Attic Orators, see Todd 1993, p. 7 n. 8.

<sup>5</sup> Canevaro 2013 provides a thorough discussion of the problems in using the state documents (mostly laws and decrees) inserted in Demosthenes’ speeches. For a review of this work, see Scafuro 2016.

worthwhile material — though its truth value in regard to legal regulation is often hard to judge, it nevertheless remains useful for discerning attitudes toward law and legal offences. (e) Attic inscriptions, too, are a valuable source for laws, but provide little information on sexual offences. Turning away from Athens to the Egyptian chora, we find marriage contracts as early as the late fourth century (e.g., P. Eleph. 1); in some, conventional clauses prohibit the new husband, inter alia, from introducing another woman for the purpose of insulting his wife (ἐφ' ὕβρει) and also from creating children with another woman.<sup>6</sup> From other cities there is a hotchpotch of anecdotal literary material often reporting extra-judicial remedies (e.g., in Pisidia, an adulterer was led around the city on a donkey, *FGrHist* 90 F 103), though sometimes reporting the statutes of famous lawgivers.<sup>7</sup>

My focus here is on sources that have something to say about rape, seduction, and adultery, a somewhat narrow but necessary focus, given constraints of space. This is somewhat regrettable, for a wider focus on sexual offences would include, inter alia, male and female prostitution and also the regulation of sexual relations with Athenian heiresses (*epiklēroi*) and with the more favorably positioned Gortynian heiress (*patrōiōkos*); the widened focus would show broader links between family and polis economy. On the other hand, examining the legal offences of rape, seduction, and adultery raises an obvious question: what is the rationale for putting these two or three offences together? Indeed, what do rape and seduction have in common insofar as law is concerned? I'll return to these non-innocent questions shortly.

My focus here is on Gortyn and Athens, again resulting from constraint of space. They are two quite different cities: in terms of political set-up and in political aspirations (after all, democratic Athens is at the height of empire in the mid- fifth century); categories of inhabitants; and levels of independence for women (apparently they enjoyed quite a bit more independence in Gortyn).<sup>8</sup> Moreover, for Gortyn, we have a score of regulations and penalties for rape, seduction, and adultery committed between persons of the same status and between persons of different status — indeed, Gagarin and Perlman (henceforth designated “G-P”), editors and authors of the most recent text, translation, and commentary on the laws of ancient Crete, point out the exceptional character of these regulations in the Great Code: “[t]his is the only part of the Code that contains a gradation of successive offences and their punishments of the sort that are common in many premodern lawcodes.”<sup>9</sup> For all that glory, the Code provides little regarding the way those laws may have been carried out, no outside perspective that might allow a picture of the relation between law on stone and law in action to emerge. Athens, on the other hand, preserves no systematic articulation of the laws — when speakers in the extant lawcourt cases cite or paraphrase laws, those citations, as mentioned earlier, can be perilous to use without careful assessment first. Nevertheless, those same speeches provide plentiful depictions of remedies, both judicial and extra-judicial, along with plentiful depictions of law-in-action that can be deemed more or less reliable by their repetition not only throughout the corpus of Attic speeches but also in the Aristotelian study of the Athenian lawcourts (*AP*) and, last but not least, in Comedy.

A final preliminary remark must address methodology; to be short: one cannot simply fill in the gaps in Athenian laws and penalties by adverting to the Gortynian ones, nor can one fill in the pre-trial, trial, and extra-judicial context in Gortyn by looking to the Athenian system.

<sup>6</sup> Yiftach-Firanko 2003, pp. 183–95.

<sup>7</sup> Examples in Schmitz 1997, pp. 107–15, and Cantarella 2005, p. 244; wider discussion in Forsdyke 2012, especially pp. 146–57.

<sup>8</sup> G-P 2016, pp. 84–86.

<sup>9</sup> *Ibid.*, p. 345; nonetheless, there are omissions: see text below at nn. 60–62.

Yet a simple statement of “what there is,” a paraphrase or even synthesis of paraphrase does not advance our knowledge very far; rather, I suggest here that it is helpful to think about some problems in the Athenian evidence by thinking through the Gortynian.

I begin with an overview of sexual offences and remedies in Athens. In doing this, I am particularly interested in finding a judicial remedy for adultery and seduction. I published on these topics, mostly in the 1990s, when much about them was controversial.<sup>10</sup> Today, some of these questions have been settled; others have receded in importance while new questions have emerged. Contentiousness over old and new questions is often the result of insufficient evidence for conclusive determination.

For a relevant example of old and new questions: Athenian writers do not always distinguish among what we think of as rape, adultery (consensual relations between a man and a woman, at least one of whom is married), and seduction or fornication (consensual relations between a man and woman who are not married to each other: both or one may be unmarried, and both or one may be married to someone else). Moreover, the definition of the activity that Attic writers and the Great Code designate with the verb *μοιχεύω* (*moicheuō*) and the act that Attic writers call *μοιχεία* (*moicheia*) as well as the agent whom they call a *μοιχός* (*moichos*) have been contentious among scholars. For a while, especially in the 1990s and beyond under the influence of David Cohen’s work and Stephen Todd’s agreement,<sup>11</sup> the term *moichos* was thought to be limited to the seducer of a married woman and *moicheia* to be an offence against marriage. Today, as we shall see, it is generally agreed that a *moichos* is an adulterer or seducer — the offence is broader than a marital one — and at times may even include rape, insofar as the term may not specify a particular offence but instead embraces any sexual offence.<sup>12</sup> Nevertheless, when we eventually look at the penalties in the Code, we see that G-P equivocate in their translation at lines 20–22 of col. II; here the Code prescribes as follows: “if someone is caught *μοικίδων* (“*moiching*”)<sup>13</sup> with a free woman in her father’s, or brother’s or husband’s house, he will pay a hundred staters.” G-P translate the activity of *μοικίδων* as “committing adultery,” but then in the commentary note “the inclusion of the father’s or brother’s house together with the husband’s indicates that ‘adultery’ here includes intercourse with an unmarried daughter or sister, not just a married woman.”<sup>14</sup> If that is so, why then do they call this “adultery”? Because it takes ages for new views (or resuscitations of old ones) to wipe out old biases. The bias here has been (1) that the meaning of *moiching* is narrow and pertains to adultery; and (2) that not only is adultery, the marital offence, more widespread, it is also the more important (in terms of family and the purity of bloodlines). The impulse for evaluating offences — especially for evaluating their importance to a particular society — has been operative since antiquity, and we shall notice it again quite soon.

I’ll now turn to sexual offences according to procedures of redress, broadly divided into self-help and judicial remedies — keeping an eye out for the *moichos* and the remedies against his offence; finally, I turn to the Gortynian Code for instructive comparison.

<sup>10</sup> Scafuro 1990, and 1997, pp. 193–216, 232–78.

<sup>11</sup> Cohen 1984; 1991a, pp. 98–132; and Todd 1993, p. 276.

<sup>12</sup> Patterson 1998, pp. 114–25; Omitowaju 2002, pp. 72–115; and Cantarella 2005. In §2 below, an argument is made for the lack of specificity in the verb *μοιχεύω* (*moicheuō*) in GC II.

<sup>13</sup> “Moiching” is the author’s playful Greek-English hybrid to represent the participial form of the verb *moicheuō*.

<sup>14</sup> Similarly Kapparis 1995, p. 122: “Yet, the most striking peculiarity of Athenian law was the definition of adultery itself, which was not limited to conjugal relationships but was extended to include any woman under the legal protection of an Athenian man.”

## 1(a) Self-Help Remedies in Athens

An early homicide law is sometimes called “the Drakon law” and refers to the late seventh century Athenian lawgiver, Drakon. While we know a late fifth century version (IG I<sup>3</sup> 104) that was inscribed at the time of the “recodification” of the laws of Athens (409/08), we do not know its precise relation to the Drakon law legislation.<sup>15</sup> The lacunose remains of the inscription do not preserve the provision with which we are concerned. Instead, it is found in a citation from Demosthenes (23.53) who attributes the law to Drakon.<sup>16</sup> It runs as follows:<sup>17</sup>

If a man kills another unintentionally in athletic games or in a fight on a highway or in ignorance in war, or beside [or “on”] his wife, mother, sister, daughter, or *pallakē* (concubine) whom he keeps for the purpose of producing free children, he shall not go into exile for these reasons.

The law does not require the killing of the offender caught in the circumstances listed in the text here; a man who kills such an offender might still be prosecuted for homicide, but he can plead that the homicide was justifiable. If the judges (called *ephetai* in these cases) vote in his favor, then the killer suffers no penalty. The law does not mention the term *moicheia* or any of its cognates, nor does it specifically define the offence of the man.<sup>18</sup> Since, however, the offender is envisioned as “beside [or ‘upon’] wife, mother, sister, daughter, or *pallakē*,” his offence might be construed (by us) as adultery, fornication, or rape, depending on the status of the woman (married or unmarried) and the circumstances of the act (consensual or non-consensual) if that information were available.<sup>19</sup>

Fourth and early third century authors who allude to this provision, and to other self-help remedies that are described later, sometimes use *moichos* as a kind of technical or quasi-technical term to designate the sexual offender. In many of these passages, the *moichos* is identifiable as an adulterer; in others, he is a seducer of unmarried women. In one he can be inferred to be the violator of a *pallakē* (concubine) in the context of the homicide law; more commonly, his specific act cannot be determined.<sup>20</sup>

The intention of the provision of the homicide law under discussion here has been much debated. Paoli in 1950, for example, viewed it as aiming to protect men from the introduction

<sup>15</sup> E.g., Stroud 1968 argues for its Drakonian origin; Gagarin 1981 says it is Drakonian with amendments, possibly made by Solon.

<sup>16</sup> Canevaro 2013, pp. 64–70, discusses the authenticity of the law inserted at Dem. 23.53 and finds it basically reliable (there is uncertainty regarding the meaning of ἐν ὁδῷ καθελῶν [translated here as “in a fight on a highway”]; the clauses referring to the sexual offence are accurately paraphrased in 23.55). The law is included among the authentic laws of Solon in Ruschenbusch’s (1966) collection as F 20\*\*.

<sup>17</sup> Dem. 23.53.

<sup>18</sup> This is stressed, e.g., by Cole 1984, pp. 100–03, and Cohen 1984, pp. 151–52, both of whom go on to argue, in different ways, against the broad interpretation of *moicheia*.

<sup>19</sup> The circumstances under which a sexual offender might be killed, as preserved in Dem. 23.53, are vague;

the phrase (translated here as “beside” [or “on”]) was probably open to some interpretation both by the killer and the judges. See Cantarella 2005, p. 241 n. 10, for different modern interpretations.

<sup>20</sup> *Moichos* as an adulterer in the context of the law on justifiable homicide: Lys. 1.30; in the context of other self-help remedies: Lys. 1.29, 49. As a seducer of unmarried women in the context of homicide: [Arist.] fr. viii 611 paragr. 1 Rose (and cf. Aeschin. 1.182); in the context of other self-help remedies: [Dem.] 59.65 and 71. A *moichos* might be used of the violator of a *pallakē* (concubine) at Men. *Perik.* 356–357, but that may be comic hyperbole. The meaning of the term in Men. *Samia* 717–718 is uncertain: here an angry father threatens to fetter the *moichos* of his unmarried daughter. For the widespread absence of specificity in the use of the term, see Omitowaju 2002, pp. 72–115.

of illegitimate offspring into their *oikoi* (households), and Carey endorsed this view in 1995.<sup>21</sup> Another solution was proposed by Cantarella in 1991: “The women listed in the legitimate homicide law, whose lovers could be killed with impunity, lived in the house of the man who was allowed to kill their lovers, whether or not these women were subject to his *kyrieia* [i.e., lawful authority].”<sup>22</sup> The violator’s offence may thus have been envisioned as the intrusion into an *oikia* (house) and concomitantly as the violation of the *timē* (honor) of the head of the household. In support of this view, Cantarella and other scholars have noted the frequency with which the intrusion of a *moichos* into an *oikia* is depicted as an act of *hubris* (“outrage”).<sup>23</sup> Aside from homicide, our Athenian sources report two other self-help remedies against *moichoi*. In Lys. 1. 49, the laws are said to provide that “if anyone take a *moichos*, he is to treat him in any way he likes.”<sup>24</sup> The meaning of the apodosis is ambiguous.<sup>25</sup> Does the clause allow the “discoverer” to kill the *moichos*, or only to beat and humiliate him (e.g., by using the punishment of “radish insertion”)?<sup>26</sup> If the wording of the law(s) were as bare as the paraphrase in the speaker’s report, then the judges would have to decide the extent of injury permissible by law if ever the family of an alleged *moichos* sought redress for his injuries in court.

The other self-help remedy that occasionally appears in our sources is the extortion of a monetary settlement; in such a case, the aggrieved party (probably the *kurios*)<sup>27</sup> might hold the offender prisoner until sureties are supplied for the sum.<sup>28</sup> Laws are not directly mentioned as sanctioning the remedy, and it is conceivable that it had no specific legal authority;<sup>29</sup> the remedy may simply have become socially acceptable practice, established over the centuries. Since there was a law, ostensibly Solonian, against the procuring of free women (one may not, e.g., prostitute one’s wife),<sup>30</sup> and another law against detaining a man unjustly as a *moichos*,<sup>31</sup> the law protected alleged sexual offenders from fraudulent demands for monetary compensation, thereby indirectly recognizing the existence of the remedy of private imprisonment with

<sup>21</sup> Paoli 1950, p. 139 (= 1976, p. 266); Carey 1995, p. 416.

<sup>22</sup> Cantarella 1991, p. 293.

<sup>23</sup> Thus Foxhall 1991, p. 299, and Harris 2004, p. 62, more forcefully (but in the same vein) regarding the household head who kills the offender: “By exempting him from conviction in this case, the law recognizes the man’s right to use violence against those who challenge his authority over the women under his control.” The technical meaning of *hubris* is discussed in §1b above.

<sup>24</sup> The law is sometimes thought to be Solonian, offering a less drastic punishment than the allowance of death in the Draconian law (e.g., Kapparis 1995, pp. 120–21). Some scholars have proposed that *moichoi* belonged to a category of wrongdoer called *kakourgoi* who were liable to arrest by the magistrates called the Eleven. There, if they confessed, they were put to death; if they did not confess, they went to trial and upon conviction would be put to death. Some have additionally proposed that the law regulating their arrest was read to the court in Lys. 1.28 and that this law may have contained the provision allowing for the (ambiguous) abuse of *moichoi* caught in the act (Lys. 1.49). The proposal is attractive (and

has been offered in various shapes), but there is no clinching proof. Harris 1990 argues against *moichoi* as *kakourgoi* and Carey 1995 endorses that argument; cf. n. 55 below for Carey’s conjecture about the law cited at Lys. 1.28.

<sup>25</sup> Cohen 1991a, pp. 115–19.

<sup>26</sup> Cohen 1985, pp. 385–87, argues against the widely accepted view that “*rhaphanidōsis*” and depilation were common punishments; Carey 1993 strongly reinserts the radish into the tradition. For a different perspective on extra-judicial punishments for adultery, see Forsdyke 2012, pp. 146–57.

<sup>27</sup> The *kurios* is the legal guardian for a child or woman; usually he will be the child’s or unmarried girl’s father, or else the husband of a married woman.

<sup>28</sup> The possibility of paying ransom is mentioned at Lys. 1.25–26 and 29; ransom is paid at [Dem.] 59.65.

<sup>29</sup> Scafuro 1997, p. 199 n. 26.

<sup>30</sup> The law is paraphrased and ascribed to Solon by Plut. *Solon* 23.1 (Ruschenbusch 1966, F 30a).

<sup>31</sup> This law is paraphrased at [Dem.] 59.67 and may be Solonian or classical: Kapparis 1995, pp. 113–14; Solonian: Ruschenbusch 1966, F 29a\*.

release by ransom. Both remedies, physical abuse and monetary compensation (ransom), were probably available only to *kurioi* or other close male kinsmen living in the same *oikos* as the *moicheusamene* (a woman who has been made a partner in *moicheia*): their application depends upon immediate recognition that a woman is in the company of a man who is not her husband.

Aeschines paraphrases a law that provided penalties for women and ascribes it to Solon:<sup>32</sup>

...the woman with whom a *moichos* is caught (or “in whose case a *moichos* has been successfully prosecuted” [?] ἐφ’ ἧ ἄν ἀλῶ μοιχός), he does not allow to adorn herself, nor even to attend the public sacrifices, lest by mingling with innocent women she corrupt them. But if she does attend, or does adorn herself, he provides that any man who meets her shall tear off her garments, strip her of her ornaments, and beat her (only he may not kill or maim her); for the lawgiver seeks to disgrace such a woman and make her life not worth the living.

There is some debate over the accuracy of this report: is Aeschines elaborating upon a more general provision of the law with his own sensational language (the tearing off of garments and stripping of ornaments), or did these details actually appear in it?<sup>33</sup> The debate arises because a document that has been inserted into [Dem.] 59 also bears upon the penalties for women, but with less detail, and yet also adds a penalty for a man who does not divorce a guilty wife:<sup>34</sup>

After he has caught the *moichos* [or “after he has successfully prosecuted him”], the one who caught him [or, “the prosecutor”] is no longer to dwell in marriage with the woman, and if he does so, he is to be disfranchised; and the woman, in whose case a *moichos* was caught [or, “has been convicted”], is not to enter into public sanctuaries; and if she does, she is to suffer any mistreatment with impunity, short of death.

The law falls into two parts: first it deals with the aggrieved husband and then with the errant woman. There are many problems. The law, if genuine, appears much abridged — it addresses only the aftermath of an adulterous act and has nothing to say of seduction.<sup>35</sup> Yet the law also supplies a provision not attested elsewhere: the aggrieved husband must divorce his wife or be penalized with the loss of civic rights (*atimia*). Moreover, the law is ambiguous (as is the summary in Aeschines) regarding whether the husband “has caught the offender” or “has successfully prosecuted him” — the verb (ἔλη) is the same in both cases; perhaps, as Gernet suggested, it would have had the former meaning in the Solonian law and the latter meaning in the classical period.<sup>36</sup> If this is a correct interpretation, then the law (if genuine) obliquely attests the existence of a post-Solonian judicial remedy against *moichoi* (i.e., there was some sort of trial for them in which they might be convicted and after which a female partner could be punished). In its second part about the penalties for the errant woman, the law omits the more detailed sanctions that are provided by Aeschines in his report (1.183): there is no mention of clothing ripped off and ornaments torn away, just a general statement that if she enters a public sanctuary, “she is to suffer any mistreatment with impunity, short of death.” As there is no consensus about the authenticity of the law that appears at [Dem.]

<sup>32</sup> Aeschin. 1.183.

<sup>33</sup> An excellent discussion of the law appears in Fisher 2001, pp. 334–38; regarding the “graphic” language used in it, see especially p. 338.

<sup>34</sup> [Dem.] 59 Neaira 87.

<sup>35</sup> Kapparis 1999, p. 355, thinks the second part (about penalties for women) “applies to all premarital or extramarital relationships”; the particular point is not discussed but perhaps could be maintained by an argument for abridgement.

<sup>36</sup> Thus Gernet 1960, p. 97 n. 2; Harrison 1968, p. 36 n. 1.

59.87,<sup>37</sup> and as it has opened the door to a judicial remedy (or at least a trial of some sort for a *moichos*), let us refrain from further discussion of it until the end of the next section.

## 1(b) Judicial Remedies in Athens

The judicial system may have offered a number of different procedures and charges that might be used against sexual offenders: a *graphē moicheias*, *graphē hubreos*, and *dikē biaiōn*. While the remedies themselves are witnessed, there is no absolutely certain attestation of their application against any sexual offender<sup>38</sup> — and in the case of one, the *graphē moicheias*, we have no idea of its substance. In fact, a *graphē* for *moicheia*, that is, a public indictment for adultery or seduction, is meagerly attested: the evidence consists in the mention of it in [Aristotle's] AP as an indictment that is overseen by the *thesmothetai* (lawcourt magistrates) and in the title of a fragmentary speech by Lysias, which provides no information at all about the offence.<sup>39</sup>

Nonetheless, a sexual offender might be prosecuted by an indictment for hubris or a private case for violence. As in the case of *moicheia*, we are ill-informed regarding the legal definitions of *hubris* (commonly translated as “outrage”) and *biaia* (“acts of violence”). Neither charge was restricted to sexual offences. The *graphē hubreos* could be brought by any legally competent Athenian citizen; a document inserted into Dem. 21 that purports to be the law on *hubris* begins as follows: “if anyone treats with *hubris* any person, either child or woman or man, free or slave, or does anything unlawful against any of them.”<sup>40</sup> (The translator of the Loeb volume translates *hubrizei* as “assault.”) Physical assault and sexual misconduct may have been most relevant to the law’s purview.<sup>41</sup> Scholars have been troubled, however, by the apparent overlap of the *graphē hubreos* with the *dikē aikeias* (private action for assault). Some have stressed the different consequences of the two procedures: the *hubristēs* convicted by the *graphē* paid the penalty to the state, whereas a losing defendant in the *dikē aikeias* paid

<sup>37</sup> The document has been widely accepted as genuine (e.g., Gernet 1960, p. 97, and Carey 1992, p. 129) but often with a caveat that it is abridged (e.g., Harrison 1968, p. 36 n. 1; Kapparis 1999, pp. 354–60). Canevaro 2013, pp. 190–96, presents numerous problematic features in the law but does not out and out condemn it: “...although it does not present any feature absolutely unacceptable in an authentic Athenian statute, [it] is slightly inconsistent with Apollodorus’ summary of the law, and heavily inconsistent with Aeschines’, as it lacks key provisions that must have been part of the law.” My own view is that it may be an early abridgement of a genuine Athenian law, perhaps of better quality than the law inserted at Dem. 23.28, confirmed by Canevaro as being part of the Urexemplar.

<sup>38</sup> Exceptionally, in Hyp. 2 *Lykophron*, the defendant has been charged (under the procedure of *eisangelia*, impeachment) with subverting the democracy on the specific grounds that he committed *moicheia*. This is the only sure instance of judicial redress for a sexual offence; the use of an *eisangelia* to bring the charge is undoubtedly an unusual stretch of that procedure.

<sup>39</sup> AP 59.3: “Also they (the *thesmothetai*) hear indictments for which a fee is paid, on charges of alien

birth, of alien corruption (that is, if a person charged with alien birth secures his acquittal by bribery), and of malicious information and of bribery and of false entry of public debts and of personation of a witness and of conspiracy and of non-registration, and of *moicheia*.” The Lysian title is: frag. XXVII (Carey) κατὰ Αὐτοκράτους μοιχείας.

<sup>40</sup> Harris in Canevaro 2013, pp. 224–31, claims the law is a forgery; while the opening clauses are paraphrased by Aeschines at 1.15 (which should corroborate their authenticity in Dem. 21.47), Harris claims that the clause καὶ παράνομόν τι ποιῆ εἰς τούτων τινά (“and if he does anything unlawful against any of them”) at 1.15 is a parenthetical remark. This is unconvincing: there is no sign of a “parenthesis” as there is, e.g., earlier in the paraphrase (ὕβριζει δὲ δὴ που ὁ μισθούμενος, “and surely he who hires, outrages”); Aeschines usually (as here) carefully demarcates quotation of the law from parenthetical/interpretive insertion; see also 1.28–30. If the clause at 1.15 were Aeschines’ inventive insertion, we would have a clear case of a misreporting of law, a feature of oratory flatly denied by Canevaro.

<sup>41</sup> See Cohen 1991b, pp. 173–74.



the penalty to the plaintiff. Moreover, the *graphē* allowed a harsher penalty: it was assessed by the *dikastērion* (lawcourt);<sup>42</sup> the successful prosecutor could propose any penalty, including death.<sup>43</sup> Other scholars have given their attention to the substance of the offence; some have proposed that *hubris* involved a subjective element. MacDowell describes the hubristic person in this way: “A person shows *hubris* by indulging in conduct which is bad, or at best useless, because it is what he wants to do, having no regard for the wishes or rights of other people.”<sup>44</sup> Fisher emphasizes the victim’s injury; *hubris* is “the deliberate attack on the *time* (honour) of another.”<sup>45</sup> Scholars now seem to have endorsed a view that combines both MacDowell’s and Fisher’s: the hubristic person deliberately offends the honor of his victim.<sup>46</sup> While most scholars who have examined the heterosexual and homosexual component of *hubris* have focused upon coercive acts, Cohen has shown that, at least in common usage, *hubris* is used to depict consensual conduct between men and women as well.<sup>47</sup>

The *dike biaiōn*, on the other hand, was a “private suit against violent acts”; the penalty was monetary.<sup>48</sup> Since the suit was private, damages would be paid to the victim himself, if the victim were an adult male, but to a guardian (*kurios* — usually the father, or else a husband, in the case of a married woman), if the victim were a young boy or female. The remedy is not specifically designed for obtaining redress for rape; indeed, the Athenians appear to have had no specific word for designating that act. In prose works, it is often referred to with the more general verb *biazesthai* (“to use force”) and sometimes with the (slightly) euphemistic *aiskhunein biai* (“to shame by force”).<sup>49</sup> It is alleged that in Solon’s time, the fine was fixed at 100 *drakhmai* (Plut. *Solon* 23), but in the late fifth or early fourth century, “at double the damages” (Lys. 1. 32). Much could be said here on the meaning of “double the damages”; a common view is that it means double the penalty that a slave would pay.

Here it is useful to consider an argument made by Euphiletos, the speaker of Lys. 1, which is repeated by Plut. *Solon* 23 and by modern writers as well. Euphiletos, who is defending his murder of Eratosthenes on the grounds that he caught him with his wife, compares the penalty for “shaming by force” (apparently read out to the court in §31) with the consequences for the *moichos* who is caught under the conditions of the homicide law (read out in §30); he concludes: “[the lawgiver] thought that those who use force (*tous biazomenous*) deserve a lesser penalty than those who use persuasion” (*tous peithontas* 32). Some have pointed out that the analogy is falsely contrived: a rapist, if caught in the act, might very well be executed on the spot without penalty to the killer according to the law on justifiable homicide, or otherwise might be punished with a death penalty under the *graphē hubreos*.<sup>50</sup> On the other hand, a

<sup>42</sup> Ruschenbusch 1965 argues that the *graphē hubreos* was meant to replace earlier laws on assault and rape with more severe penalties, but fails to explain why the *dikē aikeias* nonetheless survived. Gagarin 1979 argues that the *graphē hubreos* was designed to offer an alternative procedure (a *graphē*, that is, a “public action” not a *dikē*, a “private action”) by which a more severe penalty could be imposed. See Fisher 1992, pp. 53–62, for discussion of these and other views.

<sup>43</sup> *Lex apud Dem.* 21.47. For death as a penalty for *hubris*, see Lys. Fr. LXIV (B-S) and Dein. *Dem.* 23; also the discussions of Harris 1990, pp. 373–74, and Brown 1991.

<sup>44</sup> MacDowell 1978, p. 129 with n. 280; 1976, pp. 14–31; and 1990, pp. 18–23, 263–67. Cf. Dover 1978, pp. 34–39 (especially for the application of the *graphē* to sexual offences).

<sup>45</sup> Fisher 1990, p. 126; also 1992, pp. 36–85.

<sup>46</sup> Harris 2004, pp. 63–65.

<sup>47</sup> Cohen 1991b, p. 177.

<sup>48</sup> For attestation of the *dikē*, see Lipsius 1905–1915, p. 637 n. 1.

<sup>49</sup> Scafuro 1990; 1997, pp. 209–210; Harris 2004 (without knowledge of Scafuro 1990); and Cantarella 2005, p. 243. Omitowoju 2002 is the most sustained modern treatment of rape in classical Athens.

<sup>50</sup> See n. 44.

seducer or adulterer, even if caught in the act, is not required by law to be put to death — there were alternatives. An injured husband might prosecute the alleged offender with a *graphē hubreos* (without proposing a death penalty) or a *graphē moicheias*. Of course, we know nothing at all about the latter remedy.<sup>51</sup> Another option was that the injured husband might demand a sum of money or physically abuse the offender, without killing him. Euphiletos' argument is trumped up: its goal is to highlight the punishment of the *moichos* caught in the act, to demonstrate the desirability, even “necessity,” of that punishment which in fact has already been inflicted, which cannot be retracted (the alleged offender is dead), and so needs justification. What better way to achieve such justification than to take one law (the law on justifiable homicide), to present it as if it required the death of a *moichos* (defined as “adulterer”) caught in the act, and then to contrast that punishment with the penalty of a related offence — when the real end goal of the latter remedy may have been, as I have argued elsewhere, the acquisition of compensation for a victim of violence?<sup>52</sup>

The remarkable passage in Lysias that compares rape and adultery and finds adultery the more serious offence is paralleled centuries later when Plutarch is dumbstruck at the apparent lack of logic in Solonian penalties:<sup>53</sup>

But in general, Solon's laws concerning women seem very absurd. For instance, he permitted a *moichos* caught in the act to be killed; but if a man committed rape upon a free woman, he was merely to be fined a hundred drachmas; and if he procured a woman, the fine was twenty drachmas, unless it were one of those who go about openly, meaning of course the courtesans. For these go openly to those who offer them their price. Still further, no man is allowed to sell a daughter or a sister, unless he find that she is no longer a virgin. But to punish the same offence now severely and inexorably, and now mildly and pleasantly, making the penalty a slight fine, is unreasonable; unless money was scarce in the city at that time, and the difficulty of procuring it made these monetary punishments heavy.

Modern scholars have echoed this wonder: How could adultery be more terrible than rape? Why would the *moichos* taken in the act be permitted to suffer immediate execution but a rapist the imposition of a 100 drachma fine? The question was posed by Edward Harris in a now famous essay in 1990. He argued, and I and many other scholars endorsed the argument, that while lesser penalties were available for adultery, all in all the two offences were treated much the same: death penalties *were* available for seducer/adulterer *and* rapist if caught in the act, and a death penalty if pursued with an indictment for *hubris*.

It is most unfortunate, however, that we know nothing about the *graphē* for *moicheia*, and nothing about its penalty. If we look at the evidence for the judicial remedy squarely (the mention of it in [Aristotle's] *AP* at 59.3 and the title of a fragmentary speech by Lysias),<sup>54</sup> it certainly appears fragile. Nevertheless, we cannot absolutely ignore it.<sup>55</sup> Fragile, too, is the “oblique attestation” for a judicial remedy in the law inserted at [Dem.] 59.87 and mentioned at the end of the last section: Gernet's “post-Solonian” interpretation of the clause ἐπειδὴν

<sup>51</sup> There has been considerable speculation about the penalty for the *moichos*. Less than death: Lipsius 1905–1915, pp. 432–33 n. 50, followed by Cole 1984, p. 104. Possibly death: Harrison 1968, p. 35, and Harris 1990, p. 374. Certainly death: Carey 1995.

<sup>52</sup> Scafuro 1997, pp. 209–10.

<sup>53</sup> Plut. *Solon* 23.

<sup>54</sup> See n. 39.

<sup>55</sup> Its existence is argued by Carey 1995, p. 412. He hypothesizes that the law making the *graphē* available was cited at Lys. 1.28; it specified “killing as an option to the aggrieved party.” Kapparis 1995, pp. 119–20, also hypothesizes the existence of the *graphē*.

δὲ ἔλη τὸν μοιχόν as “after he *has successfully prosecuted the moichos*.” In this instance, the existence of a trial for a *moichos* allows civilized treatment for the allegedly guilty woman (a trial must take place before she is divorced and physically abused; she cannot be so treated merely on a hunch that she has had an adulterous relationship or perhaps even in the case that she has been caught with a *moichos*). Perhaps an unabridged form of the law that is now found at [Dem.] 59.87 may have been the post-Solonian law that created the *graphe moicheias*. Kapparis’ argument that an “underlying fear of illegitimate children passing as citizens ... unites ... [the] provisions for husbands of adulteresses and provisions for all adulteresses, into one piece” may be correct, and so too his deduction that it may not have been enacted until after the Periclean citizenship law of 451/0.<sup>56</sup> The law paraphrased in Aeschines, on the other hand, on the penalties for women with whom a *moichos* had been caught, may have, in origin, been the Solonian law, and in his time may have alluded to an extra-judicial remedy rather than a judicial one. If this speculative argument is correct, then there was no judicial remedy specifically for *moicheia* until the mid-fifth century, more than a century and a quarter after Solon’s legislation. The *graphē hubreos* and *dikē biaion* may have been available for undifferentiated sexual offences, but there was no specific judicial remedy for any of the offences that we designate adultery, seduction, and rape.

On the other hand, we know of no case in which a sexual offence was remedied by use of a *graphē hubreos* or a *dike biaon*.<sup>57</sup> Yet, scholars continue to weigh the law’s penalties for rape vs. adultery as if they reflected a serious comparative measure of society’s concern for these offences. If these “indirect” remedies were not used, and if there were no specific remedies designed for adultery and seduction — at least not until the mid-fifth century — why do we find these penalties so meaningful? I suggest that Lysias and Plutarch have misdirected us down this road and we have been addressing the wrong question. Perhaps we should ask instead: Why did the specific judicial remedy appear so late?

## 2. Sexual Offences in the Gortynian Code

For assisting our way to an answer, I turn to the Gortyn Code, col. II. While there is a great deal that could be said about each provision, my focus here is on the procedure for offences of rape, adultery, and seduction. One (quite interesting) provision has been omitted on the grounds that its substance is in dispute and would need extensive discussion.<sup>58</sup>

<sup>56</sup> Kapparis 1995, pp. 117–19.

<sup>57</sup> (1) Hyp. 2 Lyk. 12: The speaker is charged by the procedure of *eisangelia* (impeachment) with subverting the democracy on the specific grounds that he committed *moicheia*. (2) Lys. 1: The speaker defends himself on a charge of homicide, alleging that he had applied a self-help remedy under circumstances permissible by law. (3) Lys. 13.66: The defendant is said to have been taken as a *moichos* in the past. (4) Is. 8.44 and 46: Chiron’s nephew is said to have been taken as a *moichos* in the past. (5) [Dem.] 59 *Neaira* 64–66: Stephanos allegedly caught Epainetos committing

*moicheia* with Phano and tried to extort money from him; witnesses testify to the private agreement presided over by mediators (71). Only the first instance is judicial, and the procedure is unusual. There is reason to believe that there was reticence about making such cases known, and this is reflected in the evidence; for discussion, see Scafuro 1997, pp. 212–14.

<sup>58</sup> Omitted: Col. II.15–19, apparently the “attempted” intercourse with a free woman “while a relative is watching over her,” in a case where a witness testifies (15–19).

The provisions begin with a list of required compensatory payments (penalties) for rape. These vary in accordance with the status of offender and victim. Sometimes both or one is *eleutheros* (“free”), sometimes *apetairos* (“free,” but apparently not a full citizen),<sup>59</sup> sometimes *dolos* (“slave”), and sometimes *woikeus* (“serf”). The status of the last two appear to be the same in this section of the Code.<sup>60</sup> As in Athens, the victims of rape may be both male and female; the victims of a *moichos* are only female. The Code provides the obligatory payments usually without definition of the offence, with minimal detail of circumstance and procedure, and with no mention of the beneficiary of the payment. In the first two cases, the “free” status of the offender must be assumed. Some cases (e.g., the rape of an *apetairos* by a slave and vice versa) are not mentioned at all. Thus:<sup>61</sup>

If someone rapes (*kartei oipen*, lit. “to have intercourse by force”) a free man or woman, he will pay a hundred staters. If |(someone rapes) an *apetairos*, (he will pay) ten. If a slave (rapes) a free man or| woman, he will pay double. If a free man| (rapes) a male or female serf, (he will| pay) five drachmas (=2.5 staters). And if a serf (rapes)| a male or female serf, five staters.

Regarding the omissions mentioned earlier, G-P remark, “[P]resumably the judge used the fines that are specified as a guide for cases that are not mentioned.”<sup>62</sup>

Clearly G-P have inferred that the cases are brought before a judge. Elsewhere in the Code, where matters of wrongs are concerned (as opposed, e.g., to the presentation of regulations for the distribution of an estate CG IV.23–48 or for the marriage of an heiress CG VII.52–VIII.53), there may be mention of a judge (*dikastas*), his method of judgment, and pleadings. Sometimes the verb of payment is used in the context of a condemnation (CG IV.12–14 and IX.13–14); in these cases, we may be certain that litigation is involved. But, in this section there is neither judge nor decisions — simply assignments of payments. It is not surprising, then, to discover that some scholars have maintained that these cases were not litigated. The law simply supplied the amount of the obligatory payment and envisioned a private settlement. The head of household (it is assumed) first determined the guilt of the rapist and then demanded the lawful payment; the offender (presumably) paid it.<sup>63</sup> While such a procedure may have worked in the case of a slave or serf rapist (so that the owner would have authority to exact payment),<sup>64</sup> it may be more difficult to envision private settlement in the case where a free person has raped either a free person or an *apetairos*, especially as there appears to be no requirement for catching the rapist in the act. Still, as we are given no explicit hint of a judiciary framework, it is not outside the realm of possibility that a private household framework ruled even these cases, with mandatory compensatory payments set by law.

In the next cases, there is more detail regarding offence and procedure. First, in the case of the household female slave (11–16), the Code provides:<sup>65</sup>

<sup>59</sup> For discussions of this status, see Willetts 1967, pp. 12–13.

<sup>60</sup> Gagarin 2010a, pp. 14–17. On p. 17 with two tables comparing the penalties, Gagarin points out that the fines involving a slave and a serf “are exactly the same relative to those for a free person.”

<sup>61</sup> II.1–8.

<sup>62</sup> G-P 2016, p. 347. Gagarin 2010a, pp. 29–30, argues against extra-legal settlements for offences by serfs

and slaves overseen by the master in II.5–7 and 9–10, unpersuasively, to my mind.

<sup>63</sup> Thus, e.g., Willetts 1967, p. 28. For more formal scenarios of arbitration at Gortyn, see Papakonstantinou 2008, pp. 89–90.

<sup>64</sup> Maffi 1999, pp. 84–86.

<sup>65</sup> II.11–16.

If| someone should *subdue by force* a| household slave woman, he will pay two| staters;  
but if she has already had| intercourse, (he will pay) one obol| during the day, but if  
at night, two obols.| And the slave woman is to be the one| who swears.<sup>66</sup>

G-P maintain that the provision did not envision the master as the offender. Instead, “the slave woman was protected so that her master could exercise his right to use her as he wished.”<sup>67</sup> This suggests that the victim may have been expected to complain to the head of the household — he would offer an oath to the victim and the alleged rapist. The Code prescribed, however, that the household slave’s oath was to be given preference; presumably it concerned her virginity rather than the time of day.<sup>68</sup> Once again, it may be the master of the house who exacted the payment.<sup>69</sup>

In ll. 20–45, the procedure is more certainly extra-judicial.<sup>70</sup> As earlier, the payments are differentiated according to the status of the individuals,<sup>71</sup> and, in the first cases, according to where the offence takes place. Thus, ll. 20–28:

If someone is caught| *moichiōn* with a free woman| in her father’s, or brother’s or  
husband’s| house, he will pay a hundred staters.| And if in someone else’s house, fifty.|  
And if (he is caught *moichiōn*) with the woman of an| *apetairos*, (he will pay) ten. And  
if a| slave with a free woman, (he will pay)| double. *vac.* And if a slave with a slave’s|  
(woman), five (staters).

The offence is depicted as “moiching” and the verb (here, participle) is usually translated as “committing adultery.” Moreover, the offender who is “*moiching*,” unlike the rapist in the first portion of the column, is explicitly caught and then given a monetary fine under specific circumstances. In the first cases, since the offence involves a woman who is either a daughter or a sister or a wife, the offence would include (what we would call) both seduction and adultery. There is no mention of exoneration for killing the offender as in the Athenian law cited at Dem. 23.53. Instead, a sum of money is to be collected. The following lines instruct how this is to be effected (28–45):

<sup>66</sup> The phrase (in Cretan dialect) is *kartei damazen* (italics mine for emphasis). G-P 2016, pp. 347–48, gloss the phrase as “subdue by force” and contrast with *kartei oipen*, “to have intercourse by force” — i.e., the usual phrase for “rape” in this portion of the Code. G-P suggest that the difference between the two here is that the former, (*kartei damazen*), refers to someone “who pressures a slave to have intercourse, though he does not necessarily use physical force.” They also note (p. 348 ll. 5–16) that “as these statutes are written, they seem to imply that the slave/serf is the offender or the victim in each case.” Perhaps *kartei damazen* is simply a more delicately nuanced variant for *kartei oipen*. Cole 1984, p. 98, suggests “subdue”; van Effenterre and Ruzé 1995, p. 296, suggest “dompter”; “mettre sour le joug.”

<sup>67</sup> G-P 2016, p. 348.

<sup>68</sup> *Ibid.*, p. 349, and Gagarin 2010b, pp. 131–32. G-P 2016 and Gagarin 2010a and 2010b envision such cases as coming before a judge in a courtroom. I do not think that is a necessary inference.

<sup>69</sup> It may seem a difficulty, if G-P’s speculation is correct, that the master had “a Gortynian version of the *droit de seigneur*” (2016, p. 348), that he should be judge of such a case. But, that is a difficulty viewed from an entirely modern perspective, and from the speculation that he had such a right! The activity of the “Roman family council” lends support to extra-judicial remedies both in Athens and Gortyn: see Scafuro 1997, pp. 220–21 with n. 97, for bibliographical references.

<sup>70</sup> E.g., Dareste, Haussouillier, and Reinach 1891 I. 451; Cole 1984, p. 110; and Davies 2005, p. 318; cf. van Effenterre and Ruzé 1995, p. 297. One might compare the provision on ransom to that in Col. VI. 46–55, regarding a dispute that might arise (a) over the amount owed to a ransomer (after someone has been ransomed from abroad) or (b) over the authority for the ransom; in these instances, a judge decides. Here in Col. II. 28–45, the amount of the ransom is settled by law and there is no need for a judge.

<sup>71</sup> The payments are the same as in the case of the rapes in ll. 1–8.

Let (the captor) declare before three witnesses to the relatives of one who is caught that he is to be ransomed within five days; vac. and to the master of the slave before two witnesses; vac. and if he is not ransomed, he is to be in the hands of his captors to be treated as they wish. vac. But if he affirms he was tricked, the captor is to swear, in a case of fifty staters or more, with four others, each calling down curses upon himself, and for an *apetairos* with two others, and for a serf the master and one other (are to swear) that he took him while *moiching*, not by trickery. vac.

We do not know the end result for the captive who is not ransomed. He is “in the hands of his captors to be treated as they wish.” We may be reminded of the Athenian self-help remedy mentioned in *Lys.* 1.49, where the laws are said to provide that “if anyone take a *moichos*, he is to treat him in any way he likes.”<sup>72</sup> It is possible that death was not permitted in either city, but certainty is out of the question. In Gortyn, if the captive complains that he was tricked, then the captor’s oath along with the curses will be decisive in determining that he took him while he was “*moiching*” and that he did not trick him. If the captor refuses to swear the oath, that is presumably equivalent to admitting the charge of trickery and he will let the captive go.<sup>73</sup>

It is of interest that rapists are held accountable for offences only after the fact<sup>74</sup> and not for when they are “caught in the act,” or so it seems. But surely this cannot be — for why would only adulterers and seducers be caught in the act and not rapists, too? It may be that “*moichos*” and the verb “*moiching*” in mid-fifth century Gortyn are blanket terms for “sexual offender” and “committing unlawful sexual acts.” A *moichos*, then, might be someone who commits an act of adultery or seduction or rape, and, if caught, would be subjected to the same treatment. On the other hand, whether the activity of “*moiching*” is undifferentiated or not, the Code *did* give a nod to adulterers and seducers except for those who were “caught in the act.” This is not problematic in the realm of household justice. We do not expect consenting partners to complain to a head of household — they keep silent about their conduct, and, if penalized, must first be caught (perhaps this explains the provision against entrapment). A raped victim, on the other hand, might very well complain (or possibly a family member, e.g., a mother, would complain for her child). More importantly, the Code does not provide directions for a third party to make complaint against sexual offenders after the fact. Rather, it encourages third parties (namely, household members) to “catch” the offending party in the act. If this is so, then rape, seduction, and adultery are treated alike if the male actor is “caught.” Rape, however, has the additional avenue of redress through the complaint of the victim to the head of household if the offender is *not* so caught.

<sup>72</sup> See text at nn. 24–26 above.

<sup>73</sup> G-P 2016, p. 350. In Athens, a captive could bring a public charge, as the speaker of [Dem.] 59.66–67 informs us, “in accordance with the law which enacts that, if a man unlawfully imprisons another on a charge of adultery, the person in question may indict him before the thesmothetae on a charge of illegal imprisonment (γράφασθαι πρὸς τοὺς θεσμοθέτας ἀδίκως εἰρχθῆναι); and if he shall convict the one who imprisoned him and prove that he was the victim of an unlawful plot, he shall be let off scot-free, and his sureties shall be released from their engagement;

but if it shall appear that he was an adulterer, the law bids his sureties give him over to the one who caught him in the act, and he in the court-room may inflict upon him, as upon one guilty of adultery, whatever treatment he pleases, provided he use no knife.” The extent of injury permitted is sometimes thought to be short of death, either because a knife may not be used or because the murder would produce pollution if executed under the roof of the courtroom.

<sup>74</sup> It is certainly “after the fact” in the provision about the household slave who is to give an oath (11–16).

So far, then, the remedies for sexual offenses in the Gortyn Code appear to be extrajudicial and probably overseen by the head of household. This is, as said earlier, quite certain for the *moichoi* who are caught in the act; it is less certain in the case of the rapists, but not implausible. Later evidence, however, provides a public remedy before a judge. Aelian, writing in the first third of the third century CE and belonging to that group of learned authors called the Second Sophistic, reports:<sup>75</sup>

Note that on Crete at Gortyn an adulterer (*moichos*) when caught was brought before the magistrates and after conviction was made to wear a garland of wool. The garland amounted to accusation that he was depraved and effeminate, and had looks appealing to women. Furthermore he was obliged to pay the state fifty staters, suffered complete loss of rights and took no part in public affairs.<sup>76</sup>

Three sources have been suggested for Aelian's report, all fourth century, but none certain.<sup>77</sup> On the other hand, we can note that while the status of the offender and victim is unspecified, the fixed monetary penalty is the same as that for the free *moichos* who was caught in the house of someone other than the woman's father, brother, or husband in the Code (col II.23-24). The penalty here, however, is explicitly paid to *public* coffers. Since the convicted *moichos* also loses civic rights and an active political life, we can safely infer that the law applied only to free persons. Moreover, the convicted *moichos* was publicly shamed by being made to wear a "garland of wool," a humiliating substitute for a civic crown of honor. We may think of a period perhaps not much later than the Great Code, when Gortyn is still prosperous and when the term *moichos* appears to have narrowed its application and refers to the adulterer or seducer. Earlier historians thought that the private and public remedies may have overlapped. That is not unlikely, but the public one may have developed later and the following evolutionary scheme may be imagined: first, the family settles these most intimate of household affairs on its own (possibly violently); next, the state intervenes and provides mandatory sums for family heads to exact as compensatory payments (GC II.2-45); finally, the state provides its own judicial apparatus and public penalties for treating the *moichos* (Ael. VH 12.12).<sup>78</sup>

Although Aelian's report is not absolutely explicit on the point, it appears that the *moichos* is once again a man who has been caught in the act (Aelian says, literally, "after the *moichos* has been caught, he is brought before the magistrates"). If this is an accurate interpretation, then Gortyn still has no remedy, neither private nor public, for adulterers or seducers who are *not* caught in the act. The city, then, put the greatest value on the quality of its evidence (and no evidence for sexual offences is more manifest than that provided by the catching of the offender in the commission of his deed) when it was a question of seduction or adultery. The family accusers of rape, however, were left a freer hand; rapists remained under the sway of family decision-making, whether they were caught in the act or after the fact, regulated only by the mandatory compensatory sums. If adultery and seduction became

<sup>75</sup> VH 12.12.

<sup>76</sup> Aelian, VH 12.12: "Ὅτι ἐν Κρήτῃ ἐν Γορτύνη μοιχὸς ἀλοῦς ἤγετο ἐπὶ τὰς ἀρχὰς καὶ ἐστεφανοῦτο ἐρίῳ ἐλεγχθεὶς, τὸ δὲ στεφάνωμα κατηγορεῖ αὐτοῦ ὅτι ἄνανδρός ἐστι καὶ γύννης καὶ εἰς γυναῖκας καλός. καὶ ἔτι ἐπράττετο δημοσίᾳ εἰς στατήρας πεντήκοντα καὶ ἀτιμότητος ἦν καὶ οὐδενός οἱ μετῆν τῶν κοινῶν.

<sup>77</sup> Willetts 1967, p. 28, suggests Ephoros or Theophrastos. Theopompos is also a possibility (as being an author cited by Aelian: VH 3.18).

<sup>78</sup> Dareste, Haussouillier and Reinach 1891, I. 451 and n. 3, think the two remedies (private and public) may have overlapped. Willetts 1967, p. 28, thought the public one later but suggested that both may have co-existed for a short time.

a public charge after the private remedies had already been established, that will have been due to factors beyond our cognizance. But, for whatever reason it was, the city now took a more invasive interest in family affairs. Nonetheless, the family will have continued to exact payments from the rapists and it may be that in some (or many?) cases these payments will have been used, as I suggest below, as dowry.

### Coda: Back to Athens

If we return to Athens now, we may reflect on the absence of a specific judicial remedy for rape and on the late enactment of the *graphē moicheias* (after the mid-fifth century and after the enactment of Perikles' citizenship law). The rough parallel with Gortyn is perhaps not surprising. In Athens, there is some smattering of evidence that attests not only the existence of "family remedies" or "settlements" for rape but also their usage (see below). Such settlements would take the place of courtroom hearings. They were not regulated by law, except that the killing of a rapist taken in the act (as also in the killing of an adulterer or seducer taken in the act) would be considered by the court a justifiable homicide. Also, the abusive treatment of one so taken in the act would be allowed, and compensation could be accepted by the family (the court did not oversee the arrangements). Later, however, the city enacted a *graphē* against an adulterer or seducer — we do not know whether the law required the offender to have been taken in the act. Nonetheless, the family hold on rape remained; while the non-specific remedy of a private suit against violence acts (*dike biaiōn*) remained available, the law did not step in with a specific remedy.

Here I repeat what I wrote in *Forensic Stage* nearly twenty years ago, when I envisioned how Athenian families dealt with sexual offenders (i.e., adulterers, seducers, and rapists).<sup>79</sup> There I proposed that *kurioi*, driven by shame and, to some extent, by economic concerns (the problem for a father in finding a husband for a non-virgin daughter who would become an economic burden to her natal family; the problem for a husband who would have to return a dowry to a divorced wife), most likely came to terms privately with offenders. Husbands might decide to divorce guilty wives without pursuing a trial — if they could afford it (cf. Hyp. 2. 12). In the case of unmarried girls who had been raped or seduced, an inter-family meeting would probably convene. Its aim would be to induce the father of a young rapist or seducer to consent to a marriage between his son and the girl, or to pay a sum of money that could be applied to the girl's dowry and used to attract a husband outside the family's circle of friends and relations. Such arrangements are simply extensions of the practice of accepting monetary compensation in cases where offenders were caught in the act. This is necessarily a hypothetical reconstruction; there is hardly a shred of historical record here. But three factors support the reconstruction. The first is comparative evidence from Exodus 22.16, 17 (= *Coll.* 2.1); this provides a pattern of settlement similar to the reconstruction offered here: "When a man seduces a virgin who is not yet betrothed and lies down with her, he shall pay the dowry (*pherne*) for her to be his wife. If her father refuses to give her to him, the seducer shall pay in silver a sum equal to the dowry for virgins." The settlements between father and seducer articulated here reflect Jewish law of the third century and demonstrate the influence of Hellenistic Egypt on the Jewish community; influence is confirmed by the

---

<sup>79</sup> Scafuro 1997, pp. 212–16.



use of *pherne* (dowry) rather than a translation of Hebrew *mohar* (bride-price).<sup>80</sup> The comparative evidence suggests that the reconstruction of Athenian practice offered here is not infeasible fantasy. The second supporting factor is one of the terms of the reconciliation between Stephanos and Epainetos in [Dem.] 59.64-71. Stephanos is said to have taken Epainetos as a *moichos* with his putative daughter Phano. Epainetos provided sureties for the demanded compensation and then indicted Stephanos for detaining him unlawfully. The two men were then reconciled in private before the sureties who now served as arbitrators: "Having heard both of them (i.e., Stephanos and Epainetos), the arbitrators made a settlement and persuaded Epainetos to contribute 1,000 drachmas toward a dowry for the daughter of Neaira" (70). Epainetos is not explicitly required to pay compensation to Stephanos for *moicheia*; instead, he must contribute toward the unfortunate girl's "giving away" in marriage, a euphemism — as is the language elsewhere in reconciliations — but this time, for compelling a "shotgun concubinage." Epainetos is a foreigner; marriage is out of the question. The third factor is the way in which rape cases are regularly resolved in New Comedy: an agreement is made between two families concerning the marriage of the rapist and his victim, often under threat of the law.<sup>81</sup>

Rape in Athens, as with rape in Gortyn, remained in the hands of the family. In Athens, a rapist who was caught in the act (as also an adulterer or seducer) could be put to death on the spot without punishment for the killer. A similar allowance is not known in Gortyn. While non-specific judicial remedies were available in Athens for a rapist, most likely the concerned families determined his fate. The Gortynian families likewise would determine the fate of the rapist son: a city-regulated compensation would be paid to the victim's family and probably abusive treatment would be the consequence if the sum went unpaid (GC II.1-11 and 20-45). In both cases, marriage may have been the end result, and silence over the violent betrothal kept a secret, though we have none of the textured evidence for Gortyn that we have for Athens, viz., the anecdotes from the orators and the scenarios of rape and marriage from Euripidean drama and New Comedy. In studying the treatment of sexual offences in these two cities, with their widely different sources of evidence, it turns out that the severity of the penalty may not be so all-important in determining the significance of the offence. Rather, the procedure for settlement (extra-judicial) and the persons who effect it (the families) become the telling indicators of consequence. And these will have been in place for centuries.

<sup>80</sup> Bickerman 1956, pp. 91-92, is still pertinent.

<sup>81</sup> Harris 2004, p. 50, proposes, as if a novelty, that the rape plots of New Comedy ending in marriage may in fact represent a reality. For corroboration, he alludes to modern penal codes in Central and South

American countries that exonerate rapists who marry their victims. He has apparently missed Scafuro 1997, pp. 212-16, with the more relevant citation of Exodus 22.16, 17 (= *Coll.* 2.1).

## Bibliography

- Bickerman, Elias J.  
1956 "Two Legal Interpretations of the Septuagint." *Revue Internationale des Droits de l'Antiquité* 3rd series 3: 81–104.
- Bringmann, Klaus, and Eberhard Ruschenbusch†  
2010 *Solon: Das Gesetzeswerk-Fragmente. Übersetzung und Kommentar*. Stuttgart: Franz Steiner.
- Brown, Peter G. M.  
1991 "Athenian Attitudes to Rape and Seduction: the Evidence of Menander's 'Dyskolos'." *Classical Quarterly* 41: 533–34.
- Canevaro, Mirko  
2013 *The Document in the Attic Orators. Laws and Decrees in the Public Speeches of the Demosthenic Corpus*, with a Chapter by E. M. Harris. Oxford: Oxford University Press.
- Cantarella, Eva  
1991 "Moicheia. Reconsidering a Problem." In *Symposion 1990: Vorträge zur griechischen und hellenistischen Rechtsgeschichte*, edited by Michael Gagarin, pp. 289–96. Vienna: Verlag der Österreichischen Akademie der Wissenschaften.  
2005 "Gender, Sexuality, and Law." In *The Cambridge Companion to Ancient Greek Law*, edited by Michael Gagarin and David Cohen, pp. 236–53. Cambridge: Cambridge University Press.
- Carey, Christopher  
1992 *Apollodoros against Neaira: [Demosthenes] 59*. Edited with translation and commentary. Greek Orators Volume VI. Warminster: Aris & Phillips.  
1993 "Return of the Radish or Just When you Thought It Was Safe to Go Back into the Kitchen." *Liverpool Classical Monthly* 18: 53–55.  
1995 "Rape and Adultery in Athenian Law." *Classical Quarterly* 45: 407–17.
- Cohen, David  
1984 "The Athenian Law of Adultery." *Revue Internationale des Droits de l'Antiquité* 3rd series 31: 147–65.
- 1985 "A Note on Aristophanes and the Punishment of Adultery in Athenian Law." *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte* 102: 385–87.
- 1991a *Law, Sexuality, and Society*. Cambridge: Cambridge University Press.
- 1991b "Sexuality, Violence, and the Athenian Law of hubris." *Greece & Rome* 38: 171–88.
- Cole, Susan G.  
1984 "Greek Sanctions against Sexual Assault." *Classical Philology* 79: 97–113.
- Dareste, Rodolphe; Bernard Haussoullier; and Théodore Reinach  
1891 *Recueil des inscriptions juridiques grecques*. Volume 1. Paris: Leroux.
- Davies, John K.  
2005 "The Gortyn Laws." In *The Cambridge Companion to Ancient Greek Law*, edited by Michael Gagarin and David J. Cohen, pp. 305–27. Cambridge: Cambridge University Press.
- Dover, Kenneth J.  
1978 *Greek Homosexuality*. London: Duckworth.
- Effenterre, Henri van, and Françoise Ruzé  
1995 *Nomima. Recueil d'Inscriptions politiques et juridiques de l'archaïsme grec*. Volume 2. Rome: École française de Rome.
- Fisher, Nicolas R. E.  
1990 "The Law of hubris in Athens." In *Nomos: Essays in Athenian Law, Politics and Society*, edited by Paul Cartledge, Paul Millett, and Stephen Todd, pp. 123–38. Cambridge: Cambridge University Press.  
1992 *Hybris. A Study in the Values of Honour and Shame in Ancient Greece*. Warminster: Aris & Phillips.  
2001 *Aeschines: Against Timarchos*. Oxford: Oxford University Press.
- Forsdyke, Sarah  
2012 *Slaves Tell Tales. And Other Episodes in the Politics of Popular Culture in Ancient Greece*. Princeton: Princeton University Press.

- Foxhall, Lynn  
1991 "Response to Eva Cantarella." In *Symposion 1990: Vorträge zur griechischen und hellenistischen Rechtsgeschichte*, edited by Michael Gagarin, pp. 297–303. Vienna: Verlag der Österreichischen Akademie der Wissenschaften.
- Gagarin, Michael  
1979 "The Athenian Law against *hybris*." In *Arktouros: Hellenic Studies Presented to Bernard Knox*, edited by Glenn W. Bowersock, Walter Burkert, and Michael C. J. Putnam, pp. 229–36. Berlin: de Gruyter.  
1981 *Drakon and Early Homicide Law*. New Haven: Yale University Press.  
2010a "Serfs and Slaves at Gortyn." *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte* 127: 14–31.  
2010b "Legal Procedure in Gortyn." In *Symposion 2009: Vorträge zur griechischen und hellenistischen Rechtsgeschichte*, edited by Gerhard Thür, pp. 127–43. Vienna: Verlag der Österreichischen Akademie der Wissenschaften.
- Gagarin, Michael, and Paula Perlman  
2016 *The Laws of Ancient Crete, c. 650–400 BCE*. Oxford: Oxford University Press.
- Gernet, Louis  
1960 *Démosthène. Plaidoyers civils*. 4. Paris: Société d' édition "Les Belles lettres."
- Harris, Edward M.  
1990 "Did the Athenians Regard Seduction as a Worse Crime than Rape?" *Classical Quarterly* 40: 370–77.  
2004 "Did Rape Exist in Hellenistic Athens? Further Reflections on the Laws about Sexual Violence." *Dike* 7: 41–83.
- Harrison, Alick R. W.  
1968 *The Law of Athens*. Volume 1. Oxford: Oxford University Press.
- Kapparis, Konstantinos A.  
1995 "When were the Athenian Adultery Laws Introduced?" *Revue Internationale des Droits de l'Antiquité* 42: 97–122.
- 1999 *Apollodoros 'Against Neaira' [D. 59]*. Berlin: de Gruyter.
- Leão, Delfim F., and Peter J. Rhodes  
2015 *The Laws of Solon: A New Edition with Introduction, Translation and Commentary*. London and New York: I. B. Tauris.
- Lipsius, Justus H.  
1905–1915 *Das attische Recht und Rechtsverfahren*. 3 volumes in 4 (continuous pagination). Leipzig: O. R. Reisland. Reprinted 1966 Darmstadt and 1984 Hildesheim.
- MacDowell, Douglas M., ed.  
1976 "Hybris in Athens." *Greece & Rome* 23: 14–31.  
1978 *The Law in Classical Athens*. Ithaca: Cornell University Press.  
1990 *Demosthenes, against Meidias (Oration 21)*. Oxford: Oxford University Press.
- Maffi, Alberto  
1999 "La condizione della schiava nel Codice di Gortina." In *Femmes-Esclaves. Modèles d' Interprétation Anthropologique, Économique, Juridique*, edited by Francesca R. Merola and Alfredina S. Marino, pp. 81–110. Naples: Jovene Editore.  
2003 "Studi Recenti Sul Codice Di Gortina." *Dike* 6: 161–226.
- Omitowoju, Rosanna  
2002 *Rape and the Politics of Consent in Classical Athens*. Cambridge: Cambridge University Press.
- Paoli, Ugo E.  
1950 "Il reato di adulterio (μοιχεία) in diritto attico." *Studia et documenta historiae et iuris* 16: 123–82. [Reprinted in *Altri Studi di Diritto Greco e Romano (Milan) 1976: 251–307*].
- Papakonstantinou, Zinon  
2008 *Lawmaking and Adjudication in Archaic Greece*. London: Duckworth.
- Patterson, Cynthia  
1998 *The Family in Greek History*. Cambridge: Harvard University Press.

- Ruschenbusch, Eberhard (see also Bringmann 2010)
- 1965 “Ein Fremdkörper im athenischen Recht des 4. Jahrhunderts v. Chr.” *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte* 82: 302–09.
- 1966 ΣΟΛΩΝΟΣ ΝΟΜΟΙ. *Die Fragmente des solonischen Gesetzeswerkes mit einer Text- und Überlieferungsgeschichte*. *Historia Einzelschriften* 9. Wiesbaden: Franz Steiner Verlag.
- Scafuro, Adele C.
- 1990 “Discourses of Sexual Violation in Mythic Accounts and Dramatic Versions of ‘The Girl’s Tragedy’.” *Differences: A Journal of Feminist Cultural Studies* 2: 126–59.
- 1997 *The Forensic Stage: Settling Disputes in Graeco-Roman New Comedy*. Cambridge: Cambridge University Press.
- 2016 Review of *The Documents in the Attic Orators: Laws and Decrees in the Public Speeches of the Demosthenic Corpus*, by M. Canevaro. *Grammateion* 5: 73–82.
- Schmitz, Winfried
- 1997 “Der nomos moicheias — Das athenische Gesetz über den Ehebruch.” *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte* 114: 45–140.
- Stroud, Ronald
- 1968 *Drakon’s Law on Homicide*. Berkeley: University of California Press.
- Todd, Stephen C.
- 1993 *The Shape of Athenian Law*. Oxford: Oxford University Press.
- Willetts, Ronald F.
- 1967 *The Law Code of Gortyn*. Berlin: de Gruyter.
- Yiftach-Firanko, Uri
- 2003 *Marriage and Marital Arrangements. A History of the Greek Marriage Document in Egypt. 4th Century BCE — 4th Century CE*. Munich: C. H. Beck.



# Roman Bigamy: The Impossible Sex Crime

Thomas A. J. McGinn, *Vanderbilt University\**

## Introduction

I pursue two chief aims in what follows. One is to show that the Romans took a dim view of the idea of being married — or engaged — to more than one person at the same time. In other words, they punished such behavior rather severely. That is the easy part. My other goal is to demonstrate that it was literally impossible for a Roman to commit bigamy, in the sense of being married or engaged to two different persons at the same time. While somewhat more challenging, this argument has the virtue of being more interesting as well. I conclude with some brief reflections on the implications of bigamy for Roman marriage ideals and the place of bigamy among sex crimes in general.<sup>1</sup> Questions of gender, not surprisingly, arise throughout the discussion.

We begin with a definition of bigamy, ripped from the pages of *Black's Law Dictionary*:<sup>2</sup> “The act of marrying one person while legally married to another.” Though modern in origin, this definition is phrased in such a way that, leaving aside engagement for the moment, it can also serve for the Romans.<sup>3</sup> What this means, in effect, is that while it was not possible to be married to more than one person at the same time, the attempt to do so — in other words, the attempt to commit bigamy — was to commit “bigamy” at law, as we shall see.

---

\* It is a great honor for me to have been invited to participate in the superbly managed conference “Structures of Power: Law and Gender Across the Ancient Near East and Beyond” at the Oriental Institute of the University of Chicago and a distinct pleasure to thank its organizer, Ilan Peled. In this essay, I have attempted as much as possible to retain the style of the original oral presentation and to keep the annotations to the minimum necessary.

<sup>1</sup> Bigamy in the contemporary United States is typically associated with Mormon polygamy (to use the common term, though “polygyny” or, from their perspective, “polygynous polygamy,” would be more accurate). See, for example, Gordon 2002, especially pp. 66–68; Gray and Garcia 2013, p. 14; Morin 2014. Matters were somewhat different in the late nineteenth- and early twentieth-centuries, when, even as Mormon practices continued to cause concern, a more general bigamy “explosion” was under way, prompted by heightened opportunities of physical and social

---

mobility, above all for men: Friedman 1991; see also Hartog 2000, pp. 242–86, and Schwartzberg 2004.

<sup>2</sup> Garner 2014, p. 194. The relevant terminology does not always refer to marital unions, at least exclusively. The terms “polygyny” and “polyandry” are used more broadly, if only occasionally, in this article to signify “parallel sexual and reproductive relationships”: see Scheidel 2009a, p. 281 n. 2. Our focus is on legitimate marriage.

<sup>3</sup> One may usefully contrast the definition offered by Friedman 1991, p. 640: “Bigamy is the crime of being married to more than one person at a time.” For reasons that are soon to be apparent, this definition does not work for the Romans. See also the definition offered by Posner and Silbaugh 1996, p. 143: “Technically, bigamy is the state of being married to two people at once. Three makes it trigamy, and so forth....” In the US context, the usual recourse has been to declare the second union invalid, so rendering bigamy “impossible” at law in a similar sense: see, for

## Repression of Bigamy: The Praetor's Edict

How, exactly, did the Romans set out to repress bigamy? In later times they projected back onto “Numa Pompilius” rules repressing both polygyny and polyandry, a move which, rather than presenting us with reliable evidence for the early Regal Period, shows that a cultural bias in favor of monogamy existed from an early date, without offering certainty as to precisely what norms were introduced and when.<sup>4</sup> Our concern is with the time-frame from c. 100 BCE to c. 235 CE, representing the last stage of the pre-classical period and the entire classical period of Roman law, when bigamy was punished by the praetor.<sup>5</sup> References to offenders as a type were placed on a list, one of a series of similar lists developed by this official, that was designed to limit their ability *postulare* — that is, to place judicial requests before his court, the main venue for litigation of issues of private law in Rome.<sup>6</sup> This also served as an implicit mechanism for public shaming, especially given the overall content of this list.<sup>7</sup>

The rules are a bit complicated on the face of them. The praetor denied male “bigamists” — and/or their *patres familias*, if they bore responsibility for such unions formed by their children-in-power — the capacity to make judicial requests (*postulare*) for most others, placing them on a list that came to form a main building block of the civic disgrace known as *infamia*.<sup>8</sup> We do well

---

example, Friedman *ibid.* In many cases, however, opportunities for mobility rendered these rules moot, and in others the courts showed a remarkable willingness to accommodate second unions, for reasons that must be left unexplored here: Hartog 2000, pp. 87–91. The evident difference in experience may be reflected in popular usage, where references to bigamy and polygamy are not infrequent in the modern setting, while the Romans had no word for bigamy, certainly in the classical period: Sandirocco 2004, p. 165. Attitudes toward remarriage may also play a role in definition. The medieval concept of bigamy embraced not only simultaneous but serial unions as well, even if only the former were criminalized: see McDougall 2012, pp. 21–24.

<sup>4</sup> Plut. *Comp. Lyc. et Numae* 3.1–2, Gell. 4.3.3 and Paul. *Ep. Festi s.v. pelices* 248L. Cf. Peppe 1997, pp. 181–82; Astolfi 2010, pp. 281–82; and Cristaldi 2014, pp. 144–56, who all take a less critical view of the tradition (and in the first instance argues that “Numa” sought to provide an accommodation for polygyny, something doubly unlikely in my view). Cf. De Simone 2010–2011, pp. 26, 28 n. 70 (for other speculative reconstructions of a plural marriage regime in the archaic period). Later Romans regard the very idea of bigamy as outlandish, suggesting it had never been a part of the *mos maiorum*: Gell. 1.23; Macrobian. *Sat.* 1.6.19–25 (for a different view of this evidence, see Gag e 1955, pp. 165–94, and Salvatore 1990, pp. 22–27). On the modern scholarly controversy over the *leges regiae*, see McGinn 2014c, p. 223 with n. 52.

<sup>5</sup> It is not impossible that during the Republic bigamy was punished by the censors as well, through infliction (on culpable males) of *ignominia*: see Gaius 4.182.

---

<sup>6</sup> Such requests could also (eventually) be advanced before other officials with jurisdiction, but in what follows, for the sake of simplicity, only the praetor is mentioned. They might be directed at the grant of a judicial remedy such as an *actio*, *interdictum*, *restitutio in integrum*, or *bonorum possessio*, or more particularly contribute to the construction of a *formula*, the set of instructions forwarded to the finder(s) of fact for trial. While the plaintiff played a larger role in the latter, a defendant might contribute to the *formula* by requesting (*postulare*) an affirmative defense (*exceptio*) to be inserted therein. On proceedings before the praetor, see recently Metzger 2013/2015, with literature. For more on *postulare*, see Crook 1995, pp. 158–63; McGinn 1998, pp. 44–58; Carro 2006 (with Martini 2006–2007) and below.

<sup>7</sup> This despite the fact that these lists contained references to the types of persons concerned and not the names of individuals: below. My intention is not to gainsay the traditional explanation for the edicts restricting *postulare*, namely, that they show a concern to preserve decorum in the praetor's court, which is well supported by the ancient evidence. See Carro 2006, p. 83, for a recent discussion. My point is simply to deny that this was their only purpose: McGinn 1998, pp. 51–52. On shaming sanctions in modern US law, see Kahan 2006, with literature.

<sup>8</sup> As we shall see more clearly below, the *patres familias* of female “bigamists” might also be held liable under certain circumstances. On *postulare* and *infamia*, see recently Di Salvo 2012/2013, with literature. On the complex relationship between limitations on *postulare* and other civic disabilities, see n. 41 below.

at this point to dispel a misapprehension that arose some years ago over the classical status of the praetorian denial of *postulare* to bigamists. Here is the text in question:<sup>9</sup>

...[infamia notatur]...quive suo nomine non iussu eius in cuius potestate esset, eiusve nomine quem quamve in potestate haberet bina sponsalia binasve nuptias in eodem tempore constitutas habuerit.

...[He is marked with *infamia*]...or who in his own name, not at the command of him in whose power he was, or in the name of him or her whom he had in power has made arrangements for two engagements or two marriages (existing) at the same time.

The attribution of the passage, which in full contains a generous quotation of the praetor's Edict,<sup>10</sup> to the high classical jurist Julian and his otherwise unknown commentary on this source of law, as well as the words *infamia notatur*, are very widely regarded as Byzantine interpolations and need not detain us here.<sup>11</sup> The same consequences as for those who attempted plural marriage ensued for those who attempted engagement with more than one woman at the same time or (by juristic extension) who attempted to be simultaneously married and engaged to different women (in these cases, too, *patres familias* might be held responsible).<sup>12</sup>

Some scholars have argued that the praetor did not punish persons who made two arrangements for marriages that overlapped, since it was technically impossible to commit the offense of bigamy under Roman law. Thus, Antonino Metro proposes to strike the words *binas nuptias* as a further Byzantine interpolation. He offers a series of arguments in support of this contention:<sup>13</sup> (1) The ending of *constitutas* as a modifier of the two substantives *sponsalia* and *nuptias* is grammatically incorrect; (2) *constituere* can be used with *sponsalia* but not *nuptias*; (3) there are a couple of passages in his commentary on this part of the Edict in which Ulpian treats engagement but not marriage:<sup>14</sup> where he does treat them both together, his reference to the *sententia edicti* suggests the reference to marriage was not in the Edict;<sup>15</sup> (4) finally, Metro points to the impossibility, in his view, of *nuptias constituere*, where an impediment based on non-fulfillment of a capacity requirement, even apart from a continuing prior marriage for one of them, barred marriage between the parties.<sup>16</sup>

To these objections Cesare Sanfilippo adds another.<sup>17</sup> It is easy to imagine a *pater familias* who might *constituere*, which he understands to mean “contract,” two engagements but not two marriages for someone in his power — the central problem for him, too, is that this verb can only really apply to engagement and not marriage.

One might point out that the reference to the *sententia edicti* is better understood as a juristic extension by which one could not arrange a marriage and an engagement to two persons that ran simultaneously. If anything, it suggests that the Edict prohibited precisely two simultaneous marriages and two simultaneous engagements, and not one of each. Ulpian here relies on an obvious if implicit contrast between *verba edicti* and *sententia edicti*, the actual wording of the Edict as against its intent. As for the non-fulfillment of some other capacity requirement, this in fact undermines Metro's assumption that these texts must be speaking

<sup>9</sup> [Iulianus (1 *ad edictum*)] D. 3.2.1; [Julian in the first book on the Edict].

<sup>10</sup> This is widely accepted as such by modern scholars: see Lenel 1927/1974, pp. 77–78.

<sup>11</sup> So the square brackets ([ ]). See the literature cited at Metro 1975, p. 101 n. 1, and McGinn 1998, p. 46 n. 214.

<sup>12</sup> For the extension, see Ulp. D. 3.2.13.3.

<sup>13</sup> Metro 1975, pp. 106–07.

<sup>14</sup> Ulp. (6 *ad edictum*) D. 3.2.13.1–2.

<sup>15</sup> *Ibid.*, D. 3.2.13.3.

<sup>16</sup> The discussion turns on Ulp. (6 *ad edictum*) D. 3.2.13.4.

<sup>17</sup> Sanfilippo 1976.



of simultaneous arrangements that enjoy full legal validity. Such an outcome is impossible in any case since a still-existing prior valid marriage or engagement was itself a capacity impediment both for marriage and for engagement, as we shall see.

Riccardo Astolfi offers a partial critique of Metro's textual criticism.<sup>18</sup> He rightly urges that the alleged difficulty in the grammar is illusory — it is in fact common in Latin for a modifier of more than one substantive to take its ending from the closest one. He also points out that the notion of *nuptias constituere* in someone else's name (*alieno nomine*) cannot refer to contracting marriage for another person, which is impossible, but means to decide on behalf of another (that is, in this context, to arrange two simultaneous marriages for a child-in-power).

This last point can be developed further. *The Oxford Latin Dictionary* offers as a meaning for *constituere* “to bring about or set up (a state of affairs); to establish (a person in a state or condition),”<sup>19</sup> citing a fragment of Ulpian's commentary on the Edict.<sup>20</sup> Respecting marriage, it also shows the meaning “to appoint by agreement, arrange, agree upon,” citing, inter alia, a passage of Plautus about setting a date for a marriage, clearly in the context of making all the necessary arrangements for this, and one from Terence, where the reference is directly to a marriage having been arranged (*constitutae nuptiae*).<sup>21</sup> This shows that the verb can apply to marriage, and this from an early date. Its use by Augustine demonstrates, by contrast, that this meaning continued to be valid for long afterward.<sup>22</sup>

The role of the *pater familias*, where one existed, was indispensable. To be precise, his agreement was required for both engagement and marriage to enjoy validity at law, in addition to the agreement of the principals, of course. There are various ways in which his consent might be given, however, ranging from a rather active to a rather passive mode.<sup>23</sup> As we can see from the principal text, if he ordered a child-in-power to marry, the latter was not liable. Ulpian informs us in another passage that *constituere* characterizes the act of the *pater familias* who simply permits a child-in-power to make such an arrangement; presumably, the child-in-power would be liable as well, since the latter had not been “ordered” by *pater*. This fragment is of interest because it sheds important light on the meaning of *constituere* in this context:<sup>24</sup>

Si quis alieno nomine bina sponsalia constituerit, non notatur, nisi eius nomine constituat, quem quamve in potestate haberet: certe qui filium vel filiam constituere patitur, quodammodo ipse videtur constituisse.

If someone arranged two (simultaneous) engagements in someone else's name, he is not marked (with *infamia*), unless he arranges these in the name of him or her whom he had in his power. At any rate, he who allows a son(-in-power) or a daughter(-in-power) to arrange them is deemed in a certain manner to have arranged them himself.

<sup>18</sup> Astolfi 2014, p. 208 n. 110.

<sup>19</sup> *OLD*<sup>2</sup> s.v. *constituo* 6.

<sup>20</sup> Ulp. D. 3.2.13.4.

<sup>21</sup> *OLD*<sup>2</sup> s.v. *constituo* 13, citing Plaut. *Trin.* 581. Ter. *Andr.* 269. L & S s.v. *constituo* II.D cites the same two passages under the definition “to fix, appoint something (for or to something), to settle, agree upon, define, determine.”

<sup>22</sup> Augustin. *Civ. Dei* 14.22 CCL 48.444: *...nuptiarum, quas Deus...constituit...* (“...of marriage, which God...

established...”). Here Augustine speaks, at least primarily, of the institution of marriage, as opposed to arranging an individual marriage, the meaning of which he appears to take for granted. Cf. Augustin. *Civ. Dei* 4.32 CCL 47.126: *constituisse coniugia*, which is, I believe, an ironic reference to arranging marriages.

<sup>23</sup> See the discussion at Frier and McGinn 2004, pp. 65–71.

<sup>24</sup> Ulpianus (6 *ad edictum*) D. 3.2.13.1; Ulpian in the sixth book on the Edict.

As Metro points out, the text speaks of arranging engagement and not marriage. It may be that Ulpian views this as the more difficult case and so more worthy of discussion — or perhaps the compilers did. At any rate, the same logic applies to arranging engagement and arranging marriage. This text shows that “arrange” (*constituere*) has a different meaning for the *pater familias* and the principals than it does for a third party, such as a marriage broker or another relative.<sup>25</sup> This is because only a principal or a *pater familias* could agree to the engagement or marriage in a way that fulfilled the consent requirement and gave the union a foundation as a legally valid one.

Ulpian further indicates that a *pater familias* was liable only if he knew of the “doubling” at the time he gave his consent, not if he learned of it afterward.<sup>26</sup> The evidence suggests, therefore, that there would be circumstances in which either the child-in-power or the *pater familias* would be liable as well as those in which both would be, depending on the constellation of fault in each case.<sup>27</sup> Only one such legally valid relationship could exist at the same time, a point often overlooked with regard to engagement. Here, in some respects, the rules governing agreement of the parties (and their *patres familias*, if any) were treated a bit more casually,<sup>28</sup> but the fundamental principle that barred more than one from existing simultaneously at law was the same. The Romans regarded the intent to be engaged and the intent to be married in a very similar, rigorously monogamic way. There is no good reason to assume that either a principal or a *pater familias* could make more than one engagement that was legally valid at the same time. So for the Romans, the notion of “bigamy” embraces simultaneous attempted engagements as well as marriages, and even one of each.

Ulpian is careful to specify that it is not the negotiations for the engagements that must be simultaneous to incur the penalty, but the relationships themselves:<sup>29</sup>

Quod ait praetor “eodem tempore”, non initium sponsaliorum eodem tempore factum accipiendum est, sed si in idem tempus concurrant.

When the praetor says “at the same time”, this must be understood to refer not to the commencement of negotiations over engagements that occur simultaneously,<sup>30</sup> but to (plural) overlapping relationships.

<sup>25</sup> On the use of intermediaries, whose sphere of effective discretion always depended on prior authorization or subsequent ratification by a principal, see Astolfi 1994, pp. 69–70.

<sup>26</sup> Ulp. D. 3.2.13 pr.

<sup>27</sup> For a different view, see Astolfi 1994, p. 136, who holds the *pater familias* liable in all cases where he grants consent, and then exclusively.

<sup>28</sup> Frier and McGinn 2004, pp. 65–67.

<sup>29</sup> Ulpianus (6 *ad edictum*) D. 3.2.13.2; Ulpian in the sixth book on the Edict.

<sup>30</sup> Another (theoretically) possible rendering is “the simultaneous commencement of engagements,” i.e., more than one starting at the exact same moment: see, for example, Fayer 2005a, p. 79. Castello 1988, p. 1169, points to the sheer unlikelihood of such an eventuality. But the chief argument against this alternative is its banality. A close second is that it risks

tautology, since engagements that began at the same time would inevitably overlap. It seems preferable to understand *sponsalia* to mean here not, as so often in Latin usage, the engagements themselves but to refer to the (advance) arrangement thereof. Such a scenario is indeed far more realistic. Ulp. D. 23.1.18 gives a good sense of how these negotiations might unfold as a process rather than as an event. Much was often at stake with such arrangements, certainly on the level of the upper classes, where, for example, social competition helped foster a practice of engagement with and between very young children: Treggiari 1991, pp. 83–160, and McGinn 2015, especially pp. 122–30. For the archaic period, see Peppe 1997, pp. 160–68. In the principal text, Ulpian draws a line that had potentially important consequences for an elite milieu, in that it validated a practice of “shopping around,” at least up to a point.

This text has not received much attention in the scholarship, but is important for understanding Roman bigamy as a legal concept.<sup>31</sup> It was not enough to discuss bigamy, plan on bigamy, or agree in advance to bigamy. Two (attempted) simultaneous relationships were necessary. In the absence of process requirements, this meant in practical terms a granting of consent, whether genuine or merely ostensible, by the persons concerned, which might be evidenced by various positive acts, none of which however were required by law.<sup>32</sup> The same principle held for marriage and engagement. In each case, only one of the relationships could be legally valid. This text underlines how the ideas of “attempted” and “impossible” in our discussion of bigamy strictly refer to marriage (or engagement) formation, a theme to which we shall return.

We can easily see from what precedes that the praetor punished not only male “bigamists” but their *patres familias* when culpable, as well as those of female “bigamists” when they bore similar responsibility. What of female bigamists themselves? It was not, of course, that they were better tolerated. The twist is that all women were excluded from making judicial requests on behalf of anyone but themselves and so do not find themselves on this list.<sup>33</sup>

To be clear, the praetor kept three different lists regulating the right to make judicial requests (*postulare*) in his court. One provided for absolute exclusion for two types of persons: the deaf and those under seventeen years of age. Another limited such requests solely to those made on behalf of the principal himself or herself — all women were placed here, amid a small number of other types. A third list restricted requests to those made for oneself and on behalf of close relatives, patrons (i.e., former owners), their parents and children, and a small group of others. Male “bigamists” found themselves on this third list together with actors, pimps, and (condemned) thieves, just to take a few among a number of possible examples.<sup>34</sup> Similar rules applied also, it seems, to prevent them from acting as *cognitores* or *procuratores* (“legal substitutes”) for all or most others in a private law trial.<sup>35</sup>

It seems very likely that female “bigamists” did not entirely escape dedicated sanction by the praetor, despite the lack of direct evidence for this. Though excluded from making judicial requests for anyone but themselves and from acting as another’s “legal substitute” (*cognitor*

<sup>31</sup> The lion’s share of scholarly discussion over the legal status of engagements, particularly for the early period, has centered on the status of such agreements, typically framed as stipulations, as legally actionable or not: see, for, example, Bartocci 2012; and Mitchell 2016.

<sup>32</sup> On the requirements for marriage, see in the next section below.

<sup>33</sup> Val. Max. 8.3.2, Iuv. 2.51–52, 69–70 and Labeo-Ulp. (6 *ad edictum*) D. 3.1.1.5. The sources attribute the ban to the allegedly disruptive behavior of a woman, of whose name they offer different versions (for example, Carfania), in the mid-first century BCE. For discussion, see Labruna 1964/1995 (too skeptical, in my view, of the most basic elements of the story, though the evidence undeniably presents challenges); Marshall 1989, especially pp. 43–46 (treats the episode in the context of general limitations placed on women’s role in the civil courts); Benke 1995 (examines the story from an even broader perspective of patriarchal exclusion of women from the courts); Carro 2006, pp.

124–25 (agrees with Labruna); Resina Sola 2009, p. 404 (argues that forensic disputation was regarded as much a masculine preserve as was warfare); Lamberti 2012, pp. 245–48 (shows that exceptions were granted allowing some women the right of *postulare* on behalf of others); and Chiusi 2010–11/2013, pp. 148–52 (raises broadly similar issues on women’s role in the courts).

<sup>34</sup> As noted above, the list gave the type, not the person: the praetor kept no list of named individuals who fell into this or the other categories found on any of the three lists. If he already happened to know of an individual’s disqualification he was of course in a position to enforce this, but as a practical matter it must have often depended on an adversary, if he had knowledge of the ground for disqualification, to raise an objection: see McGinn 1998, p. 48, with literature.

<sup>35</sup> On the meaning of these terms, and the relationship between these two types and the *advocatus*, see McGinn 1998, pp. 48–49, with literature.

or *procurator*), women in principle could appoint their own.<sup>36</sup> This has the logical consequence that some types of women were excluded from this latter privilege, “bigamists” among them.<sup>37</sup> In this instance the law evidently treated male and female offenders in an identical manner.

This raises the question of the gendered nature of bigamy and how it was punished. Regarding the principals, the offense is defined in the same way for men and women. Matters stand differently with punishment. Apart from the exception just mentioned concerning the appointment of legal substitutes, where male and female bigamists are, it is safe to say, treated in the same manner, bigamy is repressed in a gendered sense that reflects a deeper structure of social organization than what we find at the level of the offense itself, both with regard to the main penalty, the denial of *postulare*, and the ability to act as a legal substitute for others. In both cases, the exclusion was configured in a way that applied to all women, not just bigamists, and was more severe than that which held for male offenders.

Also relevant is the fact that a woman could not be a *pater familias*, wielding *patria potestas* over others.<sup>38</sup> Thus, she would not legally be in a position to approve their engagements or marriages and so incur the penalty in that manner. Until the introduction of the law on adultery, all but one of the sanctions against bigamy simply could not apply to women qua bigamists, raising a further question as to what degree the Romans considered them likely offenders in comparison with males.

Worth pointing out is that limits placed on one’s ability to make judicial requests before the praetor — *postulare* — or to serve as a legal substitute were not a trivial matter, even for those who found themselves in this third, more generous category, as did male bigamists. While not directly impairing one’s ability to pursue one’s own interests at private law — as well as those of a small circle of family and close associates — they did exclude one from broader involvement in a key aspect of civil life. Friends were expected to help — and be helped by — friends in judicial proceedings, so that the limitations would have been felt as a severe impediment by anyone with even modest ambitions for success in the political, social, and even economic realms.<sup>39</sup> It is hardly casual that when the jurist Ulpian describes the act of *postulare*, he does so precisely in terms of putting before the presiding official one’s own judicial request, or that of one’s friend (*amicus suus*).<sup>40</sup> Beyond that, placement on a list with so many other socially despised types must have functioned as a shaming sanction in itself,

<sup>36</sup> Carro 2006, p. 85 n. 101, holds that the prohibition on appointing “legal substitutes” applied to all women, while Astolfi 2010, p. 283 n. 9, confuses this ban with that prohibiting women from acting as “legal substitutes.” See McGinn 1998, pp. 49–50.

<sup>37</sup> Only a fragment of this list survives, dealing with violators of the *tempus lugendi*, the period of ten months (in classical law) of mourning after the death of a husband in which remarriage was forbidden: FV 320 with McGinn 1998, pp. 44–53. On this period of mourning, see recently Kacprzak 2010, whose conclusions, I believe, provide support for my own view that the two rationales commonly adduced for this rule, the need to encourage respect for a decedent husband and to avoid confusion of progeny, coincided for the entire history of Roman law from pre-classical to late antique and are in fact often difficult to disentangle from each other: see McGinn 2014c,

pp. 237–41. Liability traces a pattern similar to that for bigamy in that the (new) husband or *pater familias* of a woman remarrying too soon, as well as the husband’s *pater familias*, can be sanctioned if he acts with knowledge of the woman’s status. On the other hand, the gendered nature of the violation is closely linked to the definition of the offense itself in that, if we leave aside the possibility of liability on the part of a husband or a *pater familias*, it can only be committed by a widow, not by a widower.

<sup>38</sup> Ulp. D. 50.16.195.5. See Saller 1999, especially p. 185.

<sup>39</sup> On the role of friends assisting friends (at times describable as “patrons” assisting “clients”) in court, whether as their legal substitutes or less formally, see: Crook 1995, pp. 120–31, and Verboven 2002, for example, pp. 243–44, 283, 305–12.

<sup>40</sup> Ulp. (6 *ad edictum*) D. 3.1.1.2. See McGinn 1998, p. 52.

at least in an implicit manner.<sup>41</sup> Denial of the ability to name a legal substitute might well cause great practical inconvenience, while compelling a disgraced person to come to court to represent his or her own interests can also be thought of as a shaming exercise.<sup>42</sup> The choice for bigamists, and others similarly situated, stood between risking public humiliation, plus objectively unfair treatment of their claims, or simply abandoning those claims.

A negative popular attitude toward bigamy can be read out of the biographer Suetonius' treatment of a legislative proposal — never enacted — of Julius Caesar that would have allowed him to be married simultaneously to more than one woman, and so to become the only Roman actually able to be a bigamist, in the sense of being legally married to more than one person at the same time:<sup>43</sup>

Helvius Cinna tr(ibunus) pl(ebis) plerisque confessus est habuisse se scriptam paratamque legem, quam Caesar ferre iussisset cum ipse abesset, uti uxores liberorum quaerendorum causa quas et quot vellet ducere liceret. at ne cui dubium omnino sit et impudicitiae et adulteriorum flagrasse infamia, Curio pater quadam eum oratione omnium mulierum virum et omnium virorum mulierem appellat.

Helvius Cinna, the tribune of the plebs, admitted to a great number of persons that he had kept a legislative proposal written up and ready, which Caesar had instructed him to bring forward for a vote at a time when he himself was out of town, to the effect that “he (Caesar) be permitted to marry whatever wives and as many wives as he wished, for the purpose of having children”. But so that no one have the least bit of doubt that he was engulfed by a terrible reputation for sexual misconduct and acts of adultery, the elder Curio in a certain speech describes him as “every woman's man and every man's woman”.

It is impossible to discount entirely the possibility that Suetonius, who was of course writing in the period after the enactment of the Augustan law on adultery, was influenced by this statute in his low estimation of bigamy; if so, there is almost certainly more to it than that. The passage occurs in the context of a discussion of Caesar's sexual transgressions, not least his affair with, and son by, Cleopatra. Caesar's treatment of the boy as his legitimate child was evidently a source of shame to some of his friends.<sup>44</sup> Cinna's embarrassment over the legislative proposal is manifest, and Caesar's own hesitations are telling. Curio's quip

<sup>41</sup> Gaius 4.182. Unlike a number of the other despised types found in the third list restricting the right of *postulare*, bigamists are not mentioned in the section of the *Tabula Heracleensis* setting forth exclusions from local public office and the decurionate. As suggested above, culpable males were possibly subjected to censorial sanction under the Republic. The list on which the praetor placed male bigamists (and offending *patres familias*) came to form a main component of the civic disgrace known as *infamia*, a subject that lack of space forbids us to pursue here. On the complex relationship between limitations on *postulare* and other civic disabilities see the discussion in McGinn 1998, ch. 2.

<sup>42</sup> Gardner 1993, p. 115.

<sup>43</sup> Suetonius, *Divus Iulius* 52.3; Suetonius in his *Life of Julius Caesar*. This ambition was realized many years

later by the emperor Valentinian I, who passed a law to this end: McGinn 2014c, pp. 227–28. Whatever one makes of the (plural) relationships of the famous Allia Potestas, marriage had nothing to do with them: Horsfall 1985, especially pp. 265–67. On the long-running scholarly debate over the matter, see also Rizzelli 1995. Cato the Younger's famous “loan” of his wife Marcia to his friend Hortensius involved serial, not simultaneous, marriages: see just Astolfi 2002, pp. 25–26, 124–25, 181–88, and De Simone 2010–2011. Overwhelmingly, what might be identified from the perspective of evolutionary biology as “Roman polygyny” does not concern attempted plural marriage or engagement: see Betzig 1992a; Betzig 1992b; Scheidel 2009b, pp. 295–304; Scheidel 2011, p. 111.

<sup>44</sup> Certainly for C. Oppius, who composed a work denying Caesar's paternity: Suet. *Iul.* 52.2.

only confirms the point. Bigamy was associated in the popular mind with adultery even before passage of the Augustan law.

## The Nature of the Offense

Before turning to the repression of bigamy under the Augustan law on adultery, let us consider further how the Romans conceived of this offense. It is perhaps be clear by now that this turned on the issue of consent, a fundamental element in marriage and engagement formation. Across cultures there are three basic categories of requirements for a valid marriage. The first is capacity: answering the question who can marry whom, and excluding some unions on the basis of age, relationship, or status. Second is consent: the relationship must be entered into with the free will and honorable intentions of the parties and sometimes their parents or guardians, meaning for the Romans, obviously, a *pater familias*, if one existed. Finally, there is process, of which there are two types: licensing, which helps enforce capacity requirements; and ceremony, which supports the consent requirements. The Romans had no real process requirements, which means the other two loom larger in significance.<sup>45</sup> How did they manage this state of affairs, and just how does it relate to bigamy? Our next text provides some clues:<sup>46</sup>

Quid? quod usu memoria patrum venit, ut pater familias, qui ex Hispania Romam venisset, cum uxorem praegnantem in provincia reliquisset, Romaeque alteram duxisset neque nuntium priori remisisset, mortuusque esset intestato et ex utraque filius natus esset, mediocrisne res in contentionem adducta est, cum quaereretur de duobus civium capitibus et de puero, qui ex posteriore natus erat, et de eius matre, quae, si iudicaretur certis quibusdam verbis, non novis nuptiis, fieri cum superiore divortium, in concubinae locum duceretur?

What of this? In the memory of our fathers it happened that a *pater familias* left a pregnant wife in a province of Spain and moved from there to Rome, where he married another woman without sending notice (of divorce) to his first wife. He died intestate, leaving a son born from each woman. Was the matter at issue trivial when question (subsequently) arose about the civil standing of two persons: not only the boy born from the second woman, but also his mother, who, if the verdict was that divorce from an earlier wife takes place (only) through some fixed form of words and not by means of a new marriage, was transformed into the equivalent of a concubine?

In an episode that dates on the best estimate from the second half of the second century BCE, an unidentified man leaves behind his pregnant wife in Spain and marries another woman in Rome with whom he has a child.<sup>47</sup> What is the issue facing the court? More than one way of stating this is possible, but in essence it was tasked, at least from Cicero's perspective, with deciding whether the man's remarriage at Rome effectively ended his marriage in Spain, without any requirement of notice to his first wife.<sup>48</sup> Cicero implies that for him the answer

<sup>45</sup> On what precedes, see Frier and McGinn 2004, p. 26.

<sup>46</sup> Cicero, *de Oratore* 1.183; Cicero in the first book of his *On the Public Speaker*.

<sup>47</sup> See also Cic. *de Oratore* 1.238. The dramatic date of the dialogue is 91 BCE, the date of composition 55: Fantham 2004, pp. 9, 15, 22, 305, 310.

<sup>48</sup> Astolfi 2012, p. 125, defines the question somewhat differently, as turning not on whether the first

marriage has ended in divorce or the second union constitutes concubinage but on whether appropriate notice of divorce was given to the wife in Spain or the second union is concubinage. The point is stated with greater clarity at Astolfi 2014, pp. 209–10. See also Corbino 2010, p. 204. As with marriage, Roman divorce was strikingly under-regulated by modern standards. For a recent discussion, see McGinn 2014b.

was in the affirmative, and presumably the court found the same. It was evidently accepted that the husband in this case intended the new marriage to exclude the old one and was not either sincerely or fraudulently attempting marriage with both women at the same time.

Modern scholars have debated whether the second marriage ends the first by operation of law (*ipso iure*) or not.<sup>49</sup> The evidence supports the idea that a subsequent marriage, where no manifest divorce has already occurred, simply serves as strong, all but conclusive evidence of a cessation of marital intent (i.e., evidence that the first marriage has in fact ended, and does not itself dissolve the prior marriage). In this sense it functions like a notice of divorce, which serves typically, though not always, as conclusive evidence — and only as evidence — of a cessation of marital intent by one party.<sup>50</sup> Not surprisingly, Cicero, as someone accustomed to the practice of the courts, is interested precisely in what might testify to the presence or absence of marital intent in that venue, and we can imagine that there the sending of a notice of divorce or the contracting of a new marriage ranked high for that purpose. Presumably not all contemporary legal authorities were satisfied with the outcome of the case, with some insisting on the expression of *certa quaedam verba* (“some fixed form of words”) to dissolve the first marriage. But even if a process requirement had been adopted for divorce, this does not necessarily mean it would have been possible to be married to two persons simultaneously.

This helps justify the view of Theodor Mommsen<sup>51</sup> and Edoardo Volterra,<sup>52</sup> who have been in the lead of those arguing the impossibility for a Roman of being married to more than one person at the same time.<sup>53</sup> Further support comes from the textbook of the second century jurist Gaius, who states in the context of a discussion of the rules for incest:<sup>54</sup>

Item amitam et materteram uxorem ducere non licet. item eam, quae mihi quondam socrus aut nurus aut privigna aut noverca fuit. ideo autem diximus “quondam”, quia, si adhuc constant eae nuptiae, per quas talis adfinitas quaesita est, alia ratione mihi nupta esse non potest, quia neque eadem duobus nupta esse potest neque idem duas uxores habere.

Likewise, it is not permitted to marry one’s paternal or maternal aunt. The same holds for a woman who has ever been my mother-in-law, daughter-in-law, step-daughter, or step-mother. What is more, we have written “has ever been” because, if the marriage continues to exist through which such a tie of relationship (*adfinitas*) arose, there is another reason why she cannot be married to me, since neither can the same woman be married to two men nor can the same man have two wives.

A Roman, then, could only be married to one person at a time as a matter of law. This means that the rule was one strictly “either...or.” *Either* the intention to end a prior marriage

<sup>49</sup> For the first view, see Volterra 1934/1999, p. 213; for the second, Huber 1977, pp. 58–62. Cf. Corbett 1930, p. 143, who equivocates (“[t]he second marriage was essentially void in a monogamistic society”), and Friedl 1996, pp. 218–19, who settles for *aporia*.

<sup>50</sup> Robleda 1970, pp. 140–41; Astolfi 2009, p. 92 n. 7; also the discussion at Frier and McGinn 2004, pp. 161–68.

<sup>51</sup> Mommsen 1899, p. 701.

<sup>52</sup> Volterra’s views on the subject of bigamy can be found in a number of places, but the following offers a particularly useful point of reference: Volterra 1934/1999. Despite agreement on this point, it will

be clear from this discussion that I do not share all of Volterra’s complex views on this matter.

<sup>53</sup> So also recently Astolfi 2012, pp. 127–28, despite some quibbling over whether in order to run afoul of the law it was necessary seriously to intend marriage to a second party, as he insists, or whether simply feigning such an intention would suffice. It is hard to see why the latter would not be punished. The important point, of course, is that one of the “marriages” was in all cases void.

<sup>54</sup> Gaius, *Institutiones* 1.63; Gaius in the first book of his *Institutes*.

allowed the formation of a new one, or the lack of such an intention rendered the subsequent relationship a non-marital type, e.g., concubinage, and so the woman became the equivalent of a concubine instead of a wife.<sup>55</sup> As we have already seen, the drawing of this distinction also had implications for the rights of offspring to inheritance on intestacy and, in some cases, their legitimacy.

What this means is that the penalty could only accrue to a man (leaving aside for a moment women and possible involvement by a *pater familias*) who consented to be married (and/or engaged) to two different women at the same time, or at least made it seem as though he did so consent. What provoked praetorian censure was precisely the genuine or merely ostensible attempt to form two simultaneous such unions, not the result, which would be only one valid marriage at most.<sup>56</sup> Here is a difference with the case of the man from Spain discussed by Cicero, who was not deemed guilty of wrongful behavior.<sup>57</sup> In one important sense the result was the same: that the continued existence of a prior marriage would prevent conclusion of a second one.<sup>58</sup> So, logically, attempting to marry, for example, a second woman whom one could not marry because of the presence of some other capacity impediment, that is, some impediment other than the existence of a prior valid marriage (or engagement), would not free one from praetorian sanction.<sup>59</sup> One would presumably have no better luck alleging the absence of the consent requirement, i.e., that one did not really intend a second marriage, all appearances to the contrary.

So the impediment to marriage or engagement was not precisely “bigamy” but a still-existing prior valid marriage or engagement.<sup>60</sup> To state this as a capacity requirement one would say that in order to contract a valid marriage one could not already be validly married, with the same holding for engagement, of course. Here I must note an important difference with the position of Edoardo Volterra and his followers who argue that a second marriage — all but inevitably, it seems — trumps the first by operation of law, so that, in the classical period at least, a still-existing prior marriage cannot serve as an impediment to marriage. They see

<sup>55</sup> Some scholars argue that keeping a wife and concubine simultaneously was not against the law, even if socially disfavored and not all that common: Scheidel 2009b, p. 296, with literature. Under the Principate, however, such behavior risked liability under the adultery law if the concubine did not fall into one of the small number of categories exempted under that statute: McGinn 1991.

<sup>56</sup> Ulp. D. 3.2.13.4. Of course, genuine consent was required to validate an actual marriage or engagement: Frier and McGinn 2004, pp. 41–53, 65–67.

<sup>57</sup> Huber 1977, pp. 60–62, argues that because Cicero did not know the intention of the man in question, he could not characterize him as a bigamist. The same point would in theory hold — as far as we can see — for the court that decided the case. But the question does not seem to have arisen in the first place. These considerations render moot the theory of Castello 1988, pp. 1169–70, that the praetor’s edictal provision on bigamy followed soon after this trial, and dispelled the juristic controversy. Despite the assumptions of Friedl 1996, p. 219, the later Augustan law on adultery would have found no application here.

<sup>58</sup> This emerges with reasonable clarity from Gaius 1.63 (above in the text).

<sup>59</sup> Ulp. (6 *ad edictum*) D. 3.2.13.4. Ulpian’s logic would presumably apply to all capacity impediments, including an existing prior valid marriage or engagement. The emperor Valerian makes a similar point in the rescript discussed in the next section below. “Legal impediments to intermarriage logically and naturally prevented betrothal”: Corbett 1930, p. 8, citing Paul. D. 23.2.60.5.

<sup>60</sup> For a different way of stating the matter, see Astolfi 2012, p. 133 (“La bigamia, come impedimento matrimoniale...”), and Astolfi 2014, pp. 209–10. Cf. Huber 1977, p. 65, who more correctly speaks of an existing marriage as the impediment. One might argue that since an already married or engaged person was incapable of agreeing in a legally valid manner to a new union, the bar consists in an inability to consent, perhaps on the model of an insane person: see Frier and McGinn 2004, pp. 41, 67, 218, 445. But this seems overly subtle; more importantly, the sources do not treat the matter in this way.



a change arising in late antiquity with the legislation limiting unilateral divorce, and culminating with Justinian, who allegedly considered bigamy to be a crime in itself, standing apart from *stuprum/adulterium*, while a marriage persisted even when one of the parties no longer wished to be married.<sup>61</sup>

There are two principal objections to raise to this view. One is that the argument is sustained by unpersuasive criticism of a series of texts. Related to this is what I would describe as flawed assumptions about the content of the classical rule. The second union is only valid if (all other requirements being met) the previously married party had the legally recognized intent to be married to the new spouse. For this intent to be legally valid, a divorce, meaning the cessation of intent to remain married, had to have occurred with respect to the prior union. The Romans evidently believed that, whatever the subjective intentions of the parties, one could, as a matter of law, have *affectio maritalis* for only one person at a time, so that one relationship necessarily eclipsed the other as a valid marriage.<sup>62</sup>

We can use the terms “bigamy” and “bigamist” to describe the behavior that incurred punishment under the Edict if we conceive of this in something like the terms laid out in the definition with which we began: “The act of marrying one person while legally married to another.”<sup>63</sup> Obviously, “the act of becoming engaged while legally engaged to another” counted, as well as simultaneous efforts at marriage and engagement. What this means is that for the Romans to attempt bigamy was in a legal sense to commit bigamy.

## Repression of Bigamy: The Augustan Law on Adultery

The fact that it was literally impossible to be married to more than one person at the same time may explain at least in part why “bigamy” was not for a long time treated as a criminal offense.<sup>64</sup> In any case, matters changed with the introduction of the Augustan law on adultery, which punished illicit sex with respectable women whether already married or not.<sup>65</sup> In other words, it did not punish bigamy per se, but the sex it defined as illegal was, in certain cases, linked to bigamy.<sup>66</sup>

<sup>61</sup> Volterra 1934/1999, especially pp. 212, 245–51, 255–60; 1940/1991, pp. 64–65; Eisenring 2002, pp. 111–16, 296–300, 354–56 (uncritical), with literature; and Urbanik 2016, pp. 480–81. See further the discussion of Diocletian’s rescript below.

<sup>62</sup> Worth noting is that this position is elsewhere adopted by Volterra himself: Volterra 1961, pp. 153–55, 202, but cf. p. 357, where the other view reasserts itself. See also Longo 1977, pp. 469–72, for a defense of Volterra’s arguments against the criticism of Huber 1977, pp. 54–70, where Longo dissents, however, in key respects from Volterra.

<sup>63</sup> Garner 2014, p. 194.

<sup>64</sup> At the risk of oversimplifying, one can say that, as a rule, Roman criminal law did not punish attempted offenses, at least not per se. See the discussions in Wacke 1995/2008 and Sperandio 1998. As already

noted above, however, the element of “attempt” in Roman bigamy strictly relates to marriage (or engagement) formation. More on this below.

<sup>65</sup> There is an immense literature on this legislation. Among recent treatments, see: Rizzelli 2008/2013 and Wolf 2014. See also: Rizzelli 1997 and McGinn 1998, pp. 140–247.

<sup>66</sup> Worth noting is that (attempted) plural engagement was presumably not punished under the adultery law unless sex was involved, and then perhaps only in the context of a legally invalid relationship, if the woman was not classed as exempt (n. 110 below). The possibility of sex in engagement cannot simply be ruled out. We are not very well informed about the subject but see Treggiari 1991, pp. 159–60. Perhaps relevant is the expectation of sex in underage female marriage: see McGinn 2015, pp. 111–12.

The criminalization of certain forms of non-marital sex by the Augustan adultery law raised the stakes for those committing bigamy.<sup>67</sup> Now entering a new relationship without ending a prior one spelled liability under that statute for both parties, unless one or the other was motivated by genuine mistake, such as when a man deceived a prospective wife about his actual marital status, and then of course only the mistaken party was free of culpability.<sup>68</sup> The first marriage continued and the second was void in any case. These points emerge with clarity from the following rescript of Valerian dating to the mid-third century:<sup>69</sup>

pr.: Eum qui duas simul habuit uxores sine dubitatione comitatur infamia. in ea namque re non iuris effectus, quo cives nostri matrimonia contrahere plura prohibentur, sed animi destinatio cogitatur.

pr.: A man who had two wives at the same time is without doubt afflicted with legal infamy (*infamia*). For in this matter consideration is not taken for the effects at law (*ius*), under which our fellow-citizens are prohibited from contracting more than one marriage at the same time, but intention.

This text makes clear that the infliction of the praetorian sanctions for bigamy did not depend on the existence of two valid unions, which was of course legally impossible. The phrase *animi destinatio* is of importance here. Intent matters, for bigamy, as well as marriage, adultery, and criminal fornication (*stuprum*). The latter comes into focus in the next part of the rescript:<sup>70</sup>

1: Verumtamen ei, qui te ficto caelibatu, cum aliam matrem familias in provincia reliquisset, sollicitavit ad nuptias, crimen etiam stupri, a quo tu remota es, quod uxorem te esse credebas, ab accusatore legitimo sollemniter inferetur.

2: Certe res tuas omnes, quas ab eo interceptas matrimonii simulatione deploras, restitui tibi omni exactionis instantia impetrabis a rectore provinciae: nam ea quidem, quae se tibi ut sponsae daturum promisit, quomodo repetere cum effectu potes quasi sponsa?

1. All the same, a man who, pretending to be unmarried, proposed marriage to you, when in fact he had left behind another “wife” (*mater familias*) in (another) province, will also be liable to a formal charge of criminal fornication (*stuprum*) brought by a lawful accuser. You are not liable to such a charge since you believed yourself to be a wife.

<sup>67</sup> See the discussion of [Quint.] *Decl.* 347 and Pap. D. 48.5.12(11).12 below. Such evidence argues against the promulgation of a process requirement for divorce outside circumstances specially defined by the Augustan adultery law. For another view, see Astolfi 2014, pp. 210–12, 374–90.

<sup>68</sup> Genuine mistake would free one from the consequences of both civil and criminal liability (in a broadly similar way, rape gave liability under the adultery statute for only one party: see McGinn 1998, p. 148 n. 77). Otherwise, in the case of (attempted) plural sexless engagements and in that of a small number of types of women exempted under the adultery law, only civil liability would lie: n. 110 below.

<sup>69</sup> *Impp. Valerianus et Gallienus AA. et Valerianus C. Theodora C. 9.9.18 (a. 258)* (= in part, with changes C. 5.3.5); Emperors Valerian and Gallienus Augusti and Valerian Caesar to Theodora. See above all Volterra 1934/1999, pp. 244–51. The admittedly lacunose information we have at our disposal makes it seem very likely that, in the absence of Gallienus and Valerian Caesar, Valerian alone was responsible for the issuance at Antioch of this rescript in May of 258: see Halfmann 1986, p. 237.

<sup>70</sup> For the source, see n. 69 above. It is very likely that the formulary system persisted in Valerian’s day and long afterward, meaning that limitations on *postulare* etc. still had bite: see now Bianchi 2015. For other civic disabilities possibly associated with praetorian *infamia* in this period, see n. 41.

2. At any rate, you will petition the governor of the province for the restoration, with all (possible) perseverance in collecting, of all of your property that you complain has come into that man's control under the pretense of marriage. For (on the other hand) in what way, to be sure, can you successfully recover, on the ground that you are a fiancée, precisely those gifts that he promised he was going to give you as his fiancée?

A similar point about intentional behavior holds, as the emperor makes clear, regarding the question of liability under the Augustan adultery law, here invoked for the offense of *stuprum* or criminal fornication, rendering the man vulnerable to prosecution but letting the woman off the hook.<sup>71</sup>

At the same time, a rigorous principle of monogamy holds. In fact, liability under this statute is seen to depend on the non-existence of a second valid relationship, at least for any party who knows of the existence of the first. So we must understand the crucial phrase *animi destinatio*. This is not quite the same as *affectio maritalis*, which is the term with which fulfilment of the consent requirement to Roman marriage is typically described, despite some argument to the contrary.<sup>72</sup> At the same time, the position that since the man did not intend the second marriage he cannot be liable to praetorian sanction is refuted by this text.<sup>73</sup>

One might be tempted to argue that the emperor leaves open the question of whether the man entertained marital intent toward both women and it was therefore simply the fact that the prior marriage still existed that prevented the second. In other words, the case would turn simply on the point that only his *affectio maritalis* toward his first wife could be legally valid. But there is more to it than that. The fact that the man concealed his married status from the second woman argues that his *animi destinatio* was directed at engaging in an illicit affair with her and not at contracting a marriage.<sup>74</sup> Valerian indicates that in any case, that is, whether he intended the second union to be marriage or not, the second marriage was void (because the first was still valid) and he was liable to praetorian, that is, civil, sanction. The man's deceitful behavior helps explain how the emperor finds him liable to stand trial for *stuprum*, which requires criminal, one might also say non-marital, intent. As a practical matter, it is difficult to see how civil and criminal liability would not typically cumulate in such cases.<sup>75</sup>

Here we have a nice illustration of what bigamy, in the sense of attempted multiple marriage, meant for the Romans. The element of "attempt" strictly relates only to the question of marriage (or engagement) formation. Planning to commit bigamy, or agreeing or arranging

<sup>71</sup> One notes the expression *alia mater familias*, where *mater familias* has been taken to mean "wife," "wife married with *manus*," or "respectable woman": see Astolfi 2014, p. 214 n. 121. In fact, the expression has a specific reference to a woman liable under the law on adultery: McGinn 1998, pp. 147–56. Here *alia* implies that the addressee, Theodora, was herself a *mater familias* as well, though she could not be a "wife" (*uxor*) to the man already married. Sex with her therefore entailed liability for her "husband," and under the circumstances only for him, under the adultery statute.

<sup>72</sup> So Huber 1977, pp. 62–63, who identifies *affectio maritalis* with *animi destinatio* in this context.

<sup>73</sup> The view of Astolfi 2010, p. 285, and 2014, pp. 211–14.

<sup>74</sup> Di Salvo 1971, p. 385. This holds despite the fact that the man evidently accepted a dowry from Theodora: see Astolfi 2009, 94. One might make a similar point about engagement, as the emperor in the last part of the rescript applies to this case the juristic extension made to the praetor's Edict discussed above.

<sup>75</sup> It is interesting that Valerian appears to apply the civil penalty based on the facts as presented to him, but to remand the charge of *stuprum* for trial, perhaps before the same governor mentioned in the text, though the possibility of further proceedings in the emperor's own court cannot be excluded. In any case, this suggests at minimum that at this date the distinction between the two penalties continued to be maintained.

in advance to commit bigamy, was not enough to create liability.<sup>76</sup> One had to act, an essential element in our definition, even if, in the absence of process requirements for marriage, this was defined differently than it might be in a modern context, amounting to a grant of consent, whether genuine or merely ostensible, that might be manifested by various positive acts, none of which however were required by law.<sup>77</sup>

Another way of looking at the matter is to postulate that if it were possible for a Roman to be married to more than one person at the same time, the man would be off the hook as well. Adultery and criminal fornication, like bigamy, relied on an ideal of gender-role that represents a deeply structural element in Roman society, but with certain differences. Bigamy is defined in the same way for both men and women, who are however punished rather differently, with the exception of one penalty for which they are equally eligible. The adultery law, both in important aspects of its construction of liability and of its penalty regime, is marked not by gender-equality, but by a certain gender-asymmetry.<sup>78</sup> For example, a key element of the gendered quality of the offenses of adultery and criminal fornication lay in the fact that their definition was tied to the status of the woman, as respectable, to create liability in both cases, and as married or not, to determine which of the two applied.<sup>79</sup> Regarding punishment, the law constructed negative types, with their attendant penalties, for the adulteress, cast as a prostitute, and for the complaisant husband, cast as a pimp, that do not find fully developed or even close matches across gender lines. Even the penalties meted out to the convicted adulterer and adulteress were similar, but not exactly the same.<sup>80</sup>

A declamation attributed to Quintilian gets at the connection between adultery and bigamy as effectively as the rescript does for *stuprum*.<sup>81</sup> The title reads rather like a telegram or a newspaper headline: “Absente marito rumor et nuptiae” (“Husband away; gossip and a wedding”).<sup>82</sup> The *thema* sets out the premise with remarkable efficiency:<sup>83</sup>

*thema: Adulterum cum adultera liceat occidere.* Uxor peregrinantis mariti mortem rumore cognovit. Heres inventa nupsit adulescenti cuidam et domum in dotem dedit. Supervenit maritus nocte, utrumque occidit. Reus est caedis.

*thema: It shall be permitted to slay an adulterer together with an adulteress.* The wife of a husband traveling abroad learned of his death through gossip. She was found to be his heir, married a certain young man, and gave him a house as a dowry. The husband arrived on the scene by night; he slew them both. He is being prosecuted for homicide.

<sup>76</sup> As seen with Ulp. D. 3.2.13.2, discussed above.

<sup>77</sup> A broadly similar challenge arises with another sex crime sometimes characterized as “impossible” by modern scholars. This is the commission of “adultery” with a woman who is in a marriage-like relationship that is not a legally valid marriage. Once again, the issue is not one of an attempted offense. Instead, illicit sex not strictly definable as adultery comes to be recognized as such in this instance through juristic analogy: Wacke 1995/2008, pp. 185–86, and Sperandio 1998, pp. 178–83.

<sup>78</sup> It is important, all the same, not to exaggerate the asymmetry. Corbett 1930, p. 143, claims “[b]igamy was punishable as *stuprum* in a man and as adultery in a woman.” But, as this text suggests, if a woman knowingly attempted to marry an already married man, she was liable to a charge of *stuprum*, while,

as is clear below, a man who knowingly attempted to marry a woman already married was liable to a charge of adultery.

<sup>79</sup> For more discussion of these and related matters, see McGinn 1998, ch. 5.

<sup>80</sup> See for example PS 2.26.14, with McGinn 1998, pp. 142–44.

<sup>81</sup> Though it is difficult to date with precision, most scholars accept this collection of declamations, even as they debate its connection to Quintilian, as originating in the late first century or in the second: see Winterbottom 1984, pp. xv–xvi.

<sup>82</sup> It is far from guaranteed that the titles of the declamations are original: see Winterbottom 1984, p. xi.

<sup>83</sup> [Quintilianus] *Declamationes Minores* 347; *Declamation* 347, attributed to Quintilian.

The “law” (given in boldface) is a fantasy, in the sense, to take the most obvious point, that the Augustan legislation on adultery only permitted a husband to kill his wife’s lover if he fell into certain — mostly despised — categories, as is evidently not the case here, and absolutely forbade him to kill his wife.<sup>84</sup> The fact-pattern is loaded with what might be described as aggravating factors that are designed to impugn the wife’s motives and to heighten the sense of husband’s betrayal,<sup>85</sup> including the speed of her remarriage,<sup>86</sup> the apparent reverse gender-hierarchy-difference in the ages of the new couple,<sup>87</sup> and the handing over as dowry of the marital home, which is actually the husband’s property, as he insists.<sup>88</sup> But what chiefly concerns us is the husband’s defense, or at least the legal, as opposed to the emotional, aspects of this. Here is the heart of it:<sup>89</sup>

1: Adulteros fuisse in matrimonio constat: nemo negat. legitimum porro matrimonium nisi soluto priore esse non potest. matrimonium duobus generibus solvitur, aut repudio aut morte alterius. neque repudiavi et certe vivo. meae igitur nuptiae manserunt, illae non fuere legitimae.

1: There is agreement that the pair joined by marriage were adulterers: no one denies it. A legally valid marriage, furthermore, cannot exist unless a prior one has been ended. A marriage is ended in two ways, either by divorce or through the death of either of the parties. I did not divorce and I am certainly alive. So my marriage continued and theirs was not lawful.

There is a tiny bit of ambiguity over the precise significance of *repudium* and *repudiare*,<sup>90</sup> but the key element lies in the man’s claim that he never intended a divorce and wished to remain married. He conveniently ignores his wife’s state of mind, however, when he does not simply paint this in the blackest of terms.<sup>91</sup> Much of the rest of his presentation is devoted to an emotional justification of his actions that, in legal and rhetorical terms, may be compared with the argument of the first speech of Lysias,<sup>92</sup> a document that is not only better-known, but more artfully written. Our hero cannot, for example, resist comparing himself to Ulysses upon his return to Ithaca.<sup>93</sup>

<sup>84</sup> For the relevant rules, see McGinn 1998, pp. 146–47, 202–07.

<sup>85</sup> The speaker is playing to widely held and deeply-felt male anxieties over the sexual loyalty of widows to their decedent husbands: see McGinn 2008, especially pp. 30–34.

<sup>86</sup> The speaker makes a great deal of the fact that his wife (supposedly) remarried “immediately” (*statim*) upon hearing of his death (2; see also 6–7).

<sup>87</sup> We are not given precise information about this, but I believe this is the significance of the emphasis on the status of the new husband as *adulescens* (*thema*) and *iuvenis* (7, 8). On the typical age differentials between Roman spouses at first marriage, which have the husband significantly older, see McGinn 2015, pp. 152–54.

<sup>88</sup> See the references by the speaker to *mea domus* (4, 8), and above all the emotional excursus on where he found and killed the couple (6).

<sup>89</sup> [Quintilianus] *Declamationes Minores* 347; *Declamation* 347, attributed to Quintilian.

<sup>90</sup> The ambiguity lies in the fact that these terms can refer both to divorcing and sending notice of divorce, though in this context the former meaning seems more likely, particularly since it represents the correct position at law. For a useful discussion of the terminology of Roman divorce, see Treggiari 1991, pp. 435–41.

<sup>91</sup> As Corbino 2010, p. 205 n. 165, suggests, the legal question turns on the presence or absence of justified mistake on wife’s part. The declaimer, however, refuses to allow for the former possibility: see further below.

<sup>92</sup> Like the declamation under discussion, Lysias 1 is a defense by a husband to a charge of homicide based on a claim that he caught the decedent committing adultery with his wife in his home: see Todd 2007, especially 43–60, and McGinn 2014c, pp. 233–34.

<sup>93</sup> [Quint.] *Decl.* 347.8.

All the same, a *responsum* — that is, an authoritative reply to a legal query apparently based on an actual case — by the Severan jurist Papinian suggests that a Roman court might not have dismissed such a defense out of hand. Here is the question:<sup>94</sup>

Mulier cum absentem virum audisset vita functum esse, alii se iunxit: mox maritus reversus est. quaero, quid adversus eam mulierem statuendum sit.

When a woman heard that her absent husband had died, she found a new partner. Before long, her husband returned. I ask what should be decided with respect to this woman.

The dice are not as loaded as in the declamation, but there is clearly a concern, or perhaps an assumption, that something is amiss with the wife's behavior. Papinian's response:<sup>95</sup>

respondit <non> tam iuris quam facti quaestionem moveri: nam si longo tempore transacto sine ullius stupri probatione falsis rumoribus inducta, quasi soluta priore vinculo, legitimis nuptiis secundis iuncta est, quod verisimile est deceptam eam fuisse nihil vindicta dignum videri potest: quod si ficta mariti mors argumentum faciendis nuptiis probabitur praestitisse, cum hoc facto pudicitia laboretur, vindicari debet pro admissi criminis qualitate.

He replied that the problem put was a matter not so much of law as of fact. For if after a long period of time had passed without a showing of any criminal sexual behavior on her part, she, influenced by false reports, on the ground that she was released from her prior bond, contracted a legally valid new marriage, since it is likely that she was deceived, there can be nothing deemed worthy of punishment. But if the fabricated death of her husband will be shown to have provided the pretext for remarriage, since her chastity is compromised by this behavior, she ought to be punished in accordance with the gravity of the criminal offense committed.

For the jurist, too, an over-hasty remarriage suggests, though does not by itself prove, culpability on the wife's part.<sup>96</sup> Since the actual statute, as opposed to the declamatory "law," did not permit a husband to kill his wife even when he caught her in the act of adultery, he faced liability for homicide if he did so, but there is evidence indicating his punishment might in certain circumstances be mitigated or even waived.<sup>97</sup> It is chiefly in this context that some of the declaimer's argumentation might find a place in an actual courtroom.

All the same, it is clear that the "wife" who makes an honest mistake about her husband's status is not just free from criminal (and civil) liability, as is the woman — Theodora — addressed by the rescript discussed above; she can, if she was the one previously married, contract a legally valid new marriage because her false but innocent assumption effectively ended the prior one — *quasi soluta priore vinculo*. So there emerges in Papinian's reply, as in

<sup>94</sup> Papinianus (*libro singulari de adulteris*) D. 48.5.12(11).12; Papinian in his monograph on *Adulterers*.

<sup>95</sup> For the source, see n. 94 above.

<sup>96</sup> It is impossible to know what Papinian means by "a long period of time." Though evidently not all jurists agreed, Julian establishes a five-year period during which, so long as it is uncertain whether a captured spouse is still alive, the other spouse cannot remarry without being held responsible for the

end of the marriage: see Iul. D. 24.2.6, with more evidence and discussion at Frier and McGinn 2004, pp. 156–57. For what it is worth, common law allowed a defense to a charge of bigamy if a spouse had been abroad for a number of years, typically seven, while more recently the statutory time-frame in the United States has been five years in most states: Posner and Silbaugh 1996, p. 144.

<sup>97</sup> McGinn 1998, p. 285.

the rescript, the possibility, not admitted by the declaimer, of genuine mistake as a release from liability. The most important point for our discussion is not so much argued as it is assumed in both declamation and juristic text: you can only be married to one person at a time.

A similar result emerges from another passage of Papinian that reports what is certainly an actual case:<sup>98</sup>

Divus Hadrianus eum, qui alienam uxorem ex itinere domum suam duxisset et inde marito eius repudium misisset, in triennium relegavit.

The deified emperor Hadrian relegated for a three-year term a man who had led another man's wife, while on a journey, to his own home and from there sent a notice of divorce to her husband.

It is uncertain whether Hadrian heard this case at first instance or on appeal but reasonably clear that the standing criminal court on adultery (*quaestio perpetua de adulteriis*) was not involved. The mention of a journey suggests a venue outside of Rome, at least for the commission of the offense. It is widely agreed by scholars that one of the statutory penalties for adultery was the milder form of exile known as relegation (*relegatio*), while it remains uncertain whether this was permanent or temporary, and, if the latter, how long the term was.<sup>99</sup> Papinian makes no mention of the patrimonial penalties imposed by the adultery law, nor of the infliction of praetorian disgrace for bigamy. If the defendant were found to have been guilty of these offenses, we would expect harsher treatment.

All this makes it difficult to determine precisely what offense or offenses the man was deemed to have committed. Was this adultery, bigamy, both, or neither? It is a not unlikely conjecture that counsel for both defendants argued, first, that the *ductio in domum* mentioned did not constitute an actual *deductio*, that is, the traditional procession marking the beginning of a marriage, and, second, that the sending of the *repudium* marked the end of the woman's prior union, followed closely by the start of her new one. If so, the strategy appears to have been wholly successful only for the woman, who does not, like Theodora, as we saw above, appear to have been punished at all. It seems possible all the same that Hadrian found our defendant not guilty rather than innocent, as Valerian evidently does with Theodora. In this case, it was perhaps easier for the court to reconstruct, at least in broad outline, the actions of the parties rather than the motives behind them, making it strictly impossible to prove commission of either offense.<sup>100</sup> In any case, the behavior of her new partner, which was at least construable as an attempt to marry an already married woman followed by an attempt to cover up this inconvenient fact by sending a notice of divorce to her husband, was evidently judged to be too inappropriate to pass without penalty. It is remarkable, after all, that it was he and not the woman who sent the *repudium*.<sup>101</sup> Hadrian may have wished to convey the sense not only that divorce ought to precede any attempt at remarriage, but that the new spouse was not the ideal person formally to establish the end of the prior union.

<sup>98</sup> Papinianus (*libro secundo de adulteriis*) D. 24.2.8; Papinian in the second book on *Adulteries*.

<sup>99</sup> McGinn 1998, pp. 142–43.

<sup>100</sup> Even with a relative abundance of information, clarity over the commission of sexual offenses can be elusive, as is demonstrated by the fascinating and much-debated case of Messalina and C. Silius, possibly an instance of bigamy and adultery, but

too complex to be discussed here. See, for example, Fayer 2005b, p. 67 (with literature); Corbino 2010, pp. 204–05.

<sup>101</sup> Despite the preference of the Philadelphia Digest for “...and she sent a notice of repudiation to her husband....” This would demand, at minimum, *marito suo* instead of *marito eius*.

The ancient evidence makes it clear that the Romans considered committing bigamy a highly offensive behavior. Why, then, was it never punished per se as a crime? The fact that it was, in a literal sense, impossible to marry more than one person simultaneously as a matter of law is one possible answer, as suggested above. Another is that after the passage of the adultery law, such a move may have seemed unnecessary. Under this statute, bigamists — and other offenders — received a very severe punishment. Engagement represents something of a special case, in that two or more (attempted) simultaneous relationships might give rise to civil but not criminal liability even in the wake of the law if sex was not a factor. It has been argued,<sup>102</sup> however, that the following text suggests just such a development, by which bigamy supposedly came to be regarded as a crime in itself:<sup>103</sup>

Neminem, qui sub dicione sit Romani nominis, binas uxores habere posse vulgo patet, cum et in edicto praetoris huiusmodi viri infamia notati sint. quam rem competens iudex inultam esse non patietur.

It is commonly known law that no one who finds himself under the dominion of Rome can have two wives, since even in the praetor's Edict men of this type have been marked with legal infamy (*infamia*). A judge with the appropriate jurisdiction will not allow this matter to go unavenged.

There is, I would maintain, no evidence of such a change in this text, which contains an interesting assertion of monogamy as a Roman cultural marker.<sup>104</sup> Like his predecessors, Diocletian shows a keen interest in repressing bigamy through the invocation of both civil and criminal penalties. Even though it was not an independent criminal offense, in the wake of the Augustan law, certainly as it concerns (attempted) plural marriage, bigamy is eminently definable as a sex crime.

## Conclusions

The Roman conception of marriage and engagement was rigorously monogamous, in broad terms like that of a number of other societies, but in at least one important sense distinctive.<sup>105</sup> A notable characteristic is that for them it was not only literally, meaning legally, impossible to be married or engaged to more than one partner simultaneously but emphatically so. This was true in spite of, or perhaps better because of, the fact that no process requirements existed for either marriage or engagement, meaning that there was no need of

<sup>102</sup> By Sandirocco 2004, pp. 198–200; Astolfi 2010, pp. 285–87; and 2012, pp. 128–29. Others see such a change as occurring only under Justinian, typically citing Theophilus *Paraphr.* 1.10.6: Corbett 1930, p. 143; Pugliese 1990, p. 823; and Corbino 2010, p. 213. (More literature at n. 61 above.) See, however, McGinn 2014c, p. 227.

<sup>103</sup> *Impm. Diocletianus et Maximianus AA. Sebastianae C. 5.5.2 (a. 285)*; Emperors Diocletian and Maximian Augusti to Sebastiana.

<sup>104</sup> For a full discussion, see McGinn 2014a.

<sup>105</sup> The attempt by Scheidel 2009a, p. 282, to conclude from a large number of cross-cultural surveys that

“largely monogamous systems were not very common and that *strict* [his emphasis] social monogamy was even rarer in world history” founders on the egregiously sloppy and arbitrary ways in which these data have often been collected and analyzed. Using some of the methods of classification employed would identify Rome as decidedly polygynous, and so far from “peculiar” or even “unusual” on his estimate. In my view, Scheidel himself does not adequately distinguish between legally defined monogamy, which at least potentially sets Rome apart, and various other social/sexual usages: see also Scheidel 2011. On difficulties with marital-systems data, see Gray and Garcia 2013, p. 35.



registration or ceremony as a matter of law.<sup>106</sup> The Roman cultural preference for monogamy as expressed in their law of marriage is consistent with the overall tendency in Eurasian societies to resort to heirship strategies that involve “adding children,” as opposed to wives.<sup>107</sup>

One can with confidence conclude from the evidence discussed here that marriage, and so the desire to be married, was something the Romans held in high esteem.<sup>108</sup> This institution is strongly idealistic and individualistic, despite the possibility of an intervention by a *pater familias*, entitled by the law to make his views count. At the same time, the rules for bigamy are shaped by deeply rooted considerations of gender. The same is even more true, if anything, for the other two sex crimes we have examined, adultery and criminal fornication (*stuprum*). We have seen a difference emerge in the gendered nature of these two offenses and the structure of their penalties when compared with bigamy. Liability under the adultery law arises for women in a way that directly contrasts with how this is defined for males, consistently with an overall design for the law that is better described in terms of gender-asymmetry rather than gender-equality. The same principle applies to the penalty regime.

Bigamy on the other hand is defined in the same way for both men and women. As for punishment, female bigamists are treated differently from male offenders because of a prior, more restrictive, exclusion — as women — from eligibility for some of the penalties visited upon the males, while with regard to one other penalty they are treated, on the face of it, in exactly the same way. The latter is the denial of the ability to appoint legal substitutes, which left bigamists of both genders the choice of appearing in court to pursue their claims at private law, at the risk of incurring public shame besides being denied justice, or of abandoning these claims altogether.

Like bigamy, adultery and criminal fornication are also found treated as crimes in many other societies, even as their precise definition is culturally contingent in important ways.<sup>109</sup> This is to say that the precise configuration of the legal rules for sex crimes in a given societal context, shaped as they are by ideals of gender-role and behavior, can serve as cultural markers of some significance. The Romans themselves appear to have viewed them as such.

So, despite some important differences, bigamy has much in common with these offenses. In the Roman conception, as we have seen, overlap with one or the other of them was virtually inevitable after Augustus passed his legislation making such acts criminal.<sup>110</sup> In many

<sup>106</sup> “Needless to say, monogamy never exists in pure form”: Scheidel 2011, p. 109. This does not say very much by itself. Viewed from the perspective of their law of marriage, Roman monogamy is as close to a pure form as one can reasonably expect to find (cf. p. 111). More plausible for Roman social practice on the face of it is the claim by Gray and Garcia 2013, p. 38 (see also pp. 40, 69–70, 76, 293) that “...most marital patterns reflect slight polygyny rather than strict monogamy...overwhelmingly, for most people in most societies, marriages are socially monogamous....”

<sup>107</sup> Goody 1973, pp. 10, 16–18.

<sup>108</sup> It is worth observing that, beyond the law, the practice of bigamy does not inevitably show a disregard for monogamous marriage but can suggest its status as an (often unrealized) ideal: see Schwartz-

berg 2004, especially pp. 574, 594, and McDougall 2012, pp. 19, 99–100, 110, 136–37.

<sup>109</sup> For a more explicit identification of the crime of bigamy with gendered (here male) behavior in late medieval Champagne, see McDougall 2012, especially pp. 43, 65, 72–73, 83, 93–94, 125, 140.

<sup>110</sup> An exception might occur where the female partner in the second union, whether (attempted) marriage or engagement, was classed as belonging to one of a small number of types, such as prostitutes, exempt from the strictures of the law: see McGinn 1998, pp. 194–202. To be clear, in such cases there might be civil but not criminal liability. A similar point holds for (attempted) simultaneous engagements where sex was not a factor, as we saw in the previous section.

circumstances, bigamy, like other sex crimes, will have been difficult to prove.<sup>111</sup> This challenge is all the greater for the historian, whose ability to track actual instances of this offense must remain regrettably circumscribed.

---

<sup>111</sup> See, for example, Schwartzberg 2004, p. 593. For the same of polygamy in a modern context, see Morin 2014, p. 521, where it is often difficult to distinguish this from adultery and cohabitation, themselves now generally no longer subject to criminal sanction.

## Bibliography

- Astolfi, Riccardo
- 1994 *Il fidanzamento nel diritto romano.*<sup>3</sup> Padua: CEDAM.
- 2002 *Il matrimonio nel diritto romano pre-classico.*<sup>2</sup> Padua CEDAM.
- 2009 s.v. Bigamia (Diritto Romano), *Enciclopedia di bioetica e scienza giuridica* 2: 89–96.
- 2010 “Sintesi della storia della bigamia in Roma.” *Studia et Documenta Historiae et Iuris* 76: 281–90.
- 2012 *Studi sul matrimonio nel diritto romano postclassico e giustiniano.* Naples: Jovene Editore.
- 2014 *Il matrimonio nel diritto romano classico.*<sup>2</sup> Padua: CEDAM.
- Bartocci, Ugo
- 2012 *Spondebatur pecunia aut filia: Funzione ed efficacia arcaica del dicere spondeo.*<sup>2</sup> Turin: Giappichelli.
- Benke, Nikolaus
- 1995 “Women in the Courts: An Old Thorn in Men’s Sides.” *Michigan Journal of Gender & Law* 3: 195–256.
- Betzig, Laura
- 1992a “Roman Monogamy.” *Ethology and Sociobiology* 13: 351–83.
- 1992b “Roman Polygyny.” *Ethology and Sociobiology* 13: 309–49.
- Bianchi, Paola
- 2015 “Sui *Fragmenta Augustodunensia* e il processo.” In *Ravenna Capitale: Giudizi, giudici e norme processuali in Occidente nei secoli IV–VIII 2: Studi sulle fonti*, edited by Gisella Bassanelli Sommariva, pp. 1–48. Santarcangelo di Romagna: Maggioli Editore.
- Carro, Valeria
- 2006 *...Et ius et aequom postulas...: Studi sull’evoluzione del significato di postulare.* Naples: Satura Editrice.
- Castello, Carlo
- 1988 “Lo status personale dei fidanzati nel diritto romano della fine della repubblica e del principato.” In *Estudios en homenaje al profesor Juan Iglesias* 3, edited by Jaime Roset Esteve, pp. 1165–78. Madrid: Universidad Complutense.
- Chiusi, Tiziana
- 2010–11/13 “*Fama and infamia* in the Roman Legal System: The Cases of Afrania and Lucretia.” In *Judge and Jurist: Essays in Memory of Lord Rodger of Earlsferry*, edited by Andrew Burrows, David Johnston, and Reinhard Zimmermann, pp. 143–56. Oxford: Oxford University Press. [Originally published as “La fama nell’ordinamento romano: I casi di Afrania e di Lucretia.” *Storia delle donne* 6/7: 89–105.]
- Corbett, Percy E.
- 1930 *The Roman Law of Marriage.* Oxford: Oxford University Press.
- Corbino, Alessandro
- 2010 “Status Familiae.” In *Homo, caput, persona: La costruzione giuridica dell’identità nell’esperienza romana dall’epoca di Plauto a Ulpiano*, edited by Alessandro Corbino, Michel Humbert, and Giovanni Negri, pp. 177–216. Pavia: IUSS Press.
- Cristaldi, Salvatore A.
- 2014 “Unioni non matrimoniali a Roma.” In *Le relazioni affettive non matrimoniali*, edited by Filippo Romeo, pp. 142–200. Milan: Wolters Kluwer Italia.
- Crook, John A.
- 1995 *Legal Advocacy in the Roman World.* Ithaca: Cornell University Press.
- De Simone, Monica
- 2010–2011 “Sulle tracce di un’antica prassi: La c.d. cessione della moglie.” *Annali del Seminario Giuridico dell’Università degli Studi di Palermo* 54: 8–54.
- Di Salvo, Settimio
- 1971 “Matrimonio e diritto romano.” *Index* 2: 376–389.
- 2012/2013 “In tema di *infamia* e di *postulatio*.” In *Dal diritto romano: Percorsi e questioni*, Settimio Di Salvo, pp. 95–101. Turin: G. Giappichelli Editore. [Originally published in *Dipendenza ed emarginazione nel mondo antico e moderno*, edited by Francesca Reduzzi Merola, pp. 393–96. Rome: Aracne.]

- Eisenring, Gabriela  
2002 *Die römische Ehe als Rechtsverhältnis*. Vienna: Böhlau Verlag.
- Fantham, Elaine  
2004 *The Roman World of Cicero's De Oratore*. Oxford: Oxford University Press.
- Fayer, Carla  
2005a *La familia romana: Aspetti giuridici e antiquari 2: Sponsalia matrimonio dote*. Rome: L'Erma di Bretschneider.  
2005b *La familia romana: Aspetti giuridici e antiquari 3: Concubinato divorzio adulterio*. Rome: L'Erma di Bretschneider.
- Friedl, Raimund  
1996 *Der Konkubinat im kaiserzeitlichen Rom von Augustus bis Septimius Severus*. Historia Einzelschriften 98. Stuttgart: Franz Steiner Verlag.
- Friedman, Lawrence M.  
1991 "Crimes of Mobility." *Stanford Law Review* 43: 637–58.
- Frier, Bruce W., and Thomas A. J. McGinn  
2004 *A Casebook on Roman Family Law*. New York: Oxford University Press.
- Gagé, Jean  
1955 "Les traditions des Papirii et quelques-unes des origines de l'*Equitatus* romain et latin." *Revue historique de droit français et étranger* 4th ser. 33: 20–50, 165–94.
- Gardner, Jane F.  
1993 *Being a Roman Citizen*. London: Routledge.
- Garner, Bryan A.  
2014 "Bigamy 1." In *Black's Law Dictionary*, 10th edition, p. 194. St. Paul: Thomson Reuters.
- Goody, Jack  
1973 "Strategies of Heirship." *Comparative Studies in Society and History* 15: 3–20.
- Gordon, Sarah B.  
2002 *The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth Century America*. Chapel Hill: University of North Carolina Press.
- Gray, Peter B., and Justin R. Garcia  
2013 *Evolution & Human Sexual Behavior*. Cambridge: Harvard University Press.
- Halfmann, Helmut  
1986 *Itinera principum: Geschichte und Typologie der Kaiserreisen im römischen Reich*. Stuttgart: F. Steiner Verlag.
- Hartog, Hendrik  
2000 *Man & Wife in America: A History*. Cambridge: Harvard University Press.
- Horsfall, Nicholas  
1985 "CIL VI 37965 = CLE 1988 (Epitaph of Allia Potestas): A Commentary." *Zeitschrift für Papyrologie und Epigraphik* 61: 251–72.
- Huber, Josef  
1977 *Der Ehekonsens im römischen Recht: Studien zu seinem Begriffsgehalt in der Klassik und zur Frage seines Wandels in der Nachklassik*. Rome: Università Gregoriana Editrice.
- Kacprzak, Agnieszka  
2010 "The Widow's Duty of Mourning and the Ancient Conception of Pregnancy." In *El Cisne: Derecho romano, biologismo y algo más (Primer Seminario 'Leda')*, edited by Evelyn Höbenreich and Viviana Kühne, pp. 81–97. Lecce: Edizioni Grifo.
- Kahan, Dan M.  
2006 "What's Really Wrong with Shaming Sanctions." *Texas Law Review* 84: 2075–95.
- Labruna, Luigi  
1964/1995 "Un editto per Carfania?" In *Admicula*<sup>3</sup>, Luigi Labruna, pp. 167–76. Naples: Jovene. [Originally published in *Syntelesia Vincenzo Arancio-Ruiz* 1, pp. 415–20. Naples: Jovene.]
- Lamberti, Francesca  
2012 "Mulieres e vicende processuali fra repubblica e principato: Ruoli attivi e 'presenze silenziose'." *Index* 41: 244–56.
- Lenel, Otto  
1927/1974 *Das Edictum Perpetuum: Ein Versuch zu seiner Wiederherstellung*.<sup>3</sup> Aalen: Scientia Verlag. [Originally published in Leipzig: Verlag B. Tauchnitz.]

- Longo, Giannetto  
1977 "Ancora sul matrimonio romano: A proposito del volume di Josef Huber." *Studia et Documenta Historiae et Iuris* 43: 459–80.
- Marshall, Anthony J.  
1989 "Ladies at Law: The Role of Women in the Roman Civil Courts." In *Studies in Latin Literature and Roman History* 5, edited by Carl Deroux, pp. 35–54. Brussels: Latomus.
- Martini, Remo  
2006–2007 "Review of Carro 2006." *Iura* 56: 293–98.
- McDougall, Sara  
2012 *Bigamy and Christian Identity in Late Medieval Champagne*. Philadelphia: University of Pennsylvania Press.
- McGinn, Thomas A. J.  
1991 "Concubinage and the *Lex Iulia* on Adultery." *Transactions of the American Philological Association* 121: 335–75.  
1998 *Prostitution, Sexuality, and the Law in Ancient Rome*. New York: Oxford University Press.  
2008 *Widows and Patriarchy: Ancient and Modern*. London: Duckworth.  
2014a "Diocletian on Bigamy and Incest." In *Estudos em Homenagem a Luiz Fabiano Corrêa*, edited by Sara Corrêa Fattori et al., pp. 353–93. São Paulo: Editora Max Limonad.  
2014b "Riflessi giuridici dei fatti dissolutivi delle unioni sessuali stabili." In *Ubi tu Gaius: Modelli familiari, pratiche sociali e diritti delle persone nell'età del principato (Relazioni del Convegno Internazionale di Diritto Romano, Copanello, 4–7 giugno 2008)*, edited by Francesco Milazzo, pp. 427–59. Milan: Giuffrè Editore.  
2014c "The Roman Law of Marriage in Late Antiquity." *Iura* 62: 208–50.  
2015 "Child Brides at Rome." *Iura* 63: 107–55.
- Metro, Antonino  
1975 "Binas nuptias constituere in D. 3.2.1." *Iura* 26: 101–108.
- Metzger, Ernest  
2013/2015 "Litigation." In *The Cambridge Companion to Roman Law*, edited by David Johnston, pp. 272–98. Cambridge: Cambridge University Press. [Originally published as "An Outline of Roman Civil Procedure." *Roman Legal Tradition* 9: 1–30.]
- Mitchell, Paul  
2016 "On the Legal Effects of *Sponsalia*." *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte (Romanistische Abteilung)* 133: 400–12.
- Mommsen, Theodor  
1899 *Römisches Strafrecht*. Leipzig: Duncker & Humblot.
- Morin, Ashley E.  
2014 "Use It or Lose It: The Enforcement of Polygamy Laws in America." *Rutgers Law Review* 66/2: 497–530.
- Peppe, Leo  
1997 "Storie di parole, storie di istituti: Sul diritto matrimoniale romano arcaico." *Studia et Documenta Historiae et Iuris* 63: 123–96.
- Posner, Richard A., and Katherine B. Silbaugh  
1996 *A Guide to America's Sex Laws*. Chicago: University of Chicago Press.
- Pugliese, Giovanni  
1990 *Istituzioni di diritto romano*.<sup>2</sup> Turin: Giappichelli.
- Resina Sola, Pedro  
2009 "Carfania." In *En Grecia y Roma 3: Mujeres reales y ficticias*, edited by Andrés Pociña Pérez and Jesús M. García González. Granada: Universidad de Granada.
- Rizzelli, Giunio  
1995 "Il dibattito sulle ll. 28–29 dell'elogio di Allia Potestas." *Studia et Documenta Historiae et Iuris* 61: 623–55.  
1997 *Lex Iulia de adulteriis: Studi sulla disciplina di adulterium, lenocinium, stuprum*. Lecce: Edizioni del Grifo.  
2008/2013 "Adulterium: Immagini, etica, diritto." In *Ubi tu Gaius: Modelli familiari, pratiche sociali e diritti delle persone nell'età del principato (Relazioni del Convegno Internazionale di Diritto Romano, Copanello, 4–7 giugno 2008)*, edited by Francesco Milazzo, pp. 145–322. Milan: Giuffrè Editore. [Originally published in *Rivista di Diritto Romano* 8: 1–94.]

- Robleda, Olís  
1970 *El matrimonio en derecho romano: Esencia, requisitos de validez, efectos, disolubilidad*. Rome: Libreria Editrice Università Gregoriana.
- Saller, Richard  
1999 "Pater Familias, Mater Familias, and the Gendered Semantics of the Roman Household." *Classical Philology* 94: 182–97.
- Salvadore, Marcello  
1990 *Due donne romane: Immagini del matrimonio antico*. Palermo: Sellerio editore.
- Sandirocco, Luigi  
2004 "Binae Nuptiae et Bina Sponsalia." *Studia et Documenta Historiae et Iuris* 70: 165–216.
- Sanfilippo, Cesare  
1976 "Nuptias alieno nomine constitue-re?" *Iura* 27: 101–04.
- Scheidel, Walter  
2009a "A Peculiar Institution? Greco-Roman Monogamy in Global Context." *History of the Family* 14: 280–91.  
2009b "Sex and Empire: A Darwinian Perspective." In *The Dynamics of Ancient Empires: State Power from Assyria to Byzantium*, edited by Ian Morris and Walter Scheidel, pp. 255–324. New York: Oxford University Press.  
2011 "Monogamy and Polygyny." In *A Companion to Families in the Greek and Roman Worlds*, edited by Beryl Rawson, pp. 108–15. Oxford: Wiley-Blackwell.
- Schwartzberg, Beverly  
2004 "'Lots of Them Did That': Desertion, Bigamy, and Marital Fluidity in Late-Nineteenth-Century America." *Journal of Social History* 37.3: 573–600.
- Sperandio, Marco U.  
1998 *Dolus pro facto: Alle radici del problema giuridico del tentativo*. Naples: Jovene Editore.
- Todd, Stephen C.  
2007 *A Commentary on Lysias: Speeches 1–11*. Oxford: Oxford University Press.
- Treggiari, Susan  
1991 *Roman Marriage: Iusti Coniuges from the Time of Cicero to the Time of Ulpian*. Oxford: Oxford University Press.
- Urbanik, Jakub  
2016 "Husband and Wife." In *The Oxford Handbook of Roman Law and Society*, edited by Paul J. du Plessis, Clifford Ando, and Kaius Tuori, pp. 473–86. Oxford: Oxford University Press.
- Verboven, Koenraad  
2002 *The Economy of Friends: Economic Aspects of Amicitia and Patronage in the Late Republic*. Brussels: Éditions Latomus = Collection Latomus 269.
- Volterra, Edoardo  
1934/1999 "Per la storia del reato di bigamia in diritto romano." In *Scritti giuridici* 7, Edoardo Volterra, pp. 209–67. Naples: Jovene Editore. [Originally published in *Studi in memoria di Umberto Ratti*, pp. 387–447. Milan: Giuffrè Editore.]  
1940/1991 "La conception du mariage d'après les juristes romains." In *Scritti giuridici* 2, Edoardo Volterra, pp. 3–68. Naples: Jovene Editore. [Originally published as *La conception du mariage d'après les juristes romains*. Padua: La Garangola.]  
1961 *Lezioni di diritto romano: Il matrimonio romano (Anno Accademico 1960–1961)*. Rome: Edizioni Ricerche.
- Wacke, Andreas  
1995/2008 "Pönalisierung des untauglichen Versuchs?" In *Unius Poena — Metus Multorum: Abhandlungen zum römischen Strafrecht*, Andreas Wacke, pp. 181–94. Naples: Jovene Editore. [Originally published in *Collatio Iuris Romani: Études dédiées à Hans Ankum* 2, edited by Robert Feenstra et al., pp. 593–602. Amsterdam: J. C. Gieben.]
- Winterbottom, Michael  
1984 *The Minor Declamations Ascribed to Quintilian*. Berlin: de Gruyter.
- Wolf, Joseph G.  
2014 "Die lex Iulia de adulteriis coercendis." *Iura* 62: 47–66.



# Narrative Jurisprudence and Legal Reform: An Alternative Reading of China's First Treatise on Penal Law (The Hanshu “Xing fa zhi” 《漢書。刑法志》)

*Laura A. Skosey, The University of Chicago*

## Abstract

In this paper I suggest that the “Xing fa zhi” 刑法志 (“Treatise on Penal Law”) of the Hanshu 漢書 (The Book of Han), written by the Eastern Han court historian Ban Gu 班固 (32–92 CE) at the end of the first century, ought to be read not simply as an historical record but also as a piece of literary narrative and, more specifically, as a piece of narrative jurisprudence. Narrative jurisprudence, one of many facets of the law and literature movement, permits legal criticism through a humanistic medium. It is argued that because law so strongly colors our sense of morality, it is impossible to criticize law on moral grounds. However, through literature, the narrative voice provides a means to convey subjective feeling and thus induce empathy, thereby changing our moral beliefs and, hence, our beliefs about the way law should be. Although written roughly two thousand years before the founding of this scholarly discipline, I believe that the Hanshu “Xing fa zhi” is an example of just such a “literary indictment of legal injustice.” If my reading of this text is correct, then this first legal treatise stands alone among all other such treatises found in later dynastic histories, not simply in terms of its programmatic thrust, but also, and especially, in terms of its composition.

## Introduction

電雷皆至  
天威震耀

When thunder and lightning together arrive,  
Heaven's stern majesty terrifies and is dazzling.

五刑之作  
是則是效

In the creation of the Five Punishments,



This was patterned, this emulated.

威實輔德  
刑亦助教

Imposing might in truth supports<sup>1</sup> inner moral strength;  
Punishments also assist instruction.

季世不詳  
背本爭末

The closing years of dynasties are not auspicious;  
They turn their backs on the fundamental and compete over the ends.

吳孫狙詐  
申商酷烈

Wu (Qi of Wei) and Sun (Wu of Qi) were deceitful and cunning.  
Shen (Buhai) and Shang (Yang) were cruel and violent.

漢章九法  
太宗改作

The Han completed the Nine Laws;  
And the Grand Ancestor revised and instituted (them).

輕重之差  
世有定籍

For (measuring) the differences between light and heavy (crimes)  
The (current) era has fixed records.<sup>2</sup>

Thus reads Ban Gu's summary explaining his inclusion of the "Xing fa zhi" 刑法志, translatable as "Treatise on Penal Law" or "Treatise on Legal Models,"<sup>3</sup> in the dynastic history of the Western Han Dynasty 西漢 (202 BCE–9 CE), the Hanshu 《漢書》. This seemingly benign poetic summary is actually replete with messages whose meanings become more apparent after careful analysis of the text. Ban Gu, by necessity, is forced to write between the lines, and this he does not only in this brief narration but also in the "Treatise" itself. At first glance, one may be tempted, as was Hulsewé, to interpret this summary as support for fixed penal laws to help curb the inevitable salacious behavior of people at a dynasty's end. While this

<sup>1</sup> *Fu* 輔 is literally the poles attached to a cart to keep it from overturning. This gives *wei* 威 an indispensable role in the maintenance of virtue, or inner moral potency (*de* 德); it does not simply "assist" (as Hulsewé 1955, p. 317 understands), but actually constitutes an essential component to the ruler's virtue.

<sup>2</sup> *Hanshu* 100B.4242.

<sup>3</sup> I revisit the meaning of this text's title at the end of the paper. For the sake of convenience I will hereafter refer to the "Xing fa zhi" as the "Treatise."

may be true, it is only a small part of the story. The other part is hinted at in this “Summary” and is encoded in the “Treatise” itself.

Completed in approximately 80 CE,<sup>4</sup> Ban Gu’s “Treatise” stands as the first of thirteen treatises on legal matters found in as many of China’s dynastic histories. Modern scholarship on this treatise has viewed the document largely as an historical legal log, and its author as being “in favour of a severe regime” in which mutilating punishments are the norm.<sup>5</sup> It is true that the end of the “Treatise” constitutes Ban Gu’s explicit proposal for legal reform, which includes reinstating punishments, some of them mutilating. However, I argue that this reintroduction was to be done not as a means to make the current penal system more severe, but rather to soften it.<sup>6</sup>

Since Emperor Xiaowen’s 孝文帝 (r. 179–156 BCE) abolishment of the mutilating punishments, numerous crimes that previously had been sentenced to mutilating punishments were now met with the death penalty. Ban Gu’s primary objective was to ensure that “the lightness or severity (of punishments) should fit the crime.”<sup>7</sup> My reading of Ban Gu’s proposal — which I believe is embedded in the *entirety* of the text, not simply at the tail end — differs from Hulsewé’s: I believe Ban Gu is calling for a more sensitive and just penal system in which mutilating punishments and penal laws are exacted compassionately, even sympathetically, and with caution. The way to ensure a just legal system is not by appealing to the emperor’s rational being, nor simply to past moral icons, but additionally and necessarily to the emperor as a person possessing an emotional core. By reaching the emperor’s seat of emotions, Ban Gu could help ensure that what the emperor enacted and embodied was not merely that which was dictated by law, but more importantly was morally right. This, I submit, was Ban Gu’s objective when organizing the composition of the “Treatise.”

In addition to Ban Gu’s programmatic thrust, the importance of this first “Treatise” lies: (1) in its very sophisticated and intentional composition; and (2) in the rhetorical manner in which Ban Gu sought to bring about legal reform. Moreover, I suggest that the rhetorical exercise in which Ban Gu engaged is today termed by scholars of the law and literature movement as “narrative jurisprudence.”<sup>8</sup> The entire composition of the text (e.g., the relation of its component parts; the quotation and incorporation of specific narrative “voices,” especially that of Tiyang; the opening section which lays the foundation for an analogy between the human, emotive world and the natural world; the important analogy between the ruler as parent to his child-subjects; the repeated use by Ban Gu of “the emperor pitied” and similar

<sup>4</sup> On the date of composition of the “Treatise,” see Hulsewé 1955, p. 309. Hulsewé suggests it was completed sometime after 75 CE, possibly even after 80 or 85 CE. Historian Fan Ye 范曄 (398–445) provides internally contradictory information regarding the dynastic history. According to Fan, Ban Gu worked on the *Hanshu* for just over twenty years, beginning in the middle of Emperor Ming’s 明帝 reign (r. 58–76) and ending in the middle of Emperor Zhang’s 章帝 *jianchu* 建初 reign period (76–84) (*Hou Hanshu* 40a.1334). We know that the “Treatise” was likely written before the “Imperial Annals of Emperor Xiaowen” 孝文本紀 (see n. 45 below), but precisely when each of the chapters of the *Hanshu* that were authored by Ban Gu were written is difficult to say with certainty.

<sup>5</sup> Hulsewé 1955, p. 311.

<sup>6</sup> *Ibid.* Hulsewé notes that Ban Gu advocated the reintroduction of mutilating punishments as he considered “the death-penalty too severe in many cases and hard labor too light.”

<sup>7</sup> *Hanshu* 23.1112.

<sup>8</sup> Although English lawyers of the nineteenth century wrote about the depictions of legal systems by Shakespeare, Dickens, and others, most scholars assert that law and literature as a self-conscious movement did not begin until the publication in 1973 of James Boyd White’s *The Legal Imagination*. For a different assessment of the genesis of this movement, see Hursh 2013.

empathetic or emotive words and phrases; etc.) is directly aimed at criticizing the current legal order. It also attempts to further the author's objective of legal reform by indirectly and discretely evoking sympathy in the reigning emperors of Ban Gu's time, primarily Emperor Ming 明帝 (r. 58–76) and Emperor Zhang 章帝 (r. 76–89), for those who suffered under their legal regimes; Ban Gu causes the work's imperial audience — the ultimate dispenser of law and justice, and the embodiment of morality — to question its assumptions about law, morality, and justice, and the supposed existing interrelation between them. At the same time, and tempered with his call for the compassionate implementation of punishments, Ban Gu also addresses the rectification of other legal abuses, primarily procedural ones.

Read in this way, Ban Gu's "Treatise" is not only anomalistic among the thirteen legal treatises found in thirteen of the subsequent dynastic histories,<sup>9</sup> but could also well be one of the earliest examples of narrative jurisprudence, preceding those pieces of Western literature typically studied by scholars of the law and literature movement by roughly thirteen centuries.<sup>10</sup> Moreover, such a reading attests to the cross-cultural and cross-temporal use of literature as a means to convey dissatisfaction with the legal status quo, and to spur rethinking, if not reform, of a given legal system. It also brings to light one Eastern Han 東漢 (25–220 CE) literatus' indictment of his legal regime and helps us to better understand his conception of the nature of law and the appropriate theory of punishment. Perhaps more significantly, this reading serves as a model that may be used to analyze a variety of other Asian and ancient texts of legal import.

In this paper, I first introduce the law and literature movement as it is a field that remains virtually unbroached in studies of Asian matter.<sup>11</sup> I then situate the "Treatise" in the tradition of Chinese narrative. It is necessary for me to engage in this pedagogical exercise before moving on to the next section, in which I discuss the "Treatise" specifically as a piece of narrative jurisprudence. My concluding remarks touch on whether Ban Gu's objective was realized in both actual political and literary arenas.

<sup>9</sup> Forty-five years ago, Hulsewé (1955, pp. 313–14) gingerly suggested that the "Xing fa zhi" is tinted by Ban Gu's personal opinion. Comparisons between the *Hanshu's* legal treatise and later ones are sufficient to support this claim. Indeed, the imperial historians who authored later legal treatises only mimic a portion of the entire composition of the *Hanshu's*: opening passages to later legal treatises tend to be either abstractly correlative, or provide summary justification for the existence of punishments in a less than perfectly moral or orderly world, while the overall contents of the remainder of the texts consist of listings of past legal activities, edicts, and legal measures adopted during the dynasty under study. While Ban Gu, toward the end of his treatise, explicitly states that "it behooves us to think of proposals by which (we could) clarify the source" and "rectify the root" of the current legal problems (豈宜惟思所以清原正本之論 [*Hanshu* 23:1112; Hulsewé 1955, p. 349]), and then follows this up with some very specific suggestions for reform, no call for reform is ever made in later treatises. Furthermore, there appears to be no indication of the opinions, much less the

wills, of those authors with regard to the stated legal measures.

<sup>10</sup> Among the oldest literary works studied by legal scholars are Geoffrey Chaucer's (ca. 1343–1400) "The Man of Law's Tale" from his *Canterbury Tales*, and various works by William Shakespeare (1564–1616). Other literary works often cited in this context include Herman Melville's (1819–1891) *Billy Budd, Sailor*; Fyodor Dostoevsky's (1821–1881) *The Brothers Karamazov*; Leo Tolstoy's (1828–1910) *Crime and Punishment*; Mark Twain's (1835–1910) *Pudd'nhead Wilson*; Franz Kafka's (1883–1924) various stories on legal themes (such as "In the Penal Colony" and *The Trial*); William Faulkner's (1897–1962) *The Sound and the Fury*; and Toni Morrison's (1931–) *Beloved*. For more, see Posner 1988 and West 1993.

<sup>11</sup> The only work I know of in the field of Chinese studies that employs a law and literature analysis is Kinkley 2000, which identifies a move in the depiction in Chinese crime fiction within China's legal society from paternalistic to adversarial.

## The Law and Literature Movement and Narrative Jurisprudence

As an interdisciplinary branch of legal interpretation, under the law and literature movement fall a wide variety of analyses concerning relationships between law and literature, few of which share any overarching theoretical principles.<sup>12</sup> It is non-normative in that there is no shared sense of what law is supposed to be, and no endorsement of the law of a particular culture. Some of the subjects of inquiry in the law and literature movement include law as a form of literature (for example, Justice Benjamin N. Cardozo's analysis of the literary style of judicial opinions), the regulation of literature by law (as in copyright law), and legal themes as seen in literature (or, law in literature), which is the subject of inquiry of this paper.

It is important to note that where studies of law in literature are concerned, "law" can refer to any number of things: literary accounts of legal proceedings; depictions of legal personnel, our conceptions of justice, and questions of legal philosophy; and the economic, social, and cultural effects and elements of law are but a few examples. Also included in this list are "...the uses of law as a metaphor. Thus, law represents the various ways in which persons give order and structure to lives lived in common...Law symbolizes order and rule-governance as opposed to arbitrariness and chaos, but it also symbolizes the artificiality of man-made order as against the pre-existing order of nature or of God."<sup>13</sup>

One sub-genre of law in literature studies is "narrative jurisprudence," which Richard Posner has characterized as "the literary indictment of legal injustice."<sup>14</sup> Through the use of literary interpretation as a hermeneutical tool for understanding law, narrative jurisprudence enables the self-awareness and empathetic response induced by literary means, especially the incorporation of the narrative voice, to serve as a vehicle for legal criticism.

According to legal theorist Robin West, legal obligation consists not only of fear of sanctions but also in large part stems from people's beliefs that they are morally bound to uphold the law and to respect their system of justice.<sup>15</sup> Both laws and the institutions that make and enforce them are, by and large, considered to be just. A similar argument could well be made for Han China, wherein the laws of a moral emperor were likewise cloaked in the mantle of morality and virtue, and, hence, justice. West then moves on to articulate what she terms our "critical dilemma": if we believe our legal system and its laws are grounded in, and even embody, morality, "how...could we possibly generate a moral point of view that is external to, independent of, or simply different from the point of view created by legalism, from which we can criticize law?"<sup>16</sup> According to later Confucian accounts, the justification for the Han's founding, and thus also for the existence of its imperial persons, was based on the claim of moral superiority over the Qin 秦 (221–206 BCE), whose impersonal legal system mirrored, and perhaps contributed to, its short-lived empire. Thus, for Ban Gu, the "critical dilemma" about

<sup>12</sup> For a brief account of the law and literature movement, see Thomas Morawetz in Patterson 1996, pp. 450–61; Hursh 2013. See also Posner 1988, p. 12, for a brief account of the development of the law and literature movement and the texts on which it relies. It should be noted that Posner is skeptical that literature can tell us anything about law, but in this view he represents the minority. For the majority view, see

White 1973; Weisberg 1984; White 1984, especially pp. 231–74; Levinson and Mailloux 1988; and West 1993.

<sup>13</sup> Morawetz 1996, p. 451.

<sup>14</sup> Posner 1988, pp. 132–75.

<sup>15</sup> For a similar discussion of legal obligation in the Western Zhou, see Skosey 1996, especially Chapters V and VI.

<sup>16</sup> West 1993, p. 2.

which West speaks manifests itself as a conflict — both on the level of the legal system itself, and on that of the imperial person — between doing what is *legal* and what is *just*.

West argues that “the moral point of view that will be potent against the authority of law must stem from some part of our consciousness, or perhaps some aspect of our experience, that is more or less untouched by the moral authority of law itself.”<sup>17</sup> Narrative enables such a “humanistic approach to legal criticism” whereby we undergo a “process of self-discovery” as we engage in dialogues with the texts, and that “[p]art of what we discover is our wants, needs, prejudices, desires, and preferences of which we were unaware...”<sup>18</sup> In West’s words, the value of literature to people in the legal profession as well as to others is as follows: “Literature helps us understand others. Literature helps us sympathize with their pain, it helps us share their sorrow, and it helps us celebrate their joy. It makes us more moral...The literary person...represents our potential for moral growth. She is the possibility within all of us for understanding, for empathy, for sympathy, and most simply, for love.”<sup>19</sup>

I argue that Ban Gu, in his “Treatise,” in an effort to criticize law on humanistic grounds and thereby also demonstrate “the artificiality of man-made order as against the pre-existing” and normative order of nature, engaged in a rhetorical activity that may be termed “narrative jurisprudence.” As a narrative jurisprudential text, the “Treatise” strives to: (1) induce human compassion for persons living in unjust legal systems; (2) criticize the legal and socio-cultural milieu that fostered such injustices; (3) argue that all members of unjust legal systems are victims; (4) demonstrate the “artificiality of man-made order as against the pre-existing order of nature”;<sup>20</sup> and (5) do all this through narrative techniques. However, it is first necessary to address what is meant by narrative and, in so doing, test my assumption that the “Treatise” constitutes a piece of literary narrative.

## The “Treatise” as Literary Narrative

The subject of narrative theory, until recently primarily a concern of scholars of Western literature, is still much debated. The issue is further complicated when the subject of inquiry is an Asian text: many of the criteria for determining literary narrative in the West do not find one-to-one correlations in the Chinese literary arena. However, if we combine the prevailing views of narrative, there are five basic points that can be considered as composing a narrative text: character, plot, point of view, meaning, and rhetoric, or the means by which the author conveys his or her message.<sup>21</sup> When one looks at the “Treatise” in terms of these five characteristics, the text becomes an integral whole containing many literary elements that help define law as Ban Gu envisioned it. When read as literary narrative, the “Treatise” becomes a metacritical comment: narrative becomes a metaphor for law, in that the resonant emotional elements that are essential to the success of the former are also, in Ban Gu’s estimation, necessary for the successful functioning of the latter.

In this section, I address the first four of these characteristics; the final one is the subject of the following section on narrative jurisprudence in the “Treatise.”

<sup>17</sup> West 1993, p. 2.

<sup>18</sup> *Ibid.*, pp. 254–55.

<sup>19</sup> *Ibid.*, p. 263.

<sup>20</sup> Morawetz 1996, p. 451.

<sup>21</sup> The first four characteristics are from Scholes and Kellogg 1966; the fifth is one that more recently has become a topic of debate among literary critics and academics. For relevant discussions in the context of early Chinese texts see, for example, Wang in Plaks with DeWoskin 1977, pp. 3–20, and Porter 1996.

## Character

In the “Treatise,” which begins at the time of human creation and ends during the latter part of the first century CE, during the reign of the Han emperor Zhang (r. 76–89), we meet a host of characters. Many figures are mentioned — historical, semi-historical and mythological — who, in one way or another, helped shape China’s legalism at various times. The reasons for their appearance in the evolution of China’s legal history also are given, though usually only in the most general and impersonal manner, such as a brief mention of the current socio-political climate leading to their rise, or to the implementation of certain legal measures.

While statesmen, imperial ministers, and emperors dominate the character population, also present are a convicted man, Chunyu Yi 淳于意 (Superintendent of the Granaries under the Han emperor Xiaowen), who in ca. 167 BCE was sentenced to an unspecified corporal punishment (possibly death), as well as perhaps the most memorable character in this text, his daughter, Tiying 緹縈. We will return to Tiying later. For now, it suffices to note that Tiying’s presence in the text, like that of the many other characters, is brief.

In addition to Tiying and her father, it is generally with the Han emperors and their ministers, especially those who recognize the need for reform, that the reader is afforded some psychological insight into the characters. Such would-be reformers acknowledge not only the reasons for reform but also their personal responsibility in implementing it.

If we were to identify one character whose presence is to be felt throughout the text, that character would be law. Certainly at the beginning of the text, when Ban Gu presents to his reader the creation of human civilization, he is simultaneously providing a creation myth for law. Law was born out of the sages, out of their benevolence (*ren* 仁), love (*ai* 愛), inner moral potency (*de* 德), and yielding (*rang* 讓).<sup>22</sup> But more importantly, law was grounded in the models of heaven and earth (*ze tian xiang di* 則天象地) and found resonance in and conformed to the feelings of the people (*dong yuan min qing* 動願民情).<sup>23</sup> Once we move past law’s infancy, we find that its life is one of a passive observer to its manipulation by any number of people who are spurred by a variety of motives. In a sense, law, unable to express its true nature without human assistance, but which is usually manipulated rather than fostered, is very much a victim throughout the text: it is the passive textual object, never the active subject. Law understood as a passive character, subject to abuse, underscores the empathetic response sought by Ban Gu’s proposal.

## Plot

On first reading the “Treatise,” one might conclude that the text amounts to nothing more than a chronological listing of legal events throughout history — certainly the documenting of such events does constitute one important aspect of this text. Upon further reflection, however, we find that the “Treatise” is actually composed of several interrelated sections. However, unless the text is read as an indivisible entity, the causal relationship between those

<sup>22</sup> Hulsewé translates *rang* as “deference,” which often implies a hierarchical relationship wherein the inferior defers to the superior. As will become apparent, “yielding” is perhaps a more apt translation;

throughout the text, the act of yielding is performed by the emperor and those in higher positions within society, usually in response to those below them.

<sup>23</sup> *Hanshu* 23.1079.

sections and the text's overall "followability" remain elusive, and the "Treatise" becomes no more than another piece in China's annalistic archives.

The text moves the reader through time in both linear and circular fashions, as is the case with much of Chinese history and literature: several centuries are covered, within which many of the same patterns of human error are recognized and remedied, only to be repeated. At the same time, Ban Gu's text moves in a vertical fashion. The sequence of events and, more importantly, the way in which Ban Gu has chosen to relate them serve as rungs of a ladder that move the reader upward to the text's final culmination, i.e., Ban Gu's proposals for reform and, equally important, his justification for voicing his concerns.

Hulsewé divided the text into four sections: (1) introduction; (2) historical survey of military organization; (3) historical survey of mainly penal legislation in China; (4) a recitation of the ideal results of Ban Gu's proposals.<sup>24</sup> While such a partitioning of the text is indeed possible, the broad scope of such divisions obliterates much of the finer meaning the text attempts to convey. I have divided the text into several connected parts, which, when one understands the meaning behind the "Treatise," have "followability."

The "Treatise" begins with an opening passage [Section I; HS 23.1079:1-7], which serves as an exposition on the evolution of humankind and the creation of law. Especially significant in this opening section is the introduction of the notion of a personal, emotional component to legal operations:<sup>25</sup>

聖人取類以正名而謂君為父母。明仁愛德讓。王道之本也。。。制禮作教。立法設刑。動緣民情。而則天象地。

The sages adopting this example in order to rectify names referred to the ruler as the father and mother (of the people), making clear that benevolence and love, inner moral strength and yielding, are the basis of (true) kingship...[Regarding their] instituting rules of ritual conduct and creating instructions, (and their) establishing laws and instituting punishments, in resonating with and conforming to the feelings of the people, (the sages) emulated Heaven and imitated Earth.

Important here is the inclusion of a quotation from the "Hong fan" 洪范 chapter of the Shangshu 《尚書》 which reads that "The Son of Heaven acts as the father and mother of the people" (天子作民父母), a tenet repeated at several key junctures in the text. This introduction, which interweaves law and humanity, placing them under the rubric of family, provides Ban Gu with the basis for criticizing not only the legal system of Emperor Xiaowen in the time of Chunyu Yi, but also that of the current Eastern Han emperor(s).<sup>26</sup>

Section II [HS 23.1079:7-1080:1] elaborates on the earliest implementation of law. While *ren* (benevolence, humaneness, goodness) is taken to be an immutable quality of law and legal operations, the simultaneous need for force and an awe-inspiring character is also recognized. Ban Gu, moreover, notes the necessary correlation between the natural order and seasonal characteristics, and permissible legal activity.

On the surface, the third section [HS 23.1080:1-1082:6] is a historical backdrop, which chronologically covers from the Yellow Emperor to the Springs and Autumns Period

<sup>24</sup> Hulsewé 1955, pp. 309, 311.

<sup>25</sup> *Hanshu* 23.1079.

<sup>26</sup> In this section Ban Gu also sets up law and legal administration, including military measures, as being

necessary, but which are controlled by and subject to the kingly way (*wang dao* 王道), rules of ceremonious behavior (*li* 禮), and more.

(771–ca. 453 BCE); it has the added function, however, of providing justification for Ban Gu's statements in Section II. In detailing the ancient connection between warfare and law, Ban Gu provides the historical precedent for the simultaneous use of force in conjunction with inner moral strength to control miscreant populations.

In Section IV [part A: *HS* 23.1083:1–1089:6; part B: *HS* 1090:1–1097:6], the reader finds a historical survey of moral decline. The first part, which is chronologically situated in the Warring States era (ca. 453–256 BCE), centers on the use (or more accurately, the “non-use”) of the military to maintain a prosperous state in which the people are at peace, and then parallels this to the use (again, “non-use”) of law. The second part presents how law was used — or, more accurately, “abused” — during this period. The Qin is presented as the consolidation of previous, incorrect uses of law, which was brought on in part by the supposed decimation of the rules of ritual conduct (*li* 禮) and inner moral potency (*de*). The emphasis in this section is on combining force and ritual in order that “non-action” may serve as a realistic method for handling illegal behavior. Interspersed throughout are examples of sincere attempts to rectify military and legal measures based on moral considerations, but these are outweighed by manipulative persons. This sets the stage for Ban Gu's retelling of the events in 167 BCE, which (purportedly) culminated in the elimination on emotional and moral grounds of mutilating punishments, and, later, for his critique of the current legal situation.

In the fifth section [*HS* 23.1097:7–1098:8] — the retelling of the legal ordeal of Chunyu Yi, his youngest daughter Tiying, and Emperor Xiaowen — the theme of the emperor serving as father and mother of the people is revisited. This section is at once the climax of the historical survey of moral and legal degeneration elaborated in Section IV, the link between Sections I–III and the remainder of the “Treatise,” and the turning point of the text. The story represents the legal ideal in governance and is a quintessential example of narrative jurisprudence. As such, it is at the center of my law and literature interpretation of the text, and is also seminal to Ban Gu's plea for reform on moral grounds. It is through the incorporation of this historical incident in dramatized form that “the requisite linkages in transforming what would be merely a pointillistic recital of unrelated incidents into a true narrative — that is, a unified story with its own perceptible sense of integrity” — is accomplished.<sup>27</sup>

Section VI [*HS* 1099:1–8] records some specific reforms and legal measures that were adopted as a result of the events portrayed in the previous section. Section VII [*HS* 23.11099:8–1103:10] goes on to narrate the unfortunate non-realization in practice of Xiaowen's ideal measures, and the continuing legal *cum* moral decay. Again, throughout this section, examples of sincere attempts to rectify military and legal measures based on moral considerations are presented.

Section VIII [*HS* 23.1101:10–1106:15] provides an outline of those Western Han laws that are grounded in antiquity and suited to the present age. In Section IX [*HS* 23.1108:1–1112:7], a summary of Sections I–VIII, Ban Gu wraps up the above narration and presents his rationale (i.e., justification) for legal, mainly penal, reform, the specific proposals themselves being presented in Section X [*HS* 23.1112:7–12].

In the last section (XI) [*HS* 1112:12–14], Ban Gu offers his final words of persuasion. Quoting from ancient texts (the *Shijing* 《詩經》 and *Shangshu*) which state that blessings come to those who benefit their people, and merit enables longevity (in governing?), Ban Gu reiterates the emperor's role as parent to his people. It is interesting that his final words are a quote

<sup>27</sup> Yu 1988, p. 2, where he summarizes Wang 1977.



from the “Lü xing” 吕刑 chapter of the *Shangshu*, a text that I have argued should be read as an appeal for rectifying incorrectly implemented law.<sup>28</sup>

### *Point of View*

Although not readily apparent, Ban Gu’s point of view permeates each page of the text. In a fashion typical of many early Chinese sophists and ministers, Ban Gu (except in portions of Sections IX and X) presents his point of view through the mouths and actions of others, adopting himself the guise of a would-be objective reporter. Yet Ban Gu highlights certain other perspectives throughout his narrative. Perspectives on law, governance, and humane-ness, which occupy the most prominent positions both in Ban Gu’s own estimation and in the text, include those of notable Confucians (e.g., Confucius, Zi Lu, Mencius) and proto-Legalists (e.g., Guan Zhong and especially Xun Zi).<sup>29</sup> Ban Gu’s travels through legal, military, and human histories are really a search to find the reason behind the many repeated abuses of law, and it is the results of his search that form the basis for his reform program, both in its specific content and in its justification.

It is only at the end of the text, in Sections IX–XI, that the first person point of view comes to the fore. As such, Ban Gu is neither fully a reporter of what is seen, heard, or read about, nor is he a full participant in the action. While he does recount certain current facts (such as: “At present those in the commanderies and kingdoms who die from punishments are annually counted by tens of thousands...” 今郡國被刑而死者歲以萬數),<sup>30</sup> Ban Gu still couches much of his rhetoric in the words of others, or, in “ancient” proverbs, some of which may have been of his own creation.

It is recognized that Ban Gu employed children’s ditties in his treatise on the “Five Elements” as political commentaries *cum* portents.<sup>31</sup> While poetic omens *per se* are not evident in the “Treatise,” when the text is read as a unified whole, the repeated stories of the abuses of law serve the same function as children’s ditties. Moreover, the story of Tiyang, which we will explore in detail shortly, demonstrates to the current emperor that even after reform is instituted on the books, enforcement of it is not guaranteed. Lest the current emperor find himself in a similar position as his well-intentioned predecessor, Emperor Xiaowen, he should heed the lessons of the prophetic past.

### *Meaning*

Meaning is a multi-faceted term. It refers at once to “the relationship between two worlds: the fictional world created by the author and the ‘real’ world, the apprehendable (sic) universe”<sup>32</sup> as well as to “the overall purport of a work as it is actually realized in the text,” and which consists of the use of character, plot, and point of view.<sup>33</sup> This brings us to the more important aspect of narrative meaning: the author’s attempt “to control the reader’s response.”<sup>34</sup>

Ban Gu made a masterful attempt at controlling the reader’s response, especially that of the emperor. For example, of the four types of relationships typically designated as employed

<sup>28</sup> Skosey 1996, pp. 193–99.

<sup>29</sup> Most attention in terms of the number of quotes and their length is devoted to Confucius and Xunzi.

<sup>30</sup> *Hanshu* 23.1109.

<sup>31</sup> See, for example, Birrell 1993, pp. 102–107.

<sup>32</sup> Scholes and Kellogg 1966, p. 82.

<sup>33</sup> Wang 1977, p. 14.

<sup>34</sup> Scholes and Kellogg 1966, p. 82.

by authors of narrative literature, Ban Gu primarily and most obviously used only the relationship between characters and characters, and that between the author and his audience.<sup>35</sup> In addition, Ban Gu utilized a third type of relationship, one not included in the most widely accepted four types: Tiyang's narrative can be viewed as a relationship between character and audience. The profound emotional chord that her words struck in Emperor Xiaowen was bound to have a direct effect on the current emperor, and indeed, on anyone else who was to read the "Treatise." The meaning of the text becomes clearer, however, when we analyze it as a piece of narrative jurisprudence, the topic to which we now turn.

## The "Treatise" as Narrative Jurisprudence

Ban Gu utilizes the narrative form of his "Treatise" in at least three ways to advance his views on jurisprudence and legal ethics: (1) He introduces the metaphor of compassionate parenting; (2) he applies this metaphor in the Tiyang story; and (3) he reflects his own theory of the nature and function of law and punishment through the literary character of Emperor Xiaowen.

### *Compassionate Parenting: Serving as the Father and Mother of the People*

The humanizing rhetoric of parenting constitutes a seminal component of the narrative jurisprudential nature of the "Treatise." In order to better understand his use of this rhetorical device, we must first look briefly at Ban Gu's estimation of the nature of law and punishment. Ban Gu never suggests that laws and punishments should be abolished; rather, he recognizes their necessity. His summary of the "Treatise" further supports this view: "Imposing might in truth supports inner moral strength; punishments also assist instruction."<sup>36</sup> However, Ban Gu's ideal legal system is one in which laws and punishments exist, but, because of the ruler's moral rectitude and sense of compassion, they are not used. Ban Gu's entire narrative — from the historical facts incorporated therein, to his composition of the text, to his own very pointed statements — reflects this ideal. For example:<sup>37</sup>

故曰。善師者不陳。善陳者不戰。善戰者不敗。善敗者不亡。

Therefore, it is said: "He who is good at handling armies, does not array (them). He who is good at arraying (armies) does not enter into battle. He who is good at entering into battle does not inflict a defeat. He who is good at inflicting defeat does not destroy."

<sup>35</sup> The other two are: (1) author and narrator, and (2) characters and narrator.

<sup>36</sup> *Hanshu* 100B:4242.

<sup>37</sup> *Hanshu* 23.1088. Hulsewé (1955, pp. 361–62 n. 77) discusses the possible Confucianist origin of this saying, in spite of its Daoist flavor, as well as paral-

els to texts from other schools. I would argue that the philosophy advanced in this passage, as well as in the entirety of the "Treatise," cannot be relegated to a particular school of thought, but rather seems to over-arch many, including Confucian, Daoist, and military.

And:<sup>38</sup>

若夫舜修百僚。咎繇作士。命以蠻夷猾夏。寇賊姦軌。而刑無所用。所謂善師不陳者也。

Now, when Shun regulated the hundred officials, Gao Yao served as judge.<sup>39</sup> He was commissioned as the Southern Man and Eastern Yi peoples were acting treacherously towards the Chinese (states), and robbers and bandits were villainous and in violation (of the law),<sup>40</sup> yet punishments were without being used. This is what is called “He who is good at handling armies does not array them.”

The “Shun dian” 舜典 chapter of the Shangshu, from which a portion of the above citation derives, further confirms Ban Gu’s position that the compassionate human element is requisite in the use of law and punishments. After listing some of Shun’s specific legal initiatives, the text then attributes the following words to Shun:

欽哉，欽哉，惟刑之恤哉！

Let me be reverent! Let me be reverent! Would that (the enacting of) punishments arrive at sympathy.

It would be irresponsible, as well as incorrect, to claim that Ban Gu’s reform proposal was based solely on an appeal to the emperor’s emotional core. To make such a claim would be to suggest that Ban Gu was able to divorce himself completely from his historiographical and hermeneutic contexts, and it would force us to turn a blind eye to much of the text itself. Indeed, a large component of Ban Gu’s appeal rests in the didactic tales of well-known persons, dynasties, and philosophies, especially those that underscore the benefit of non-action (*wu wei* 無為) on the part of the ruler (the above citation being one such example), and the devastating effects of rash excess. In this way, Ban Gu reaches out to the ruler’s rational and practical sides as well. Particularly prominent in this regard is the lengthy passage from the “Yi bing” 議兵 chapter of the *Xunzi* 《荀子》 and its moral: what goes around comes around; therefore, one should not operate with vengeance or excess, but through a committed program of non-action, with respect, morality, and righteousness at its center.<sup>41</sup>

However, Ban Gu’s appeal diverges from traditional ones, such as those found in many of the philosophers’ books, through his use of the narrative jurisprudential voice. While Ban Gu, like many of his predecessors, viewed law as being intimately connected with the inner moral power (*de* 德) or sense of right (*yi* 義) of the ruler and his ministers, his contribution to the art of persuasion rested in his appeal to the ruler’s sense of compassion, which is laid out in the opening section of the “Treatise.” In a break from his contemporaries and successors,

<sup>38</sup> *Hanshu* 23.1088.

<sup>39</sup> Yan Shigu 顏師古 (581–645) notes that *shi* 士 can be interpreted either as a judge or as an official in charge of the enforcement of criminal laws. *Hanshu* 23:1089.

<sup>40</sup> Yan Shigu contrasts *jian* 姦 (“being traitorous outside”) with *gui* 軌, understood as *jiu* 究 (“being unruly within the state”). I have chosen to read *jian gui* as a binome, as it often is found, “to behave in a villainous and illegal manner.”

<sup>41</sup> *Hanshu* 23.1085.4–1089:6; Hulsewé 1955, pp. 325–28. Throughout we also find mentions of the economic and personal benefit to the ruler of such an appropriate course of “action,” appeals very reminiscent of, though never directly quoting from, the “Kang gao” 康誥 and “Jiu gao” 酒誥 chapters of the *Shangshu*. See, for example: *Hanshu* 23.1097:1–2; *Hanshu* 29.1097:3–5; *Hanshu* 23.1112:12–14. On the economic aspect of law in the Western Zhou, with special attention to the “Kang gao” and “Jiu gao,” see Skosey 1996, pp. 266–69.

Ban Gu leaves behind most cosmological or correlative significance imputed to law, suggesting that there may have been yet another reason for his introductory section. In writing the first history of law, Ban Gu naturally would have felt compelled to write about law's origins. This would have proved a formidable task for the historian, as any actual documents from law's formative period (e.g., oracle-bone and bronze inscriptions, and administrative documents on perishable or long-since lost or destroyed materials) would have been lacking. Yet instead of crippling the historian, this black hole in law's transmitted history afforded Ban Gu the opportunity, within certain bounds, to imbue law with those qualities he wished to see realized in his own time. The introduction, therefore, sets the stage for the direction in which Ban Gu's narrative moves, i.e., toward eliciting a compassionate or sympathetic response from its audience.

The text begins with a presentation of man as a sentient being, fully capable of being able to decide between right and wrong. This is seen as the defining trait of humanity: it is the use of reason, instead of mere reliance on brute strength, which makes man the noblest of all creatures. However, the text then immediately distinguishes between simple intelligence and intelligence accompanied by benevolence and love. The latter two qualities allow for the creation of society, which seems to be formed when a sage, who possesses the four kingly qualities (humanity, love, inner moral power, and yielding) attracts appreciative adherents.

As mentioned above, the introduction begins its explicit discussion of law with a quote from the "Hong fan," what I would term the slogan of this treatise: "The Son of Heaven serves as the father and mother of the people."<sup>42</sup> Ban Gu then links the basis of true kingship — which again rests in humaneness, love, inner moral strength, and yielding (仁愛德讓。王道之本也。) — with the creation and institution of both formal and informal ritual (*li* 禮) and educational rules (*jiao* 教), as well as legal (*fa* 法) and penal (*xing* 刑) rules which, in emulating heaven and earth, were to reflect popular sentiment. The themes set up in this introduction are returned to later in the text at key points, most notably in the context of Chunyu Yi's legal episode. But, most importantly, it is through the combined use of benevolence and love on the one hand, and the metaphor of parents as the embodiment of such love and compassion on the other, as the cornerstone of all social groupings and the point of emergence of all human constructs, that Ban Gu is able to lay the foundations for a humanistic criticism of law, whereby "the moral point of view that [is] potent against the authority of law...stem[s] from some part of our consciousness, or perhaps some aspect of our experience, that is more or less untouched by the moral authority of law itself."<sup>43</sup> Ban Gu's appeal for legal reform rests at least in part in the chronological priority he allotted to benevolence, love, and humans as parents. This allows him to appeal to man's duty to first and foremost be a compassionate father/mother, a role that both precedes and supersedes man's role as lawgiver or law enforcer.

### *The Intimidating Voice of the Dawn Breeze: The Story of Tiyang*

Ban Gu's use of the rhetoric of "ruler as parent" finds concrete application in a dramatized retelling of an historical incident revolving around a father, his daughter, and the Western Han Emperor Xiaowen. The daughter, Tiyang, is a character not mentioned in studies of the "Treatise." It is usually the story in which she appears that garners attention. Interestingly,

---

<sup>42</sup> *Hanshu* 23.1079:5.

<sup>43</sup> West 1993, p. 2.

the section of the “Treatise” that relates the incident in question is an anomaly within the document: in terms of both content and style, it is quite unlike what precedes or follows. The personal element; the use of direct quotation of a non-imperial, non-official, non-literatus, and, most notably, non-male person; the presence of an emotional component; and the introduction of an actual private, familial relation are all contrasted with the rational, official, public, orthodox, and male-centric materials incorporated in most of the rest of the text. Clearly, Ban Gu, a man of uncontested literary talent, was trying to convey a message to his reader(s): The inclusion of Tiyang had a greater function than simply serving as an introduction to Emperor Xiaowen’s abolishment of the mutilating punishments, which Ban Gu could have noted in a brief sentence. It is through a law and literature analysis that the greater meaning of this text becomes clear.

Many of Robin West’s law and literature analyses highlight the role of the literary character. This character is often the central element in Western narrative. In traditional Chinese narrative literature, however, it is rarely any single character that reaches out and touches the heartstrings of the reader, but rather the entirety of the text with its interrelated components. It is thus of great interest that, in the middle of the “Treatise,” Ban Gu presents the reader with this most memorable character, Tiyang, the youngest daughter of a physician, Chunyu Yi, who had been arrested and imprisoned on what may have been charges of malpractice.

According to Sima Qian 司馬遷 (145–86 BCE), Chunyu Yi was born in Linzi 臨淄 County in present day Shandong 山東 Province.<sup>44</sup> From an early age, he was interested in medicine and the divinatory and occult arts (*fangshu* 方術). He came under the tutelage of Yang Qing 陽慶, an aged Grandee of Qi 齊, who, being without male progeny, took Chunyu Yi under his wing and taught him the arts of the legendary Yellow Emperor and the noted healer Bian Que 扁鵲. In a short time, Chunyu Yi had mastered the teachings and was capable of making diagnoses and curing the sick. He became an itinerant physician, but he often came upon incurable cases, thus inciting the ire of the families of many of those ill persons. Someone lodged an accusation against him, probably during the thirteenth year of Emperor Xiaowen (167 BCE)<sup>45</sup> — Chunyu Yi was thus arrested and moved to the capital, Chang’an, where he was imprisoned while awaiting trial.<sup>46</sup>

At the time of his arrest, Chunyu Yi bemoaned the fact that he had no sons, only five daughters: “In giving birth to children, if one has no sons, then in times of urgency it is not advantageous” (生子不生男。緩急非有益。<sup>47</sup>) The narrative that follows is replete with references to the emotions felt not only by Chunyu Yi and Tiyang, but most importantly by

<sup>44</sup> *Shiji* 105.6b.

<sup>45</sup> The dates of this incident vary. *Shiji* 10.427–428 (“Xiaowen benji”), *Hanshu* 4.125 (“Wendi ji” 文帝紀), and *Hanshu* 23.1097 (“Treatise”) tell us it was in the thirteenth year of Xiaowen (167 BCE; the first two texts specify the fifth month); *Shiji* 105.2795 (“Bian Que Cang Gong liezhuan” 扁鵲倉公列傳) states it occurred in the emperor’s fourth year (176 BCE); and in the *nianbiao* of the *Shiji*, the abolishment of mutilating punishments is listed as having occurred in

Xiaowen’s twelfth year (168 BCE). It is interesting to note that in *Hanshu* 4.125, Ban Gu refers the reader to the “Treatise” (“A discussion of this is in the ‘Treatise on Penal Law’” 語在刑法志), indicating that he had written the Treatise before (completing) the imperial annals.

<sup>46</sup> In Chunyu Yi’s biography, his inability to cure a number of people is linked with his arrest and imprisonment (*Shiji* 105.6b).

<sup>47</sup> *Hanshu* 23.1097.

Emperor Xiaowen. In order to appreciate the emotive elements of the passage, I quote at length Chunyu Yi's tale:

少女緹縈。自傷悲泣。乃隨其父至長安。上書曰。

youngest daughter, Tiying, **was grieved and cried mournfully**. (She) thereupon followed her father to Chang'an, and sent up a letter (to the emperor) which read:

妾父為吏。齊中皆稱其廉平。今坐法當刑。妾傷夫死者不可復生。刑者不可復屬。雖後欲改過自新。其道亡繇也。妾願沒入為官婢。以贖父刑罪。使得自新。

"My father served as an official. In Qi (the people) all **praise his honesty and equity**. Today he sits (judged by) the law and meets with corporal punishment. **I am sorrowful** that those who die cannot be born again, and those who receive corporal punishment cannot again attach (the amputated part of their body). Even if they later wished to correct their errors and renew themselves, such a way would be without that by which to follow it. I wish to be confiscated and serve as a government bondsmaid and thereby redeem my father's crime, (so as) to enable him to renew himself."

書奏天子。天子憐悲其意。遂下令曰。

When the letter had been submitted to the Son of Heaven, **the Son of Heaven was moved to pity and sorrow by its kindly sentiment** and thereupon sent down an edict saying,

制詔御史。蓋聞有虞世之時。劃衣冠異章服以為戮。而民弗犯。何治之至也。今法有肉刑三。而姦不止。其咎安在。非乃朕德之薄。而教不明與。吾甚自愧。

Imperial Order to the Imperial Censors: "I have heard it said that in the time of the Possessor of Yu, one demarcated the clothing and hats (of criminals) and differentiated (their) emblems and apparel in order to make this (their) disgrace, and the people did not violate (the laws). **What perfection of governance!** Today, the laws have three mutilating punishments, yet the villainy does not stop. Wherein does the fault of this lie? Is it not simply that **my inner moral potency is meager and my teachings are not enlightened?! I am extremely ashamed of myself!**"

故夫訓道不純而愚民陷焉。詩云。愷弟君子。民之父母。今人有過。教未施而刑已加焉。或欲改行為善。而道亡繇至。朕甚憐之。刻肌膚。終身不息。何其刑之痛而不德也。豈稱為民父母之意哉。其除肉刑。有以易之。

"Therefore, when in practicing the Way one is not **pure**, the benighted people will be entrapped thereby. The Odes say: '**The kind and brotherly lord is the father and mother of the people.**' Today when people have transgressions, the teachings are not yet extended (to them), yet mutilating punishments are applied to them. Perhaps (they) would desire to alter their behavior and do good, yet (such) a way is without that by which to reach it. **I greatly pity this!** Cutting into their flesh and skin (such that) to the end of their lives they cannot find respite, **how painful** is this and **how unvirtuous!**

***Could this be what is meant by serving as the father and mother of the people?! Let the mutilating punishments be abolished, and let something else replace them... ”***<sup>48</sup>

We see that Tiying, by appealing to the emperor’s emotional being, was able to lead him through, in West’s words, a “process of self-discovery.”<sup>49</sup> She reawakened in Emperor Xiaowen “understanding, empathy, sympathy, and simply love,” to repeat West.<sup>50</sup> In Ban Gu’s words, Tiying helped put Xiaowen back on the path of true rulership by nurturing “humaneness and love, together with inner moral strength and yielding,” which constitute “the basis of true kingship,” and forced him to revive the sages’ legal ideal. Chunyu Yi was promptly released, Tiying remained free, and the mutilating punishments were wiped off the books.<sup>51</sup> Chunyu Yi eventually became the director of the Imperial Granaries.

That Ban Gu would have chosen to include the words of a young woman — the youngest of five children (all girls) and the least significant member of her immediate family (indeed, of any and all families) — to induce empathy in the male emperor — the *Son of Heaven* and the *father and mother of all people*, unquestionably the most powerful member of all families — seems if not unimaginable, then at least comic. There exists such a great degree of incongruity between the speaker and her audience that one wonders why a person in Tiying’s position would even have attempted to “speak” with the emperor. However, it is precisely this stark contrast in opposites that drives the message home to the text’s audience. It is at this point that we are first faced with the effects of another’s emotional plea: the emperor, moved to pity by her words, realizes his own moral inadequacy and its devastating consequences. In my estimation, this part of the narrative certainly constitutes the climax of the “Treatise.”

At this point, one needs to ask if I am reading more into the Tiying narrative than Ban Gu had intended, or if Tiying did indeed hold some special importance to the historian. After all, the story of Tiying was not a literary creation of Ban Gu’s; it appears in Sima Qian’s *Shiji* 史記 (Historical Records) as well as in Liu Xiang’s 劉向 (ca. 77–6 BCE) *Lie nü zhuan* 《列女傳》 (Biographies of Notable Women). Let us first examine these appearances. The story of Tiying as it appears in the *Hanshu* is almost identical with its appearance in *Shiji* 10.427–428, “The Basic Annals of Emperor Xiaowen” 《孝文本紀》, leading one to assume that Ban Gu appropriated the story verbatim from his predecessor. However, it has been suggested that parts of the *Hanshu* were used by later editors to supplement or reconstruct badly damaged or lost sections of the *Shiji*.<sup>52</sup> This may well have been the case with this particular story. We find the same story in the *Shiji* biography of Chunyu Yi (*Shiji* 105), but with some significant differences.

In the *Shiji* biography of Chunyu Yi, Chunyu Yi’s legal ordeal is said to have occurred in Xiaowen’s fourth year (176 BCE), which differs from the “Treatise” and *Shiji* “Basic Annals of Emperor Xiaowen” accounts, both of which give a thirteenth year dating (167 BCE).<sup>53</sup> Other differences are also evident. The story of Chunyu Yi’s legal mishap as it appears in the *Shiji* biographical account is less than half the total length of that in Ban Gu’s “Treatise.” While Tiying does figure in this section of her father’s biography, her appearance is abbreviated when compared to the “Treatise.” Even more truncated is Emperor Xiaowen’s response to her words.

<sup>48</sup> *Hanshu* 23.1097–1098.

<sup>49</sup> West 1993, pp. 254–55.

<sup>50</sup> *Ibid.*, p. 263.

<sup>51</sup> Despite the emperor’s abolishing of the mutilating punishments, they continued to be used by unscrupulous officials, according to Ban Gu.

<sup>52</sup> Hulswé 1993a and 1993b.

<sup>53</sup> See n. 45 above.

The text simply says, “When the memorial was heard, the Emperor was saddened by her sentiment. During this year (he) *also* abolished the laws (governing) mutilating punishments” (書聞上悲其意。此歲中亦除肉刑法。). In this retelling of Chunyu Yi’s tale, there is no definitive causal link between Tiyang’s plea and the abolishment of mutilating punishments.

It is odd that Chunyu Yi’s biography contains a slightly different version of the story as compared to the preceding Imperial Annals, suggesting that perhaps one of these versions may not have been written by Sima Qian. Fortunately, we have a further source for the Tiyang story, Liu Xiang’s, where Tiyang is eulogized along with other women who, through their rhetorical and persuasive talents, were able to eradicate evil.<sup>54</sup> Liu Xiang’s version of the tale closely approximates Ban Gu’s — among other similarities, it posits a direct link between Tiyang’s plea and the abolishment of mutilating punishments — and I suggest that this is the likely source of the “Treatise” narrative. There is, however, one important difference between the two that occurs after Emperor Xiaowen realizes his moral insufficiency and declares, “Let the mutilating punishments be abolished” (其除肉刑). Liu Xiang’s version of the story then continues with very specific legal reforms, e.g., the actual penal degrees to which certain convictions were to be mitigated. Ban Gu, however, chose not to include this information at this point, opting in favor of a rather less detailed statement. By providing only summary information regarding Xiaowen’s response, Ban Gu was able to fulfill his duty as recorder of legal acts without distracting the reader from the main function of the passage with a lot of “unnecessary” details. It was Ban Gu’s version of Liu Xiang’s version of the Tiyang story that I believe was reincorporated into the *Shiji*’s “Annals of Emperor Xiaowen.”

While the original appearance in Chinese literature of Tiyang’s narrative may not be of great consequence to this paper, what is of great consequence is the fact that Ban Gu chose to incorporate it into this “Treatise,” as well as the manner in which he did so. In fact, it is unlikely that Xiaowen ever heard Tiyang’s plea. The discrepancies in the several versions of this incident, especially as to the date of Xiaowen’s abolishment of mutilating punishments relative to the date of Chunyu Yi’s legal ordeal, suggest that the two events did not have a causal relationship. It is more likely that Tiyang’s plea (if it was indeed made at all) epitomized the sentiments of a segment of the general populace or officialdom at the time. However, Ban Gu would have us believe that the two events had a direct connection, and in presenting them in this way he advances his position on jurisprudence, thus strengthening his own plea for legal reform.

I believe that in Tiyang, with her emotionally guided response to her father’s arrest, Ban Gu found a comrade in arms. There is most certainly a personal dimension to Ban Gu’s affinity for the literary Tiyang. Early in his writing of the *Hanshu*, Ban Gu himself was arrested on false charges of privately altering the state history and was only released after his younger twin brother, the famous Han general Ban Chao, protested to the emperor on his behalf.<sup>55</sup> Fortunately, we need not rely on circumstantial evidence: Ban Gu himself provides direct proof of his admiration for Tiyang and all that her emotive actions stood for and presumably accomplished. Lest his “Treatise” be unable to convey his feelings on the subject, Ban Gu sought recourse in poetry, that which “speaks (one’s) will.”<sup>56</sup>

<sup>54</sup> Liu 1991, j. 6:13b–6:14b.

<sup>55</sup> *Hou Hanshu* 40A.1333–1334. This event occurred in the middle of Emperor Ming’s reign.

<sup>56</sup> The phrase *shi yan zhi* 詩言志 is first found in the “Shun dian” chapter of the *Shangshu* and later appears in Mao Heng’s 毛亨 (fl. Western Han) preface to his commentary on the *Shijing*.



三王德彌薄。惟後用肉刑。太倉令有罪。就遞長安城。

The inner moral potency of the three kings is increasingly meager.  
It is later (rulers) who employed mutilating punishments.  
The Director of the Imperial Granaries had (incurred) a criminal charge,  
And in the end was sent to the city of Chang'an.

自恨身無子。困急獨煢煢。小女痛父言。死者不可生。

He resented himself for being without sons,  
And thus, in his urgency, he stood alone.  
His youngest daughter was pained by her father's words.  
(And because) those who die cannot live (again).

上書詣闕下。思古歌雞鳴。憂心摧折裂。晨風揚激聲。

She sent up a memorial and went to the palace watchtower.  
I think of the rooster's crow in an ancient song.  
The troubled heart snaps and splits.  
The dawn breeze raises an urgent voice.

聖漢孝文帝。惻然感至情。百男何憤憤。不如一緹縈。

The sagely Han Emperor Xiaowen,  
In sadness, he is moved to reach the summit that is (his) feelings.  
One hundred sons, what confusion!  
They are not as good as one Tiying.<sup>57</sup>

Here, again, Ban Gu takes the opportunity to emphasize the extent to which Tiying's words (the dawn breeze's voice) can tug at the Emperor's heartstrings, causing him to respond sympathetically and to realize the moral deficiency not only within himself but also within the legal system of which he was an embodiment.

The line "I think of the rooster's crow in an ancient song" is very pointed. This reference is possibly directed at one or more of three poems in the *Shijing*, all of which may be termed love poems. The poem entitled "Ji ming" 《雞鳴》 (The Rooster Crows), from the "Airs of Qi" section, is a conversation that occurs at dawn between a couple as they awake. Their feelings for one another become apparent in the final stanza when the man says, "It would be sweet to dream together with you" (甘與子同夢), which may perhaps be understood as a reference to their common hearts and aspirations. "Feng yu" 《風雨》 (Wind and Rain), from the "Airs of Zheng," describes the happiness and fulfillment of two lovers reunited. Finally, in the last stanza of "Nü yue ji ming" 《女曰雞鳴》 (The Woman Said, "The Cock is Crowing!"), also from the "Airs of Zheng," the man pays homage to his partner by presenting her with various jades. While Ban Gu and Tiying were of two different eras, he paid homage to this woman, whose dreams he shared, by offering her not jade ornaments but a literary treasure.

<sup>57</sup> See the *zhengyi* 正義 commentary of Zhang Shoujie 張守節 (fl. 736) to *Shiji* 105.2795–2796.

## The Literary Character of Emperor Xiaowen and Ban Gu's Theory of the Nature of Law and Punishment

While awakening the emotional, compassionate core of the ruler is the essential starting point of legal reform, it does not in and of itself constitute such reform, nor even guarantee that reform will be realized. History tells us that humans believe punishments to be a necessary component for social control; however, they also believe these punishments should be applied sparingly so as not to wound the collective soul of society. Ban Gu illustrates this point through the use of imperial personages, most notable among them Emperor Xiaowen, whom we shall consider here, and in so doing he elucidates his own theory of punishment.

Upon reading the "Treatise," one is tempted to view Emperor Xiaowen as being the person whom, with regard to legal matters, Ban Gu holds in highest esteem among all the imperial personages in the text.<sup>58</sup> In spite of the fact that Emperor Xiaowen was not always able to live up to his ideal of government, the *Hanshu* portrays Xiaowen as a frugal man of the people, one of whose great concerns was the population's economic and personal well being. Toward the beginning of "The Annals of Emperor Xiaowen," the emperor bemoans the fact that in the spring the plants thrive and find contentment in their lives, while many of his people are widows, widowers, and orphans, and many more lack the wherewithal to feed and cloth themselves. Xiaowen exclaims, "What then does it mean to serve as the father and mother of the people?" (為民父母將何如).<sup>59</sup> He then orders that government doles be given to select sectors of the populace.

Ban Gu's "Summary" of Xiaowen's annals also eulogizes the emperor as one who finally brought peace and prosperity to the empire, and who ascended to the Way of the Han (*deng wo Han dao* 登我漢道).<sup>60</sup> While Ban Gu, in his "Summary," interestingly and tellingly did not credit Xiaowen with the abolishment of the mutilating punishments, he does list clarification of punishments as well as eliminating the execution of family members of convicted criminals as two of the Emperor's noteworthy successes. We also know that Xiaowen abolished onerous land taxes for much of his reign. However, it is not simply Xiaowen's legal reforms that are his claim to fame in Ban Gu's eyes. Rather, it was the motivation behind these accomplishments that enabled his legal behavior to garner praise. By way of illustration, let us examine the section of the "Treatise" that records Xiaowen's abolishment, albeit imperfect, of the punishment of joint responsibility.<sup>61</sup> Xiaowen's reasons

<sup>58</sup> It should be noted that while Xiaowen was probably justly credited for certain compassionate legal acts, it was his ministers, especially Zhang Shizhi 張釋之, who were the likely sources of softening the legal system; see *Hanshu* 23.1097 and Hulsewé 1955, p. 375 n. 154. Zhang Shizhi, Xiaowen's Commandant of Justice (*ting wei* 廷尉), is famed for his reluctance to overstep the laws. On two occasions, he disagreed with Emperor Xiaowen, who wanted to punish people more strictly than was warranted under law, suggesting that Xiaowen was not as humane as he was portrayed in later texts. See Zhang Shizhi's biography in *Hanshu* 50.2307–2312, especially *Hanshu* 50.2310 and 2311, and that in *Shiji* 102. For the purposes of Ban Gu's argument (as well as for his personal safety), however,

it was important for him to cast the emperor as the personage from whom morally enforced law emanated.

<sup>59</sup> *Hanshu* 4.113.

<sup>60</sup> *Ibid.*, 100B.4237.

<sup>61</sup> Although Xiaowen ended up abolishing the punishment of exterminating relatives, on at least one occasion he wanted a criminal to be so punished, even though the prescribed punishment for the offense (stealing a jade from an imperial temple) was public execution in the market place followed by exposure of the corpse and head (*qi shi* 棄市, literally, "casting off in the market place"). See *Hanshu* 50.2311. For the temporary abrogation of the punishment of joint responsibility, see *Hanshu* 23.1104–1105.

for this penal reform are enlightening not so much with regard to his theory of punishment, but more so (albeit indirectly) to Ban Gu's, who in this section of the text lauds Xiaowen's benevolence.

Xiaowen engaged in a persistent verbal battle with those of his ministers who favored retaining the punishment of joint responsibility, a battle that began in the first year of his reign when the Emperor issued an edict stating:<sup>62</sup>

法者。治之政。所以禁暴而衛善人也。今犯法者已論。而使無罪之父母妻子同產坐之及收。朕甚弗取。其議。

"The Law is the correct (instrument) for orderly government; it is the means whereby the violent are restrained whilst the good people are protected. At present, when those who have transgressed the law have already been sentenced, yet one, causing their guiltless fathers and mothers, wives, children, and brothers to be adjudicated for the (same crime), attain and arrest them. We very much do not (wish) to adopt this (practice). Let suggestions be made!"

Two noteworthy aspects of Xiaowen's edict are that: (1) Law, in addition to restraining cruelty, is also — and equally importantly — meant to protect the good; and (2) punishing guiltless people constitutes a breach, even an abuse, of law.

Xiaowen's ministers responded with an argument favoring such an extreme punishment, viewing it as a "means to hamper people's intentions and to cause them to consider transgressing the laws as something serious" (所以累其心。使重犯法也。)<sup>63</sup> Xiaowen brought this debate to a close when he stated:<sup>64</sup>

朕聞之。法正則民慤。罪當則民從。且夫牧民而道之以善者。吏也。既不能道。又以不正之法罪之。是法反害於民。為暴者也。朕未見其便。宜孰計之。

"We have heard that when the law is upright, then the people are honest; when crimes are matched (by correct punishments), then the people are compliant. Moreover, those who shepherd the people and lead them by means of goodness are officials. (But) since they are unable to lead (the people) and moreover use unjust laws to incriminate them, this is (a matter of) the law, on the contrary, inflicting harm on the people, and becoming something cruel. We have not yet seen the expediency of this. It is proper that (you) thoroughly consider this."

Xiaowen here spells out his thoughts more clearly. Punishments must exactly match the crime, and officials must not engage in procedural or other substantive abuses, even if those acts are legally sanctioned; unjust laws must not be applied. In this way, society can prevent law itself from becoming the very thing it seeks to restrain. The image of the shepherd leading, not coercing, the people along the path of honesty (*que* 慤) and compliance (*cong* 從) furthers the notions that law should be used: (1) to protect, not harm people, and (2) to bring out the best in people, not simply restrain the worst in them.

When taken together with the Tiyang narrative, Xiaowen's legal-political-personal philosophy provides Ban Gu with the building blocks for his own theory of punishment, a theory

<sup>62</sup> *Hanshu* 23.1104; Hulsewé 1955, p. 341, with slight emendation.

<sup>63</sup> *Ibid.*

<sup>64</sup> *Hanshu* 23.1104.

that approximates retributivism.<sup>65</sup> Central to retributivism is the notion of “proportionality” proposed by Hegel: the severity of the punishment should exactly match that of the crime. While retributivists acknowledge the difficulty in computing such an equation, they nonetheless believe that their attempts at so doing are preferable to the utilitarians, under whose schema punishment may be disproportionately severe, such that the innocent sometimes are inadvertently punished. Ban Gu prefers to err on the side of compassion, to let some guilty escape punishment if it means the innocent will not suffer punishment. Near the end of his “Treatise,” Ban Gu explicitly states, “Rather than kill an innocent (person), it is preferable to lose a guilty (one)” (與其殺不辜。寧失有罪。)<sup>66</sup>

Ban Gu specifically calls for the existence of harsh punishments, including the death penalty. However, the use of such punishments, especially the death penalty, should be judicious and just. Ban Gu lauds previous administrations on this front: “(regarding) verdicts in lawsuits that resulted in the death penalty, the average each year was but one person per thousand plus persons” (斷獄殊死。率歲千餘口而一人。)<sup>67</sup> Such a situation is possible when the ritual teachings are firmly established, the laws and punishments are clear, people are not impoverished, and officials do not function with their private interests first and foremost.<sup>68</sup> Specifically, with regard to punishments, they should restrain evil behavior. This opinion is expressed above, with Emperor Xiaowen’s edict concerning the abolition of joint liability. Ban Gu also repeats this theme later in the text, there quoting from Xunzi: “In all cases, as to the root of regulating penal (systems), it is in order to restrain violence and evil, and moreover to punish (criminal behavior) before (it arises)” (凡制刑之本。將以禁暴惡。且懲其 [未] 也。)<sup>69</sup>

Ban Gu stops short, however, of advocating deterrence as one of the qualities of punishment. As we saw above, those ministers who countered Xiaowen in his efforts to abolish joint liability advocated a deterrent element to punishments. The result was not simply punishments whose harshness exceeded the crime; in some cases, officials extrapolated from this theory to take the letter of the law to an extreme. This was true in Ban Gu’s time, when the death penalty was being exacted at alarmingly high rates. Such legal behavior was anathema to the original intent of punishments: ““Those of the present day who adjudicate lawsuits strive after means of killing (the accused). Those of old who adjudicated lawsuits, strove after means of keeping them alive”” (古之聽獄者。求所以殺之。今之聽獄者。求所以生之。)<sup>70</sup> Just as implementing a lenient punishment on a severe offender would be futile, so too

<sup>65</sup> There are two main theories of punishment, deterrence and retribution, and one lesser theory, reformation. However, it is Walker’s emendation of this standard categorization — whereby punishments are divided into utilitarian and retributive — that I find more instructive. Briefly, under utilitarian punishments fall those that aim at the deterrence of future crimes by the particular offender as well as other members of society, elimination or incapacitation of the offender, correction of the offender, and education of the public at large; retributivists, as the name suggests, aim to make the punishment fit the crime; see Walker 1991.

<sup>66</sup> *Hanshu* 23.1110.

<sup>67</sup> *Ibid.*, 23.1108.

<sup>68</sup> *Ibid.*, 23.1109. During the Qin and Han, even though there exist many documented examples in which official abuses of the law and procedural misconduct were tried and punished according to the law, there were enough instances of procedural misconduct escaping legal prosecution to cause Ban Gu and others to debate the causes of and solution to these problems. In an unpublished paper entitled “Ritual, religion and law in early imperial China,” Michael Lüdtke provides paleographic and textual evidence of the exercise of power according to the law, remedies against unjust action, the accountability of officials who do not apply the law, and the precedence of proper procedure.

<sup>69</sup> *Ibid.*, 23.1111.

<sup>70</sup> *Ibid.*, 23.1109.

is implementing overly harsh punishments one of the causes of great disaster; punishments must be “adequate to the crime” (*dang zui* 當罪).<sup>71</sup> When even one person “does not obtain equitable (justice),” due to official misconduct or inappropriate punishments, a true King “is grieved for him in his heart” (一人不得其平。為之悽滄於心。).<sup>72</sup>

Ban Gu’s abhorrence of the excessive use of punishments is highlighted by his lengthy foray into the military analogy to law in roughly the first half of the “Treatise,” wherein he is able to express his opposition to vengeance and his apparent advocacy of retributivism. He ends his summation of the Xunzi quote (in Section IV), the longest of all quotations in the text, with the very explicit warning that “(regarding) the power of retributive actions, in each (case) it comes according to the kind (of initial action taken); its way is just so” (報應之勢。各以類至。其道然矣。).<sup>73</sup>

Ban Gu, like Emperor Xiaowen, and even like the legalist Shang Yang 商鞅 (d. 338 BCE), was a reformist, one who saw the efficacy of changing laws to suit current needs or behavioral trends.<sup>74</sup> Yet unlike Shang Yang, Ban Gu was not willing to discard the past. The basis of his legal system combined the moral rectitude of past sagely rulers with the compassion inherent in all people; it would incorporate the ruler’s emotionally informed moral core supported by legal measures. This philosophy is also apparent in the summary of Ban Gu’s “Biographies of Cruel Officials” 《酷吏列傳》, where he argues in favor of the implementation of laws as “tools of government” (法令者。制之具。), but only in conjunction with ritual rules and inner moral potency.<sup>75</sup> It was with such established modes of social control that Ban Gu found palatable forces that could deter illicit behavior and make possible a humane legal system. It was from this angle that Ban Gu approached the emperor with his proposal for reform.

## Conclusions

In his discussion on modern historical writing, Louis Kampf noted the following: “It has too often been said that the distinguishing mark of modern historical writing is its emphasis on fact. The reverse is closer to the truth: Only as the exclusive emphasis on fact begins to lose its importance will real historical concerns be ready to appear. For only then do we become capable of dealing with the nature of development itself, rather than casually assuming that the listing of a succession of events implies a developmental sequence.”<sup>76</sup>

By this definition, Ban Gu was an historian of the first rank. We return to the beginning of this paper and to the first line of Ban Gu’s summary of the “Treatise”:

When thunder and lightening together arrive,  
Heaven’s stern majesty terrifies and is dazzling.

This line undoubtedly was inspired by the twenty-first hexagram of the *Zhouyi* 《周易》, or *Book of Changes*, “Shi he” 噬嗑 (Biting Together), and in particular the *Commentary on the Judgment* and the *Commentary on the Images*:<sup>77</sup>

<sup>71</sup> *Hanshu* 23.1111.

<sup>72</sup> *Ibid.*, 23.1109.

<sup>73</sup> *Ibid.*, 23.1089.

<sup>74</sup> On Xiaowen’s reformist policies, see *Hanshu* 23.1099.

<sup>75</sup> *Hanshu* 90.3645.

<sup>76</sup> See Kampf 1967, p. 80; quoted in Wang 1977, p. 16.

<sup>77</sup> *Zhouyi zhengyi* (Kong 1986), j. 3.6b–3.7a. See also, commentaries to *Hanshu* 100B.4242.

噬嗑。  
振下離上。亨。利用獄。

Biting Together  
Zhen (thunder trigram) below and li (separation trigram) above.  
Constancy.  
It is beneficial to employ litigation.

《象》曰。  
頤中有物。曰噬嗑。  
噬嗑而亨。  
剛柔分。動而明。  
雷電合而章。  
柔得中而上行。  
雖不當位。利用獄也。

The *Commentary on the Judgments* says:  
When there is matter between the cheeks, this is called “biting together.”  
Biting together there is constancy.  
Hard and soft are divided.  
When the soft takes action, the hard is enlightened.  
Thunder and lightening, by uniting together, are brilliant.  
The soft (one), obtaining to the central (position), moves upward.  
Although it does not suit the position, it is (none the less) beneficial for (employment of) legal matters.

《象》曰。  
電雷噬嗑。  
先王以明罰敕法。

The *Commentary on the Images* says:  
Thunder and lightening bite together.  
The former kings in this way clarified punishments and rectified the law.

The image of awe inspiring thunder and lightening serving as the model for the former kings' creation of legal mechanisms is that by which lawsuits are properly conducted. Although not generally accepted as appropriate to the position, a certain amount of softness, pliability, femininity is necessary to the just implementation of legal measures. When this softness is embraced, the male superior will be enlightened and all will benefit.

While narrative jurisprudence does not concern itself with the question of outcome, there is nonetheless tantalizing evidence to suggest that Ban Gu found a sympathetic ear in Emperors Ming and Zhang, rulers whose collective reign, referred to as the “Golden Age of the Eastern Han,” is still eulogized for its diligence in affairs of state and unwavering integrity among both the rulers and their officials. However, success in the literary context should rather be measured by asking whether or not Ban Gu created a viable piece of literary jurisprudence. I believe the answer to this question is affirmative. In Tiying, the “soft” one who “moves upward,” enabling litigation to be beneficial, we find West’s “literary person” who “helps us understand others...to sympathize with their pain” who “makes us more moral... makes us better people.” To repeat, “she represents our potential for moral growth. She is the possibility within all of us for understanding, for empathy, for sympathy, and most simply, for

love,”<sup>78</sup> or, in the words of Ban Gu, for *ren* (benevolence), *ai* (love), *de* (inner moral potency), and *rang* (yielding).

It is ironic that the man who rallied in support of emotional, heart-felt discretion to constitute the touchstone of legal acts and measures and who stood against legal abuses on the part of corrupt officials, who revered the actions of a youngest daughter and who clearly favored the abolishment of the punishment of joint responsibility, died in prison after having been arrested because of his association with Dou Xian 竇憲 (d. 92 CE), a Han general who committed suicide after his clan was ousted by Emperor Zhang’s successor, Emperor He 和.<sup>79</sup> It is also ironic that he had a younger sister who, like Tiying, distinguished herself in Chinese history for coming indirectly to the aide of her father.<sup>80</sup> While it is not clear whether Ban Gu’s legal ideal was realized in his time, when the “Xing fa zhi” is read as a piece of narrative jurisprudence, it becomes at once a “*treatise*” on penal law and models as well as a lasting record of Ban Gu’s own “*volition*” on the subject.<sup>81</sup>

---

<sup>78</sup> West 1993, p. 263.

<sup>79</sup> In 89 CE, Ban Gu had accompanied Dou Xian on a campaign against the Xiong Nu in the north, serving as Army Supervisor (zhong hu jun 中護軍), the assistant to the General in Chief during campaigns. However, Ban Gu was expelled from office when Dou Xian was defeated. In 91 CE, the Dou clan was ousted by the young emperor He, who had grown tired of ruling under the direction of the Empress Dowager Dou. Dou Xian committed suicide, and Ban Gu was arrested because of his association with him, and was incarcerated in Luoyang, where he died in prison. See Hou Hanshu 40B.1385–1386.

---

<sup>80</sup> Ban Biao 班彪 (3–54 CE) began the *Hanshu*, but completed very little of it before he died. The project was then taken over, first unofficially and later with imperial support, by Ban Gu. His sister, Ban Zhao 班昭 (45–116 CE), completed the few portions of the *Hanshu* that Ban Gu was unable to finish prior to his untimely death, thus fulfilling their filial duty to their father.

<sup>81</sup> The word *zhi* 志 means “volition, will.” It can be also read as “record, treatise,” where it stands for the orthographically more complex 誌. The word *fa* 法 can mean “law” or “model.”

## Bibliography

- Birrell, Anne  
1993 *Popular Songs and Ballads of Han China*. Honolulu: University of Hawaii Press.
- Hulsewé, Anthony F. P.  
1955 *Remnants of Han Law*. Leiden: Brill.  
1993a "Hanshu." In *Early Chinese Texts: A Bibliographic Guide*, edited by Michael Loewe, p. 301. Early China Special Monograph Series 2. Berkeley: Early China Special Monograph Series.  
1993b "Shiji." In *Early Chinese Texts: A Bibliographic Guide*, edited by Michael Loewe, p. 406. Early China Special Monograph Series 2. Berkeley: Early China Special Monograph Series.
- Hursh, John  
2013 "A Historical Reassessment of the Law and Literature Movement in the United States." *GRAAT* online Issue 14, June 2013.
- Kampf, Louis  
1967 *On Modernism*. Cambridge: Cambridge University Press.
- Kinkley, Jeffrey C.  
2000 *Chinese Justice, the Fiction: Law and Literature in Modern China*. Redwood City: Stanford University Press.
- Kong, Yingdai  
1986 *Zhouyi zhengyi*. Taipei: Chung Hwa Book Company.
- Levinson, Sanford, and Steve Mailloux, editors  
1988 *Interpreting Law and Literature: A Hermeneutic Reader*. Evanston: Northwestern University Press.
- Liu, Xiang  
1991 *Lie nü zhuan*. Beijing: Zhongguo shudian.
- Lüdke, Michael  
Ritual, Religion and Law in Early Imperial China. Unpublished.
- Morawetz, Thomas  
1996 "Law and Literature." In *A Companion to Philosophy of Law and Legal Theory*, edited by Dennis Patterson, pp. 450–61. Oxford: Blackwell Publishing.
- Patterson, Dennis, ed.  
1996 *A Companion to Philosophy of Law and Legal Theory*. Massachusetts: Blackwell Publishers.
- Plaks, Andrew J., with Kenneth J. DeWoskin  
1977 *Chinese Narrative: Critical and Theoretical Essays*. Princeton: Princeton University Press.
- Porter, Deborah L.  
1996 *From Deluge to Discourse: Myth and the Generation of Fiction in China*. Albany: State University Press of New York.
- Posner, Richard A.  
1988 *Law and Literature: A Misunderstood Relationship*. Cambridge: Harvard University Press.
- Scholes, Robert, and Robert Kellogg  
1966 *The Nature of Narrative*. Oxford: Oxford University.
- Skosey, Laura A.  
1996 *The Legal System and Legal Tradition of the Western Zhou (ca. 1045–771 B.C.E.)*. PhD dissertation, The University of Chicago.
- Walker, Nigel  
1991 *Why Punish?* Oxford: Oxford University Press.
- Wang, John C. Y.  
1977 "Early Chinese Narrative: The Tso chuan as Example." In *Chinese Narrative: Critical and Theoretical Essays*, edited by Andrew H. Plaks, pp. 3–20. Princeton: Princeton University Press.
- Weisberg, Richard H.  
1984 *The Failure of the Word: The Protagonist as Lawyer in Modern Fiction*. New Haven: Yale University Press.
- West, Robin  
1993 *Narrative, Authority, & Law*. Ann Arbor: University of Michigan Press.



- White, James B. Zhonghua Shuju, editor
- |      |  |      |                              |
|------|--|------|------------------------------|
| 1973 | <i>The Legal Imagination</i> . Chicago: University of Chicago.         | 1973 | <i>Hou Hanshu</i> . Beijing. |
|      |  | 1987 | <i>Hanshu</i> . Beijing.     |
| 1984 | <i>When Words Lose Their Meaning</i> . Chicago: University of Chicago. | 1998 | <i>Shiji</i> . Beijing.      |
- Yu, Anthony C.
- 1988 "History, Fiction and the Reading of Chinese Narrative." *Chinese Literature: Essays, Articles, Reviews* 10/1: 1-19.

Section II

The Ancient Near East:  
Law, Administration,  
and Economy



# Women and Household Dependents in Ur III Court Records

*Laura Culbertson, American Public University\**

## Introduction

The Ur III state of late third millennium Mesopotamia is often characterized as patriarchal. Society and economy consisted of interlocking networks of households (Sumerian  $e_2$ )<sup>1</sup> and men managed most, but not all, of the households. It was once suggested that early state formation entailed the full subjugation of women.<sup>2</sup> However, some scholars noted problems with patriarchal approaches to the Ur III state, such as the danger of ignoring the participation of non-male members in society.<sup>3</sup> A challenge for any approach to gender in the Ur III period is that women and slaves are less visible in the textual records compared to free men, obscuring gender dynamics. Also, Ur III state and society are difficult to separate given that the state consisted of networks of participation and alliances woven through marriages and economic integration, and that most of the records and their depiction of society served the interests of the state. In addition to the challenge of accessing women, we face the impossibility of recovering a complete picture of their social and political context.

This chapter is a short survey of the participation of women and household dependents, such as slaves, in one dimension of the Ur III state: legal practices. Court records from this period contain reports of disputes, which represent moments when a person's status and role in society and state could change. These records can thus indicate the limits and extents to which women and household slaves had agency in society or within their families and households. As one might expect, the survey shows that gender, which was not a formal legal category, cannot in isolation illuminate the relationships among disputants in this period and was not the sole factor determining the rights and roles of people participating in dispute resolution. In the Ur III cities of Girsu and Umma, women's participation in dispute resolution was determined by their position in the context of family and household and the wealth and status of that household.

---

\* Shortly before this article went to press, the author obtained the important new volume *The Role of Women in Work and Society in the Ancient Near East* (Lion and Michel 2016, editors). Citations are included where possible.

---

<sup>1</sup> Garfinkle 2008.

<sup>2</sup> Rohrlich 1980.

<sup>3</sup> See, for example, Wright 2008.

Compared to other periods of Mesopotamian history, free women and household slaves in the Ur III period exercised a somewhat higher degree of participation and agency in court and public proceedings.<sup>4</sup> They could inherit property, perhaps initiate court proceedings in special circumstances, and represent their interests in court, although it may be difficult to disentangle personal interests from the interests of the household or family. Their participation was not based on the same experiences and entitlements held by free men. As Harriet Crawford put it, women lived in a kind of “parallel universe” that could intersect with the world of men but not with completely identical interests, rights, or parameters.<sup>5</sup>

As mentioned, the sources for this investigation are mainly court records.<sup>6</sup> Even though it lasted only a century (ca. 2100–2000 BCE), the Ur III state yielded hundreds of thousands of administrative and economic documents. Despite the high volume of sources, uneven coverage of contexts and activities limits access to Ur III society, and most documents concern economic activities. Around 400 documents report the results of dispute resolution gatherings held in the provincial cities of Girsu and Umma, as well as a few from Ur and Nippur. Many of the texts open or conclude with the Sumerian *di-til-la* meaning “case closed” — with some irony, given that disputants revisited many cases repeatedly as disputes did not permanently conclude with one resolution session. According to dates on the documents, the archives of court records span nearly four decades, from the later decade of king Šulgi’s reign to the first few years of the reign of the dynasty’s final king, Ibbi-Sin.

The court records involve a variety of people from the Umma and Girsu urban societies, including all kinds of occupations: musicians, gardeners, doctors, shepherds, brewers, tailors, smiths, barbers, architects, archivists, priests and priestesses, etc. Some of these people served as both disputants and court officials along with provincial, military, and royal authorities; the composition of Ur III “courts” changed from one session to another. The records implicate women and other household members like slaves and minors by name more often than other types of records do. Prosopography helps reconstruction of the relationships among people of different genders, classes, ages, occupations, affiliations, and within and among households.

A more formal source on law for this period is the so-called Laws of Ur-Namma (LUN).<sup>7</sup> This royally commissioned work includes entries of “laws” that are “either aspirational or reflections of social and legal practice or reality.”<sup>8</sup> The laws reflect the point of view of the economic rights of free men, but laws disclose that daughters, wives, wives-to-be, and household slaves of free men had protected legal statuses as determined by their relationships to free men.

---

<sup>4</sup> Compared to, for example, Neo-Babylonian records. Ur III society of course pre-dates many social and political upheavals and changes in legal practices. Laws and gender norms of later periods should not be read back into Ur III documentation. For a summary of imposition of restrictions on women’s rights and mobility, see Crawford 2014, pp. 23–24.

<sup>5</sup> Crawford 2014.

<sup>6</sup> Some sources for the court records in which full citations can be found are Falkenstein 1956–1957; Culbertson 2009; Molina 2004; 2008; 2010; and 2014. Throughout the paper the cited records are identified by museum number or, if relevant, a publication

---

containing transcription or translation. Records cataloged in Falkenstein’s authoritative work, *Die neusumerischen Gerichtsurkunden*, are identified according to his numbering with the designator NG. We don’t have many court records from cities other than Girsu and Umma, and our picture is woefully incomplete.

<sup>7</sup> For a recent edition of the LUN, see Civil 2011. Wilcke 2014 expounded on this edition and compared parts of the LUN to court records. See also Roth 2014, pp. 148–49 for a sample of relevant entries concerning gender.

<sup>8</sup> Roth 2014, p. 144.

The following sections consider the general state of what is known about women in the Ur III period, the challenges of studying gender in the court records, and a survey of women's access to court proceedings. The examples of widows and a musician family from Girsu help illustrate the roles women could take on. It should be mentioned that the households represented by the court records under discussion are not representative of all areas of Ur III society but mostly reflect urban households of Girsu and Umma and the better-off families who lived there.

## General Comments on Women and Slaves in the Ur III Period

As we should expect, Ur III women did not comprise one social group that shared a collective identity within the state, the upper echelons of the urban political economy or administration, the labor force, or the law; men also did not share a collective identity. As shown by numerous scholars using a variety of approaches, women in the Ur III period participated in political, administrative, and economic life along with men, appearing to various degrees in all levels of society, even if their contributions are not always accessible in the textual record.<sup>9</sup> Women ran large and small households or estates, managed property, employed workers, performed bureaucratic functions, wielded seals, supervised laborers, held mid-level administrative positions, and had high-ranking, public careers.<sup>10</sup> Apparently, no cultural norms categorically prevented women from serving in such roles.<sup>11</sup> At the lower strata of society, women participated in the labor force alongside men.<sup>12</sup> Thus, a strict sex-based division of labor has been challenged.<sup>13</sup> Additionally, it has been suggested that the idea of a clean bifurcation of public and private spheres along male and female gender lines is outdated.<sup>14</sup>

Slaves also did not comprise one unified social, legal, or economic category during the Ur III period.<sup>15</sup> Many categories of unfree or dependent status are known, ranging from permanent to temporary household slaves, to prisoners of war, to laboring men, women, and families dependent on state or other institutions. Slaves in the urban households attested in the court records probably shared little of the experiences of state dependents and workers, who are not much attested in court records except in a few disputes involving their supervisors. Most wealthy households included at least one slave.<sup>16</sup> The origin of household enslavement varied and could be the result of debt, punishment for a crime, or status established at birth to slave mothers. Slaves in the context of urban elite households could speak for

---

<sup>9</sup> See, to name but a few studies: Michalowski 1976; 1979; 1982; Van De Mieroop 1989; 1999; Bahrani 2001, pp. 108–09; Roth 1998; Wright 2008, p. 271; Garcia-Ventura 2014; 2016; Asher-Greve 2013; Lafont 2013a; 2013b; and Crawford 2014. Lafont 2016 surveyed the evidence for women's contributions to labor with comments on the "invisible" forms of labor they performed in households. Nowicki 2016, pp. 42–44, overviewed attestations of women and royal women in royal inscriptions and the terminology associated with them.

<sup>10</sup> All of these roles have been illuminated thanks to the reconstructions and studies of the Garšana and Iri-Sağrig archives. On Garšana, see Owen and Mayr 2007 and the contributions in Owen 2011. For a syn-

---

opsis of female functionaries at Iri-Sağrig, see Owen 2013, pp. 125–27. See Lafont 2016, pp. 151–53, for comments on both.

<sup>11</sup> Wright 2008, p. 268.

<sup>12</sup> Adams 2010 discusses the evidence from Garšana, for example.

<sup>13</sup> Garcia-Ventura 2014; 2016.

<sup>14</sup> Lafont 2013a.

<sup>15</sup> See Adams 2010 and Neumann 2011 for sources on slaves in private households and their socioeconomic role in the Ur III period, and Culbertson 2011 for the rights of household slaves, including children, in court proceedings.

<sup>16</sup> Neumann 2011, p. 22.

themselves in court proceedings. This is not necessarily a legal entitlement, but a contextual one originating in cases when their status vis-à-vis a household was unclear or when they faced accusations of wrongdoing.

Even though some Ur III women and unfree persons had more access to court proceedings than those of other ancient Near Eastern contexts, we should avoid a depiction of Ur III gender equality or of women enjoying unrestricted mobility and freedom. The women and slaves attested in our sources operated within the bounds of their status and households as prescribed by the statuses of husbands, mothers and fathers, or sons. It is not clear from the court records if independent or unattached women had rights in provincial court systems. Daughters and slaves were subject to the affairs of their fathers and mothers. For example, fathers could use their daughters as pledges and enslave them to work off a debt for the household and a good number of female household slaves originated by this situation.<sup>17</sup> Before examining cases of women and household slaves in court proceedings, some notes on how to identify them are needed.

## Problems of Accessing Gender in the Court Records

As mentioned, court records offer comparatively greater inclusion of household members, but identifying gender in these records is not always straightforward. This is firstly because gender is not at the forefront of the legal cases or matter under dispute. Roth discussed the complex of factors that define a person's position in the law, or in this case in dispute resolution, noting that "a wide range of tangible and intangible factors such as citizenship, wealth, age, family position, as well as gender, combine in often subtle and unexamined ways to produce an individual's standing in the law as 'legal subject.'"<sup>18</sup> The laconic court records do not expound on such complexes of factors. Second, gender identifiers in the court records are not abundant or perhaps not obvious to someone well removed from the community, for reasons beyond the fact that Sumerian grammar does not include male-female gendering. In general, words indicating gender appear in the court records to establish a relationship between two or more people involved in a dispute. A third problem is that relationships among women and between women and their husbands, siblings, and sons are legally explained and presented according to their relationship to their household head (even after he has died) or another male family member.

Two things help us identify a court participant's gender (at least male and female genders): their roles in the court proceedings and terminology. Free men occupied the roles of court officials: judges, institutional witnesses (*maškim*), scribes, and other functions such as the "people who stood at the case."<sup>19</sup> Governors (all male) also served the function of judge in both Umma and Girsu. But in the Ur III period, both men and women could appear as witnesses, oath-takers — which often served the role of evidentiary witnesses — and disputants, as both "plaintiffs" and "defendants." Slaves could also serve as witnesses and disputants.

Words indicating gender relationships in the court records include:

<sup>17</sup> Culbertson 2011.

<sup>18</sup> Roth 1998, p. 174.

<sup>19</sup> Regarding the lists of persons identified as *lu<sub>2</sub>-ki-ba-gub-ba* at Umma ("men who stood at the place,"

meaning "the persons present") and *lu<sub>2</sub>-marza* at Girsu, it may generally be assumed that these persons were male because they were listed as occupying high-ranking military roles (see Molina 2014, pp. 128–29).

- Siblings: nin<sub>9</sub> (sister), šeš (brother)<sup>20</sup>
- Slave/servant: geme<sub>2</sub> (female), arad<sub>2</sub> (male)
- Daughter-in-law, daughter-in-law status: e<sub>2</sub>-gi<sub>4</sub>-a, nam- e<sub>2</sub>-gi<sub>4</sub>-a<sup>21</sup>
- Son-in-law, son-in-law status: mussa, nam-mussa
- Widow: nu-mu-SU/kuš<sup>22</sup>

Words not specific about gender and requiring interpretation from context include:

- dam (male or female spouse)<sup>23</sup>
- dumu (male or female offspring)<sup>24</sup>
- lu<sub>2</sub> (person)<sup>25</sup>

Though listed here, the terms for male and female siblings and slaves are not always present in the highly abbreviated records. Terms like “son-in-law” can help, but this term is not a formal legal category that defines a man’s status. Rather, it is means of describing the relationship between disputants in a particular moment of transition and confirmation in court. This particular term appears in only three cases to clarify relationships.<sup>26</sup> One example is:<sup>27</sup>

Ur-Šulgira swore by the name of the king regarding son-in-law-ship (nam-mussa) for Nin-azu. He (Ur-Šulgira) said, “Amagina is my spouse (dam).” Before Anini, before Lugalhegal the goldsmith. Agi and Uda will swear. They were the witnesses to the oath of the king.

In this case, the use of nam-mussa established the relationship between Ur-Šulgira (male) and Ninazu, the mother of Amagina who he promised to marry. We are given no hints about the genders or identities of those who swore the oaths, nor about their relationships to the others.

We have been well cautioned not to read gender assumptions into cuneiform documents.<sup>28</sup> But this can be challenging when gendering Sumerian names. In the court record NG 126, a participant is mentioned by the name of <sup>1</sup>Lu<sub>2</sub>-hu-wa-wa geme<sub>2</sub> Ur-<sup>d</sup>Ba-ba<sub>6</sub>, “Lu-Huwawa, female

<sup>20</sup> Siblings are only differentiated by gender when it relates to the case under dispute. An example appears in BM 106540, in which a brother swears nin<sub>9</sub>-mu-um “she is my sister” and denies that the sister has been sold into slavery (line 3, Molina 2008, p. 135). BM 023678 concerns a brother and his enslaved sister in court (text 4 in Molina 2004). See also RLM 41. If siblings are listed together — to serve as witnesses or collectively represent their claim in an inheritance, for example — both brothers and sisters are together but not differentiated in the text by gender (for example, NG 75:18–20 or NG 99). In many cases, siblings are not listed but subsumed under dumu or dumu-ni, “his/their children.”

<sup>21</sup> See Civil 2011, p. 255. These terms are rare in court records. See NG 29:15’.

<sup>22</sup> An example is in NG 6:2.

<sup>23</sup> And related terms like dam nu-tuku, “unmarried” (NG 166:15).

<sup>24</sup> In only a few instances, dumu-nita<sub>2</sub>, “male offspring/heir,” and dumu-munus, “female offspring,” are attested. These are listed together when referring to

the offspring of slave parents and slave families; see NG 44, 83, 117. The latter term also appears in NG 205:27.

<sup>25</sup> This relates to its use in personal names and in terms like lu<sub>2</sub>-inim-ma, “witness.” Also, before the Ur III period, lu<sub>2</sub> meant “person” and not “man” in lawsuits (Wilcke 2007, p. 42: “There is no restriction according to gender”). Westenholz and Zsolnay 2017, pp. 24–26, discussed the meaning of lu<sub>2</sub> as “person” in Sumerian records with reference to LUN.

<sup>26</sup> NG 18, the fragmentary NG 167, and BM 106498.

<sup>27</sup> BM 106498, in Molina 2010, p. 214.

<sup>28</sup> Roth 1998 and Van De Mieroop 1999, p. 144. As Van De Mieroop explained, “the gender of the person is not always clear, especially with names in the Sumerian language, which does not distinguish grammatically between the masculine and feminine... Moreover we know that some names could be given to both men and women in the same coherent group of texts”. He added that preconceptions have led Sumerologists to interpret gender-ambiguous names according to their assumptions about where the boundaries between male and female realms fall.



slave of Ur-Baba.” The rarely attested personal name Lu-Huwawa may strike modern specialists as masculine given the inclusion of  $lu_2$  and onomastic conventions of Semitic names (used as “man” for Akkadian *awīl*- in masculine names). Huwawa is a masculine creature, but studies in Sumerian onomastics have shown that male and female personal names could invoke both male and female deities.<sup>29</sup> In any case, the designation  $gme_2$ , “female slave,” indicates the person named Lu-Huwawa is not male.<sup>30</sup>

Reading gender into the names can have bearing on how we interpret the court cases. One simple example of this concerns  $^dBa-ba_6-ib_2-gu-ul$ , a name that appears several times in the court records. Names including a theophoric element referring to local goddess Baba/Bau belong to both men and women in the Ur III period. If the same name appears in multiple texts, we can search for gender identifiers by looking at the context and case, comparing examples where possible. Two examples of attestations of  $^dBa-ba_6-ib_2-gu-ul$  involve contestations over the sale of slaves by this name. Adam Falkenstein touched on the ambiguity of the name, explaining that most people of the name in question were female, though there was one case in which he found the gender to be unclear:<sup>31</sup>

Case closed. Uršugalama son of Utumu bought Baba-ibgul from Šeškala son of Lugalazida for the full price of [x] shekels of silver in the year Zabšali (was destroyed).

The same name appears in NG 94, for which Falkenstein argued that the name is “clearly used as a male name here”:<sup>32</sup>

Case closed. (Regarding) Baba-ibgul dumu Ur-Lamma, male slave ( $arad_2$ ) of Ursaga, overseer throne-bearer, Urgala son of Šagube said, “I bought him/her”.

The reason for his interpretation of this slave’s gender is the slave’s patronymic, which indicates an enslaved father. Perhaps the link to an important official adds more importance to the origin and affiliations of the slave. However, female slaves under contestation are also named with or without patronymics and matronymics in the same manner of both cases, so there is not a fail-proof basis for assigning different genders to one  $^dBa-ba_6-ib_2-gu-ul$  or another unless more about the context is given.

## Participation in Court

Women and household slaves appear in court records by name with striking frequency compared to other types of documents. But with the above considerations in mind, it should be

<sup>29</sup> di Vito 1993, pp. 19, and Van De Mierop 1999, p. 143.

<sup>30</sup> Lines 12–13 of the tablet also reiterate this: Ba-zi dumu Šeš-šeš-ra /  $Lu_2$ -Hu-wa-wa nam- $gme_2$ -ni-še<sub>3</sub> ba-an-na-sum. Falkenstein (1956–1957, p. 216) remarked that Lu-Huwawa “als Frauenname ist auffällig” and noted that the name  $^dBa-ba_6-lu_2-ša_6$  also contains  $lu_2$  while ostensibly referring to a woman as attested in the fragmentary NG 199 iv 3’–4’: “[Na]m-tar- $ib_2$ -du<sub>7</sub> has married  $^dBa-ba_6-lu_2-ša_6$ , the offspring of [U]r-Nanše.” The name in question appears where the name of the daughter-turned-wife’s name typi-

cally appears in the court records’ marriage formula. Another name illustrating a need for caution is Da-ga. The name appears for a person involved in the sale of a slave (NG 176) and as oath-swearing witnesses in various cases (for example, NG 182), which could presumably refer to male roles. But the first case of the Sammeltafel NG 166, the name (da-ga dam šeškal-la) refers to a woman who took an oath to solidify a marriage agreement.

<sup>31</sup> Falkenstein 1956–1957, p. 151 n. 2, in discussion of NG 92:1–7.

<sup>32</sup> *Ibid.*, p. 153 n. 2.

clear that the precise gender ratio of participants in the attested court cases of Ur III Girsu and Umma is undeterminable. Because the court records implicate so many different members of households, many personal names are unattested outside this corpus, particularly names of household slaves, minors, younger siblings — people not explicitly involved in the state economy or administration. But we can survey the ways women and slaves participated in urban court proceedings in this context. As mentioned already, women could participate in the court system in some of the same ways as men. A prevailing assumption is that they did not adjudicate cases, serve as judges, or serve court functions such as the institutional witness (*maškim*), and I am not aware of an exception. However, both free women and female domestic slaves participated in all other roles: as disputants, witnesses, and taking oaths that were decisive in winning or ending a dispute. They appear alone or alongside husbands, brothers, sisters, or mothers. They won and lost cases, and there is no clear correlation between success or failure in court and one gender category.<sup>33</sup>

One reason to find women as actors in the court system is their expanded roles in urban society and economy, as mentioned above. The business and political ventures of elite women in particular would entail situations vulnerable to dispute.<sup>34</sup> Women who held offices in the temples could be implicated in disputes.<sup>35</sup> The fact that women could buy and sell slaves independent of their husbands also meant they were implicated in disputes if the sales went wrong.<sup>36</sup> Moreover, women retained rights over the minors of the household and their children and could sell their own children if economic emergency required it.<sup>37</sup>

In the course of court proceedings themselves, women are attested as performing the same functions as men save for the restricted positions mentioned above. As for whether they could initiate disputes, the phrasing of some court records implies this possibility. For example, the second case of NG 202 presents a case that must have been initiated by Sagkisa:

Sagkisa, wife (*dam*) of Lugalmea, declared (in court): “Ur-Dumuzida has killed Lugalmea my husband (*dam*).” Ur-Dumuzida brought up witnesses that he did not kill him.<sup>38</sup>

<sup>33</sup> Frankly, the reports are often too short to pry nuances about gender from them. NG 172:14'–17', for example, reports simply that *dam ab-ba-gi-na*, “spouse of Abbagina,” disputed with Ur-Baba over ten shekels and won.

<sup>34</sup> Women are attested in disputes over interest they are personally owed, as in NG 142, for example. The situation is perhaps most visible in a handful of cases in which a woman represents herself in court while her husband is still alive. NG 210 i 12'–ii 6' perhaps includes a case of a woman involved in a dispute — at least we might follow Falkenstein in assuming the person in question is female. She is identified as *Zi-ig-zi-ig dam Ur-gar gudu<sub>4</sub>*, “Zigzig spouse of Urgan the *gudu<sub>4</sub>-priest*” (name unattested elsewhere). Zigzig was involved in a slave sale. The key information of the case is missing, but the resolution of the report tells that *Zi-ig-zi-ig u<sub>3</sub> dam-ni nam-erim<sub>2</sub>-am<sub>3</sub>*, “Zigzig and her spouse swore the oath.” This suggests that her husband is alive and can support her interests in court, while Zigzig herself was the main actor of this dispute and economic transaction that set the dispute in motion.

<sup>35</sup> NG 115, for example, which involves a dispute among priests and priestesses over some linens. See also the first case in NG 78.

<sup>36</sup> Examples include BM 105369 (Molina 2008, p. 132) and NG 83, in which the slaves were purchased from a governor in the case prehistory. The crux of such dispute resolution proceedings was proving that the slaves were acquired independently of the household head's estate. Wives could also bequeath slaves independently of their husbands and represent such decisions in court, as attested in NG 171.

<sup>37</sup> See, for example, BM 106439.

<sup>38</sup> I follow Falkenstein's assumption that Sagkisa is female (1956–1957, p. 332). Other cases involving women as primary disputants include these examples: NG 44, 45, 96, 115, 136, 141, 142, 150, the first case of 179, 180, 182, the second case of 193, BM 106451, and others. The cases are united by having the initiating disputant identify as “spouse” (*dam*) of someone. Free men did not have to identify by their wives.

The construction of the report places Sagkisa as the initiator of the accusation and dispute; presumably Ur-Dumuzida, accused of murdering Lugalmea, would not initiate proceedings. Disputes typically ended when judges confirmed the status of a contested item or person, or when a disputant took an oath to solidify his or her claim or position in the dispute. Women performed such oaths, sometimes pairing with their husbands to swear along with them,<sup>39</sup> and they could play a decisive role in ending a dispute by offering a confirmation<sup>40</sup> or by paying recompense.<sup>41</sup> Not only are women attested as witnesses,<sup>42</sup> but a few also held power to reject the testimony of other witnesses in court proceedings, forcing their opponents into taking oaths.<sup>43</sup> Like male disputants, women were asked by judges to produce sale records with fixed time frames in disputes over sales, though it is not clear if judges demanded written documentation from women more often than from men.<sup>44</sup> In cases of divorce, women could use the court to demand settlements from their husbands and successfully receive such demands.<sup>45</sup>

Women used court proceedings to direct the fates of their children and preserve the household, with or without a living husband. Both husbands and wives played a role in approving the marriages of their children.<sup>46</sup> This implies some degree of shared authority over household membership, though not necessarily equality. After the death of her husband, a woman could use the courts to defend the status of herself and her children.<sup>47</sup>

Remarkably, male and female household slaves spoke for themselves in court to issue claims of freedom.<sup>48</sup> In many cases, this occurred because a household head had died, opening a moment at which their statuses were contestable. Slaves are also attested as having raised disputes about their own sale.<sup>49</sup> In a few cases, household slaves were implicated in court for reasons related to their expanded roles in urban life.<sup>50</sup> One interesting example is found in NG 126, reporting the dispute between two slaves (one of whom is the above-mentioned Lu-Huwawa geme<sub>2</sub>) — and by extension their owners — over the fate of a garment or dress:

Lu-Huwawa the (female) slave of Ur-Baba, the doctor, stole a garment of Bazi the offspring of Šeššeš and later brought it back. “Lugalurdu the (male) slave of Bazi gave it to me,” she declared (in court). Lugalurdu swore in the temple of Ninmara that he did not give her this garment. Bazi, the offspring of Šeššeš, has been given

<sup>39</sup> NG 185 contains an example.

<sup>40</sup> NG 42 contains an example.

<sup>41</sup> A likely example of a high-ranking woman exerting a role in disputing is found in BM 106442, dealing with missing goats, and the promise of Ninkuli to make recompense and end the dispute (she pays three times the number of missing goats). On Ninkuli's gender see Culbertson 2009, p. 205 n. 11.

<sup>42</sup> Examples are found in NG 29, 39, 54, 58, 75, 98, 108, 127, 180, 193, 198, 200, and 206.

<sup>43</sup> NG 86.

<sup>44</sup> A woman was given seven days to produce a sale record in NG 109. Tablets are also demanded of women in NG 166 and 205 — in fact, many cases of written documentation involve women. However, the sample of cases involving tablets as evidence is too small to determine whether the judges demanded written documentation from women over men.

<sup>45</sup> One example is found in NG 20, in which wife Geme-Enlila left husband Lu-Utu and promised before the governor and witnesses that for ten shekels of silver she would not escalate the dispute.

<sup>46</sup> This was already noted in Lafont and Westbrook 2003, p. 201. The best example is NG 15, in which a marriage is terminated because the groom did not have the permission or knowledge of his parents.

<sup>47</sup> This is presumably the case in NG 44, in which a wife contests the sale of her family.

<sup>48</sup> Examples are listed in Culbertson 2011, p. 43, and include NG 32, 33, 34, 35, 205, and BM 019356, among others.

<sup>49</sup> Illustrated by NG 45, in which a girl protests her sale by her mother and loses the case.

<sup>50</sup> Slaves could appear even when their own status was not the matter of dispute (Lafont and Westbrook 2003, p. 195), although most cases of slaves in court do involve disputes over their enslavement and/or sale.

Lu-Huwawa in servitude/enslavement (nam-geme<sub>2</sub>). Sigturtur, the wife of the doctor Ur-Baba, and her offspring Guahuš were present at the place of the dispute and for the oath. Gudea the city elder was the maškim. Lu-Šara, Ur-Ištara, and Ludingira were the judges.

Inferring from the background of this situation, some household slaves interacted across households, suggesting a degree of mobility beyond a single household. Regarding this case, Lafont suggested the judges intended to punish Lu-Huwawa's household and owners in their decision to make her a servant or slave of the other enslaved disputant, Bazi.<sup>51</sup> This interpretation reinforces that individuals were not subjects of the law outside their household and place within it.<sup>52</sup>

## The Example of Widows

The previous section mentioned some of the ways women and slaves are attested as having participated in court. But just because women or slaves could participate in court proceedings does not mean such interactions and abilities were guaranteed to them as "rights," let alone rights that transcended social and family position by virtue of a gender right. But wealthy or elite women could exercise power in dispute resolution. By looking at the particular case of widows — women who operated in court proceedings over estate matters without the presence of husbands — we can see how women's access and power in court was still circumscribed by their status and household position and legitimized through a relation to the family and often to a household head, even if he was deceased.<sup>53</sup>

The most common reason for women to appear in court proceedings concerned the death of a household head (especially in the Girsu archive). As in other periods, family households were the basic socioeconomic unit in urban Ur III societies, consisting of many people beyond a nuclear family to include slaves and their families, and workers or dependents of various kinds. When the male head of household died, the fate of both the property and the status of household members became vulnerable to contestation by other parties or to fragmentation among household members. The potential for a precarious transition is evidenced by several cases in which household heads used the court or declaratory oaths to publicly establish their wishes before death.<sup>54</sup>

<sup>51</sup> Lafont 2000, p. 64, text no. 25. LUN §2 states that the punishment for theft is execution, not enslavement (Civil 2011, p. 246).

<sup>52</sup> Other notable examples of slaves involved in disputes about matters other than slave status are NG 178, in which a slave of a priest (Hu-wa-wa arad<sub>2</sub> en) has been living in a disputed house and was taken before judges by a priest, and the fragmentary NG 129, in which two slaves dispute over stolen onions: "Urbadabra the slave of Lusaga son of Urdingira stated: "DINGIRkurub stole my onions. Urbadabra came up (as a witness)" (lines 7'-13').

<sup>53</sup> It is an interesting feature of this period that widows of means could come to court and represent in-

terests at all. Lafont 2016, p. 167-68, also discussed evidence for widows' agency in court. Although it is tempting to assume that widowhood invariably entailed a total loss of power, we are cautioned against such a blanket assumption; see Stol 2016, pp. 275-82.

<sup>54</sup> By disinheriting sons before the court, for example, as in BM 095843, BM 106479, and possibly NG 204. Arranging marriages, as in NG 18, was another way to secure the trajectory of household property into the next generation. In BM 022858, a widow was set up in a house by her brother-in-law whose sons, upon his death, claimed the house (see Molina 2004, p. 175).

Despite legal precautions, ambiguities and contestations ensued after the death of household heads, sometimes persisting for decades. In NG 18, two widows disputed over the son-in-law-ship of Lu-Ningirsu. The widows were Atu, Lu-Ningirsu's mother, and Geme-Lamma, who initiated the proceedings with a demand for the fulfillment of marriage between her daughter and Lu-Ningirsu. Presumably, both husbands had died by the time of this dispute, but their oaths and arrangements haunted the proceedings. Using witnesses, it was demonstrated that Atu's husband swore when he was alive that his son Lu-Ningirsu would marry the daughter of Lu-Gudea, another party. Witnesses (including one woman) confirm that Atu witnessed her husband's oath. But Atu rejected the witnesses. Lu-Gudea swore to his claim. Then witnesses swore that Geme-Lamma renounced her claim to Lu-Ningirsu. She rejected the witnesses and Lu-Gudea swore again. In the end, Lu-Ningirsu was confirmed to marry Lu-Gudea's daughter.<sup>55</sup>

Other records concern disputes between widows and the offspring of their deceased husbands, usually over the matter of disambiguating the estate of the deceased household head. The court record NG 26 reports that Gemešul, the childless second wife of Ur-Lamma, was involved in a dispute with children from Ur-Lamma's first marriage, presumably with the unsuccessful goal of acquiring provisions.<sup>56</sup> The third case reported in NG 28 (lines 15'-24') concerns a dispute over the slave Urnidu, who belonged to a deceased household head. After his death, his wife gave Urnidu to another household, to the contestation of her late husband's heirs. The text is fragmentary but concerns the widow's confirmation that she was entitled to manage Urnidu's ownership (the outcome of the case is unclear or missing). A case reported in the partially broken tablet NG 29 concerns the fate of the property and house of Kalla, disputed between his widow Umma and the widow of her son; with both men dead, the women's relationship was described in terms of daughter-in-law-ship (*nam-e<sub>2</sub>-gi<sub>4</sub>-a*). Using witnesses, Umma demonstrated that Kalla left his estate only to her and that her daughter-in-law had not appropriately resided in her in-laws' household. Based on the testimony of witnesses who supported these findings (including female witnesses), Umma won the dispute.

Court record NG 99 concerns the aftermath of the death of Dudu, whose status must have been substantial given that past proceedings concerning his estate involved the Grand Vizier (line 19). From the court record we learn that a house and slaves faced contestation. Using written documentation, Dudu's widow was able to prove that even though Dudu's son managed the property, she purchased it with her own silver and none of her husband's. A second matter of contention was the slave Ninana, daughter of a goldsmith, and her children. After Dudu's death, his widow freed Ninana's three children, which raised a dispute from Dudu's children. High-ranking temple officials appeared as witnesses to state that Dudu had given Ninana to his widow in the past. The result of the case was a confirmation of Ninana to Dudu's widow.<sup>57</sup> The record of this dispute indicates that such women not only held their own property and slaves, but also maintained the social and political affiliations (or perhaps her husband's affiliations) to represent ownership in court against the normal grain of patrilineal inheritance.

<sup>55</sup> Lafont 2000, pp. 42-43, for a breakdown of this complicated court case.

<sup>56</sup> Falkenstein 1956-1957, pp. 42-43. The document presents Gemešul as the initiating disputant, opening the report with her name and affiliations. She was most likely the initiator given this construction;

however, the formula of many court records is to list the successful disputant first, even if they may have been the "defendant" in the dispute.

<sup>57</sup> Wilcke 1998, pp. 50-51, for an interpretation and discussion of this document.

These examples show that no social or legal barrier prevented widows from using court proceedings.<sup>58</sup> They could use proceedings to preserve the interests of their household, their husband's legal arrangements, or their own sustenance and preferences for their children's marriages. Very likely, all these interests overlapped. However, the women do not operate free from the shadow of their household or husbands.

## Women and Household Dependents in Context: A Musician Family of Girsu

To explore the dynamics among household members in the context of the legal practices, this section concerns one of the best-attested multigenerational families in the court records, the musicians of Girsu descending from Lu-Nina, "senior singer."<sup>59</sup>

Figure 6.1 charts the family of Lu-Nina, with solid lines indicating blood relationships, dashes indicating marriages, dotted vertical lines indicating slaves, and diagonal dotted lines indicating professional and court affiliations. This does not represent a single moment in the family's history but rather relationships spanning a few decades.

Musicians in the Ur III period ranked among the most elite levels of society.<sup>60</sup> Men of this family held important political positions in the urban administration with links to the royal family in Ur. Lu-Nina served as a judge in court alongside the governor; when he died, his son Urmes inherited this role.<sup>61</sup> In the ensuing years, male and female members of the extended household served in court in various capacities, including as disputants and witnesses. The men also served as judges, institutional witnesses, and other court functions. Lu-Nina's estate was contested upon his death and defending property in the aftermath involved the participation of all his children, both male and female.<sup>62</sup>

Free, elite women in the family such as Ninmekala ventured out of the household sphere, interacting with other women and networks and engaging in economic transactions. This opened the possibility of disputing with other men or women from other households and serving as witnesses in cases for their affiliates and friends. In the previously mentioned case of NG 29 concerning a widow's bid for inheritance, possibly the same Ninmekala appeared as a witness against the new widow in support of the senior widow Umma. Ninmekala and Ninmedalla owned and transferred slaves without their husbands.<sup>63</sup> The former woman also possessed the ability to represent the household interests along with or in lieu of her husband Urmes.<sup>64</sup>

Her daughter Baba-izu and Urmes appear in two cases in which the family cuts ties with a man named Kamu.<sup>65</sup> In one case, Urmes the son of Dati uses the court to dissolve their professional relationship after accusing Kamu of taking sealed boxes from a storehouse they used

<sup>58</sup> And other examples, such as NG 63.

<sup>59</sup> Sumerian *nar gal*, on which title see Pruzsinszky 2012, p. 35.

<sup>60</sup> On musicians of this period, see Ziegler 2011 and Pruzsinszky 2010.

<sup>61</sup> NG 113:13–14, 54; probably dates to Šulgi 40 and NG 161.

<sup>62</sup> Or so we can infer from texts like NG 58, if the people involved are the same. See Falkenstein 1956–1957, p. 96, notes on 14'–19'.

<sup>63</sup> NG 58. The report indicates that Ninmekala managed slaves in and transferred them to the house of Urmes. Nevertheless, the women handle a claim to the slaves with their own witnesses.

<sup>64</sup> NG 29, if this is the same Nimekala dam Urmes.

<sup>65</sup> NG 205, cases 4 and 5.

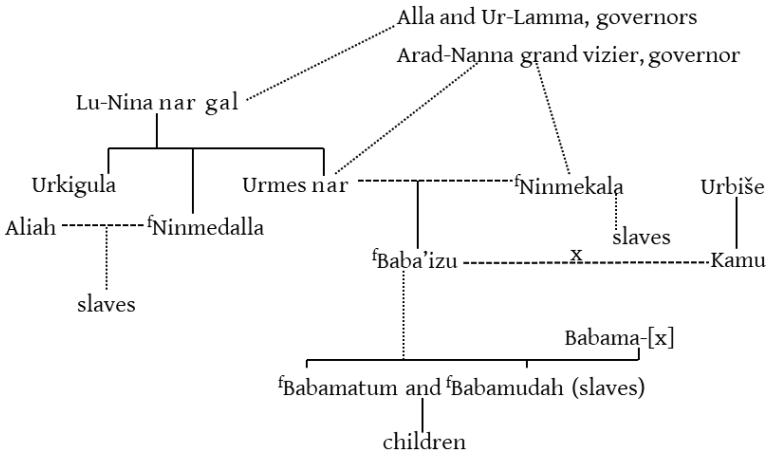


Figure 6.1 The family of Lu-Nina nar gal

for a business venture. The judges decide Kamu should replace what he took. This case is followed on the tablet by the dissolution of Kamu's marriage to Baba-izu, the daughter of Urmes and Ninmekala. The outcome of the proceedings was a decision for Kamu to pay the standard one mina to Baba-izu, but to additionally pay a sum exceeding nine shekels to Urmes.<sup>66</sup> In the same year, Baba-izu was involved in a dispute over her slaves Babamtum and Babamudah and their respective children. The disputant was Abakala, but the patronymic identifying his father is broken.<sup>67</sup> She won the case regardless, and the slaves were confirmed to her on the basis of demonstrating that Ninmekala had given her the slaves. The Grand Vizier Arad-Nanna presided over all these cases. Moreover, we can see that the household consisted of parallel generations of slaves whose statuses were subsumed under the arrangements of the household's free women.

Because of the high status of this family, we must not extrapolate conclusions about women's agency across society. However, we can see that involvement in the court system occurred on the basis of household status and in accordance with the political and economic networks established by the family head and others.

## Conclusions

There is no single "status of women" or "status of slaves" in the court records from Umma and Girsu. Although women are not judges or adjudicators in Girsu or Umma, more powerful women can use the court system for the interests of their households or relationships. Women in more precarious positions of enslavement or widowed status could also use the courts and succeed in attested cases. From some cases we might infer that women possessed resources, power, and influence in the court, but in all cases the degree of participation depended on the status and dynamics of the household to which they belonged as opposed to an abstract notion of rights, gender equality, or individual interest.

<sup>66</sup> It is unclear whether this is related to the marriage payments or if this is the quantity allegedly taken

from the storehouse mentioned in the previous case; personal and professional affairs had blended.

<sup>67</sup> NG 87:10: ab-ba-kal-la dumu ur-[x].

## Bibliography

- Adams, Robert McC.  
2010 "Slavery and Freedom in the Third Dynasty of Ur: Implications from the Garshana Archives." *Cuneiform Digital Library Journal* 2010: 2.
- Asher-Greve, Julia M.  
2013 "Women and Agency: A Survey from the Late Uruk to the End of Ur III." In *The Sumerian World*, edited by Harriet E. W. Crawford, pp. 359–77. London: Routledge.
- Bahrani, Zainab  
2001 *Women of Babylon: Gender and Representation in Mesopotamia*. London: Routledge.
- Civil, Miguel  
2011 "The Law Collection of Ur-Namma." In *Cuneiform Royal Inscriptions and Related Texts in the Schøyen Collection*, edited by Andrew R. George, pp. 221–86. Cornell University Studies in Assyriology and Sumerology 17. Ithaca: CDL Press.
- Crawford, Harriet E. W.  
2014 "An Exploration of the World of Women in Third Millennium Mesopotamia." In *Women in the Ancient Near East: A Sourcebook*, edited by Mark W. Chavalas, pp. 10–27. London: Routledge.
- Culbertson, Laura  
2009 Dispute Resolution in the Provincial Courts of the Third Dynasty of Ur. PhD dissertation, University of Michigan.  
2011 "A Life-Course Approach to Household Slaves in the Late Third Millennium BC." In *Slaves and Households in the Near East*, edited by Laura Culbertson, pp. 33–48. Oriental Institute Seminars 7. Chicago: The Oriental Institute.
- di Vito, Robert A.  
1993 *Studies in Third Millennium Sumerian and Akkadian Personal Names: The Designation and Conception of a Personal God*. Rome: Editrice Pontificio Istituto Biblico.
- Falkenstein, Adam  
1956–1957 *Die neusumerischen Gerichtsurkunden*. Munich: Verlag der Bayerischen Akademie der Wissenschaften.
- Garcia-Ventura, Agnès  
2014 "Weaving in Ur III Mesopotamia: Women's Work?" In *Textile Trade and Distribution in Antiquity*, edited by Kerstin Droß-Krüpe, pp. 135–40. Wiesbaden: Harrassowitz.  
2016 "The Sex-Based Division of Work versus Intersectionality: Some Strategies for Engendering the Ur III Textile Work Force." In *The Role of Women in Work and Society in the Ancient Near East*, edited by Brigitte Lion and Cécile Michel, pp. 174–92. Berlin: de Gruyter.
- Garfinkle, Steven J.  
2008 "Was the Ur III State Bureaucratic? Patrimonialism and Bureaucracy in the Ur III Period." In *The Growth of an Early State in Mesopotamia: Studies in Ur III Administration. Proceedings of the First and Second Ur III Workshops at the 49th and 51st Rencontre Assyriologique Internationale*, edited by Steven J. Garfinkle and Justin C. Johnson, pp. 55–61. Madrid: Consejo Superior de Investigaciones Científicas.
- Lafont, Bertrand  
2000 "Les textes judiciaires sumériens." In *Rendre la justice en Mésopotamie*, edited by Francis Joannès, pp. 35–68. Saint-Denis: Presses Universitaires de Vincennes.  
2013a (1) Women Economic Activities at Home and Outside Home during the Ur III Period. Paper presented for the Sumer/Ur III Workshop 1 in Nanterre 11/2012.  
2013b (2) State Employment of Women During the Ur III Period. Paper presented for the Sumer/Ur III Workshop 2 in Tokyo 6/2013.  
2016 "Women at Work and Women in Economy and Society during the Neo-Sumerian Period." In *The Role of Women in Work and Society in the Ancient Near East*, edited by Brigitte Lion and Cécile Michel, pp. 149–73. Boston; Berlin: de Gruyter.



- Lafont, Bertrand, and Raymond Westbrook  
 2003 "Neo-Sumerian Period (Ur III)." In *A History of Ancient Near Eastern Law*, edited by Raymond Westbrook, pp. 183–226. Leiden: Brill.
- Lion, Brigitte, and Cécile Michel, eds.  
 2016 *The Role of Women in Work and Society in the Ancient Near East*. Studies in Ancient Near Eastern Records 13. Berlin: de Gruyter.
- Michalowski, Piotr  
 1976 "Royal Women of the Ur III Period Part I: The Wife of Shulgi." *Journal of Cuneiform Studies* 28: 169–72.  
 1979 "Royal Women of the Ur III Period, Part II: Geme-Ninlila." *Journal of Cuneiform Studies* 31: 171–76.  
 1982 "Royal Women of the Ur III Period – Part III." *Acta Sumerologica* 4: 129–42.
- Molina, Manuel  
 2004 "Some Neo-Sumerian Legal Texts in the British Museum." In *Von Sumer nach Ebla und zurück: Festschrift Giovanni Pettinato zum 27. September 1999 gewidmet von Freunden, Kollegen und Schülern*, edited by Hartmut Waetzoldt, pp. 175–84. Heidelberg: Heidelberg Orientverlag.  
 2008 "New Ur III Court Records Concerning Slavery." In *On the Third Dynasty of Ur: Studies in Honor of Marcel Sigrist*, edited by Piotr Michalowski, pp. 125–44. *Journal of Cuneiform Studies Supplementary Series 1*. Boston: American Schools of Oriental Research.  
 2010 "Court Records from Umma." In *'Why Should Someone Who Knows Something Conceal It?'* *Cuneiform Studies in Honor of David I. Owen on his 70th Birthday*, edited by Alexandra Klei-nerman and J. M. Sasson, pp. 201–17. Bethesda: CDL Press.  
 2014 "Court Officials at Umma in Ur III Times." *Zeitschrift für Assyriologie* 103/2: 125–48.
- Neumann, Hans  
 2011 "Slavery in Private Households toward the End of the Third Millennium B.C." In *Slaves and Households in the Ancient Near East*, edited by Laura Culbertson, pp. 21–32. Chicago: The Oriental Institute.
- Nowicki, Stefan  
 2016 "Women and References to Royal Women in Mesopotamian Royal In-scriptions." *Studia Orientalia Electronica* 4: 36–52.
- Owen, David I, ed.  
 2011 *Garšana Studies*. Cornell University Studies in Assyriology and Sumerology 6. Bethesda: CDL Press.  
 2013 *Cuneiform Texts Primarily from Iri-Sağrig/Āl-Šarrākī and the History of the Ur III Period*. Volume 1. NISABA 15. Bethesda: CDL Press.
- Owen, David I., and Rudolf H. Mayr  
 2007 *The Garšana Archives*. Cornell University Studies in Assyriology and Sumerology 3. Bethesda: CDL Press.
- Pruzsinszky, Regine  
 2010 "Die königlichen Sängler der Ur-III Zeit." In *Musiker und Musiker und Tradierung: Studien zur Rolle von Musikern bei der Verschriftlichung und Tradierung von literarischen Werken*, edited by Regine Pruzsinszky and Dahlia Shehata. Vienna: Wiener Offene Orientalistik.  
 2012 "Singers, Musicians and Their Mobility in the Ur III Period Cuneiform Texts." In *ICONEA 2009–2010: Proceedings of the International Conference on Near Eastern Archaeomusicology*, edited by Richard Dumbrell and Irving Finkel, pp. 31–39. Piscataway: Gorgias Press.
- Rohrlich, Ruby  
 1980 "State Formation in Sumer and the Subjugation of Women." *Feminist Studies* 6/1: 76–102.
- Roth, Martha T.  
 1998 "Gender and Law: A Case Study from Ancient Mesopotamia." In *Gender and Law in the Hebrew Bible and the Ancient Near East*, edited by Victor H. Matthews, Bernard M. Levinson, and Tikva Frymer-Kensky, pp. 173–84. Sheffield: Sheffield Academic Press.  
 2014 "Women and Law." In *Women in the Ancient Near East: A Sourcebook*, edited by Mark W. Chavalas, pp. 144–74. London: Routledge.

- Stol, Marten  
2016 *Women in the Ancient Near East*. Berlin: de Gruyter.
- Van De Mieroop, Marc  
1989 "Women in the Economy of Sumer." In *Women's Earliest Records*, edited by Barbara S. Lecko, pp. 53–70. Atlanta: Scholars Press.  
1999 *Cuneiform Texts and the Writing of History*. London: Routledge.
- Westenholz, Joan G., and Ilona Zsolnay  
2017 "Categorizing Men and Masculinity in Sumer." In *Being a Man: Negotiating Ancient Constructs of Masculinity*, edited by Ilona Zsolnay, pp. 12–41. London: Routledge.
- Wilcke, Claus  
1998 "Care of the Elderly in the Third Millennium BC." In *The Care of the Elderly in the Ancient Near East*, edited by Marten Stol and Sven P. Vleeming, pp. 23–57. Leiden: Brill.
- 2007 *Early Ancient Near Eastern Law: A History of Its Beginnings*. Revised edition. Winona Lake: Eisenbrauns.
- 2014 "Gesetze in sumerischer Sprache." In *Studies in Sumerian Language and Literature: Festschrift Joachim Krecher*, edited by Natalia V. Koslova, E. Vizirova, and Gábor Zólyomi, pp. 455–616. Winona Lake: Eisenbrauns.
- Wright, Rita P.  
2008 "Gendered Relations and the Ur III Dynasty: Kinship, Property, and Labor." In *Gender through Time in the Ancient Near East*, edited by Diane Bolger, pp. 247–80. Lanham: AltaMira Press.
- Ziegler, Nele  
2011 "Music, the Work of Professionals." In *The Oxford Handbook of Cuneiform Culture*, edited by Karen Radner and Eleanor Robson, pp. 288–312. Oxford: Oxford University Press.



# Spheres of Economic and Administrative Control in Middle Kingdom Egypt: Textual, Visual, and Archaeological Evidence for Female and Male Sealers

*Melinda G. Nelson-Hurst, Tulane University*

## Introduction

Sealing — the practice of placing a piece of mud impressed by a stamp over the opening of vessels and papyrus letters — was widely in practice among ancient Egyptian administrators during the Middle Kingdom (c. 1975–1640 BCE). The stamp seal's impression could include an individual's name and titles or the name of an institution (fig. 7.1), though most often it featured designs without text. In recent years, a substantial amount of work has been conducted in order to analyze the distribution of the broken seal impressions left behind from opening items at settlement sites such as *Wah-sut* (South Abydos) and Elephantine and at Egyptian fortresses in Nubia. Much of this work addresses the types of items sealed and what placing these seals on items and then subsequently breaking them meant in terms of administrative and social functions. While the topic has been examined somewhat already, the types of items particular officials were in charge of sealing and opening still remains to be explored to its fullest extent. The current work explores this last avenue, particularly focusing on women who left behind seal impressions, or who held titles related to sealing, and their potential male counterparts.

Central to this exploration are the issues of whether a specific title carried with it defined duties, whether these duties varied by officeholder, and whether a distinction in duties existed between the women and men who held the same, or very similar, titles. For example, a woman named Tjat who held the title of female sealer (*htmtt*) appears in painted scenes in the tomb chapel of the local ruler Khnumhotep II at Beni Hasan.<sup>1</sup> Tjat has received some attention from scholars over the past century, with the interpretation of her role changing from one of a purely honorary position to one having actual administrative duties. Universal to all interpretations up to this point has been that Tjat was the mistress (and later second wife) of Khnumhotep II, a relationship that would explain her prominence in his tomb. However, this analysis, which has been accepted without criticism over the years, is due for a comprehensive reexamination.

---

<sup>1</sup> Hölzl 1992, pp. 279–83; Junge 1975, §695–98; Newberry and Griffith 1893–1900, vol. I, pp. 39–72; Kessler 1981, pp. 120–85; and Ward 1984.



Figure 7.1. Scarab seal (find #032674 from Building E at *Wah-sut*) of the Storeroom Superintendent of the Chamber of Incoming Goods, Anen, Possessor of Veneration. Scarab seals such as this one were used to impress their designs on mud sealings that secured containers, doors, and papyrus letters (image courtesy of Nicholas Picardo)

While exploring all of the evidence related to Tjat is beyond the scope of this article, we examine here some of the most critical facets of Tjat and her role within Khnumhotep II's administration — what did it mean for Tjat to be a sealer, how might her role compare to that of men with similar titles and/or duties, and, by extension, could her administrative role be solely responsible for her inclusion in tomb scenes? Thus, while this study is not specifically about Tjat, she features as one of its main case studies, and an examination of her position sheds light on women's administrative control over particular goods during the Middle Kingdom more generally.

To uncover what we can about the responsibilities of ancient female and male officials with sealing duties, we have multiple corpora of material to examine, primarily in the categories of the above-mentioned seal impressions left behind at archaeological sites and of tomb chapel (and to a lesser extent stela) depictions of people who held these titles carrying out their functions.<sup>2</sup> The latter corpus offers a (somewhat biased) view of the types of duties that administrators with titles related to sealing carried out through their portrayals of these officials supervising crafts, sealing containers, or otherwise participating in the creation and securing of commodities and precious materials. Through these same scenes, we may also see how these men and women ranked within the larger households and administration of their

<sup>2</sup> While many figures in iconography cannot be linked to a specific person with a particular office, some do appear with text labels that display their names and official titles.

superiors, who were typically the local rulers and nomarchs (the men who commissioned the large, rock-cut tombs in which these officials appear). The location of these officials in the scenes (particularly in terms of how close they are to the local ruler), whether they sit or stand, and what — if anything — they carry offer us iconographic clues to help interpret how those designing these tomb scenes viewed the status and duties of the individuals depicted.<sup>3</sup>

The nature of the archaeological data is, of course, quite different. While tomb decoration offers a static and biased snapshot of the administrative and domestic life in households, or social houses,<sup>4</sup> of high officials, archaeological evidence at settlement sites includes data from over a period of time and in a physical distribution with different implications than those found in iconography. When discernible, the horizontal distribution of seal impressions (and occasionally the stamp seals themselves; fig. 7.1) offers data on what was being opened in which parts of the site. However, the purpose of sealing goods with impressed mud sealings as well as how to interpret the distribution of mud sealings left behind in the archaeological record are two topics that are still somewhat debated. Some see groupings of seal impressions as attesting to a kind of strict accounting of goods coming and going.<sup>5</sup> In this accounting method, broken seal impressions would be counted periodically and each would represent a specific amount of a particular good being removed from its storage. Others see sealing as a way of accounting for who last accessed the stored items and whether anyone had tampered with them since that person had re-sealed them, but not for accounting the quantity of the goods being accessed.<sup>6</sup> Still others argue that we should not interpret individual seals as equating to individual people because they may be a type of funerary good that could be reused over multiple generations.<sup>7</sup>

A full examination of the above three interpretations of seals and sealings is beyond the scope of the current work. However, a brief discussion of the second type of analysis and the reasons for it is warranted, since it is the interpretation that underlies some of the subsequent parts of this study. The disposition of seal impressions at sites varies, and our examples of such sites are still relatively restricted because of the limited number of Middle Kingdom settlement sites excavated with more recent techniques for distinguishing and examining sealings, which initially appear to be mere small clumps of mud, blending in with broken mudbrick and other debris, when they are excavated. However, excavations at Abydos and Elephantine have shown that seal impressions with particular people's names and titles tend to cluster in discrete (vertical) layers, suggesting that their use was only for a relatively short span of time and not multiple generations and, thus, that particular individuals used these seals.<sup>8</sup> In addition, the sealings' horizontal clustering suggests that particular individuals, and perhaps sometimes those individuals' deputies, had specific, physical spheres of control over valuable goods of various types.<sup>9</sup> This type of distribution is similar for both men in the domestic and administrative spaces at South Abydos and women in the town of *Wah-sut*, South Abydos. In

<sup>3</sup> On the ranking of officials based on their physical proximity to Khnumhotep II in his tomb chapel decoration, see Seidlmayer 2007, pp. 351–68.

<sup>4</sup> For discussions of the anthropological concept of the social house and its applicability to Middle Kingdom Egyptian contexts, see Picardo 2015, pp. 243–87, and Nelson-Hurst 2015, pp. 257–72.

<sup>5</sup> Smith 1990, pp. 197–226; 1998, pp. 219–30; and 2001, pp. 173–94.

<sup>6</sup> Wegner 2001, pp. 93–99, and von Pilgrim 2001, p. 164. For additional details on the corpus from Elephantine, see von Pilgrim 1996.

<sup>7</sup> Ben-Tor, Allen, and Allen 1999, pp. 47–74.

<sup>8</sup> Contra the heirloom argument, Wegner 2001, pp. 80, 93–99, and von Pilgrim 2001, p. 162.

<sup>9</sup> Wegner 2001, pp. 80, 93–99, and von Pilgrim 2001, pp. 162–63.

the case of the latter, the find spots of the women's seal impressions show diffuse distributional patterns, but the majority of the sealings of each woman are clustered in a specific area of the town (for example, the seal impressions of the king's daughter Reniseneb concentrate specifically around the northwest part of the mayor's residence).<sup>10</sup> The majority of sealings at this site and at Elephantine appear to be the result of repeated sealing and opening of containers within the same location rather than from items that were transported from one part of the site to another or that originated from another site.<sup>11</sup> Thus, the clusters of seal impressions from individuals evidence the physical sphere of sealing activity of that individual.<sup>12</sup>

In addition to the findspots of seal impressions, characteristics of the impressions themselves can provide us with a great deal of information about the individuals doing the sealing and what the person was likely securing. In addition to the stamped side of the sealing sometimes having a name and title, the back of the impression — the part that had been affixed to the vessel or other item — carries an impression left by the item that it once sealed. For example, a sealing that once was affixed to a box usually exhibits at least a partial impression from a knob, the string used to secure two knobs together, and sometimes the grain of the wood. Depending on the impression left behind, we may determine if the sealing was originally attached to a papyrus document, cloth (such as a bag), a grass container, a peg or knob (which would have secured a box or door), a wicker container, or a door bolt (fig. 7.2). Identifying the type of container sealed allows us to narrow down the possible types of goods secured within it. Thus, the combination of back types (impressions that indicate the type of item sealed), impressions with names (and sometimes titles), and locations of where the sealings were disposed/deposited can provide a somewhat detailed — though still incomplete — picture of which goods were being sealed by whom and where they were being sealed and opened within the structure.

## The Sealing Evidence from *Wah-sut*

Within the remains of *Wah-sut*, South Abydos excavated and published up to the time of writing, seal impressions of eight different women appear in great enough numbers and level of preservation to include here. Of these women, five carry the title of *nbt pr*, or lady of the house; one was a *sꜣt ḥꜣti-ꜣ* (mayor's daughter); the highest in status of this group was a *sꜣt nsw*, or king's daughter; and one final woman held an administrative title, *iryꜣt-ꜣt*, or chamber keeper. Despite the varied ranks of these women, their seal usage is similar in distribution (though not in quantity). Each woman's seal impressions tend to cluster in or just outside of a specific section of a house. The majority of these women's seal impressions functioned as peg/knob sealings for boxes (or doors), with a smaller number coming from sealed linen bags.<sup>13</sup> As Wegner has suggested, the number of the women's seal impressions in comparison to those of men at South Abydos indicates that these women most likely used their own seals exclusively (or, at least, most of the time), rather than delegating the sealing to subordinates.<sup>14</sup> The

<sup>10</sup> Wegner 2004, pp. 223–24, and Picardo 2015, p. 272; cf. Grajetzki 2009, pp. 159–60.

<sup>11</sup> Wegner 2004, p. 225, and von Pilgrim 2001, p. 168.

<sup>12</sup> While in some cases subordinates may have used the seals of their superiors, the clustering of certain seals in limited levels of refuse at the Senwosret III

Temple indicates that they were used only for a distinct period of time and not passed on or used commemoratively; see Wegner 2001 and 2007, p. 351; cf. Ben-Tor, Allen, and Allen 1999.

<sup>13</sup> Wegner 2004, p. 225, and Picardo 2015, p. 260.

<sup>14</sup> Wegner 2004, pp. 221–40.

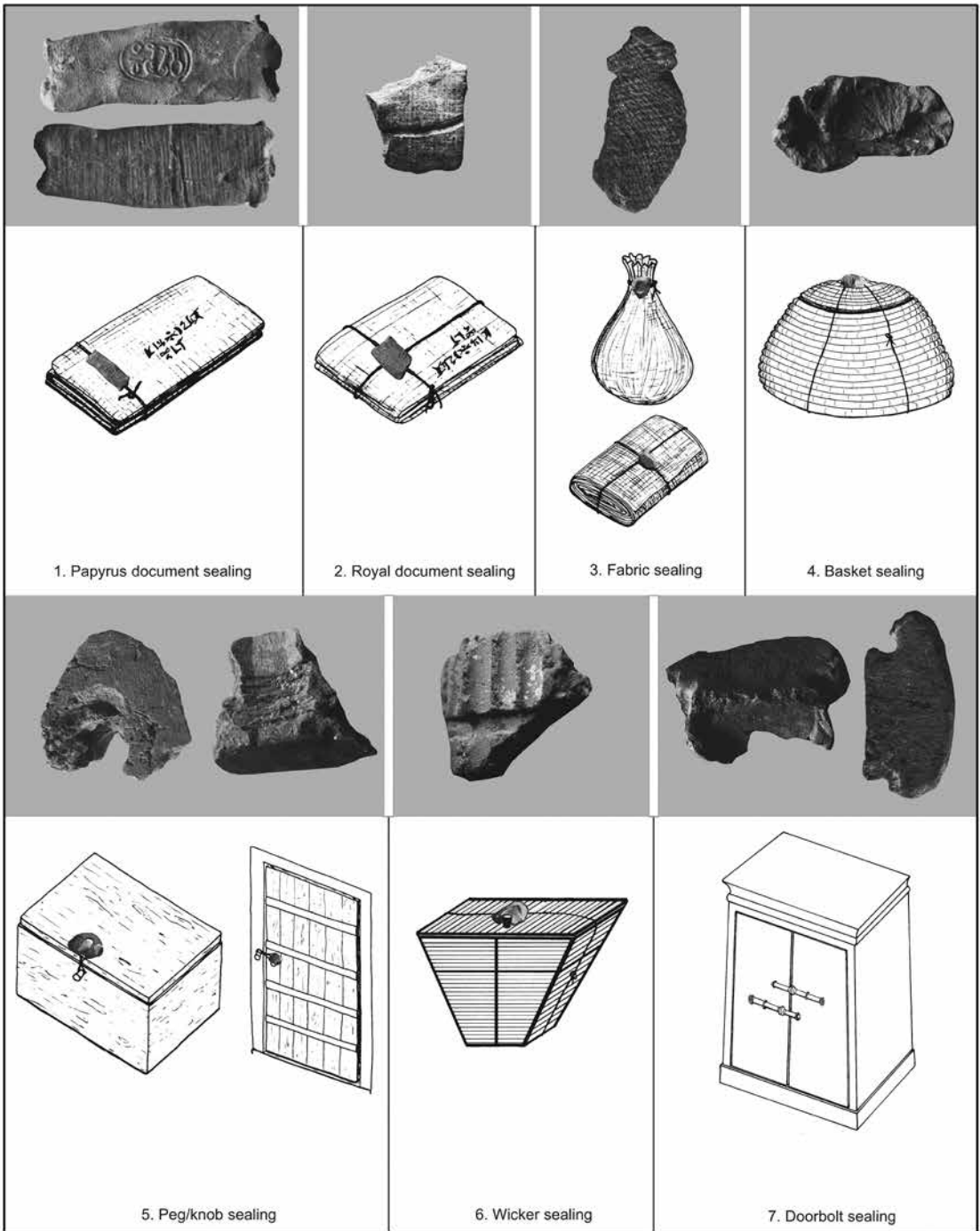


Figure 7.2. Sealing back types provide some indication of the objects to which the sealings were affixed (image courtesy of Josef Wegner)



impressions left by the king's daughter cluster in the northwest section of Building A, those of the ladies of the house cluster in and around Buildings B and E, the mayor's daughter's sealings appear in Building E, and the chamber keeper's impressions cluster in and around Building E.<sup>15</sup> Of particular interest are the sealings of the chamber keeper named Ipi. She was particularly active at the site, having left behind by far the largest number of seal impressions of anyone at the *Wah-sut* settlement, including men.<sup>16</sup> The majority of seal impressions left by Ipi and the other women at *Wah-sut* are of the peg/knob type, suggesting that they were in charge of wealth stored in boxes (or behind doors).

Nicholas Picardo has pointed out that the pattern of women's sealings in Building E being concentrated in certain areas, but not in excessively high numbers, may suggest that the women's sealing activity in this building related to the control of non-staple wealth — in other words, things of value that did not need to be accessed very regularly for sustenance or ration/payment distribution, like grain would need to be.<sup>17</sup> Since Tjat's titles of sealer and "keeper of the property of her lord" (*iry ht nb.s*) suggest that she carried out duties of an administrative character related to wealth<sup>18</sup> (specifically within the household of Khnumhotep II),<sup>19</sup> the sealing evidence from women at *Wah-sut* is applicable for comparison to the evidence for Tjat and other women with the same title who appear in tomb and stela decoration.

## Iconographic Evidence

### *Representations of Tjat in the Tomb of Khnumhotep II*

The sealer Tjat appears in four scenes within the tomb of Khnumhotep II. In these scenes, she always appears relatively close to members of Khnumhotep's nuclear family. The most famous scene of Tjat shows her on the shore (or possibly accompanying Khnumhotep II in his boat) while Khnumhotep II is hunting birds with his wife Khety, who sits at the front of the boat.

In the offering scene, Tjat appears immediately behind Khety (Khnumhotep II's wife) and her daughters, but in front of their nurse. This placement implies that both Tjat and the nurse, who stands behind her, were in the service of and close to Khety and her daughters. In addition, when we take the scene as a whole, we see that other female household members rank below these two women iconographically, suggesting a social or household ranking as well. Khety is the highest, followed by her daughters and then Tjat and the nurse. Below these women are the attendant (*tyt*) Hetepet and her daughters, who in turn were above the female household servants who carry offerings in the third register.

Tjat also appears in the pilgrimage scene, voyaging north in the second boat. Khety and her daughters are inside a cabin, keeping them out of the sun, while immediately behind the

<sup>15</sup> Picardo 2015, pp. 270–72, table 11.1, and Wegner 2004.

<sup>16</sup> Picardo 2015, pp. 270–72, table 11.1.

<sup>17</sup> *Ibid.*, p. 264.

<sup>18</sup> See also the previous paragraph on the distribution of sealings. Titles of women from the Old Kingdom also often indicate this type of supervision of non-staple wealth. Such titles include "inspector of the

treasure," "overseer of ornaments," and "overseer of cloth" (Fischer 1989, p. 27).

<sup>19</sup> However, note that women could certainly perform supervisory and administrative duties in an extroverted manner that connected them with people outside of their own households. See, for example, the case of the elder Sitnebsekhtu, who probably oversaw a flax workshop, alluded to in Heqanakht's letters and accounts: Allen 2002, pp. 18 (Letter IV verso, lines 11–12), 20 (Account VII, lines 19–14), 50–51, 118.

cabin and not in the shade is the sealer Tjat. It is interesting to note that the boats also include a male overseer of sealers and a male treasurer, positions potentially similar to Tjat's position of sealer, and that all of the officials stand out in the sun.

Tjat's fourth and final appearance in the tomb is in the shrine at the back of the tomb. In this case, she also follows Khety and her daughters, but with a table of offerings and an official named Khnumhotep at a smaller scale between her and the other women. Above Tjat are bags of eye paint and a mirror, indicating that these items were associated specifically with her. While Tjat is represented near Khnumhotep II in the fowling scene, she never appears in any scene without Khety, suggesting that she was in attendance of Khety, rather than Khnumhotep II, in all four cases.

### *Representations of Other Female Sealers*

There are few instances of the title of female sealer during the Middle Kingdom — only Tjat and possibly the woman Ib-Neith named in a Sinai inscription<sup>20</sup> — but we have multiple representations of female sealers from the period that immediately precedes it, the late First Intermediate Period. One such example can be seen on a tomb relief of the late First Intermediate Period now in Stockholm, but probably originating from Saqqara.<sup>21</sup> In the first register stands a woman<sup>22</sup> and her daughter.<sup>23</sup> In the second and third registers, we find one male and three female figures bringing various goods for the women. The three female offering bearers are all labeled *htmty.t* (sealer), while the man does not possess a label. In the second register, the two women carry mostly non-staple goods, such as a fan, a storage chest, and a mirror, while in the third register, the female and male figures carry foodstuffs as well as flowers. By comparison, while Tjat does not carry any goods in the offering scene in the tomb of Khnumhotep II, the ranking in that scene is similar, with the women who carry food items being the lower ranking of those included in the scene. Additionally, in the shrine, Tjat appears with a mirror and bags of eye paint above her (items of similar value to those carried by the women in the second register of the Saqqara relief), while she is separated from the food.

In a somewhat similar vein is another late First Intermediate Period stela, most likely from Dendera.<sup>24</sup> Behind the woman who is the main figure on the stela stands a female sealer<sup>25</sup> who offers what appears to be a jar of unguent. Below the sealer, and perhaps meant to be associated with her, is a mirror in a mirror case inside of a box. Both of the above late First Intermediate Period examples, as well as Tjat's place in the shrine, suggest that the position of female sealer relates most strongly to non-staple types of wealth — particularly, but not exclusively, those associated with the women of the household, as well as the people attending those women. While these are only a few examples, Fischer observed a number of women with titles related to overseeing wealth for the women of elite households, particularly non-staple household wealth,

<sup>20</sup> Whether the text label in question refers to the figure of a woman next to it is questionable. See Gardiner, Peet, and Černý 1952–1955, no. 120N; Fischer 1976, p. 79 n. 69; and Ward 1984, pp. 53–54.

<sup>21</sup> It was stored in the Saqqara magazine until it was sold in 1931. See Peterson 1972, pp. 3–8.

<sup>22</sup> Sat-Hathor.

<sup>23</sup> Ptah-em-sas.

<sup>24</sup> Vandier 1936, pp. 54–58, pl. 2.1.

<sup>25</sup> Intef-ankhu.

in his studies on Old Kingdom and First Intermediate Period women.<sup>26</sup> This focus on valuable, non-staple goods, particularly those stored in boxes or bags, is reminiscent of the distribution of women's seal impressions found at *Wah-sut*, which suggest similar practices at that site.

### *Representations of Men with Titles or Duties Related to Sealing in the Tomb of Khnumhotep II*

One of the main issues to address here is whether or not men with titles related to sealing and similar actions carried out duties comparable to those fulfilled by women with titles related to sealing, such as Tjat. One of the male attendants who appears most often in the tomb of Khnumhotep II close to the tomb owner (in a manner similar to that of Tjat's presence near Khety and her daughters) is not a sealer, but the keeper of linen (*iry ḥbsw* or *iry sšrw*)<sup>27</sup> — a position also linked to supervising expensive items (specifically linen, but perhaps other items as well) — named Khnumhotep. This Khnumhotep generally appears carrying a staff, sandals, weapons (in the hunting scene), or unguent for Khnumhotep II. These items would appear to be parallel to those we saw female sealers in charge of on the two First Intermediate Period monuments discussed above. Likewise, in the shrine at the back of the tomb, Tjat is shown with bags of eye paint and a mirror above her (their position indicating their relationship to her), items of similarly high value.

Among the men in the tomb of Khnumhotep II with titles explicitly linked to sealing are two treasurers, a few sealers, and an overseer of sealers. The treasurers appear in scenes where one follows a statue procession, receives measured goods while sitting under a portico, or stands before Khnumhotep II. The sealers appear further away from Khnumhotep II than the treasurer or overseer of sealers, sometimes among those carrying foodstuffs of some kind. However, the sealers themselves do not carry foodstuffs. They sometimes carry a staff or stick of some sort or a pair of sandals. Thus, it would seem that (male and female) administrators with titles related to being in charge of sealed goods did not handle food offerings directly (and possibly not their distribution, either). In addition to the offering scene, sealers are also shown supervising the men who work on potentially expensive items, such as linen and a statue shrine.

A particularly intriguing feature of the sealers, overseer of sealers, and treasurers is their lighter, more yellow skin tone compared to that of other men in the scenes, including Khnumhotep II and his sons. These men with titles related to sealing instead appear quite similar in skin tone to the women in the tomb. The keeper of linen, Khnumhotep, whom we discussed above, is also consistently shown lighter, though not always as light as the women and sealers. Could this use of color be referencing similar duties for both men and women with sealing-related positions, perhaps within the house or other structures, where they would be less exposed to the sun?<sup>28</sup> While another possibility would be that the artist was alluding to a foreign origin for these officials, nothing other than their skin tone suggests such an

<sup>26</sup> Fischer 1989, p. 27.

<sup>27</sup> For additional details on the interpretation of this figure and his title, see Maitland forthcoming.

<sup>28</sup> Note that one of the two treasurers who appear in Khnumhotep II's tomb chapel decoration sits in the shade under a portico. Of course, in many cases, masculine titles related to sealing and supervision

of property could be related to contexts outside of households. However, since large estates often included men with titles indistinguishable from those associated with outside administration, a certain number of male sealers were likely associated primarily with household-administration duties, as seems also the case for the women we have seen.

idea; their dress is typically Egyptian and their names are not only Egyptian, but also mostly names popular in the specific region where Khnumhotep II lived. Thus, it appears that the choice of skin tone meant to convey something other than geographical or cultural origins, such as the type or setting of their work.

While a comprehensive review of men with titles related to sealing in Middle Kingdom tombs is beyond the scope of this article, a review of the published sources suggests that the same pattern of activities holds true at other locations and other times during the Middle Kingdom. For example, in the tomb of Amenemhat at Beni Hasan (tomb 2), sealers and a treasurer appear holding a staff or nothing at all (they never carry foodstuffs) and stand close to Amenemhat himself. As in the tomb of Khnumhotep II, their positions in the scenes imply high social and administrative status by their proximity to the tomb owner or through their actions of supervising other officials.

## Conclusions

In summary, the evidence for the women who left behind seal impressions at *Wah-sut* and women with the title of sealer depicted in mortuary contexts, such as Tjat, suggest that both groups of women were in charge of securing precious items, particularly those stored in boxes or bags, such as mirrors, fans, and eye paint. The women in tomb scenes and on stelae also appear to specifically attend the high-status women in those scenes. Likewise, the men with positions related to sealing or who are in close attendance of Khnumhotep II in his tomb scenes carry or supervise work on luxury items, such as linen, sandals, and statues, or carry symbols of status and function in the form of different types of staffs, sticks, and possibly sealing paraphernalia. While future research into a wider variety of officials from different contexts will undoubtedly flesh out the picture further, this initial investigation suggests that the roles of women and men with sealing duties were quite similar. Though they likely functioned in different physical spheres — as suggested in both archaeological and iconographical evidence — both groups were responsible for some of their superiors' most expensive possessions. By extension, this evidence suggests that we should no longer discount or gloss over the importance of women's administrative roles in elite households and fall back on accounting for their presence in the historical record by means of other factors, such as their intimate relationships with elite men.

---

Fischer (1963) noticed this same type of color choice in Old Kingdom examples and suggested essentially the same interpretation (the color relating to the indoor nature of bureaucratic life). He also noted that Middle Kingdom tombs at Beni Hasan depict some supervisors with light colors. However, for Beni Hasan, Fischer was relying on Newberry's publications,

---

which (being black and white) do not show the more subtle variations in color. In addition, while Newberry sometimes did indicate lighter-than-usual skin tones of figures in his plates, he often did not. See Fischer 1963, pp. 17–22, pls. I–III, and frontispiece, especially p. 19.

## Bibliography

- Allen, James P.  
2002 *The Heqanakht Papyri*. Publications of the Metropolitan Museum of Art Egyptian Expedition 27. New York: Metropolitan Museum of Art.
- Ben-Tor, Daphna; Susan J. Allen; and James P. Allen  
1999 "Seals and Kings." *Bulletin of the American Schools of Oriental Research* 315: 47–74.
- Fischer, Henry G.  
1963 "Varia Aegyptiaca." *Journal of the American Research Center in Egypt* 2: 17–51.  
1976 *Varia*. Egyptian Studies I. New York: Metropolitan Museum of Art.  
1989 *Egyptian Women of the Old Kingdom and Heracleopolitan Period*. New York: Metropolitan Museum of Art.
- Gardiner, Alan H.; Thomas E. Peet; and Jaroslav Černý  
1952–1955 *The Inscriptions of Sinai*. London: Egypt Exploration Fund.
- Grajetzki, Wolfram  
2009 *Court Officials of the Egyptian Middle Kingdom*. London: Duckworth.
- Hözl, Christian  
1992 "The Rock-tombs of Beni Hasan: Architecture and Sequence." In *Atti del VI Congresso Internazionale di Egittologia*, volume 1, edited by Jean Leclant et al., pp. 279–83. Torino: Comitato Organizzativo del Congresso.
- Junge, Friedrich  
1975 "Beni Hassan." *Lexikon der Ägyptologie* 1: 695–98.
- Kessler, Dieter  
1981 *Historische Topographie der Region zwischen Mallawi und Samalut*. Beihefte zum Tübinger Atlas des Vorderen Orients. Reihe B, Geisteswissenschaften 30. Wiesbaden: Reichert Verlag.
- Maitland, Margaret  
Forthcoming *The Representation of Social Identity and Hierarchy in the Elite Culture of Middle Kingdom Egypt*. PhD dissertation, University of Oxford.
- Nelson-Hurst, Melinda G.  
2015 "The (Social) House of Khnumhotep." In *The World of Middle Kingdom Egypt (2000–1550 BC): Contributions on Archaeology, Art, Religion, and Written Sources*, edited by Gianluca Miniaci and Wolfram Grajetzki, pp. 257–72. Middle Kingdom Studies 1. London: Golden House Publications.
- Newberry, Percy E., and Francis L. Griffith  
1893–1900 *Beni Hasan*. Archaeological Survey of Egypt 1–2, 5, 7. London: K. Paul, Trench, Trubner.
- Peterson, Bengt J.  
1972 "A Tomb-Relief from the End of the First Intermediate Period." *Orientalia Suecana* 21: 3–8.
- Picardo, Nicholas S.  
2015 "Hybrid Households: Institutional Affiliations and Household Identity in the Town of Wah-sut (South Abydos)." In *Household Studies in Complex Societies: (Micro) Archaeological and Textual Approaches*, edited by Miriam Müller, pp. 243–87. Oriental Institute Seminars 10. Chicago: The Oriental Institute.
- von Pilgrim, Cornelius  
1996 *Elephantine XVIII: Untersuchungen in der Stadt des Mittleren Reiches und der Zweiten Zwischenzeit*. Archäologische Veröffentlichungen 91. Mainz am Rhein: von Zabern.  
2001 "The Practice of Sealing in the Administration of the First Intermediate Period and Middle Kingdom." In *Le Sceau et l'Administration dans la Vallée du Nil. Villeneuve d'Ascq 7–8 juillet 2000*, edited by Institut de papyrologie et d'égyptologie de Lille, pp. 161–72. Cahier de Recherches de l'Institut de Papyrologie et d'Égyptologie 22. Villeneuve d'Ascq: Université Charles de Gaulle-Lille III.

- Seidlmayer, Stephan J.  
 2007 "People at Beni Hassan: Contributions to a Model of Ancient Egyptian Rural Society." In *The Archaeology and Art of Ancient Egypt. Essays in Honor of David B. O'Connor*, edited by Zahi A. Hawass and Janet E. Richards, pp. 351–68. Cairo: Supreme Council of Antiquities.
- Smith, Stuart T.  
 1990 "Administration at the Egyptian Middle Kingdom Frontier: Sealings from Uronarti and Askut." In *Aegean Seals, Sealings and Administration: Proceedings of the NEH-Dickson Conference of the Program in Aegean Scripts and Prehistory of the Department of Classics, University of Texas at Austin, January 11-13, 1989*, edited by Thomas G. Palaima, pp. 197–226. Aegaeum 5. Liège: Université de Liège.  
 1998 "The Transmission of an Administrative Sealing System from Lower Nubia to Kerma." In *Conférence internationale des études nubiennes*, edited by Institut de papyrologie et d'égyptologie de Lille, pp. 219–30. Cahier de recherches de l'Institut de papyrologie et d'égyptologie de Lille 17. Villeneuve d'Ascq: Université Charles de Gaulle-Lille III.  
 2001 "Sealing Practice, Literacy and Administration in the Middle Kingdom." In *Le Sceau et l'Administration dans la Vallée du Nil. Villeneuve d'Ascq 7-8 juillet 2000*, edited by Institut de papyrologie et d'égyptologie de Lille, pp. 173–94. Cahier de Recherches de l'Institut de Papyrologie et d'Égyptologie 22. Villeneuve d'Ascq: Université Charles de Gaulle-Lille III.
- Vandier, Jacques  
 1936 "Quatre Stèles Inédites de la Fin de l'Ancien Empire et de la Première Époque Intermédiaire." *Revue d'Égyptologie* 2: 44–64.
- Ward, William  
 1984 "The Case of Mrs. Tchat and Her Sons at Beni Hasan." *Göttinger Miszellen* 71: 51–59.
- Wegner, Josef  
 2001 "Institutions and Officials at South Abydos: An Overview of the Sigillographic Evidence." In *Le Sceau et l'Administration dans la Vallée du Nil. Villeneuve d'Ascq 7-8 juillet 2000*, edited by Institut de papyrologie et d'égyptologie de Lille, pp. 77–106. Cahier de Recherches de l'Institut de Papyrologie et d'Égyptologie 22. Villeneuve d'Ascq: Université Charles de Gaulle-Lille III.  
 2004 "Social and Historical Implications of Sealings of the King's Daughter Reniseneb and Other Women at the Town of Wah-Sut." In *Scarabs of the Second Millennium BC from Egypt, Nubia, Crete and the Levant: Chronological and Historical Implications, Papers of a Symposium, Vienna, 10th-13th of January 2002*, edited by Manfred Bietak and Ernst Czerny, pp. 221–40. Denkschriften der Gesamtkademie 35; Contributions to the Chronology of the Eastern Mediterranean 8. Vienna: Verlag der Österreichischen Akademie der Wissenschaften.  
 2007 *The Mortuary Temple of Senwosret III at Abydos*. Publications of the Pennsylvania-Yale Expedition to Egypt 8. New Haven; Philadelphia: Peabody Museum of Natural History; University of Pennsylvania Museum of Archaeology and Anthropology).



## Females as Sources of Authority in Hittite Government and Religion

Gary Beckman, *University of Michigan\**

The culture of Hittite Anatolia of the Late Bronze Age was most definitely patriarchal in nature and generally unfavorable to women, at least as judged by today's more progressive values. Social attitudes in Ḫatti are well exemplified by an incident in a folk tale in which an offended man lashes out at his wife: "You are a woman and think like one!<sup>1</sup> You know nothing at all!"<sup>2</sup> The Hittite Laws inform us that a woman's monthly wage was half or less than that of a man,<sup>3</sup> and that when partners of equal social status divorced, the male walked off with the greater portion of the children.<sup>4</sup> Marriages were generally patrilocal, and with the payment of the bride price, a girl entered under the authority of her new spouse or of his father.<sup>5</sup>

On the rare occasion when closer specification was felt to be necessary, individuals were identified by patronyms.<sup>6</sup> Despite attempts by various scholars to demonstrate the practice of matrilineality in Ḫatti,<sup>7</sup> it remains clear that property and social position were passed down through the male line, as shown both by the Laws and by sparse documentary evidence.<sup>8</sup> However, women did have a role to play in this matter, for a new husband might be adopted as son by his bride's father. Indeed, several Hittite kings seem to have attained their supreme positions after marrying the daughter of their predecessors,<sup>9</sup> and henceforth referred to themselves as the "sons" of the latter.

---

\* CTH refers to entries in Laroche 1971, as updated by the Konkordanz der hethitischen Keilschrifttafeln (<http://www.hethport.uni-wuerzburg.de/hetkonk/>). Accessed June 27, 2017. Further abbreviations are those of the *Chicago Hittite Dictionary* (Chicago: The Oriental Institute, 1980-).

<sup>1</sup> MUNUS-*nili*ṣyaṣz zik; literally, "you are of womanly nature."

<sup>2</sup> KUB 24.8 (CTH 360) i 36-37; see edition in Siegelová 1971, pp. 6-7. For a full English translation of the *Tale of Appu*, see Hoffner 1998, pp. 63-65. Given the limits of our sources, it is probably futile to interrogate them for subtleties beyond the assignment of gender identities on a naïve biological basis.

<sup>3</sup> §§24, 158 (CTH 291-292); see edition in Hoffner 1997, pp. 32-33, 126-27.

---

<sup>4</sup> §31 (CTH 291). But upon the dissolution of the marriage of a free woman with a male slave, the mother received all but one child (§32). See edition in Hoffner 1997, pp. 40-41.

<sup>5</sup> Beckman 1986, pp. 15-17.

<sup>6</sup> For instance, in some colophons the scribe names his father. See that of Ḫanikuili, son of Anu-šar-ilāni, in KBo 19.99, which I discuss in Beckman 1983b, pp. 103-104.

<sup>7</sup> For example, Riemschneider 1971 and Bin-Nun 1975.

<sup>8</sup> For a full discussion of this question, see Beckman 1986.

<sup>9</sup> This is certainly the case for Arnuwanda I (Beal 1983, p. 119) and may also be true of Zidanta I and Alluwamna.





Figure 8.1. Central panel in Chamber A at Yazılıkaya. After Akurgal 1961, p. 79, Abb. 19

This expedient is reflected in the general principle of royal succession set forth in the Proclamation of King Telipinu:<sup>10</sup>

Let only a prince of the first rank, a son, become king! If there is no first-rank prince, then whoever is a son of the second rank — let this one become king! If there is no prince, no (male) heir, then whoever is a first-rank daughter — let them take a husband for her, and let him become king!

Thus, in the ideal Hittite society, a female might at best serve as a conduit for the legitimate transmission of political authority between men across generations.

Yet among the Thousand Gods, as the Hittites referred to their pantheon, hegemony was shared by a married couple, the Storm-god of Ḫatti and the Sun-goddess of the city of Arinna, a pair later syncretized with the Hurrian Teššup and Ḫepat. These partners are depicted on the front panel of Chamber A of the rock sanctuary of Yazılıkaya near the Hittite capital, each at the head of a procession of deities of their respective gender (fig. 8.1). The Sun-goddess, who despite her designation was predominantly a chthonic, rather than a solar, deity,<sup>11</sup> exercised a definite influence on human political life. A prayer addressed to her begins:<sup>12</sup>

To the Sun-goddess of Arinna, My Lady, Lady of the Lands of Ḫatti, Queen of Heaven and Earth, Lady of the kings and queens of Ḫatti, Torch of Ḫatti, the one who rules the kings and queens of Ḫatti. The one whom you look upon with favor as king or queen is right with you, O Sun-goddess of Arinna, My Lady. You are the one who chooses (for rule) and the one who removes (from rule). In respect to the other gods and befitting the dignity of the Storm-god of Nerik and the Storm-god of Zippalanda, your sons, you took for yourself the lands of Ḫatti as your share (of the world).

<sup>10</sup> KBo 3.1 (CTH 19) ii 36–39; see edition in Hoffmann 1984, pp. 32–33.

<sup>11</sup> Beckman 2011.

<sup>12</sup> KUB 29.19 + 1193/u (CTH 383) i 1–13; translation adapted from Singer 2002, p. 97.



Figure 8.2. The Hittite social universe

The title “Great King of Ḫatti” was synonymous with “Chief Priest of the Sun-goddess of Arinna,”<sup>13</sup> which indicates that on the ideological plane the human monarch functioned as steward or regent of this deity.<sup>14</sup> Since she also bears the epithet “Arinniti,” “She of Arinna” — an adjective of appurtenance borrowed from the Hattic language of central Anatolia — and plays a prominent role in the few religious texts preserved from the pre-Hittite culture that employed this tongue,<sup>15</sup> it is reasonable to conclude that her pairing with the Storm-god of Indo-European origin<sup>16</sup> was the result of an accommodation of indigenous beliefs with the cosmological conceptions of the latecomers to the region.

How do we square this proprietorship of the land by a goddess with the inferior position of those who shared her gender among the human population of Ḫatti? The answer is very simple: There is no necessary correlation between the social status of human women and the position of female divinities within the religious system professed by their culture.<sup>17</sup> The human and the divine are entirely different in essence and functioning, even if men and women often think about their deities by means of analogies to the human body, emotions, and experience. Despite the reverence shown to the Virgin Mary in her numerous manifestations in pre-modern Roman Catholic Europe, the societies of this period and region remained thoroughly patriarchal.

But to the extent (as was indeed the case in Ḫatti) that the gods of a culture are immanent in, and representative of, the various aspects of the cosmos within which humans exist — a cosmos, moreover, in which natural reproduction is sexual — some of these beings are unsurprisingly conceived of as feminine in biological sex. The realms of vegetal fertility and the birth of animals come immediately to mind as provinces frequently assigned cross-culturally to female divinities. Thus, among the Hittites, the Sun-goddess of Arinna, who was alternatively referred to as the Sun-goddess of the Earth,<sup>18</sup> embodied the matrices — the soil and the womb — from which new life emerged, while the Storm-god contributed the necessary fructifying fluid in the form of rainfall and underground waters.<sup>19</sup>

When it came to interaction between men and women on the one hand and gods on the other, the royal couple served as the point of intersection between the two levels of the universe (fig. 8.2). The king and queen represented and argued for the interests of human beings before their divine masters, as illustrated, for example, by the series of prayers in which King Muršili II pleads for the abatement of a plague ravaging the land.<sup>20</sup> Conversely, through oracles, omens, dreams, etc., the monarchs received information from the gods, including their complaints about human activities and their requests from their mortal subjects.<sup>21</sup>

<sup>13</sup> For relevant passages, see Taggar-Cohen 2006b, p. 369.

<sup>14</sup> Beckman 2002.

<sup>15</sup> Klinger 1996, pp. 141–47.

<sup>16</sup> West 2007, p. 247.

<sup>17</sup> Zsolnay 2009; and cf. Beckman 2000a.

<sup>18</sup> Soysal 2004, p. 325.

<sup>19</sup> On his association with the latter, see Deighton 1982.

<sup>20</sup> Translated in Singer 2002, pp. 46–69.

<sup>21</sup> On means of communication between men and gods, see Beckman 1999b.

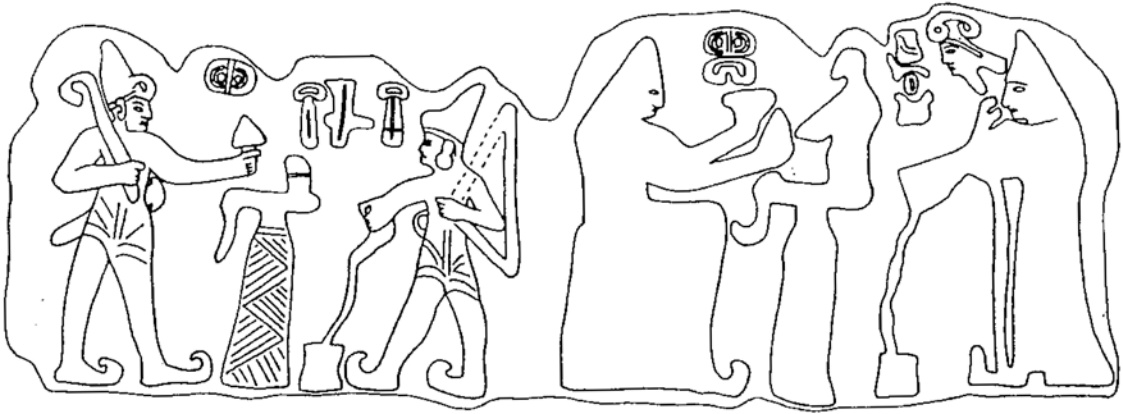


Figure 8.3. Rock relief at Fraktin showing Ḫattušili III and Puduḫepa at worship.  
After Savaş 2001, p. 611, fig. 2

Notionally, all cult was carried out by the king in his capacity as Chief Priest, although in practice many religious duties would have been delegated to technically more qualified subordinate specialists.

For her part, the Hittite queen stood at the head of all women active within the religious establishment, bearing in this function the traditional title *Tawannanna*.<sup>22</sup> Significantly, this position would be retained by the queen after the death of her husband, passing to the spouse of his successor only upon her own demise. The unfinished rock relief at Fraktin (fig. 8.3), which represents King Ḫattušili III and Queen Puduḫepa pouring libations to the Storm-god and the Sun-goddess, respectively, illustrates the gendered and parallel devotional responsibilities of the royal couple.

Furthermore, seemingly owing to her importance in the realm of worship, the queen — alone among her sisters — exercised real authority in secular matters. The best-known of the Hittite queens in this respect was the aforementioned Queen Puduḫepa,<sup>23</sup> who was active both in the administration of palace affairs and on the stage of international diplomacy, corresponding as an equal with Ramesses II of Egypt.<sup>24</sup> To a certain extent, her prominence was due to circumstance: Her husband Ḫattušili III was a usurper and probably relied in part for support in his claim to the throne upon Puduḫepa's family ties with the highest strata of the society of Kizzuwatna,<sup>25</sup> which was a significant component of the Hittite empire. In addition, Ḫattušili was sickly throughout his lifetime, and probably died relatively young, leaving Puduḫepa to act as a kind of regent for their son and his successor Tudḫaliya IV.

<sup>22</sup> Beckman 2012.

<sup>23</sup> See the sketch of her career in Otten 1975. Like Naqia/Zakutu in late eighth-century Assyria (Melville 1999) or the Empress Dowager Cixi (Tzu-hsi) in the second half of the nineteenth century in China (Chang 2013), Puduḫepa moved into a vacuum left by weak or underage males, and exercised power in their names. After all, the dynamics of gender relations within a

family — even a royal one — may depend more on the constellation of personalities that constitute it than upon the dictates of general societal attitudes.

<sup>24</sup> As evidenced by the letter KUB 21.38 (CTH 176), translated in Beckman 1999a, pp. 131–35 (Text 22E).

<sup>25</sup> For a detailed discussion on the life and health of this king, see Ünal 1974.

Nonetheless, participation in governance is documented for other queens. For instance, King Muršili II says of his stepmother, the Babylonian second wife and widow of his father Šuppiluliuma I (a woman known to us only by the title Tawannanna, which seems to have served as her personal name in Ḫattuša): “Just as she administered the palace and the land of Ḫatti [in the time of my father and the] time of my brother, [she likewise administered] them at this time (viz., under my reign) too.”<sup>26</sup> Although this passage indeed indicates a sphere of activity in which a woman exercised administrative authority, the limits to her independence are revealed by the fact that it is drawn from a document in which the king defends her removal from office at his instigation.<sup>27</sup>

Returning now to the care and feeding of the gods, many of the lesser cultic servants of goddesses were also women, undoubtedly because they shared with their mistresses a common gender identity.<sup>28</sup> Similarly, animal offerings to goddesses were frequently drawn from the females of the respective species — ewes, say, in preference to rams — just as dark-colored beasts were considered the most appropriate gifts for chthonic deities.<sup>29</sup>

Of course, priestesses were also often attendant upon male divinities, for women made up at least half of the communities whose *raison d’être*, according to the Hittite worldview, was simply to supply the basic needs of their divine masters through praise, offerings, entertainment, and the production of foodstuffs for their temple establishments. If the entire community was meant to be involved in this enterprise, it was only fitting that women be represented in most if not all of its phases and aspects.

But in the province of magic, women were not “tokens” — included simply in order to fill out the representation of the human world — but rather took an equal if not leading role, making up a little more than half of the individuals attested by name as authors of rituals.<sup>30</sup> This rough numerical parity with the male magical experts is most striking and is in accord with the preponderance of goddesses among deities of magic; Ḫannaḫanna, Iṣḫara, Šaušga, and Kamrušepa, all women, are the most important divine healers in Hittite religion.<sup>31</sup>

Among references to female magical practitioners, the most common designation is the Sumerogram <sup>MUNUS</sup>ŠU.GI, “Old Woman.”<sup>32</sup> Although this writing appears in other contexts with its literal and basic meaning of “aged female human,” and in such circumstances undoubtedly has a different Hittite reading, in most if not all religious texts it stands for Hittite *ḫašauwa*.<sup>33</sup> This Hittite term literally indicates not “old woman,” but rather “(she) of birth” — the midwife.<sup>34</sup> Over time, it had become a general designation for a female ritual expert, sometimes applied to a woman additionally called by another title, such as “wet-nurse.” The linguistic and sociological association of the midwife with wider healing competencies is also known from many other pre-modern cultures. Compare the French usage of the expression *sage femme* for “midwife” alongside *accoucheuse*.

<sup>26</sup> KUB 14.4 (CTH 70) i 10’–12’.

<sup>27</sup> Miller 2014.

<sup>28</sup> On women in Hittite worship, see Taggar-Cohen 2006a and 2006b, pp. 312–68.

<sup>29</sup> Haas 2003, pp. 400–401.

<sup>30</sup> Beckman 1993, pp. 36–37.

<sup>31</sup> For references, see Beckman 1993, p. 36.

<sup>32</sup> Beckman 2016.

<sup>33</sup> On the midwife and her designations in Ḫatti, see Beckman 1983a, pp. 232–35.

<sup>34</sup> Beckman 1983a, pp. 232–33.

Another expression meaning “midwife” is MUNUS *ḥarnauwaš*, which may be rendered literally as “woman of the birth-stool.” In a passage from one of her prayers on behalf of her ailing husband, Queen Puduḥepa tells a goddess:<sup>35</sup>

Among men it is said: “To a ‘woman of the birth-stool’ a deity is favorable.” I, Puduḥepa, am a “woman of the birth-stool,” (and since) I have devoted myself to your son (the Storm-god of Nerik), yield to me, O Sun-goddess of Arinna, my lady! Grant to me what [I ask of you]! Grant life to [Ḫattušili], your servant! Through [the Fate-deities] and the Mother-goddesses let long years and days be given to him.

When we examine the activities of actual midwives in the Hittite birth rituals,<sup>36</sup> we find that their duties fall into two categories. First, there are the physical tasks involved in any birth: The midwife prepares the equipment necessary for parturition and thereafter delivers the child. Second, the midwife recites incantations on behalf of the newborn, beseeching the gods to remove evil influences and to grant a desirable fate to the child. One such speech reads, in part:<sup>37</sup>

O Sun-goddess of the Earth, may you seize [(various evils)]! And further [...] you shall not let them loose (again)! But for the child continually give life, fitness, and long years!

Note the similarity of this speech to the request made by Puduḥepa on behalf of Ḫattušili in her prayer just quoted: In each instance, life and long years are requested from the divine addressee. The significance of the queen’s reference to herself as a midwife is now apparent. The Hittites believed that the gods lent a favorable ear to the midwife when she sought a good fate for the newborn, and through her metaphor Puduḥepa strengthens her own request for vitality for the invalid king.

If the midwife displayed a special talent in securing divine favor for the neonate, then other individuals might also on occasion seek out her services. That is, it was not only the practical expertise of the Old Women in connection with birth and other medical and magical problems that accounts for the prominent place of women in the healing arts of Ḫatti, but also the particular favor with which the utterance of a midwife was thought to be received by the gods. Given the great importance of recitations in Hittite magic,<sup>38</sup> the prominence of the eloquent woman in such endeavors is hardly surprising.

But the dealings of the Old Woman with the supernatural did not end with healing. Within the ceremonies of the state cult she usually conducts the rite known as *mukeššar*, “evocation,”<sup>39</sup> by which a god or goddess is summoned and drawn to the site of worship along paths strewn with fruit and other foodstuffs. The <sup>MUNUS</sup>ŠU.GI was also the practitioner in charge of the performance of oracles of various types. During the early years of the Hittite state, at least some Old Women, like the members of many other categories of religious experts, seem to have been organized in a guild associated with the royal palace. We may draw this conclusion from the appearance in older texts (or later copies of such) of expressions such as “Chief of the Old Women,” “Old Woman of the Palace,” and “Old Woman of the King.” I suspect that

<sup>35</sup> KUB 21.27 (CTH 384) ii 15–23; see edition in Sürenhagen 1981, pp. 112–13.

<sup>36</sup> The corpus of Hittite-language material is edited in Beckman 1983a.

<sup>37</sup> KBo 17.60 rev. 8’–11’ (CTH 430.3.A); see edition in Beckman 1983a, pp. 60–61.

<sup>38</sup> Beckman 1999b.

<sup>39</sup> CHD L–M, 324–26.

these terms refer to a college of diviners, since the performance of oracles is the only activity of the Old Woman definitely documented in Old Hittite sources. The implied demand of King Ḫattušili I<sup>40</sup> in his *Testament*,<sup>41</sup> that a female intimate avoid consulting with the Old Women, was probably intended to counter any attempt by this group of ladies to interfere in political or dynastic matters through their predictive faculties.<sup>42</sup>

To sum up, Hittite society was basically patriarchal, but the role of the female was appropriately recognized and honored in religious conceptions and cultic practice. Since women held up half the sky, their contributions were welcomed, even if the direction of household and state was normally reserved for senior males.

---

<sup>40</sup> KUB 1.16 + KUB 40.65 (CTH 6); see translation in Beckman 2000b. The text in question is a Hittite-Akkadian bilingual.

---

<sup>41</sup> de Martino 1989.

<sup>42</sup> Beckman 2016.

## Bibliography

- Akurgal, Ekrem  
1961 *Die Kunst der Hethiter*. Munich: Hirmer Verlag.
- Beal, Richard  
1983 “Studies in Hittite History.” *Journal of Cuneiform Studies* 35: 115–26.
- Beckman, Gary  
1983a *Hittite Birth Rituals*. Wiesbaden: Harrassowitz.  
1983b “Mesopotamians and Mesopotamian Learning at Ḫattuša.” *Journal of Cuneiform Studies* 35: 97–114.  
1986 “Inheritance and Royal Succession among the Hittites.” In *Kaniššuar. A Tribute to Hans G. Güterbock on His Seventy-Fifth Birthday, May 27, 1983*, edited by Harry A. Hoffner, Jr. and Gary Beckman, pp. 13–31. *Assyriological Studies* 23. Chicago: The Oriental Institute.
- 1993 “From Cradle to Grave: Women’s Role in Hittite Medicine and Magic.” *Journal of Ancient Civilizations* 8: 25–39.
- 1999a *Hittite Diplomatic Texts*. 2nd edition. Atlanta: Scholars Press.  
1999b “The Tongue is a Bridge: Communication between Humans and Gods in Hittite Anatolia.” *Archiv Orientalní* 67: 519–34.
- 2000a “Goddess Worship — Ancient and Modern.” In “A Wise and Discerning Mind.” *Essays in Honor of Burke O. Long*, edited by Saul M. Olyan and Robert C. Culley, pp. 11–23. Providence: Brown Judaic Studies.
- 2000b “Bilingual Edict of Ḫattušili I.” In *The Context of Scripture 2: Monumental Inscriptions*, edited by William W. Hallo and K. Lawson Younger, pp. 79–81. Leiden: Brill.
- 2002 “‘My Sun-God.’ Reflections of Mesopotamian Conceptions of Kingship among the Hittites.” In *Ideologies as Intercultural Phenomena*, edited by Antonio Panaino and Giovanni Pettinato, pp. 37–43. Milan: Università di Bologna.
- 2011 “Sonnengott (Sun God), Anatolien, philologisch.” *Reallexikon der Assyriologie* 12: 611–13.
- 2012 “Tawananna.” *Reallexikon der Assyriologie* 13: 488–90.
- 2016 “The Old Woman: Female Wisdom as a Resource and a Threat in Hittite Anatolia.” In *Audias fabulas veteres. Anatolian Studies in Honor of Jana Součková-Siegelová*, edited by Šárka Velhartická, pp. 48–57. Leiden: Brill.
- Bin-Nun, Shoshana R.  
1975 *The Tawananna in the Hittite Kingdom*. Heidelberg: Carl Winter.
- Chang, Jung  
2013 *Empress Dowager Cixi. The Concubine Who Launched Modern China*. New York: Alfred A. Knopf.
- Deighton, Hillary  
1982 *The “Weather God” in Hittite Anatolia*. Oxford: British Archaeological Reports.
- de Martino, Stefano  
1989 “Ḫattušili I e Ḫaštayar: un problema aperto.” *Oriens Antiquus* 28: 1–24.
- Haas, Volkert  
1994 *Geschichte der hethitischen Religion*. Leiden: Brill.  
2003 *Materia Magica et Medica Hethitica*. Berlin: de Gruyter.
- Hoffmann, Inge  
1984 *Der Erlass Telipinus*. Heidelberg: Carl Winter.
- Hoffner, Harry A. Jr.  
1997 *The Laws of the Hittites*. Leiden: Brill.  
1998 *Hittite Myths*. 2nd edition. Atlanta: Scholars Press.
- Klinger, Jörg  
1996 *Untersuchungen zur Rekonstruktion der hattischen Kultschicht*. Wiesbaden: Harrassowitz.
- Laroche, Emmanuel  
1971 *Catalogue des textes hittites*. Paris: Klincksieck.

- Melville, Sarah C.  
1999 *The Role of Naqia/Zakutu in Sargonid Politics*. Helsinki: Neo-Assyrian Text Corpus Project.
- Miller, Jared L.  
2014 "Mursili II's Prayer Concerning the Misdeeds and the Ousting of Tawananna." In *Proceedings of the Eighth International Congress of Hittitology, Warsaw, 5–9 September 2011*, edited by Piotr Taracha, pp. 516–57. Warsaw: Agade.
- Otten, Heinrich  
1975 *Puduḫepa. Eine hethitische Königin in ihren Textzeugnissen*. Wiesbaden: Franz Steiner Verlag.
- Riemschneider, Kaspar  
1971 "Die Thronfolgeordnung im altheithitischen Reich." In *Beiträge zur sozialen Struktur des Alten Vorderasien*, edited by Horst Klengel, pp. 77–102. Berlin: Akademie Verlag.
- Savaş, Savaş O.  
2001 "Yumruk Biçimli Gümüş Hitit Kabil ile Fraktin Kaya Anıtı Üzerinde Görülen Bazı Kült Nesnelерinin İdentifikasyonu." In *Akten des IV. Internationalen Kongresses für Hethitologie, Würzburg, 4.–8. Oktober 1999*, edited by Gernot Wilhelm, pp. 610–22. Wiesbaden: Harrassowitz.
- Siegelová, Jana  
1971 *Appu-Märchen und Hedammu-Mythus*. Wiesbaden: Harrassowitz.
- Singer, Itamar  
2002 *Hittite Prayers*. Atlanta: Society of Biblical Literature.
- Soysal, Oğuz  
2004 *Hattischer Wortschatz in hethitischer Textüberlieferung*. Leiden: Brill.
- Sürenhagen, Dietrich  
1981 "Zwei Gebete Ḫattušilis und der Puduḫepa. Textliche und literaturhistorische Untersuchungen." *Altorientalische Forschungen* 8: 83–168.
- Taggar-Cohen, Ada  
2006a "The NIN.DINGIR in the Hittite Kingdom: A Mesopotamian Priestly Office in Hatti?" *Altorientalische Forschungen* 33: 313–27.  
2006b *Hittite Priesthood*. Heidelberg: Universitätsverlag Winter.
- Ünal, Ahmet  
1974 *Hattusili III*. Heidelberg: Carl Winter.
- West, Martin L.  
2007 *Indo-European Poetry and Myth*. Oxford: Oxford University Press.
- Zsolnay, Ilona  
2009 "Do Divine Structures of Gender Mirror Mortal Structures of Gender?" In *In the Wake of Tikva Frymer-Kensky*, edited by Steven Halloway, JoAnn Scurlock, and Richard Beal, pp. 103–20. Piscataway: Gorgias Press.





Section III

Beyond the Ancient Near East:  
Family and Kin Relations



## The Dowager v. the Royal Court: A Ninth-Century BCE Case of Family Law Recorded in Chinese Bronze Inscriptions

*Edward L. Shaughnessy, The University of Chicago\**

This paper presents a series of three ancient Chinese bronze vessels, the inscriptions on which commemorate an intra-lineage lawsuit in which both men and women figure prominently. Two of the vessels, with different but related inscriptions that date to 823 and 822 BCE, have been known for more than a century. In 2006, another two vessels, both bearing an identical inscription related to but different from the earlier two inscriptions, were excavated in Fufeng county, Shaanxi; this inscription fits neatly between the other two inscriptions and helps to explain the relationships among the people mentioned in them. The inscriptions concern a land dispute within two lineages of a single family, the matriarch of which serves as the final authority within the family. Her judgment is eventually ratified by the royal court. These inscriptions should rank as some of the earliest evidence in China for the tension between familial and governmental authority in matters of civil law.

China's first great flowering of the literary arts is seen in the inscriptions on ritual bronze vessels of the Western Zhou period (c. 1045–771 BCE). These vessels were typically cast to commemorate significant events in the life of the patron; they were almost invariably dedicated to an ancestor or ancestors, and they often ended with a prayer that “sons’ sons and grandsons’ grandsons would eternally treasure and use” them. The *Liji* 禮記 or *Record of Ritual*, enshrined as one of the Chinese classics, contains a retrospective statement providing the rationale behind these inscriptions:<sup>1</sup>

夫鼎有銘。銘者自名也。自名以稱揚其先祖之美。而明著之後世者也。為先祖者。莫不有美焉。莫不有惡焉。銘之義稱美而不稱惡。此孝子孝孫之心也。唯賢者能之。…銘顯揚先祖。所以崇孝也。身比焉。順也。明示後世。教也。夫銘者壹稱而上下皆得焉耳矣。是故君子之觀於銘也。既美其所稱。又美其所為。為之者明足以見之。仁足以與之。知足以利之。可謂賢矣。賢而勿伐。可謂恭矣。

---

\* I am very grateful to Robert Eno, Maria Khayutina, and Ondřej Škrabal for their close readings of a first draft of this paper. I am also grateful to Christoph Harbsmeier, Ondřej Škrabal, and Jeffrey Tharsen for their comments on my preliminary presentation of

---

the translations included in it. The present draft incorporates many of the very helpful suggestions made by all of these friends.

<sup>1</sup> *Liji Zheng zhu*, 14 (“*Ji tong*” 祭統), 25a–b.

As for caldrons having inscriptions, the inscriber names himself. He names himself in order to mention and praise the beauty of his ancestors and to illuminate them to later generations. Of ancestors, there is none who does not have good points and none one who does not have bad points. The propriety of an inscription is to mention the good and not to mention the bad. This is the sentiment of a filial son and a filial grandson. Only a worthy is capable of it. ... The reason that we praise the ancestors is to exalt filial piety. That we place ourselves next to them is due to succession, and that we illustrate them to later generations is for education. In an inscription, with a single mention both those above and below obtain their places. This is why when a noble-man looks at an inscription, he not only admires who it mentions, but he also admires the one who made it. Since the maker was enlightened enough to display the [good points of the ancestor], humane enough to join them, and wise enough to benefit from them, then he can be called worthy indeed. To be worthy but not to boast can be called respectable indeed.

While hundreds of inscriptions commemorate an official's appointment at court, not one mentions a demotion. Similarly, there are scores of inscriptions recounting Zhou victories in battle, but not a single defeat. Even the handful of inscriptions concerning court cases were invariably cast by the victor in the suit. As the *Record of Ritual* puts it, "The propriety of an inscription is to mention the good and not to mention the bad." Nevertheless, every once in a while it is possible to see in an inscription a glimpse of a family's "dirty laundry."

In the present study, I propose to examine a set of vessels (figs. 9.1 and 9.2) that commemorate the settlement of a controversy that roiled one of the greatest Zhou families of all, the Shao 召 (or 𠄎) family. The inscriptions on these vessels hint that they were made at a time of turmoil, both within the family and in the state at large, and that two of the family's lineages — the ducal lineage as well as a cadet lineage — were contending for control of its lands and retainers. Although the settlement recorded in the inscriptions shows that the ducal lineage retained majority control, it apparently had to concede a considerable minority interest to the cadet lineage. It is noteworthy that the initial intra-family negotiations were decided by the family's matriarch. However, the inscriptions also suggest that her decision was not final. The settlement still needed to be approved and registered at the royal court. Even though this dispute coincided with a time when a newly installed king faced various challenges, both internal and external, the inscriptions show that the royal court retained ultimate authority over the property of even such an important family as the Shaos.

This controversy came to light, at least originally, in a pair of inscribed bronze tureens (*gui* 簋) cast for an individual named Diao Sheng 瑯生, and thus known as the *Diao Sheng gui* 瑯生簋. The first vessel of the pair to be published, over two hundred years ago (in 1804), has an unusual inscription that seems to begin midway through a story; it begins with a date notation to the sixth year of an unnamed reign, and so is now known as the *Sixth Year Diao Sheng gui* 六年瑯生.<sup>2</sup> Some years later, another catalog of bronze inscriptions included a second *Diao Sheng gui* inscription. This inscription is completely different from the first (though both inscriptions have exactly the same number of graphs: 104) apparently filling in the first part of the story. It begins with a "fifth year" date notation, for which reason it is now usually called

<sup>2</sup> Ruan 1804, 6.17a–18b. For a rubbing of the inscription (the Ruan 1804 entry includes only a hand-copy of the inscription), see Zhongguo Shehui kexueyan-  
an Kaogu yanjiusuo, #4293. For a photograph of

the vessel, see Zhongguo Qingtongqi quanji bianji  
weiyuanhui, volume 6, #129.



Figure 9.1. Fifth Year Diao Sheng gui  
五年琯生簋 vessel



Figure 9.2. Sixth Year Diao Sheng gui  
六年琯生簋 vessel

the *Fifth Year Diao Sheng gui* 五年琯生簋.<sup>3</sup> Although neither of these early catalogs indicated where the vessels had been unearthed,<sup>4</sup> it is fortunate that both of them are still extant, the *Sixth Year* vessel currently housed in the National Museum of China in Beijing and the *Fifth Year* vessel now in the collection of the Yale University Art Museum.

The inscriptions on the two *Diao Sheng gui* (figs. 9.3 and 9.4) are as difficult as they are anomalous (it is doubtless because they are anomalous that they are difficult). Some of the greatest names in the history of Chinese paleography and bronze studies have called them among the most difficult inscriptions of all to understand. Sun Yirang 孫詒讓 (1848–1908) said of them: “The characters are strange and archaic, and it is not yet possible to read them all the way through.”<sup>5</sup> Now, more than a century since he studied them, with the great advances in Chinese paleography and bronze studies that that century has brought, it may finally be possible to read them all the way through. In any event, it is worth the effort.

<sup>3</sup> Wu 1895, 3–2.25. The inscription is also included in *Yin Zhou jinwen jicheng*, #4292. For a photograph of the vessel, see Rawson 1990, p. 423, fig. 52.8 (where, however, it is called Zhou Sheng gui).

<sup>4</sup> Although the *Jungu lu jinwen* of Wu Shifen 吳式芬 (1796–1856) was produced during his lifetime “in family,” it was first published posthumously only in 1895. Wu Shifen was a younger contemporary of Ruan Yuan 阮元 (1764–1849), the editor of *Jigu zhai zhong ding yiqi kuanzhi* in which the *Sixth Year* inscription was first recorded, and says that he personally saw the *Fifth Year* vessel in Luoyang 洛陽. This may suggest that the two vessels appeared at the same time — which is what we would expect. Since they were made to be a pair, they must have been put into the ground — whether in a tomb or a cache for safe-keeping — as a pair. Thus, it stands to reason that they would have been taken out of the ground as a pair as well.

<sup>5</sup> Sun 1903, p. 30. For a similar assessment, see Shirakawa 1971, p. 854. The inscriptions have also been studied by some of the most prominent contemporary scholars of Chinese paleography, including Guo 1935, B.142; Yang 1952, pp. 268–72; Lin 1980, pp. 120–35; Li 1981, pp. 3–8; and Zhu 1989, pp. 79–96, to mention just some of the most important. For the most recent studies of these inscriptions, digesting opinions found in more than twenty other studies, see Wang 2012, pp. 63–71, and 2013, pp. 76–79. As far as I know, the only published translations into a Western language are in Kosey 1996, pp. 400–08 (both *Fifth Year* and *Sixth Year* inscriptions), and Li 2011, pp. 282–83 (*Sixth Year* inscription only). As I mention below, a new discovery of Diao Sheng vessels was made in 2006, and has generated a great many more recent studies.



Figure 9.3. Fifth Year Diao Sheng gui  
五年凋生簋 inscription



Figure 9.4. Sixth Year Diao Sheng gui  
六年凋生簋 inscription

The two *Diao Sheng gui* inscriptions recount the successful resolution of an inter-lineage land dispute involving Diao Sheng, representing a cadet branch-lineage of the Shao lineage,<sup>6</sup> and Hu the Senior of Shao 鬻 (i.e., 召) 白 (i.e., 伯) 虎 (better known as Duke Hu of Shao 召公虎), representing the senior Shao lineage. Duke Hu of Shao (or simply Duke Hu, as I refer to him below for the sake of simplicity) is famous in Chinese history for having saved from a rebellious mob the young crown prince who was to become King Xuan (r. 827–782 BCE);<sup>7</sup> this

<sup>6</sup> That Diao Sheng 凋生 (also read as Zhou Sheng, i.e., 周生, however this seems to reflect an incorrect understanding of the name) belongs to the greater Shao lineage is clear from the *Sixth Year Diao Sheng gui*, which is dedicated to his “resplendent ancestor the Duke of Shao” (*lie zu* Shao Gong 烈祖鬻公). His name should probably be understood as indicating that he is the son (*sheng* 甥) of a secondary consort from the Diao 凋 lineage. For the best demonstration of this general argument, see Zhang 1983, pp. 83–89. Diao Sheng also cast a *li*-caldron (Jicheng #0744) with an inscription showing his father, Gong Zhong 竟中, to be a member of a cadet branch of the lineage:

凋生乍文考竟中隣厥，凋生其邁年子子孫永寶用高。

“Diao Sheng makes for his cultured deceased-father Gongzhong this offertory *li*-tripod; may Diao Sheng for ten-thousand

years have sons’s sons and grandsons’ grandsons eternally to treasure and use it to make offering.”

In the various Diao Sheng inscriptions, Diao Sheng is also referred to as *bo* 伯 and *boshi* 伯氏 (though some scholars interpret this *bo* or *boshi* to refer instead to Duke Hu, i.e., Hu, the Senior of Shao), showing that he himself was the senior member of this cadet lineage. Finally, Diao Sheng is mentioned as well in the *Shi Li gui* 師釐簋 inscription (Heji #4324/4325), where he is called by the title *zai* 宰 “master of ceremonies” and in which he serves as the guarantor of the vessel’s patron, Captain Li 師釐, upon his royal appointment. This suggests that he was a figure of some importance in the late Western Zhou state.

<sup>7</sup> For this famous episode in Western Zhou history, see Sima, 4, pp. 143–44.

probably took place just twenty years before the events commemorated in the *Diao Sheng gui* inscriptions.<sup>8</sup> After the king came to power, Duke Hu continued as one of his two great protectors. Then, in the king's sixth year, 822 BCE, presumably the same year commemorated by the second *gui* inscription, he is said to have led a Zhou army on a long-distance campaign into the Huai 淮 River valley, a campaign much celebrated in the poem "Jiang Han" 江漢 of the *Shi jing* 詩經 or *Classic of Poetry* (Mao 262).<sup>9</sup> The entirety of this poem is in praise of Duke Hu; the fourth stanza contains one of the king's commands to him:

王命召虎：	The king commanded Hu of Shao:
來旬來宣；	"Come take control, come show yourself.
文武受命，	When Wen and Wu received the mandate,
召公維翰。	The Duke of Shao was their support.
無曰：予小子，	Don't say: 'I am but a young son.'
召公是似。	The Duke of Shao was just like this.
肇敏戎公，	You have opened well the martial work
用錫爾祉。	For which I award you blessings."

The "Duke of Shao" who was the "support" of Kings Wen (r. 1056–1050 BCE) and Wu (r. 1049/1045–1043 BCE) was one of the founders of the dynasty, a figure whose contributions to the state continued to be praised throughout the dynasty and even thereafter. That the king should compare his descendant to him shows just how important Duke Hu was in his own age.

The relationship between Diao Sheng and Duke Hu is more or less clear from the inscriptions. However, what makes the inscriptions particularly difficult to understand is the mention in them of other family members. The *Fifth Year* inscription begins with Diao Sheng referring to both "Milady" (*fushi* 婦氏) and also a "Dowager" (*junshi* 君氏). The former term seems clearly to refer to the wife of Duke Hu and has caused little disagreement among interpreters of the inscriptions. However, there has been no such consensus about the latter term. There is some evidence in traditional literature that *junshi* was a generic term for the wife of a lord or ruler, and this has been cited by many scholars as its meaning in these inscriptions.<sup>10</sup> There does seem to be internal evidence within these inscriptions — though not

<sup>8</sup> Given the mention of Duke Hu in the inscription and his prominent association with King Xuan's reign, there is a general consensus (though by no means unanimity) that the *Diao Sheng* vessels date either to the fifth and sixth years of that reign, or to the reign of King Xuan's father, King Li (r. 857/853–842/827). One of the reasons that this earlier possibility has been discounted in the past is due to the widespread belief that King Li's reign was very long, thirty-seven years even before he was forced into exile in 842 BCE. This would mean that vessels cast in the fifth and sixth years of his reign would date to 874 and 873 BCE, seemingly too early for Duke Hu who was still leading troops on campaign fifty years later. However, as indicated by the reign dates I provide here, there is good reason to believe that King Li's reign began considerably later, in 857 BCE (or even in 853 BCE in

another sense), which would put the fifth and sixth years of his reign in the late 850s (or even the early 840s), thirty years or less before the opening years of King Xuan's reign. If the *Diao Sheng* vessels do indeed date to King Li's reign, this would of course undercut the entire historical context suggested at the end of the present essay. Nevertheless, I feel confident that the basic analysis of the family dynamic would be unchanged.

<sup>9</sup> *Mao Shi Zheng jian*, 18.21a.

<sup>10</sup> The term occurs in the *Zuo zhuan* 左傳 in the third year of Duke Yin (i.e., 720 BCE), and the text specifies that it refers to the mother of the duke; for a full discussion of this identification, see Yang 1981, p. 26. Sun Yirang pointed this out early on in his *Gu zhou yulun* (see above, n. 6), p. 30.



unambiguous by any stretch — to suggest that she was indeed the mother of Duke Hu, though some scholars have understood the term to refer to his father or even to Duke Hu himself.<sup>11</sup> After careful consideration of all of the evidence, I find myself persuaded by the traditional evidence, and this understanding informs both my translations and also my analysis of the way the family dispute was resolved. Needless to say, if this identification is mistaken, my analysis is also be mistaken. Further complicating our understanding of the Dowager, as I refer to her from here on, is that in the *Fifth Year* inscription she seems to be alive, even if she is, in her own words, already “old.” However, by the *Sixth Year* inscription, not only is Duke Hu’s father referred to by a posthumous temple name, Somber Senior (Youbo 幽伯), but so too is the mother, Somber Jiang (You Jiang 幽姜), indicating that she must have died in the interval.

There is one other generic reference to one of the protagonists that adds greatly to the confusion: *bo* 白 (i.e., 伯) or *boshi* 白氏 (i.e., 伯氏), which can be rendered as something like Senior or Sir Senior and which refers to the firstborn son in a generation. Scholars are divided about fifty-fifty between identifying this *boshi* with Diao Sheng or with Duke Hu. Duke Hu is almost by definition the senior member of his generation of the Shao lineage, and indeed in the inscriptions calls himself Senior Hu of Shao 鬻白虎. On the other hand, even though Diao Sheng’s name shows him to have belonged to a cadet branch lineage of the family (and was the patron of still another vessel in which he referred to his father as Cadet Gong [Gong Zhong 寃中]<sup>12</sup>), it is not at all implausible that he was the senior member of his generation in that branch lineage, and so he too could have been referred to as Senior. Indeed, for him to represent the branch lineage in this intra-family dispute, it is likely that he would have needed to be the senior member of his generation. Since reference to this *bo* or *boshi* seems to come in a direct quotation of Duke Hu, and could not be self-referential, it seems to me that it must refer to Diao Sheng. However, I should also hasten to add that ancient Chinese bronze inscriptions employed no punctuation marks, and certainly did not indicate the beginning — or especially the ending — of quotations, and so this evidence too is not unambiguous.

Without wishing to confuse the issue too much with all of these ambiguities, perhaps it is best now just to present the two inscriptions, first in a modern character transcription (adding, for the sake of clarity, modern punctuation) and then adding my own preliminary translation. Recall that the two inscriptions were doubtless meant to be read as a single continuous text.

Fifth Year Diao Sheng gui 五年珮生簋

隹五年正月己丑，珮生又  
事，鬻來合事。余獻婦氏以  
壺，告曰：“以君氏令曰：‘余老  
之。公僕庸土田多[言柔柔]；弋白  
氏從許。公宕其參，女則宕  
其貳；公宕其貳，女則宕其

<sup>11</sup> See Lin 1980, p. 124, for the suggestion that *Junshi* is Duke Hu’s father rather than mother (Lin also suggests that *fushi* 婦氏, here translated as “Milady,” was Duke Hu’s mother rather than his wife). Wang and Qiu (2008, p. 46) argue that it should refer to none other than Duke Hu himself. Needless to say, differ-

ent identifications of these terms result in radically different interpretations of the dynamics of the dispute.

<sup>12</sup> For this inscription and its implications, see n. 7 above.

一。’余霽于君氏大章，報婦氏帛束、璜”。霽白虎曰：“余既訊，𠄎我考我母令。余弗敢𠄎，余或至我考我母令。”琯生則堇圭。

It was the fifth year, first month, *jichou* (day twenty-five); Diao Sheng was in charge of affairs and Shao came to participate in the affairs. I presented Milady with an amphora, and reported saying: “Because the Dowager commanded saying: ‘I have grown aged. The ducal laborers and field bosses have many complaints. Would that you follow and assent to the following: If the duke is allotted three parts of them you will then be allotted two parts of them, and if the duke is allotted two parts of them you will then be allotted one part of them,’ I was given by the Dowager a great jade-tablet, and requite Milady with a bolt of silk and a jade demi-circlet.” Hu, the Senior of Shao said: “I have already investigated. Let it be as our deceased-father and our mother command. I would not dare to cause disorder, and I now bring forth our deceased-father and our mother’s command.” Diao Sheng then presented a *gui*-jade.

#### Sixth Year Diao Sheng *gui* 六年琯生簋

隹六年四月甲子，王才𡗗。霽白虎告曰：“余告慶”，曰：“公𡗗稟貝，用獄[言𡗗柔]，為白又祗又成，亦我考幽白、幽姜令。余告慶，余以邑訊有𡗗。余典勿敢封。今余既訊。有𡗗曰：‘𡗗令’。今余既一名典，獻白氏則報璧”。琯生奉揚朕宗君其休，用乍朕刺且𡗗公嘗𡗗，其萬年子子孫孫實用高于宗。

It was the sixth year, fourth month, *jiazi* (day one); the king was at Pang. Hu, the Senior of Shao reported saying: “I report felicity,” and said: “The cowries held by the ducal (lineage) have been used to adjudicate the complaints, with blessings and success on behalf of the Senior. It was also our deceased-father Somber Senior and Somber Jiang’s command. I report felicity. I have questioned the supervisors about the settlements. I have put on record that I would not dare to make boundaries. Now I have already questioned the supervisors and said: ‘Let it be as commanded.’ Now I have already one-by-one signed the records, and presented them to Sir Senior, who then requited with a bi-jade disk.” Diao Sheng upholds and extols the grace of the lord of our lineage, and herewith makes for our resplendent ancestor the Duke of Shao this autumn-sacrifice *gui*-tureen. May for ten-thousand years sons’ sons and grandsons’ grandsons treasure and use it to make offering in the lineage-temple.

Before going on to consider the implications of these inscriptions for the history of family law in China, we must now pause to introduce yet another inscription commemorating the same event. In November 2006, peasants restoring a dike at Wujun xicun 五郡西村, some 5 km to the west of the county seat of Fufeng 扶風 county, Shaanxi (fig. 9.5), uncovered a circular cache in which bronze vessels, bells, weapons, a set of chariot pieces, and a single



Figure 9.5. Map of Fufeng 扶風 county, Shaanxi. A indicates the location of the county seat, some 5 km to the east of Wujun xicun 五郡西村, where the cache containing the *Diao Sheng zun* 琯生尊 was discovered in November 2006

jade piece had been carefully secreted (fig. 9.6).<sup>13</sup> Of the twenty-seven bronzes in the cache, clearly the most important for historical purposes are two aesthetically unexceptional *zun* 尊-vases bearing identical inscriptions, one moreover that rephrases much of the content of the first of the two *gui* inscriptions.<sup>14</sup> Much like the two *Diao Sheng gui* inscriptions, this *Diao Sheng zun* 琯生尊 inscription also begins with a date notation, “fifth year, ninth month, first auspiciousness,” showing that this text pertains to events that happened at just about the midpoint of the interval between the other two inscriptions. As does the *Fifth Year Diao Sheng gui* inscription, the *Diao Sheng zun* inscription begins by alluding to the dispute between Diao Sheng and Shao Bo Hu about the division of the family’s lineage retainers and land holdings. As in the *Fifth Year Diao Sheng gui* inscription, this dispute is adjudicated by the Dowager, though in this case she proposes only that the senior lineage should receive 60 percent as opposed to 40 percent for the cadet lineage (recall that in the *Fifth Year Diao Sheng gui* inscription, the Dowager also proposed that the senior lineage should receive two-thirds as opposed to one-third for the cadet lineage, but this less favorable resolution for Diao Sheng’s

<sup>13</sup> Baoji shi Kaogudui and Fufeng xian bowuguan 2007, pp. 3–12; Baoji shi Kaogu yanjiusuo and Fufeng xian bowuguan 2007, pp. 4–27.

<sup>14</sup> The inscription on the *Diao Sheng zun* has prompted an outpouring of scholarship, much of it also providing reconsiderations of the *Diao Sheng gui*

inscriptions. For some of the most important of these studies, see Xin and Dong 2007, pp. 76–80; Li 2007, pp. 71–75; Xu 2007, pp. 17–27; Wu 2007, pp. 103–04, 111; Liu 2008, pp. 100–01; Wang 2008, pp. 39–64; and Feng 2010, pp. 69–77.



Figure 9.6. Bronze vessels discovered in the Diao Sheng 弔生 cache at Wujun xicun 五郡西村 in November 2006; one of the two *zun*-vessels is standing upright at the far right

branch-lineage is not mentioned in the *zun* inscription). In this case, the Dowager provides a rationale for this apportionment: The “ducal” lineage is the elder, while Diao Sheng’s lineage is junior. An exchange of gifts seems to have signaled the agreement of the respective parties within the lineage, with Diao Sheng receiving a jade tablet (*zhang* 璋, i.e., 璋) and giving in turn silk and a jade ring to Milady — presumably the wife of Duke Hu of Shao, as noted above. Then, like the *Sixth Year gui* inscription, the *zun* inscription extols the grace of his lineage and dedicates the vessel to the Duke of Shao, presumably Duke Shi of Shao, the founding father of the lineage some two centuries earlier. However, the *zun* inscription

uniquely concludes by the swearing of an oath (by whom is unclear, but presumably sworn to by both Diao Sheng and by Duke Hu):<sup>15</sup>

其又敢亂茲命，曰：女事鬻人，公則明殛。

If anyone should dare disorder this command, say: “You serve the men of Shao, the dukes then swear to put you to death.”

One other important innovation of the *zun* inscription is that it provides a name for Milady: at her first mention in this inscription, she is called Shao Jiang 鬻姜, showing clearly that she was the wife of Duke Hu. As in the cases of the two *gui* inscriptions, the translation offered here should be regarded as tentative.

<sup>15</sup> This oath is similar to oaths both in traditional literature, such as the *Zuo zhuan* 左傳 (see, for instance, two examples at Duke Xi 僖 28 and one example at Duke Xiang 襄 11), and especially to the Houma 侯馬 and Wenxian 溫縣 covenant texts (*mengshu* 盟書). In these cases, it is clear that it is the ancestral spirits who are being called upon to inflict punishment, so that *gong* 公 “duke” here should be construed as a plural noun referring to the deceased “dukes” of the Shao lineage, and not as a singular noun referring to the still living Duke Hu. *Ming* 明 is more troublesome. In the unearthed covenant texts, it customarily comes before *ji* 殛 “to put to death,” as it does here, and seems to serve as an adverb: “brightly, publicly.” However, in the *Zuo zhuan* cases, it is clearly an adjective describing the “spirits”: *ming shen* 明神 “bright spirits.” However, there is still another possibility, reflected in the translation given here. Dong Shan 董珊 (2008, pp. 356–62) cites a just published inscription on a Western Zhou bronze vessel, reading:

中譟父作尊簋，用從德公。其或貿易，則盟殛。

“Zhong Lefu makes this offertory *gui*-tu-reen, to use to follow the Virtuous Duke. If anyone trades or changes it, then I swear to put them to death.”

Dong Shan provides a photograph of the inscription and a url to a *Zhonghua qingtongqi julebu* 中華青銅器俱樂部 website, but the url does not seem to be correct. Dong Shan himself takes the *meng* 盟 “to swear; oath” in this inscription as a phonetic loan for *ming* 明 “bright”: “then brightly put them to death.” He similarly suggests that the oath in the *Diao Sheng zun* inscription should mean that “the dukes will then grandly punish them.” However, it seems to me just as likely that the graph in this *Zhong Lefu gui* inscription should read as written (i.e., as *meng* 盟), and that the *ming* 明 of the *Diao Sheng zun* inscription should be understood as its protograph.

## Diao Sheng zun 瑀生尊

隹五年九月初吉，**𠄎**  
 姜以瑀生**𠄎**五尋壺  
 兩以君氏命曰：余老之。  
 我僕庸土田多柔；弋  
 許，勿使散亡。余宥其  
 三，汝宥其貳。其兄公，  
 其弟乃。余熏大章。報  
 婦氏帛束、璜，有**𠄎**眾  
**𠄎**兩辟。瑀生奉揚朕  
 宗君休，用作**𠄎**公尊  
**𠄎**，用祈前錄、得純、靈  
 終，子孫永實用之享。  
 其又敢亂茲命曰：女  
 事**𠄎**人，公則明殛。

It was the fifth year, ninth month, first auspiciousness. Shao Jiang on account of Diao Sheng's five measures of cloth and two vases brought out the Dowager's command, saying: "I have grown aged. Our laborers and field bosses have many complaints. Would that you assent and not let them disperse and abscond. We will be allotted three parts of them and you will be allotted two parts of them. The elder brother is the ducal (lineage), and the younger brother is secondary." I receive a great jade-tablet, and requite milady with a bolt of silk and a jade demi-circlet, and to the supervisors conjointly award two jade *bi*-disks. Diao Sheng in response extols my lineage lord's beneficence, herewith making for the Duke of Shao this offertory vase, with which to entreat exceeding wealth, virtuous purity, and a fine end; sons and grandsons will eternally treasure and use it to make offerings. If anyone should dare disorder this command, say: "You serve the men of Shao, the dukes then swear to put you to death."

Ideally, I would prefer just to let the inscriptions speak for themselves. Unfortunately, I suspect that none of the Diao Sheng inscriptions, including even that on the recently discovered *Diao Sheng zun* (fig. 9.7), is sufficiently self-explanatory to make this a viable option, even if we could be assured that the translations were entirely unobjectionable (and in this case I can give no such assurance). As I have noted in passing above, there are no punctuation marks in the originals, and certainly no quotation marks — this makes the parsing of the inscriptions particularly problematic. It is also unclear if the *Diao Sheng zun* inscription is simply a retrospective recounting of the same negotiations recorded by the *Fifth Year Diao Sheng gui* inscription, or if — as seems more likely (especially given the different set of gift-tokens exchanged among the principals) — it marks a subsequent, and presumably more definitive, negotiation.

The problematic nature of the inscriptions invites speculation. We cannot even be sure where the Shao estate was located, though it was probably in the vicinity of Wujun xicun, Fufeng county, Shaanxi, where the *Diao Sheng zun* cache was discovered. This was the ancestral homeland of the Zhou people, and where its elite families maintained estates throughout the entirety of the dynasty. Caches such as the one in which the *Diao Sheng zun* was found were dug when this area was being overrun by enemies at the end of the dynasty; treasures — primarily



Figure 9.7. Rubbing of the inscription on the *Diao Sheng zun* 琯生尊

bronze vessels — were buried in them for safe-keeping. Unfortunately, the Zhou elites were never able to return to the area. Duke Hu himself may have evacuated to the eastern capital at Luoyang; a tomb, M1906, excavated there in 1993 contained, among other artifacts, a late Western Zhou *xu* 盥-tureen inscribed “Hu the Senior of Shao herewith makes for my cultured deceased-father” (Shao Bo Hu *yong zuo zhen wen kao* 鬻白虎用作文考).<sup>16</sup> Although it is unlikely that this relatively small tomb was that of Duke Hu himself, that it contained a vessel made by him may indicate his presence in the area.

It is perhaps inviting to speculate that Duke Hu’s activities at the royal court made him a largely absentee lord of his own lands. The royal capital was only about 100 km to the east of the Shao estate, perhaps a two-day journey. However, the years immediately preceding the events recounted in the *Diao Sheng* inscriptions were an eventful period. The king, King Xuan, had come to power after a fourteen-year interregnum, following the forced exile of his father, King Li (r. 857/853–842/828). It was during the insurrection that forced King Li into exile that Duke Hu had saved the young crown-prince, apparently sacrificing his own firstborn son so that the crown-prince could escape the mob. During the interregnum, political power in the capital fell to a warlord from the eastern part of the realm. It was only with

<sup>16</sup> For this discovery, see Luoyang Shifan xueyuan and Luoyang shi Wenwuju 2006, p. 69.

the death of King Li in exile that Duke Hu, together with another scion of one of the great old Zhou families, Duke Ding of Zhou 周定公, was able to install the young crown-prince as King Xuan. In the *Zhushu jinian* 竹書紀年 or *Bamboo Annals*, the annals for the first six years of this reign read as follows:<sup>17</sup>

元年甲戌春正月，王即位，周定公、召穆公輔政。復田賦。作戎車。燕惠侯薨。

二年，錫大師皇父、司馬休父命。魯慎公薨。曹公子蘇弑其君幽伯疆。

三年，王命大夫仲伐西戎。齊武公壽薨。

四年，王命蹶父如韓，韓侯來朝。

五年夏六月，尹吉甫帥師伐玁狁，至于太原。秋八月，方叔帥師伐荆蠻。

六年，召穆公帥師伐淮夷。王帥師伐徐戎，皇父、休父從王伐徐戎，次于淮。

王歸自伐徐。錫召穆公命。西戎殺秦仲。楚子霜卒。

First year (*Jiaxu*), first month: The king assumed position. Duke Ding of Zhou and Duke Mu of Shao (i.e., Duke Hu of Shao) assisted the government. Restored the field taxes and made war chariots. Lord Hui of Yan died.

Second year: Awarded command to Grand Captain Huangfu and to Supervisor of the Horse Xiufu. Duke Shen of Lu died. Prince Su of Cao assassinated his lord Jiang, the Somber Elder.

Third year: The king commanded the Great Minister Zhong to attack the western belligerents. Shou, Duke Wu of Qi, died.

Fourth year: The king commanded Juefu to go to Han, and the lord of Han came to court.

Fifth year, summer, sixth month: Yin Jifu led troops to attack the Xianyun, reaching as far as the Great Plain. Autumn, Eighth month: Cadet Fang led troops to attack Jing-Man.

Sixth year: Duke Mu of Shao led troops to attack the Huai Yi. The king led troops to attack the Xu belligerents. Huangfu and Xiufu followed the king to attack the Xu belligerents, making camp in Huai. When the king returned from attacking Xu, he awarded a command to Duke Mu of Shao. The western belligerents killed Qin Zhong. Shuang, prince of Chu, died.

Telescopic though these annals are, they do suggest something of the turbulence of the time. Upon his accession, King Xuan moved to restore the royal treasury and especially to rebuild the army. Beginning in the third year of the king's reign, Zhou armies were put into the field, first attacking enemies to the west. In the fifth year, a major campaign was launched even further afield in the west, followed shortly thereafter by another campaign to the south. Then the sixth year brought a multi-pronged campaign to the east, with one army led by none other than Duke Hu (referred to in these annals by his posthumous temple name, "Duke Mu of Shao") and another army led by the king himself. Under the circumstances, it would be understandable if Duke Hu of Shao was not paying much attention to his own family.

Meanwhile, at the homestead, Duke Hu's father was dead and his mother, the Dowager, had grown aged. His wife, like his mother, was from a non-Zhou family, the Jiang 姜. This family had long provided brides for the Zhou royal family and elites. Milady, Shao Jiang, must have been a woman of considerable substance herself, but she was, after all, an outsider. When trouble broke out among the field hands, she was called upon to deal with the crisis, to be

<sup>17</sup> *Zhushu jinian*, Xia 下 8b-9a.

sure; but it was her mother-in-law, the Dowager, who had authority within the family. We now know, thanks to the recently discovered *Diao Sheng zun*, that not only were there “many complaints” among the laborers, but apparently some portion of them had already absconded. The Dowager’s initial response was ambiguous, suggesting in some cases that the main branch of the family would receive three parts out of five (i.e., 60 percent) and in other cases two parts out of three (67 percent), while Diao Sheng’s junior branch would receive either two parts out of five or one part out of three. The *Diao Sheng zun* inscription indicates that she subsequently agreed to the more equitable allotment, giving Diao Sheng 40 percent of all of the property or its produce, even if she did add the justification that the elder branch of the family was, after all, “ducal,” while Diao Sheng’s branch was “secondary.” Diao Sheng accepted this proposal with an exchange of gifts, and then sealed it with an oath: “If anyone should dare disorder this command, say: ‘You serve the men of Shao, the dukes then swear to put you to death.’”

This was not quite the end of the matter. Whether Duke Hu was present or not during the initial negotiations (he is quoted in the *Fifth Year Diao Sheng gui* inscription as approving of his mother’s command, but is not mentioned directly in the *Diao Sheng zun* inscription), he apparently did have to formalize the agreement with the royal authorities. The Sixth Year inscription seems to place him in the capital (or at least the subsidiary capital at Pang 葬), where he was questioned about the agreement by certain “supervisors” (*yousi* 有司). After the matter was further investigated, he was then required to sign a register: “Now I have already one-by-one signed the records” (*jin yu ji yi ming dian* 今余既一名典).<sup>18</sup> These “records” must have been deeds or land registers, which Duke Hu then turned over to Diao Sheng.

## Conclusion

In conclusion, it is certainly noteworthy that authority to negotiate a solution to the problems that were plaguing the Shao family resided with the Dowager. Nevertheless, the inscriptions on the Diao Sheng vessels do not end with that intra-family negotiation, and the Dowager’s decision was apparently not final. It was necessary for her son, Duke Hu of Shao, to go to the capital to have the royal authorities notarize the family’s decision.<sup>19</sup> Although the king enters into these inscriptions only minimally, his presence at Pang being noted at the beginning of the Sixth Year inscription, this does not mean that he was absent. The inscriptions show that, despite being embroiled in multiple wars, the royal court retained an impressive degree of authority over the landholdings and decisions of even such an important family as that of Duke Hu.

<sup>18</sup> I am grateful to Ondřej Škrabal for pointing out this reading, which he also notes goes back to Lin 1980, p. 130, and ultimately, though less explicitly, to Yang 1952, p. 271.

<sup>19</sup> These authorities are identified only as “supervisors” (*yousi* 有司), a generic title that can refer either to royal authorities (including the three highest “supervisors”: *Sima* 司馬, Supervisor of the Horse [equivalent to the Minister of War], *Sigong* 司空, Supervisor of Work [or *Sikong* 司空, Supervisor of

Lands], and *Situ* 司徒, Supervisor of Lands [or *Situ* 司徒, Supervisor of the Multitudes]) or to local supervisors. I assume that since these supervisors are acting at Pang, they are officers of the court. Other “supervisors” are mentioned in the *Diao Sheng zun* inscription as recipients of gifts from Diao Sheng; there is no way to know whether they are the same supervisors as in the *Sixth Year* inscription, dispatched from the capital, or if they were local officials.



## Bibliography

## Traditional Sources

*Li ji Zheng zhu* 禮記鄭注. Sibuyao edition.

*Mao Shi Zheng jian* 毛詩鄭箋. Sibuyao edition.

Qian, Sima 司馬遷

*Shi ji* 史記. Zhonghua shuju edition.

*Zhushu jinian* 竹書紀年. Sibuyao edition.

## Modern Sources

Baoji shi Kaogudui and Fufeng xian bowuguan  
2007 “Shaanxi Fufeng xian xin faxian yipi Xi Zhou tongqi” 陝西扶風縣新發現一批西周青銅器. *Kaogu yu wenwu* 考古與文物 4: 3–12.

Baoji shi Kaogu yanjiusuo and Fufeng xian bowuguan  
2007 “Shaanxi Fufeng Wujun xicun Xi Zhou qingtongqi jiaocang fajue jianbao” 陝西扶風五郡西村西周青銅器窖藏發掘簡報. *Wenwu* 文物 8: 4–27.

Dong, Shan 董珊  
2008 “Houma Wenxian mengshu zhong ‘Ming ji shi zhi’ de jufa fenxi” 侯馬、溫縣盟書中“明殯視之”的句法分析. *Guwenzi yanjiu* 古文字研究 27: 356–62.

Feng, Shi 馮時  
2010 “Diao Sheng san qi mingwen yanjiu” 琯生三器銘文研究. *Kaogu* 考古 1: 69–77.

Guo, Moruo 郭沫若  
1935 *Liang Zhou jinwenci daxi kaoshi* 兩周金文辭大系考釋. Tokyo: Bunkyoūdō.

Li, Feng  
2011 “Literacy and the Social Contexts of Writing in the Western Zhou.” In *Writing & Literacy in Early China: Studies from the Columbia Early China Seminar*, edited by Li Feng and David P. Branner, pp. 271–301. Seattle: University of Washington Press.

Li, Xueqin 李學勤  
1981 “Qingtongqi yu Zhouyuan yizhi” 青銅器與周原遺址. *Xibeidaxue xuebao* 西北大學學報 2: 3–8.

2007 “Diao Sheng zhu qi mingwen liandu yanjiu” 琯生諸器銘文聯讀研究. *Wenwu* 文物 8: 71–75.

Lin, Yun 林漢澐  
1980 “Diao Sheng gui xin shi” 琯生簋新釋. *Guwenzi yanjiu* 古文字研究 3: 120–35.

Liu, Huan 劉桓  
2008 “Guanyu Wu nian Diao Sheng zun de shidu wenti” 關於吳年琯生尊的釋讀問題. *Kaogu yu wenwu* 考古與文物 3: 100–101.

Luoyang Shifan xueyuan and Luoyang shi Wenwuju  
2006 *Luoyang chutu qingtongqi* 洛陽出土青銅器. Beijing: Zijincheng chubanshe.

Rawson, Jessica  
1990 *Western Zhou Ritual Bronzes from the Arthur M. Sackler Collections*. Cambridge: Harvard University Press.

Ruan, Yuan 阮元  
1804 *Jigu zhai zhong ding yiqi kuanzhi* 積古齋鐘鼎彝款識. Yangzhou: N.p.

Shirakawa, Shizuka 白川靜  
1971 *Kim bun tsūshaku* 金文通釋. Volume 33. Kobe: Hakutsuru Bijutsukan.

- Skosey, Laura A.  
1996 The Legal System and Legal Tradition of the Western Zhou (ca. 1045–771 B.C.E.). PhD dissertation, The University of Chicago.
- Sun, Yirang 孫詒讓  
1903 *Gu Zhou yulun* 古籀餘論. Reprint 1989. Beijing: Zhonghua shuju.
- Wang, Hui 王輝  
2008 “Diao Sheng san qi kaoshi” 琯生三器考釋. *Kaogu xuebao* 考古學報 1: 39–64.
- Wang, Jinfeng 王進鋒 and Yonghai Qiu 邱詠海  
2008 “Diao Sheng zun yu Diao Sheng qi renwu guanxi lun” 琯生尊與琯生器人物關係論. *Baoji Wenli xueyuan xuebao* 寶雞文理學院學報 (*Shehui kexue ban* 社會科學版) 3: 45–49.
- Wang, Jing 王晶  
2012 “Wu nian Diao Sheng gui mingwen jishi” 五年琯生簋銘文集釋. *Jiaying xueyuan xuebao* 嘉應學院學報 3: 63–71.  
2013 “Liu nian Diao Sheng gui mingwen jishi” 六年琯生簋銘文集釋. *Jiaying xueyuan xuebao* 嘉應學院學報 1: 76–79.
- Wu, Shifen 吳式芬  
1895 *Jungu lu jinwen* 攔古錄金文. N.p.
- Wu, Zhenfeng 吳鎮烽  
2007 “Diao Sheng zun mingwen de jidian kaoshi” 琯生尊銘文的幾點考釋. *Kaogu yu wenwu* 考古與文物 5: 103–04, 111.
- Xin, Yihua 辛怡華 and Liu Dong 劉棟  
2007 “Wu nian Diao Sheng zun mingwen kaoshi” 五年琯生尊銘文考釋. *Wenwu* 文物 8: 76–80.
- Xu, Yihua 徐義華  
2007 “Xin chutu Wu nian Diao Sheng zun yu Diao Sheng qi ming shi xi” 新出土五年琯生尊與琯生器銘試析. *Zhongguo shi yanjiu* 中國史研究 2: 17–27.
- Yang, Bojun 楊伯峻  
1981 *Chunqiu Zuo zhuan zhu* 春秋左傳注. Beijing: Zhonghua shuju.
- Yang, Shuda 楊樹達  
1952 *Jiweiju jinwen shuo* 積微居金文說. Reprint 1997. Beijing: Zhonghua shuju.
- Zhang, Yachu 張亞初  
1983 “Xi Zhou mingwen suo jian mou sheng kao” 西周銘文所見某生考. *Kaogu yu wenwu* 考古與文物 5: 83–89.
- Zhongguo Qingtongqi quanji bianji weiyuanhui, editor  
1997 *Zhongguo Qingtongqi quanji* 中國青銅器全集. 16 volumes. Beijing: Wenwu chubanshe.
- Zhongguo Shehui kexueyuan Kaogu yanjiusuo, editor  
1984–1994 *Yin Zhou jinwen jicheng* 殷周金文集成. 18 volumes. Beijing: Zhonghua shuju.
- Zhu, Fenghan 朱鳳瀚  
1989 “Diao Sheng gui ming xin tan” 琯生簋銘新探. *Zhonghua wenshi luncong* 中華文史論叢 1: 79–96.



# Women's Archives from Elephantine and the Judean Desert: Law Codes and Archaeological Finds

*Tal Ilan, Freie Universität Berlin*

## Introduction

In the year 1997, a conference was held at the Israel Museum celebrating fifty years to the Qumran discovery. In this conference I first discussed the relationship between the Babatha archive and the Jewish documents from Elephantine.<sup>1</sup> There I argued that the Babatha archive, which was found by a team of archaeologists — chief among them Yigael Yadin — in a cave in Nahal Hever, together with other documents found in the Judean Desert — chief among them the archive of another woman, Salome Komaise — demonstrate what a woman's legal archive at the time had looked like. It consisted of three recognizable documents: (1) a marriage contract; (2) a deed of gift; and (3) a renunciation of claims document. The function of the first of these documents is clear. The function of the other two has to be explained in some detail. Since, according to Jewish law, a daughter does not automatically inherit from her father, the deed of gift was the legal mechanism whereby a father bestowed some of his property on his daughter. The deed of gift was usually produced quite close to the date of the daughter's marriage, and so the first two documents are often very closely dated. The renunciation of claims document was necessary so that the daughter owning the property could argue her right to it against counter claims that may be made by persons who are defined by law as the natural heirs of her father: foremost among them would be her brothers or their sons; in the absence of these, her father's brothers and their sons; but most probably not the daughter or the wife.<sup>2</sup>

In order to argue my point decisively, in the end of my article "Women's Archives in the Judean Desert" I referred the reader to the Elephantine papyri. I wrote:

Finally, I would like to ... make a generalization about the contents of women's archives, claiming that marriage contracts, deeds of gift and renunciations of claims constituted the usual make up of a Jewish woman's personal paperwork for centuries. Making such a claim on the basis of two archives both originating from a Jewish settlement under Roman rule in the province of Arabia is very bold indeed. For this reason I feel that it is necessary to prove my case elsewhere. Before the discovery

---

<sup>1</sup> Ilan 2000.

<sup>2</sup> See especially Cotton and Greenfield 1994; slightly altered in Cotton 1996a and 1996b. See also Katzoff

---

1991; Yaron 1992; and, more recently, Oudshoorn 2007, pp. 213–98.

of the documents in the Judaeen Desert, the only similar documentation of Jewish social life in antiquity were the Aramaic papyri from fifth century BCE Elephantine Egypt. I am interested in two personal archives which were discovered in Aswan. One of them is that of Mivtahiah, the daughter of Mahsiah. The archive ... consists of a marriage contract, a deed of gift and several deeds of renunciation of claims from various neighbors ... The second archive was designated by the publishers the Anani archive, but ... reveals a complex relationship between a Jewish man, Anani, another Jew, a slave owner, whose maidservant, Tamat, Anani marries and the daughter of the two, Yehoyishma. The documents in the archive are Tamat's and Yehoyishma's marriage contracts, deeds of gift to Tamat and to Yehoyishma, both from Anani, the former's husband and the latter's father, and a renunciation deed ... The Aramaic papyri from Elephantine were written in Egypt, in Aramaic in the 5th century BCE... 600 years later, in Greek and in Arabian Maoza, the Babatha and Salome archives were composed... I find the similarity of the basic contents of the archives striking. Jewish women from Persian Elephantine in Egypt and Jewish women from Roman Maoza in Arabia, 600 years apart, carried with them their marriage contracts, their deeds of gift and documents renouncing other persons' claims to their property. This has to tell us something about the universality of Jewish women's paperwork for generations.<sup>3</sup>

In light of this argument, I would like to test the question of how similar are the two groups of documents are. Unlike my discussion in 2000, which began with, and concentrated on, the archives from the Judaeen Desert, I would like to begin here with the finds from Elephantine, and somewhat modify my sweeping argument from over a decade ago.

Two archives from Elephantine pertain to women. One deals with Mivtahiah, who was married three times; she was the aunt of the leader of the Jewish community in Elephantine, Gamariah ben Yedaniah. The other deals with two women, a mother and daughter, Tamat and Yehoyishma, both ex-slaves. Tamat, while still a slave, married Ani and gave birth to Yehoyishma — thus, Yehoyishma was born into slavery and only freed several years later, together with her mother.<sup>4</sup> The documents of Mivtahiah were certainly deposited in the domicile (they were found in situ), while the documents of Tamat and Yehoyishma probably were, perhaps under peaceful circumstances.<sup>5</sup> A note should be made here of a relevant event: In 410 BCE the Jewish Temple of Elephantine was destroyed by an angry mob at the instigation of the priests of the Egyptian Ram-God Khnum<sup>6</sup>; the house of Tamat and Yehoyishma, which bordered on the Jewish Temple, was probably partially destroyed during the riots.<sup>7</sup> The last document in the Mivtahiah archive is dated to February 410 BCE, just several months before the Temple's destruction; the last document of the Tamat/Yehoyishma archive is dated to 402 BCE, eight years after.<sup>8</sup> There is no direct indication that it is this event, or any other catastrophe, that made the families abandon their homes and the documents therein. Because of this, the number of documents in each of these archives had time to accumulate. The archive of Mivtahiah covers sixty-one years (471–410 BCE) and consists of eleven documents. The Tamat/Yehoyishma archive covers fifty-four years (456–402 BCE) and consists of thirteen documents.

<sup>3</sup> Ilan 2000, p. 760.

<sup>4</sup> Porten 1968, pp. 200–63.

<sup>5</sup> *Ibid.*, pp. 262–63.

<sup>6</sup> For a list of the documents and their dates, see Porten and Yardeni 1989, p. 15.

<sup>7</sup> For a map, see Porten and Yardeni 1989, p. 176.

<sup>8</sup> Porten and Yardeni 1989, p. 52.

I want to begin by stating that here, like in the Judean Desert, the owners of the archives are women. Failing to note this gendered aspect of the archives, Bezalel Porten, the foremost scholar of the Elephantine papyri, wrote of the Mivtahiah archive that was found in situ in a house in Elephantine which perhaps belonged to her nephew:

In his publication, E. Sachau divided the material [i.e. the Aramaic papyri found on location in Elephanite T.I.] into four categories: (1) letters, (2) lists, (3) legal documents, and (4) literary documents. The main personality in the first category was clearly Yedaniah ben Gemariah, nephew of Mivtahiah and leader of the Jewish community in the last decade of the century ... The absence of any private documents belonging to Yedanyah ben Gemariah indicates that all of these were public papers ... there are several possible explanations of why Mivtahiah's private archive, which was passed to her son Yedaniah ben Ashor, was found adjacent to the public papers of Yedaniah's namesake, Yedaniah son of Gemariah, Mibtahiah's brother.<sup>9</sup>

Porten goes on to speculate about this, and even suggests that "the archive may have ended in this particular point because later documents were stored in another jar which has not yet been discovered."<sup>10</sup> In other words, there may have been an archive that displayed the private life of Yedaniah son of Gemariah next to this one, but it was not found.

Of course this could be the case, but as it remains speculation, the only accumulation of personal Jewish documents that have been found to date are those of women. Even the non-Jewish Egyptian archive, which Porten uses to compare with Mivtahiah's and Yehoyishma's archives, is that of a woman from Achimanid Thebes, in Egypt (Tsenenhor).<sup>11</sup> I suspect that this is not, as Porten assumed, because men's archives were not found, but because men possessed no such documentation. I wrote about this in my 2000 article:

It would be incorrect to claim that no man's archive was discovered in the [Judean Desert] caves. In fact we can now identify three archives which had belonged to man. Two of them were discovered in Nahal Hever and one in Wadi Muraba'at. The contents of these archives are, however, singularly different [from those of the women T.I.]. In Nahal Hever, Yadin discovered the private correspondence of one Jonathan bar Bain, one of Bar-Kokhba's generals and the Jewish commander of Ein Gedi, out of which the Nahal Hever cave refugees fled. Jonathan bar Bain brought with him to the cave his military and administrative correspondence with Bar Kokhba, as well as his correspondence with other military personnel. The documents are highly impersonal. We do not know if Jonathan was married, whether he had children, or even whether he owned property in Ein Gedi ... The second archive was found, so Yadin informs us, in a (woman's) leather bag, and the documents therein belonged to a certain Eleazar bar Shmuel. This person was more business minded, since his archive consisted of papyri documenting leasing contracts which he signed with various farmers in Ein Gedi. Again the papyri are businesslike and not personal. We do not know whether Eleazar was married or any other personal information. The third archive was ... discovered in the cave of Wadi Muraba'at ... The archive belonged to one Jesus ben Galgula, who was apparently Bar-Kokhba's military commander in Herodium, whence he fled to Wadi Muraba'at. This person also retained Bar-Kokhba's military correspondence with him. The only personal detail we know about him is that his sister was apparently also hiding in the cave, since her marriage contract was found in the excavations ... If we wish to inquire into the question, why the composition of men's archives looks so strikingly different from women's, the answer I suspect lies in the social and legal

<sup>9</sup> Porten 1968, p. 263.

<sup>10</sup> *Ibid.*, pp. 262–63.

<sup>11</sup> *Ibid.*, pp. 258–59.

position of women at the time. A woman was defined by her relationship to a man (or men) and she carried documentation to prove it. A man, on the other hand, belonged to no-one and was not required to prove who he was. Thus, here too, as in other ancient sources, the private/public dichotomy between women and men is displayed. While men's documents ... provide information of public life and political history, women's archives provide rich data on private life and social history.<sup>12</sup>

Having established the similarity between the archives in terms of social reality, I now wish to go into some detail about the documents that all archives have in common.

## Marriage Contracts

Let us begin with the Elephantine women. Although married three times, Mivtahiah holds in her archive only her very last marriage contract with her third husband, Ashor, the King's architect from the year 458 BCE.<sup>13</sup> Concerning her first marriage, Porten noted that "no marriage contract for this union has been found and no children from the union are known. Yezaniah disappeared from the scene (he probably died)."<sup>14</sup> In other words, Porten assumed that the absence of Mivtahiah's first marriage contract needs to be explained. Thus, when dealing with a suit brought against Mivtahiah's sons from her third marriage, by the nephews of her first husband, Porten speculates: "The marriage contract, having served to clarify the inheritance, may have been discarded at this time. Such a reconstruction would also explain its absence from Mivtahiah's archive."<sup>15</sup> He also states that "Some time after the death of her first husband Mivtahiah married again ... no marriage contract of this union is preserved,"<sup>16</sup> but adds that "the couple was divorced and ... since he (i.e., the husband T.I.) allowed her to remove her dowry, she may have had to surrender to him the marriage contract which stipulated her right to it. This would explain the absence of the marriage contract from the archive."<sup>17</sup> I would argue that this would probably better explain the absence of the first marriage contract, and it is also how I explained the absence of Babatha's first marriage contract in her archive:

It is unnecessary to dwell here on the function of the marriage contract. Suffice is [sic] to note that its function was not dissimilar to the function of the deeds ... It was proof of a debt the husband owed his wife, which she may one day collect. Wedding contracts were not ceremonial documents, as they are today. They were collected. A canceled marriage contract was ... published by [Hannah] Cotton [from the Judaeen Desert], indicating that the sum therein had been paid. It is thus revealing to discover that although Babatha's husband died in 130 CE, and although Babatha escaped to the Nahal Hever cave in 135 CE, her marriage contract was still intact, suggesting that it had not been paid ... It should come as no surprise that Babatha's first marriage contract is absent from the archive. We may justly assume that it had been collected.<sup>18</sup>

This is another instance where the practice we observe in the Judaeen Desert documents is already attested in Elephantine.

<sup>12</sup> Ilan 2000, pp. 758–59.

<sup>13</sup> Porten and Yardeni 1989, pp. 30–32.

<sup>14</sup> Porten 1968, p. 244.

<sup>15</sup> *Ibid.*, p. 257.

<sup>16</sup> *Ibid.*, p. 245.

<sup>17</sup> *Ibid.*, pp. 245–47.

<sup>18</sup> Ilan 2000, p. 758. The reference is to Cotton 1994. On the Babatha archive, see Lewis 1989 and Yardeni and Levine 2002.

In the other archive from Elephantine, both Tamat, the slave woman who married Anani the Temple official, and her daughter Yehoyishma's wedding contracts, have been preserved.<sup>19</sup> Tamat's marriage contract is from 449 BCE; her daughter's is from 420 BCE, twenty-nine years later. The last document from this archive is dated to 402 BCE. Perhaps both couples were still married at the time, and both husbands still alive. There was no need to collect the dowry therein, and no need to cancel the documents. It is for this reason that they are still both preserved in the archive.

## Deeds of Gift

Mivtahiah possessed two deeds of gift; both were given to her by her father. One is of a house from 460 BCE, given to her the same day she first married.<sup>20</sup> This is accompanied by another document, dated to the same day (or twenty days later), that her father presented to her newly-wed husband, in which his rights in the house and in the plot of land on which it stands are listed, since the house is clearly his wife's.<sup>21</sup> The second is of a house from 446 BCE, eight years after Mivtahiah's marriage to her third husband.<sup>22</sup> There is no definite pattern here. While the first house is bestowed on marriage, the second is not.

As for Tamat and Yehoyishma, since Tamat was a slave, she was given no deed of gift at marriage — certainly not by her father, who is unknown from any document. However, in 434 BCE, fifteen years after their marriage, Tamat's husband, Anani, presents her with a deed of gift for part of his house.<sup>23</sup> This may suggest that the marriage worked well and there was some reciprocity, gratitude, and perhaps even love involved. Interestingly, in the Babatha archive, too, we find a husband giving his wife a deed of gift. Babatha's mother, Miriam, was given a deed of gift by her husband Menahem in 120 CE, sometime after Babatha was already married and provided for.<sup>24</sup>

The case is different for Yehoyishma, daughter of Tamat and Anani — it reminds one much more of the case of Mivtahiah. Yehoyishma was married in October 420 BCE. Three months earlier in July, her father gave her part of his house in a deed of gift.<sup>25</sup> Obviously, the deed of gift was drawn up in association with the upcoming wedding. This is similar to the case of the first house and the first marriage of Mivtahiah.

In the Babatha archive we find something similar: the marriage document of Babatha's stepdaughter Salampsio and the deed of gift presented to her by her father are dated ten days apart one from the other, in 128 CE.<sup>26</sup> This case is similar to Mivtahiah's first marriage and to Yehoyishma's wedding, in which they both receive deeds of gift from their fathers. This seems to have been the standard procedure both in Elephantine and in the Judean Desert documents.

In contrast, the deed of gift from the Salome Komaise archive is from the mother to the daughter and is presented to her two years before her second marriage.<sup>27</sup> This, like the deed of gift of Tamat from her husband (and of Babatha's mother from her husband), indicates that there was the standard way of presenting one with a deed of gift. This also reveals the

<sup>19</sup> Porten and Yardeni 1989, pp. 60–63, 78–83.

<sup>20</sup> *Ibid.*, pp. 22–25.

<sup>21</sup> *Ibid.*, pp. 26–28.

<sup>22</sup> *Ibid.*, pp. 34–37.

<sup>23</sup> *Ibid.*, pp. 68–71.

<sup>24</sup> Yardeni and Levine 2002, pp. 73–88.

<sup>25</sup> Porten and Yardeni 1989, pp. 74–77.

<sup>26</sup> Lewis 1989, pp. 76–87.

<sup>27</sup> Cotton and Yardeni 1997, pp. 203–23.



numerous deviations that the legal system accepted concerning such a deed, but it is beyond question that all of them, in both remote localities, were presented to woman rather than to men. Furthermore, the association of a first marriage with a deed of gift, presented by the father to the bride, is clearly indicated, and continued to be in force in Jewish communities 600 years apart.

## Renunciation of Claims Deeds

Finally, the archive of Mivtahiah includes, as I had argued, several deeds of renunciation. The first one concerns the exact territory on which Mivtahiah's first house stands, but it was given to her father by his neighbor four years before the house was given to Mivtahiah.<sup>28</sup> Did her father procure the renunciation deed because he planned to bestow the house on his daughter and took precautions to secure it for her? This remains mere conjecture. More likely, and as is argued below, his neighbor, who provided him with this deed, had at some point contested Mivtahiah's father's rights to the territory.

The second deed of renunciation that we find in the archive, regarding a house, is from the year 416 BCE, forty-four years after Mivtahiah's father had bestowed on her the first house.<sup>29</sup> The deed is produced for the benefit of Mivtahiah's sons, by the nephews of Mivtahiah's first husband. It seems the nephews had waited long for her to die in order to demand their uncle's share in the house; at the time Mivtahiah had received the house itself and the uncle had been given a deed by her father permitting him domicile, rights of construction, and use of the territory. The court ruled against the nephews, and they had to produce a deed of renunciation. But what does their claim against Mivtahiah's natural heirs say about a woman's right to property? Possibly, as Porten reconstructed the events: "... the marriage contract with Yezaniah [i.e., Mivtahiah's first husband] was opened to see what term was employed to describe Mivtahiah's rights to her husband's property. It must have been discovered that Mivtahiah was to inherit her husband, and he her."<sup>30</sup> Until such an event took place, it was not naturally assumed that a woman had any right to such property. She needed documentation thereof, and since in this case, her sons inherit from her (and not from their father), they too needed such documentation.

This is very similar to the renunciation of claims of the above-mentioned Shelamzion, Babatha's stepdaughter. By June 130 CE, just two years after her marriage, Shelamzion's father died and immediately the sons of his brother brought her to court, demanding that she hand over her property.<sup>31</sup> Hannah Cotton and Jonas Greenfield wrote of this sequence of events: "The gift apparently did not go undisputed by the guardians of Yehudah's nephews and orphaned sons of his brother Yeshu'a ... The very drawing of a deed of gift to ensure that the daughter would come to possess her father's property after his death strongly suggests that this property would not have become hers automatically."<sup>32</sup> As she was able to produce a deed of gift that her father had given her two years hence, she managed to elicit from her cousins a deed of renunciation, which she could henceforth produce to substantiate her claim to her property.

<sup>28</sup> Porten and Yardeni 1989, pp. 20–21.

<sup>29</sup> *Ibid.*, pp. 44–47.

<sup>30</sup> Porten 1968, p. 257.

<sup>31</sup> Lewis 1989, pp. 88–93.

<sup>32</sup> Cotton and Greenfield 1994, p. 218.

In the Judean Desert, another deed of renunciation was found. It belongs to the archive of Salome Komaise, who we have up to this point only mentioned in passing. Komaise's archive is also not a classical one, because by the time it was deposited (last dated document — 131 CE; date of deposition — end of the Bar Kokhba Revolt in 135 CE) she had been widowed (or divorced; the first marriage contract has not been found) and married a second time. She had also been orphaned and had lost a brother. In 127 CE, she writes her mother a deed of renunciation on the property of her dead brother.<sup>33</sup> This is an unusual situation, but it probably derives from the fact that all males in this family are deceased. The survivors are mother and daughter. It appears that after the death of both males in the family (father and brother), Salome Komaise sued her mother for the property. As Jacobine Oudshoorn claims: "It is unlikely that the mother had any rights based on intestate succession either to her husband or her son's estate and therefore the rights that are acknowledged here are most likely based on a gift."<sup>34</sup> The deed of gift was not found, but this is perhaps because the archive was Salome's and not her mother's. In any case, in the document we read: "[the cont]roversy ... has now been solved," indicating that there had been a controversy and the deed of renunciation was produced after it was settled.

Thus, unlike my initial argument in 2000, deeds of claim-renunciation are found only in three of the four women archives at our disposal: Mivtahiah's, Babatha's, and Salome Komaise's.<sup>35</sup> Tamat and Yehoyishma carried no such documents because no one contested their right to the property they owned, perhaps because at the time that their archive was deposited, their male relatives were still alive. Thus, unlike what I had argued in my 2000 article, what deeds of renunciation prove is not that every woman carried both a deed of gift and a deed of renunciation on the same property so as to prove it belonged to her, but rather that most women's claims to property were contested by other (mostly male) potential heirs, often close on the death of a male relative. This was true in Elephantine, where Mivtahiah's first husband's nephews challenged her sons' right to her property, as well as in the Judean desert, where the nephews of Babatha's second husband challenged her and her stepdaughter's right to their property.

Both archives seem to indicate what Hannah Cotton first claimed, which was then substantiated by Jacobine Oudshoorn with regard to the law of succession evident in the Judean Desert documents: "... the son is legal heir to the father's estate and in his absence the brother of the deceased is legal heir. Whether there is a son or not, the wife never has any claims based on the law of succession. The daughter does not inherit even in the absence of a son."<sup>36</sup>

Both Hannah Cotton and Jacobine Oudshoorn had problems with identifying this law as Jewish. Cotton and Greenfield wrote: "In denying the claims of the wife to her husband's property, this law seems to have been not unlike the Jewish law of succession. It differs from Jewish law in the claims of the man's brother or his brother's sons to those of the daughter. Jewish law prefers the claim of children, whatever their sex, to those of the man's brother or brother's sons."<sup>37</sup> Oudshoorn, who wanted to a greater extent to stay with Jewish law, argued

<sup>33</sup> Cotton and Yardeni 1997, pp. 193–202.

<sup>34</sup> Oudshoorn 2007, p. 234.

<sup>35</sup> There is a deed of renunciation in the Tamat and Yehoyishma archive, but it is addressed to neither of them; it is addressed to their husband/father, and it touches on no immobile property that they then

owned, but rather on an object described as *hijra* (see Porten and Yardeni 1989, pp. 16–19), about which Porten wrote: "The situation described in the first document and the reason for its inclusion in the Ananiah archive are most obscure" (Porten 1986, p. 202).

<sup>36</sup> Oudshoorn, 2007, p. 237.

<sup>37</sup> Cotton and Greenfield 1994, p. 220.

that this was the case only if the daughter married exogamously. She wrote: “If my assumptions above are true, the law of succession at the time would not deny the daughter the right to inherit her father’s estate, as long as she was unmarried or married to the next of kin.”<sup>38</sup>

## Conclusions

What this paper attempted to show is that the comparison of the archives from Elephantine and from the Judaean Desert should focus not on the extent to which these practices follow biblical law toward another fascinating insight: that Jews living centuries apart treated women’s paperwork and their machinations in exactly the same way. Women, and not men, were expected to carry documents proving their personal status, and especially proving their right to own property. In the absence of such paperwork, their possession of property was immediately challenged by males, who law privileged as natural heirs of property. This was true in fifth century BCE Elephantine in Egypt and in second century CE Judaea, regardless of what we read in the Bible on this issue. I think that in the discussion of long-enduring (*longue duree*) forms of gender discrimination within a given culture, over time and geographical expansion, this can go down as an outstanding example.

---

<sup>38</sup> Oudshoorn 2007, p. 245.

## Bibliography

- Cotton, Hannah M.  
 1994 "A Canceled Marriage Contract from the Judean Desert." *Journal of Roman Studies* 84: 94–86.  
 1996a "Courtyard(s) in Ein-Gedi: Papyrus Yadin 11, 19 and 20 of the Babatha Archive." *Zeitschrift für Papyrologie und Epigraphik* 112: 197–201.  
 1996b "Deeds of Gift and the Law of Succession in the Papyri from the Judean Desert." *Eretz Israel* 25: 410–14. [Hebrew]
- Cotton, Hannah M., and Jonas Greenfield  
 1994 "Babatha's Property and the Law of Succession." *Zeitschrift für Papyrologie und Epigraphik* 104: 211–24.
- Cotton, Hannah M., and Ada Yardeni  
 1997 *Aramaic, Hebrew and Greek Documentary Texts from Nahal Hever and Other Sites*. DJD XXVII. Oxford: Clarendon Press.
- Ilan, Tal  
 2000 "Women's Archives in the Judean Desert." In *The Dead Sea Scrolls: Fifty Years after their Discovery*, edited by Lawrence H. Schiffman, Emmanuel Tov, and James VanderKam, pp. 755–60. Jerusalem: Israel Exploration Society.
- Katzoff, Ranon  
 1991 "Papyrus Yadin 19: A Gift after Death from the Judean Desert." In *Proceedings of the Tenth World Congress of Jewish Studies C/1*, edited by World Congress of Jewish Studies, pp. 1–8. Jerusalem: World Union of Jewish Studies. [Hebrew]
- Lewis, Naftali (with Yigael Yadin)  
 1989 *The Documents from the Bar-Kokhba Period in the Cave of Letters: Greek Papyri*. Judean Desert Studies 2. Jerusalem: Israel Exploration Society.
- Oudshoorn, Jacobine G.  
 2007 *The Relationship between Roman and Local Law in the Babatha and Salome Komaise Archives*. Studies on the Texts of the Desert of Judah 69. Leiden: Brill.
- Porten, Bezalel  
 1968 *Archives from Elephantine: The Life of an Ancient Jewish Military Colony*. Berkeley: University of California Press.
- Porten, Bezalel, and Ada Yardeni  
 1989 *Textbook of Aramaic Documents from Ancient Egypt II: Contracts*. Winona Lake: Eisenbrauns.
- Yardeni, Ada, and Baruch Levine (with Yigael Yadin and Jonas Greenfield)  
 2002 *The Documents from the Bar-Kokhba Period in the Cave of Letters: Hebrew, Aramaic and Nabatean-Aramaic Papyri*. Judean Desert Studies 3. Jerusalem: Israel Exploration Society.
- Yaron, Reuven  
 1992 "Acts of Last Will in Jewish Law." In *Acts of Last Will*, pp. 29–45. Transactions of the Jean Bodin Society for Comparative Institutional History 59. Brussels: De Boeck.



# From Nuzi to Medina: Q. 4:12b, Revisited

David S. Powers, Cornell University\*

## Introduction

The Qur'ân contains several linguistic puzzles that have never been fully solved. One such puzzle is found in the second half of verse 12 of *Sûrat al-Nisâ'* ("Women"), which treats the subject of inheritance. The grammar and syntax of this sub-verse are notoriously difficult, and the meaning of the word *kalâla* remains obscure down to the present day. In this essay I propose a new reading of the consonantal skeleton of Q 4:12b and a new understanding of its meaning. My proposal is based on two types of evidence: (1) the physical evidence of an early Qur'ân manuscript, Bibliothèque Nationale de France Arabe 328; and (2) linguistic evidence found in matrimonial adoption contracts recorded on cuneiform tablets in Nuzi in the middle of the second millennium BCE. The physical and linguistic evidence combine to suggest that it took nearly a century — fifty years more than is generally thought to be the case — for the consonantal skeleton of the Qur'ân to reach its final form. I begin with a review of the traditional Islamic account of the collection of the Qur'ân.

## The Collection of the Qur'ân

Islamic tradition teaches that God spoke to Muḥammad over a period of twenty-three years between 610 and 632 CE and that, after receiving a divine communication, the Prophet would teach it to his Companions. The revelations are said to have been preserved in two ways: Some Muslims memorized the words taught to them by the Prophet; others inscribed the utterances on palm branches, animal bones, stones, cloth, parchment, papyrus, and wooden boards. Accordingly, at the time of Muḥammad's death in AH 11/632 CE, the revelations would have existed in the minds of the Muslims who had memorized them as well as on various writing surfaces. There was as yet no codex or book. In the years immediately following the death of the Prophet, these heterogeneous and unwieldy materials were collected, placed in sequential order, divided into chapters, edited, and redacted, thereby producing the text known as the Qur'ân. The redaction of the Qur'ân is one of the fundamental cruxes of modern scholarship on the rise of Islam.<sup>1</sup>

---

\* This essay includes material from chapters 2 and 8 of Powers 2009. In references to Arabic sources, I use a period (.) before line numbers, e.g., Ibn Abī Dā'ūd 1355/1936, 6.11–18 = p. 6, lines 11–18. Abbreviations: CAD = *The Assyrian Dictionary of the Oriental Institute of the University of Chicago*; EI<sup>2</sup> = *Encyclopaedia of Islam*, 1954–2002. 2nd edi-

---

tion. 11 volumes. (Leiden: Brill); EQ = *Encyclopaedia of the Qur'ân*, 2001. 5 volumes, plus index (Leiden: Brill).

<sup>1</sup> See generally EI<sup>2</sup>, s.v. *Qur'ân* (A. Welch); EQ, s.vv. *Codices of the Qur'ân* (F. Leemhuis); *The Collection of the Qur'ân* (J. Burton); *Manuscripts of the Qur'ân* (F. Déroche); *Muṣḥaf* (H. Motzki); Motzki 2001; Gilliot 2006.

One finds considerable information about the redactional process in what I shall call the standard account of the Qur'ân's collection. In the sources, this complex project is encompassed by the verb *jama'a*, which signifies *to collect*, although in the present instance the term may perhaps signify *to gather* — that is to say, to bring together a group of sheets to form the quires of a codex. The promulgation of an official, state-sponsored codex (*muṣḥaf*) is said to have been the work of the first three caliphs, and the Qur'ân is said to have been collected or gathered on two separate occasions. The first collection was undertaken in response to conditions in Arabia following the death of the Prophet. In apparent defiance of the Qur'ânic pronouncement that Muḥammad was the “Seal of Prophets” (Q. 33:40), an erstwhile Muslim named Musaylima renounced Islam and declared himself to be a prophet. In the year AH 11/632 CE, Muslim forces fought a fierce battle against Musaylima and his supporters at al-Aqrabâ' in the district of al-Yamâma in the Najd.<sup>2</sup> The fighting was intense, and large numbers of Qur'ân reciters (*qurrâ'*) are said to have fallen in battle. Their deaths reportedly caused 'Umar b. al-Khaṭṭâb (d. AH 23/644 CE) to express concern that the record of the revelations that had been preserved in the hearts and minds of men would be lost forever.<sup>3</sup> For this reason, 'Umar advised the first caliph Abû Bakr (r. AH 11–13/632–34 CE) to collect all of the surviving records, both written and oral. Upon hearing this proposal, the caliph expressed concern about carrying out an innovation: “How can I do something that the Messenger of God did not do?” To this question 'Umar replied that such a collection would be a good thing (*khayr*), and he persisted in his efforts to persuade the caliph until “God set [Abû Bakr's] heart at ease just as previously He had set 'Umar's heart at ease.”<sup>4</sup> The decision to collect the Qur'ân may have been an innovation, but it had God's blessing.

After accepting 'Umar's proposal, Abû Bakr summoned Zayd b. Thâbit al-Anṣârî (d. AH 45/665 CE) who, as a young man, had served as the Prophet's secretary.<sup>5</sup> Zayd's initial reaction to the proposal was similar to that of Abû Bakr: “How can the two of you do something that the Messenger of God did not do?” To this question Abû Bakr replied that it was a good thing, and the caliph and 'Umar persisted in their efforts to persuade Zayd until “God set [Zayd's] heart at ease just as previously He had set the hearts of Abû Bakr and 'Umar at ease.”<sup>6</sup> Zayd now asked the Companions to bring him the revelations that had been committed to memory and/or recorded in writing, and he transcribed these divine utterances onto unbound sheets or folio pages (*ṣuḥuf*), taking care to accept only those revelations that could be verified by two witnesses.<sup>7</sup> It was a difficult task — more difficult, Zayd is reported to have said, than moving a mountain from one spot to another. When his work was done, Zayd gave the sheets to Abû Bakr, who thus earned the distinction of being the first Muslim caliph to collect the Qur'ân between two boards.<sup>8</sup> Before he died, Abû Bakr conveyed the sheets to 'Umar, his successor as caliph (r. AH 13–23/634–44 CE). Prior to his death, 'Umar gave the sheets to his daughter Ḥafṣa (d. AH 45/665 CE), one of the widows of the Prophet.<sup>9</sup>

<sup>2</sup> *EI*<sup>2</sup>, s.vv. Musaylima (W. Montgomery Watt) and al-Yamâma (G. R. Smith).

<sup>3</sup> Ibn Abî Dâ'ûd 1355/1936, 6.11–22, 7.1–19, 8.8–9.5, 20.10–21.2, 23.12–19. According to a variant, it was not 'Umar but Abû Bakr who initiated the first collection (Ibn Abî Dâ'ûd 1355/1936, 6.7–11).

<sup>4</sup> Ibn Abî Dâ'ûd 1355/1936, 6.11–18, 23.12–19.

<sup>5</sup> *EI*<sup>2</sup>, s.v. Zayd b. Thâbit al-Anṣârî (M. Lecker).

<sup>6</sup> Ibn Abî Dâ'ûd 1355/1936, 6.19–7.1.

<sup>7</sup> Alternatively, it is said that the project was a collective effort. See Ibn Abî Dâ'ûd 1355/1936, 9.5–15.

<sup>8</sup> Ibn Abî Dâ'ûd 1355/1936, 5.5–6.3. Alternatively, it is said that 'Umar was the first to collect the Qur'ân, on which, see further below.

<sup>9</sup> *Ibid.*, 8.7–8, 9.3–5, 9.18–20, 21, l. 2.

Abû Bakr may have been the first caliph to collect the Qur'ân between two boards, but his text competed with other texts associated with the names of one or another Companion. The free circulation of unofficial versions of the Qur'ân alongside the text sponsored by the first caliph reportedly gave rise to additional anxieties relating to the accurate preservation of the divine revelations. Whereas the first collection was triggered by fear of the loss of the memorized record, the second was triggered by disagreements over the *rasm* or consonantal skeleton. And whereas the first collection was a purely Arabian affair, the second involved the Muslim community in Kufa,<sup>10</sup> or, alternatively, on the frontier with Armenia and Azerbaijan.<sup>11</sup>

In narratives about the second collection, three Companions play a prominent role: 'Abdallâh b. Mas'ûd (d. AH 33/653 CE), a well-known Qur'ân reciter;<sup>12</sup> Ḥudhayfa b. al-Yamân (d. AH 36/656 CE), a military commander;<sup>13</sup> and Abû Mûsa al-Ash'arî (d. AH 52/672 CE), a military commander, governor, and Qur'ân reciter.<sup>14</sup> Ibn Mas'ûd was a man of humble origins who took great pride in his mastery of the Qur'ân. He is said to have boasted that he knew the location in which every verse of the Qur'ân had been revealed and the identity of every person or persons about whom a verse had been revealed. He was careful to add, however, that were he to discover someone whose knowledge of the Qur'ân exceeded his own, he would jump on his camel and ride to him.<sup>15</sup> One day, all three Companions were sitting in the mosque in Kufa, where Ibn Mas'ûd was reciting the Qur'ân. When he finished his recitation, Ḥudhayfa exclaimed, "The reading of the son of the mother of a slave and [viz., versus] the reading of Abû Mûsa al-Ash'arî! By God, if this [situation] continues, then the next time I meet the Commander of the Believers, I will order him to establish it according to a single reading." In response to the insult to his mother and himself, Ibn Mas'ûd directed certain angry words at Ḥudhayfa, who now remained silent.<sup>16</sup>

In a variant of the preceding report, it is not the reading of the Qur'ân that is problematic but the consonantal skeleton. Sometime in the year AH 29/649–50 CE, Ḥudhayfa was sitting in a prayer circle in the mosque in Kufa while the Qur'ân was being recited by two groups of men who differed over the consonantal skeleton of Q. 2:196. One group read: "Fulfill the major pilgrimage (*ḥajj*) and the minor pilgrimage ('*umra*) for God (*lillâh*)" — which would become the standard reading. The other group read: "Fulfill the *ḥajj* and the '*umra* to the house (*li'l-bayt*)." Suddenly, an unidentified Muslim called out, "Let those who follow the recitation of Abû Mûsa [al-Ash'arî] gather in the corner by the Kinda gate, and let those who follow the recitation of 'Abdallâh b. Mas'ûd gather in the corner next to 'Abdallâh's house." Upon hearing this statement, Ḥudhayfa's face turned red. He stood up, tore his tunic in two, and declared, "Either he [viz., the unidentified Muslim] will ride to the Commander of the Believers or I will. This is how those who came before you behaved"<sup>17</sup> (alternatively: "the Muslims will disagree about their Book just as the Jews and Christians did previously").<sup>18</sup> When the unidentified Muslim remained in his place, Ḥudhayfa jumped on his mount and rode to Medina, where he advised 'Uthmân (r. AH 23–35/644–56 CE) about the gravity of the situation and warned that if the

<sup>10</sup> Ibn Abî Dâ'ûd 1355/1936, 11.20–12.12, 13.12–16, 13.22–14.10, 14.11–18.

<sup>11</sup> *Ibid.*, 18.15–20, 21.2–4, 23.13–18.

<sup>12</sup> *EP*<sup>2</sup>, s.v. Ibn Mas'ûd (J.-C. Vadet).

<sup>13</sup> On Ḥudhayfa, see Lecker 1993, pp. 149–62.

<sup>14</sup> *EP*<sup>2</sup>, s.v. al-Ash'arî, Abû Mûsa (L. Vecchia Vaglieri).

<sup>15</sup> Ibn Abî Dâ'ûd 1355/1936, 14.11–18; cf. 16.4–7, 16.10–19.

<sup>16</sup> Ibn Abî Dâ'ûd 1355/1936, 13.12–16.

<sup>17</sup> *Ibid.*, 11.18–12.12.

<sup>18</sup> Ibn Abî Dâ'ûd 1355/1936, 19.1–2, 19.20–20.1, 21.4–6. In some reports (22.19, 23.10, 25.8–10), these disagreements led to mutual accusations of *kufûr*, or infidelity. In others (21.4), the disagreements were so serious that the Muslim community came to the verge of *fitna*, or civil strife.



caliph did not take immediate action, the enemies of Islam were on the verge of striking a fatal blow to the new religion.<sup>19</sup>

‘Uthmân set up a commission composed of twelve men, headed by Zayd b. Thâbit al Anṣârî. Three members of the commission were prominent members of the tribe of Quraysh: ‘Abdallâh b. al-Zubayr (d. AH 73/692 CE), Sa‘îd b. al-‘Âṣ (d. AH 57–59/677–79 CE), and ‘Abd al-Raḥmân b. al-Ḥârith b. Hishâm (d. ?).<sup>20</sup> The caliph charged the commission with the task of producing a codex that would put an end to disputes over the consonantal skeleton of the Qur’ân. To facilitate matters, ‘Uthmân borrowed the sheets produced at the time of the first collection, which had passed into Ḥafṣa’s possession, so that they might serve as the basis for the second collection (Ḥafṣa reportedly refused to part with the sheets until the caliph had agreed to return them to her after completing his project).<sup>21</sup> ‘Uthmân instructed Zayd to produce his new collection in the Qurashî dialect spoken by the Prophet. In the event of disagreement over a reading, the word or phrase in question was to be written and pronounced in accordance with the conventions of Qurashî speech patterns.<sup>22</sup> According to ‘Uthmân, the resulting Book was revealed from one source, in one consonantal skeleton, and with one meaning.<sup>23</sup>

The *imâm* or mother codex<sup>24</sup> produced by Zayd on behalf of ‘Uthmân served as a model for copies that were sent to four cities (presumably Mecca, Basra, Kufa, and Damascus);<sup>25</sup> or to six towns and regions (Mecca, Syria, Yemen, Bahrayn, Basra, and Kufa);<sup>26</sup> or to every region, military district, or garrison town;<sup>27</sup> or to the people.<sup>28</sup> The question now arose: What should be done with the earlier unofficial codices that were circulating within the community of believers? In theory, it should have been possible to revise the unofficial codices so as to bring them into conformity with the new mother codex. If this option was considered, it was rejected. ‘Uthmân ordered his agents to recall the unofficial codices and to destroy them through incineration (*iḥrâq*), immersion in water (*gharq*), erasure (*maḥw*), and/or shredding (*tamzîq*).<sup>29</sup> The sight of God’s words rising in flames or being immersed in water, erased, or shredded surely made a strong impression on members of the community. Consider, for example, the following exchange between Ḥudhayfa b. al-Yamân and certain unidentified interlocutors. “What do you think?” Ḥudhayfa asked. “Would you believe me if I were to tell you that you are going to take your codices (*maṣâḥif*), burn them and throw them into the privy?” To which the interlocutors replied, “May God be praised. Don’t do it O Abû ‘Abdallâh!”<sup>30</sup> Curiously, no one criticized the action taken by ‘Uthmân, at least initially. Even ‘Alî b. Abî Ṭâlib is reported to have said that if ‘Uthmân had not burned the *maṣâḥif*, he would have done so himself.<sup>31</sup> As for the sheets in Ḥafṣa’s possession, they were destroyed following her death in AH 45/665 CE by the governor of Medina (and future caliph) Marwân b. al-Ḥakam (d. AH 65/685 CE),<sup>32</sup> who not only participated in her funeral procession but also recited the final prayer over her body. No sooner had the Prophet’s wife been laid to rest than Marwân seized the sheets and burned them, purportedly for fear that with the passage of time doubts would arise and

<sup>19</sup> Ibn Abî Dâ‘ûd 1355/1936, 11.14–12.12.

<sup>20</sup> *Ibid.*, 19.2–5, 20.3–4, 25.11–12, 25.18–19, 26.4–7.

<sup>21</sup> *Ibid.*, 19.2–3, 20.2–3, 20.6–7, 21.7.

<sup>22</sup> *Ibid.*, 19.5–6, 20.4–5.

<sup>23</sup> *Ibid.*, 18.7–13.

<sup>24</sup> *Ibid.*, 21.18.

<sup>25</sup> *Ibid.*, 34.14.

<sup>26</sup> *Ibid.*, 34.17.

<sup>27</sup> *Ibid.*, 19.6–8, 20.6–7, 21.8, 23.7–8, 23.12, 23.18–19, 24.14.

<sup>28</sup> *Ibid.*, 24.6.

<sup>29</sup> *Ibid.*, 13.17–14.5, 19.8, 20.8–9, 22.1–2.

<sup>30</sup> *Ibid.*, 17.8–10.

<sup>31</sup> *Ibid.*, 12.12–21, 22.15–17, 23.2–5.

<sup>32</sup> *Et*<sup>2</sup>, s.vv. Ḥafṣa (L. Vecchia Vaglieri), Marwân I b. al-Ḥakam (C. E. Bosworth).

people would claim that some revelations included in the *ṣuḥuf*, or sheets, had been omitted from the *muṣḥaf*, or official codex.<sup>33</sup>

The new ‘Uthmânic codex is said to have been widely distributed and welcomed everywhere except in Kufa, where Ibn Mas‘ûd was outraged by the caliph’s decision to entrust the collection of the Qur’ân to Zayd b. Thâbit, a Jewish convert to Islam who had been only eleven years old at the time of the *hijra* in 622 CE. Ibn Mas‘ûd may have been of servile origins (as Ḥudhayfa took care to remind him), but he had been one of the first men to join the community of believers. Indeed, he boasted, he had recited as many as seventy *sûras*, or chapters, to the Prophet’s Companions while Zayd was still a Jew playing with children (alternatively: before Zayd became a Muslim; or, in an even stronger formulation, while Zayd was still an infidel in his mother’s womb).<sup>34</sup> Ibn Mas‘ûd advised his supporters to resist the caliphal order to surrender their codices and to protect these texts with their lives. Indeed, he instructed them to shackle the codices to their necks in anticipation of the Day of Judgment,<sup>35</sup> at which time, presumably, only those Believers who adhered to his text would attain salvation.<sup>36</sup> The stakes were high.

According to the logic of the preceding narrative, it was the ‘Uthmânic codex that was distributed throughout the rapidly expanding community, and it was the consonantal skeleton of this codex that took its place as the universally accepted text of the Qur’ân.

That the Qur’ân was collected or gathered on two separate occasions — first by Abû Bakr and then by ‘Uthmân — is widely known and accepted by Muslim and non-Muslim scholars alike. Less well known is the redactional activity undertaken during the reign of ‘Abd al-Malik b. Marwân (r. AH 65–86/685–705 CE), who ruled from Damascus and, like all of the Umayyads, regarded himself as God’s deputy (*khalîfat allâh*).<sup>37</sup> It was ‘Abd al-Malik who declared Arabic to be the official language of administration, minted the first aniconic coins, and commissioned the construction of the Dome of the Rock in Jerusalem.<sup>38</sup>

Whereas the first two collections of the Qur’ân were carried out in Medina by caliphs who were creating a state in Arabia, the redactional activity sponsored by ‘Abd al-Malik was carried out in Damascus by a caliph who ruled over a rapidly expanding multiconfessional empire. This activity was surely related to the caliph’s efforts to unify his polity, and it would have had the full support of the powerful Umayyad army. The sources do not specifically mention a *third* collection, perhaps because the consonantal skeleton that eventually was accepted is universally regarded as a product of the collection undertaken by ‘Uthmân. It is noteworthy, however, that ‘Abd al-Malik is reported to have said that he was afraid to die in the month of Ramaḍân because, inter alia, that was the month in which “I collected the ’ (*jama‘tu al-qur’ân*).”<sup>39</sup> Even if (as some have argued) the verb *jama‘a* here signifies *to know by heart* or *to memorize* rather than *to collect*, it nevertheless remains the case that ‘Abd al-Malik was closely involved with the text of the ’ and instructed his talented and powerful advisor, al-Ḥajjâj b.

<sup>33</sup> Ibn Abî Dâ‘ûd 1355/1936, 21.8–13, 24.20–25.5.

<sup>34</sup> *Ibid.*, 14.18–15.12, 16.20–17.2, 17.2–5, 17.16–17.

<sup>35</sup> *Ibid.*, 15.12–19. Ibn Mas‘ûd cited — with irony — Q. 3:161: “It is not for any prophet to deceive [the people]. Those who deceive will bring their deceit [with them] on the Day of Judgment. Then every soul will be paid in full what it has amassed, and they will not be wronged.”

<sup>36</sup> *Ibid.*, 17.19.

<sup>37</sup> On the term *khalîfat allâh*, see Crone and Hinds 1986.

<sup>38</sup> *EI*<sup>2</sup>, s.v. ‘Abd al-Malik b. Marwân (H. A. R. Gibb); Robinson 2006.

<sup>39</sup> al-Balâdhurî 2001, p. 586. In this same statement, the caliph is reported to have said that it was during the month of Ramaḍân that he was born, weaned, and received the oath of allegiance.

Yûsuf al-Thaqafî (AH 41–95/661–714 CE), to introduce numerous changes to the text.<sup>40</sup> Like Ḥudhayfa b. al-Yamân before him, al-Ḥajjâj was critical of Ibn Mas‘ûd, whose reading of the ‘ he characterized as “the *rajaz* [poetry] of Bedouin.”<sup>41</sup> Like Ḥudhayfa, al-Ḥajjâj sought to put an end to disagreements over the consonantal skeleton of the Qur’ân. Some of these disagreements may have had a bearing on caliphal legitimacy, for al-Ḥajjâj reportedly removed from the text certain unidentified verses that threatened the interests of the Marwânid branch of the Umayyad family. In addition, he is said to have changed the consonantal skeleton of eleven words, established the canonical order of verses and chapters, and introduced for the first time vowels and diacritical marks.<sup>42</sup> Just as ‘Uthmân had sent four (or six) copies of his codex to major population centers, al-Ḥajjâj sent six copies of the newly revised edition to Egypt, Syria, Medina, Mecca, Kufa, and Basra.<sup>43</sup> Just as ‘Uthmân had ordered the destruction of all unofficial codices, so, too, al-Ḥajjâj ordered the destruction of all codices other than his own and copies made from it. Presumably, this instruction applied not only to official copies of the ‘Uthmânîc codex but also to the mother codex itself. When the order to destroy all earlier codices reached Medina, however, members of the third caliph’s family refused to produce the ‘Uthmânîc codex, claiming that it had been destroyed on the day on which ‘Uthmân was assassinated. Be that as it may, one century later, when Ibn Wahb (d. AH 187/813 CE) asked Mâlik b. Anas (d. AH 179/795 CE) about the ‘Uthmânîc codex, he replied, “It has disappeared.”<sup>44</sup>

Islamic sources report that the Qur’ân was collected on two separate occasions — once during the caliphate of Abû Bakr and again during the caliphate of ‘Uthmân — and that additional redactional activity took place during the caliphate of ‘Abd al-Malik. The sources also report that a systematic campaign to destroy nonconforming Qur’ân codices was carried out on two separate occasions — first during the caliphate of ‘Uthmân and again during that of ‘Abd al-Malik — and that in AH 45/665 CE the *ṣuḥuf*, or sheets, collected by Zayd b. Thâbit for Abû Bakr were destroyed by the governor of Medina. Only a handful of western scholars, e.g., Prémare and Robinson, have paid serious attention to the redactional activity sponsored by ‘Abd al-Malik.<sup>45</sup> This is unfortunate because disregard for this activity has the effect of making it appear as if the final, definitive version of the Qur’ân was established during the short period of a quarter of a century that encompassed the first three caliphates. The inclusion in this scenario of the redactional activity undertaken by al-Ḥajjâj on behalf of ‘Abd al-Malik has the effect of allowing the reading and consonantal skeleton of the Qur’ân to remain open and fluid until the death of the caliph in AH 86/705 CE, a full three-quarters of a century after the death of the Prophet.<sup>46</sup>

<sup>40</sup> *EI*<sup>2</sup>, s.v. al-Ḥadjjâj b. Yûsuf (A. Dietrich).

<sup>41</sup> Prémare 2005, pp. 202–03.

<sup>42</sup> Ibn Abî Dâ‘ûd 1355/1936, 49–50, 117–118. The verses in which the spelling of a word was changed were 2:259, 5:48, 10:22, 12:45, 23:85–89, 26:116 and 167, 43:32, 47:15, 57:7, and 81:24.

<sup>43</sup> ‘Abd al-Masîḥ al-Kindî, *Letter to al-Hâshimî*, p. 137, cited in Hoyland 1997, p. 501. On al-Kindî, see *EI*<sup>2</sup>, s.v.

<sup>44</sup> Ibn Abî Dâ‘ûd 1355/1936, 35.18–19, 49–50; cf. Ibn Wahb 1992, p. 254.6; Ibn Shabba 1990, p. 7.15.

<sup>45</sup> Prémare 2002; 2005; Robinson 2006, pp. 100–104. According to Hoyland (1997, p. 501), it is “almost certain” that al-Ḥajjâj undertook a revision of the Qur’ân, but he suggests that this project was limited to “sponsoring... an improved edition” — without attributing any special importance to the resulting improvements.

<sup>46</sup> The assumption that the reading and consonantal skeleton of the Qur’ân remained open and fluid until ca. 86/705 also has the effect of bringing the literary evidence into synchrony with the surviving documentary evidence relating to the text of the Qur’ân. The earliest extant physical evidence of the Qur’ân to which a secure date can be assigned is the 240 m long mosaic inscription that runs along the uppermost part of the octagonal arcade inside the Dome of the Rock in Jerusalem. The inscription, composed of a series of recognizable Qur’ânîc verses, was addressed generally to the People of the Book and specifically to Christians. The Dome of the Rock was commissioned by ‘Abd al-Malik in the year 72/691–92. See Grabar 2006. The verses that make up the inscription are especially concerned with the subject of Christology.

There is one striking anomaly in the standard account of the collection of the Qur'ân. Islamic sources indicate that disagreements over the reading and consonantal skeleton of the text were of such a nature as to cause members of the early community to accuse one another of *kufur*, or infidelity;<sup>47</sup> that these disagreements brought the community to the brink of *fitna*, or civil strife;<sup>48</sup> and that the textual problems were so serious that they could be solved only through the systematic destruction of all codices that did not conform to the 'Uthmânic codex. At the same time, however, the sources preserve few — if any — examples of a textual variant that would account for accusations of infidelity, civil strife, or the destruction of all codices that were not in conformity with the mother codex. The surviving variants are minor.<sup>49</sup>

The traditional explanation for the establishment of the official Qur'ânic codex appears to have been formulated in such a manner as to downplay the significance of the textual problems encountered by the scribes who edited and redacted the text. At the same time that the standard account avoids specific references to substantive textual variants, it refers generally to differences between one reading and the next, to members of the community who struggled to preserve readings that they considered to be authentic, to three successive campaigns to destroy nonconforming texts, and to the trauma and anxiety generated by those campaigns. In this respect, the standard account may be accurate, reflecting the general contours of the process that culminated in the establishment of a canonical text. What is missing are specific details.

Such details are to be found in the early Qur'ân manuscript to be analyzed below. On the basis of paleographic and codicological evidence, I shall argue that the consonantal skeleton of one word was in fact modified in a manner that had a dramatic impact on the meaning of the verse in which this word occurs. The word in question is *kalâla*.

## The Problem

The word *kalâla* is a *dis legomenon*, a word that occurs twice in the Qur'ân, both times in *Sûrat al-Nisâ'* ("Women"). The early Muslim community devoted considerable effort to explaining the meaning of this word.

The first task confronted by the earliest exegetes was to identify the two verses in which the word *kalâla* appears in *Sûrat al-Nisâ'*. In early manuscripts, the transition from one verse to the next is marked by an end-of-verse symbol, but individual verses have no number assigned to them. The first mention of *kalâla* occurs near the beginning of the *Sûra*. What would subsequently be identified as the eleventh and twelfth verses of this chapter specify the shares of inheritance to which the heirs of the deceased are entitled: the eleventh verse awards shares of the estate to daughters, a mother, and a father; the twelfth verse awards shares of the estate to husbands, wives, and siblings. Our concern here is with the second half of the twelfth verse, which awards shares of the estate to siblings. It is here that the word *kalâla* occurs for the first time in the Qur'ân. The early exegetes treated the entirety of the eleventh

<sup>47</sup> Ibn Abî Dâ'ûd 1355/1936, 22.19, 23.10, 25.8–10

<sup>48</sup> *Ibid.*, 21.4.

<sup>49</sup> This point was made more than seventy-five years ago by Arthur Jeffery (1937, p. 10), who observed: "[W]hen we have assembled all the variants from

these earlier codices that can be gleaned from the works of exegetes and philologists, we have only such readings as were useful for the purposes of *tafsîr* and were considered to be sufficiently near orthodoxy to be allowed to survive."

and twelfth verses in *Sûrat al-Nisâ'* as a single unit known collectively as *âyat al-fard* or the *inheritance verse*.<sup>50</sup> This may explain why the second half of the twelfth verse in this chapter currently has no distinctive linguistic tag that would identify it or distinguish it from the rest of the so-called inheritance verse. Be that as it may, it is curious that two verses should be treated as one. For convenience, I refer to this sub-verse as Q. 4:12b (or 4:12b or simply v. 12b) — although it is important to keep in mind that the Qur'ân codices produced in the first century AH had no system of verse numbering.

The consonantal skeleton of 4:12b is traditionally vocalized as follows (for convenience, I divide the sub-verse into five clauses and the first sentence into three sub-clauses):

- 1a *wa-in kâna rajul<sup>un</sup> yûrathu kalâlat<sup>an</sup> aw imra'at<sup>un</sup>*  
 1b *wa-lahu akh<sup>un</sup> aw ukht<sup>un</sup>*  
 1c *fa-li-kull<sup>i</sup> wâhid<sup>in</sup> minhumâ al-sudus<sup>u</sup>*  
 2 *fa-in kânû akthar<sup>a</sup> min dhâlik<sup>a</sup> fa-hum shurakâ'<sup>u</sup> fî al-thuluth<sup>i</sup>*  
 3 *min ba'd<sup>i</sup> waṣṣiyat<sup>in</sup> yûṣâ bihâ aw dayn<sup>in</sup> ghayr<sup>a</sup> muḍârr<sup>in</sup>*  
 4 *waṣṣiyat<sup>an</sup> min allâh<sup>i</sup>*  
 5 *wa'llâh<sup>u</sup> 'alîm<sup>un</sup> ḥalîm<sup>un</sup>*

The word *kalâla* occurs in l. 1a, the opening clause of a conditional sentence. The grammar, syntax, and meaning of this clause are tortuous.<sup>51</sup> On one point, however, there is universal agreement among the commentators. *Kalâla* is a kinship term — albeit an odd one: According to some authorities, the word refers to the heirs (*al-waratha*) and signifies the relatives of a deceased person other than a parent and child; according to other authorities, the word refers to the deceased (*al-mawrûth*) and signifies a person who dies without leaving a parent or child. If we follow the first definition, then l. 1a–b would mean, “If a man’s heirs are someone other than a parent or child or [if] a woman’s heirs are someone other than a parent or child, and he [or she] has a brother or sister....” If we follow the second definition, it would mean, “If a man dies leaving neither parent nor child — or [if] a woman [dies leaving neither parent nor child], and he [or she] has a brother or a sister....” In both instances, it is necessary to assume, first, that the compound subject in l. 1a is the phrase “a man ... or a woman” — even if the two elements of this compound subject are separated from one another by the adverbial phrase “*yûrathu kalâlat<sup>an</sup>*”; and, second, that the third person masculine singular pronoun suffix *-hu* in *wa-lahu* in l. 1b refers back not only to the “man” in the bifurcated compound subject in l. 1a but also to the “woman” — as if l. 1b specified, “and he or she has a brother or sister” (emphasis added), which it does not.

There is no unanimity among the exegetes as to which of the two definitions of the word *kalâla* is correct. With respect to Q. 4:12b, grammar, syntax, and lexicography point to the first definition as the appropriate one. We may therefore adopt the following as a working translation of the sub-verse:

<sup>50</sup> For ease of reference, Qur'ân scholars assigned linguistic tags to important verses, e.g., the debt verse (*âyat al-dayn*), the poll-tax verse (*âyat al-jizya*), the throne verse (*âyat al-kursî*), the light verse (*âyat al-nûr*), or the stoning verse (*âyat al-rajm*). See EQ, Index,

240–41. Although the second half of the twelfth verse in *Sûrat al-Nisâ'* might have been called *âyat al-kalâla*, or “the *kalâla* verse,” I have found only one isolated instance of this usage. See Powers 2009, p. 217.

<sup>51</sup> Powers 1986, pp. 22–29, and 2009, pp. 209–19.

- 1a If a man's heirs are someone other than a parent or child or [if] a woman's heirs are someone other than a parent or child,
- 1b and he [or she] has a brother or sister,
- 1c each one of them is entitled to one-sixth.
- 2 If they are more than that, they are partners with respect to one-third,
- 3 after any legacy that is bequeathed or debt, without injury (*ghayr<sup>a</sup> muḍârr<sup>in</sup>*).
- 4 A commandment from God.
- 5 God is all-knowing, forbearing.<sup>52</sup>

The second Qur'ânic verse in which *kalâla* appears is easier to locate. The word is mentioned in the opening line of the last verse in *Sûrat al-Nisâ'*. According to the Companion al-Barâ' b. 'Âzib (d. AH 72/691–92 CE), the last verse of this chapter was also the last verse of the Qur'ân revealed to the Prophet.<sup>53</sup> This verse is easily identifiable in time (last verse revealed) and space (last verse in the chapter). If this were not sufficient, it was given a special linguistic tag: *âyat al-ṣayf* or *the summer verse*, presumably a reference to the summer of AH 11/632 CE (the Prophet is said to have died on 12 Rabî' 1/7 June of that year). For convenience, I refer to this verse as Q. 4:176 (or 4:176 or simply v. 176) — although again it is important to keep in mind that there were no individual verse numbers in the earliest Qur'ân codices.

Q. 4:176 awards shares of the estate to siblings in circumstances similar to those of 4:12b. Verse 176 may be translated as follows (again, I divide the verse into individual clauses):

- 1 When they ask you for advice, say: God advises you with regard to *al-kalâla*:
- 2 If a man dies without a child (*laysa lahu walad*), and he has a sister, she is entitled to half of what he leaves.
- 3 He is her heir if she does not have a child.
- 4 If they [f.] are two, they are entitled to two-thirds of what he leaves.
- 5 If they are brothers and sisters, a male is entitled to the share of two females.
- 6 God makes clear for you [lest] you go astray.
- 7 God is all-knowing.<sup>54</sup>

The inheritance rules specified in ll. 2–5 are framed by an introduction in l. 1, on the one hand, and by a theological observation in l. 6 and a characterization of God in l. 7, on the other. Unlike the opening line of v. 12b, which is linguistically difficult, the language of v. 176 is straightforward and unequivocal. In l. 1, the authorial voice that controls the text refers to certain unnamed persons (“they”) who have been asking the male addressee (“you”) for advice about *kalâla*. The authorial voice indicates that the words inscribed in ll. 2–5 constitute God's response to these questions: “When they ask you for advice, say: God advises you with regard to *al-kalâla*” (“*Yastaftûnaka qul allâhu yuftikum fî al-kalâla*”). Line 2, which appears to

<sup>52</sup> The variation in translations of this verse is impressive. See Powers 2009, Appendix 1.

<sup>53</sup> al-Ṭabarî 1969, volume 9, pp. 433–34, nos. 10,870–73. Other verses contend for the distinction of being the last verse revealed to Muḥammad, the best known and most widely accepted being Q. 5:3: “Today I

have perfected your religion for you and completed My blessing for you and have approved Submission (*islâm*) as a religion for you.”

<sup>54</sup> For English translations of 4:176, see Powers 2009, Appendix 1.

define *al-kalâla* as a man who dies without a child, awards half the estate to a sister who has no living brother. Line 3 indicates that the term *kalâla* also applies to a childless woman, and it awards the entirety of the estate to a single brother. Line 4 awards two-thirds of the estate to two sisters. Line 5 establishes that when brothers and sisters inherit jointly, a male receives twice the share of a female. The theological observation in l. 6 indicates that God revealed this verse to the community (“you,” in the plural) so that its members would not go astray.

The circumstances mentioned in Q. 4:176 are virtually identical to those mentioned in 4:12b: In both cases, a childless man or woman dies leaving one or more siblings. There is, however, a formal difference between the two verses: Whereas in v. 12b we find only one set of rules for a childless man or woman whose closest surviving blood relative is one or more siblings, in v. 176 we find two sets of rules, one for a childless man who dies leaving siblings and another for a childless woman who dies leaving siblings. In addition to this formal difference, there are two substantive differences between the verses: First, whereas in v. 12b brothers and sisters inherit equal shares of the estate in all circumstances, in v. 176 the share of a brother is twice as large as that of a sister who inherits together with him. Second, the size of the share awarded to siblings differs in the two verses: In v. 12b, a brother and sister receive one-sixth each and, in the event that there are more than two siblings, the award is capped at one-third; in 4:176, one sister (in the absence of a brother) inherits half the estate, two or more sisters (in the absence of a brother) inherit two-thirds, and a brother (in the absence of a sister) inherits the entire estate.

Presumably, the interlocutors mentioned in the opening line of Q. 4:176 were Companions who asked the Prophet for advice about *kalâla*. The Prophet then consulted with the Divinity, who revealed 4:176 so that the community would not go astray. As for the Prophet himself, he had little or nothing to say about the meaning of *kalâla*. Subsequent generations of Muslim scholars filled in this gap. Beginning in the last quarter of the first century AH, the first exegetes scrutinized the word *kalâla* as it is used in vv. 12b and 176. These men identified eight cruxes in these two verses. The first six cruxes are internal to ll. 1a and 1b of v. 12b:

- Crux 1:       Should the verb *y-w-r-th* be read as an active verb (*yûrithu*) or as a passive verb (*yûrathu*)?
- Crux 2:       What does *kalâla* mean?
- Crux 3:       Why is *kalâla* in the accusative case?
- Crux 4:       Why is the compound subject (“a man .... or a woman”) bifurcated, that is to say, why does the text specify “a man *yûrathu kalâlat<sup>an</sup>* or a woman” rather than “a man or a woman *yûrathu kalâlat<sup>an</sup>*”?
- Crux 5:       Does *yûrathu kalâlat<sup>an</sup>* refer to the “man” mentioned immediately before the phrase, to the “woman” mentioned immediately after it, or to both?
- Crux 6:       Why is there no agreement in gender or number between *wa-lahu* (“and he has”) in l. 1b and its antecedent in l. 1a (“a man ... or a woman”)?

The last two cruxes emerge from a comparison of vv. 12b and 176:

- Crux 7: Why is it that the word *kalâla* in v. 12b refers to the heirs, i.e., “the relatives of a deceased person other than a parent and child,” whereas in v. 176 the same word refers to the deceased, i.e., “a person who dies without a child”?
- Crux 8: What accounts for the discrepancy in the size of the shares awarded to siblings in these two verses?

Lexicographers, grammarians, and exegetes would eventually provide reasonable answers to these eight cruxes, based on the traditional vocalization of Q. 4:12b.<sup>55</sup> To the best of my knowledge, however, no Muslim scholar has ever asked, “Why do these problems exist?” It is to this question that the remainder of this essay is devoted. Our investigation begins in Egypt at the beginning of the nineteenth century. But it then takes a detour in an unexpected direction — the town of Nuzi in Mesopotamia in the middle of the second millennium BCE.

## Bibliothèque Nationale de France, Arabe 328a

On January 17, 1809, the German traveler Ulrich Seetzen visited the Mosque of ‘Amr b. al-‘Âṣ in Fustat, where a young boy directed him to a small room on the north side of the building. When Seetzen entered the room, he saw ancient manuscripts lying on the floor, in no apparent order, mixed with old carpets and piled up to a height of one foot. In his journal, the German traveler noted that the manuscripts included old and rare copies of the Qur’ân, and that when he attempted to purchase some specimens, he was rebuffed by women who insisted that the manuscripts could not be bought or sold because they had been designated as endowments (*waqfs*).<sup>56</sup>

Undeterred, Seetzen turned to the French Orientalist who was serving as Dragoman and Vice-Consul in Cairo, Asselin de Cherville (1772–1822). This representative of the French government succeeded where the German had failed. In a letter written in 1814, de Cherville noted that he had acquired a substantial number of Qur’ân fragments written on parchment and dating from the first centuries of Islamic history. His plans to study the manuscripts and bring the results of his research to the attention of the Orientalist scholarly community were ended by his death in 1822 at the age of fifty. Three years later, de Cherville’s manuscript collection was shipped to his family in Marseille. In 1833, his heirs sold the collection to the Bibliothèque Royale. In 1851, the French Orientalist Joseph Toussaint Reinaud (1795–1867) hired one of his students, the refugee Italian Orientalist Michele Amari (1806–1889), to work on the manuscripts. It was Amari who identified the contents of individual fragments, collected and brought together fragments belonging to a single manuscript, and classified the manuscripts according to format and script. One of the manuscripts classified by Amari was BNF 328a.<sup>57</sup>

In 1998, Déroche and Noja Noseda published a facsimile edition of BNF 328a, thereby making this manuscript fragment available to the wider scholarly community.<sup>58</sup> Three years later, Dutton published the first comprehensive study of the contents of BNF 328a, with special

<sup>55</sup> Powers 1986, pp. 22–29; 2009, pp. 209–19.

<sup>57</sup> Déroche 2009.

<sup>56</sup> See the chapter “Les pérégrinations d’un manuscrit” in Déroche 2009.

<sup>58</sup> Déroche and Noja Noseda 1998, volume 1.



attention to variant readings.<sup>59</sup> Dutton compared the consonantal variants in the manuscript with variants attributed to the seven authoritative Qur'ân readers. Based on this comparison, he determined that BNF 328a contains thirteen consonantal variants, six of which are associated with the reading of Ibn 'Âmir (d. AH 118/736 CE), the principal Qur'ân reader of Damascus.<sup>60</sup> Dutton concluded "with considerable confidence" that BNF 328a corresponds to the reading of Ibn 'Âmir,<sup>61</sup> and he suggested that the codex has a distinctive Syrian flavor and was probably written somewhere in Syria or the Jazîra.<sup>62</sup>

Dutton's identification of BNF 328a with the reading of Ibn 'Âmir and his conclusion that the manuscript was written in Syria or the Jazîra await scholarly confirmation. With regard to provenance, it is possible that BNF 328a was produced in Syria (or another location outside of Egypt) and subsequently made its way to Fustat, where it was deposited in the Mosque of 'Amr b. al-'Âṣ. Alternatively, it is possible that BNF 328a was produced in Fustat and remained there until it was sent to France in 1825. These are not the only possibilities, but even if they were, the hypothesis of Syrian provenance, although attractive, is not definitive.

BNF 328a is a fragment of a codex that has a vertical format. The writing surface is parchment, the skin of an animal dressed and prepared for writing. Every sheet of parchment has two sides, hair and flesh. Each of the five quires in BNF 328a is a quaternion: a rectangular sheet of parchment folded three times to produce eight folios and sixteen folio pages. The outermost side of the first folio page of each quaternion is the flesh side. Thus, when the bound manuscript lies open, the verso of a preceding folio (e.g., 25v) lies opposite the recto of the immediately following folio (e.g., 26r). Two folio pages of this type are called a "double page." Within a given quire, the hair sides of a double page face one another and the flesh sides of a double page face one another.

BNF 328a was written by four scribes working as a team. Of the fifty-six surviving folio leaves, forty-nine were produced by Scribe A (1a–9a, 10b–25a, 27b–28a, 30b–32a, 34b–35a, and 38b–56b), seven by Scribe B (28b–30a, 32b–34a, 35b–38a), one by Scribe D (9b–10a), one by Scribe E (25b–26a).<sup>63</sup>

The team of scribes wrote the manuscript using metallo-gallic ink, a liquid produced from the chemical reaction that results from the combination of tannic acid (extracted from gall nuts) and a metallic salt such as ferrous or copper sulfate, to which gum arabic is added. The scribes may have used a ruler to mark the lines of the manuscript, but there is considerable variation in the number of lines on a folio page: The normal range fluctuates between twenty-two and twenty-six lines, with twenty-three lines being the most common number; but seven folio pages have twenty-one lines, seven have twenty-seven lines, and three have twenty-eight.<sup>64</sup> The distance between each line is generally regular, although again there is variation.

<sup>59</sup> Dutton 2001, pp. 71–89.

<sup>60</sup> *EI*<sup>2</sup>, s.v. Ibn 'Âmir (editor).

<sup>61</sup> Dutton 2001, pp. 74, 82.

<sup>62</sup> *Ibid.*, pp. 83–84.

<sup>63</sup> Amari speculated that BNF 328b was part of the same codex as BNF 328a, an assumption confirmed by Déroche, based on codicological evidence. The two fragments are bound together as BNF 328. Folios

fifty-seven to seventy were written by Scribe C. See Déroche 2009.

<sup>64</sup> Of 111 folio pages, the distribution of lines per page is as follows: twenty-one lines (seven pages), twenty-two lines (twenty-five pages), twenty-three lines (twenty-three pages), twenty-four lines (eighteen pages), twenty-five lines (sixteen pages), twenty-six lines (thirteen pages), twenty-seven lines (seven pages), twenty-eight lines (three pages).

There are occasional diacritical marks but no vowel signs.<sup>65</sup> The last word of a verse is followed by a space of 1–1.5 cm. This space is filled with a symbol that marks the end of a verse. Each scribe used a different symbol, for example: six dots arranged in three pairs, horizontally (:::); eight dots arranged in two pairs, vertically (:::); and four dots arranged vertically (:). The transition from the end of one chapter to the beginning of the next is marked by an empty line.<sup>66</sup> Originally, the manuscript had no five- or ten-verse markers, and it was not until the second or third century AH that these symbols were added. At that time, the end of every fifth verse was marked by a red *alif* surrounded by dots, and the end of every tenth verse was marked by a red circle containing a letter in black that represents the number of the verse according to the *abjad* system.<sup>67</sup>

The four scribes wrote in what is known as the Ḥijâzî style script which, despite its name, was used not only in West Arabia but also in Egypt, Syria, and the Yemen in the first and second centuries AH.<sup>68</sup> The letter forms found in the oldest examples of the Ḥijâzî style script vary from one fragment to the next, and at least four substyles have been identified. BNF 328a has been classified by Déroche as Ḥijâzî 1, which is the first stage in the development of Qur’ânic calligraphy. The letters are thin and slender. The long, vertical strokes give the codex an elongated appearance and a distinctive vertical emphasis. The spacing between adjacent words as well as the spacing of letters within words is regular. When used as a conjunction, the letter *wâw* (“and”) is written as an independent grapheme situated roughly equidistant between the two words that it connects and from which it is usually separated by 3–5 mm. In its initial and medial forms, *kâf* occupies less than half the height of a line and has a short extension at the top written at an oblique angle. The defining feature of the Ḥijâzî style script, however, is the oblique orientation of the vertical *alif*, which, in its independent form, has a short curved return or serif at the base. This oblique orientation is shared by the *lâm* and three final letters: *kâf*, *ṭâ*, and *zâ*.<sup>69</sup>

The spacing of letters and words, height of initial and medial *kâf*, and oblique orientation of the *lâms* and *alifs* of the Ḥijâzî style script are all matters of direct relevance to the present investigation.

<sup>65</sup> Like other early scripts, the Ḥijâzî style script did not have any diacritical marks to distinguish between and among the several possible readings of a homograph: <ba’/ta’/thâ’/nûn/yâ’>, <jîm/hâ’/khâ’>, <fâ’/qâf’>; or between one of a pair of homographs: <dâl/dhâl’>, <ṭâ’/zâ’>, <‘ayn/ghayn>, <shîn/shîn’>.

<sup>66</sup> See Déroche 2006, pp. 32–43, 65–102, 114, 167–84, 205–19.

<sup>67</sup> Déroche and Noja Nosedá 1998, 1: xi ff. Cf. Déroche 1992.

<sup>68</sup> The designation of this script as Ḥijâzî is based on the following statement by al-Nadîm (d. 385/995) in his description of the earliest Arabic scripts: “The first of the Arab scripts was the script of Makkah, the next of al-Madînah, then of al-Baṣrah, and then of al-Kûfah. For the *alifs* of the scripts of Makkah and

al-Madînah there is a turning of the hand to the right and lengthening of the strokes, one form having a slight slant.” al-Nadîm 1970, volume 1, p. 10. In the middle of the nineteenth century, Amari coined the term *Ḥijâzî script* to refer to the style of writing practiced in Mecca and Medina. This term is misleading, however, inasmuch as most of the extant fragments and manuscripts written in this script were found in Damascus, Fustat, and Ṣan‘â’. For this reason, François Déroche has suggested that it is better to speak of the *Ḥijâzî style* rather than the *Ḥijâzî script*, and he uses the term *Ḥijâzî codex* to refer to manuscripts written in this style. I follow his lead. See EQ, s.v., Manuscripts of the Qur’ân (F. Déroche); cf. Gruendler 1993, pp. 131–41.

<sup>69</sup> Déroche 1992.

## The Revision of Q. 4:12b

The following analysis of BNF 328a is based on examination of the facsimile edition published by Déroche and Nosedà; examination of the manuscript itself in Paris in May and November of 2007 and July of 2008; and digital images of the manuscript produced using natural, ultra-violet, and infrared light.

BNF 328a contains the entirety of *Sûrat al-Nisâ'*. Q. 4:12b occurs on folio 10b (second quire), and 4:176 occurs on folio 20b (third quire). Both folio pages were written by Scribe A. Let us compare the handwriting used to produce the word *kalâla* in these two verses, beginning with v. 176, the last verse of *Sûrat al-Nisâ'*.

The first legible word on folio 20b (fig. 1), l. 1 is *wa-yazîduhum*, the eighth word of 4:173.<sup>70</sup> The last word on folio 20b is *uhilla*, the eighth word of v. 3 of *Sûrat al-Mâ'ida*. The transition from *Sûrat al-Nisâ'* to *Sûrat al-Mâ'ida* is marked by a blank line (l. 13).

Folio 20b has twenty-five lines, which is within the normal range. However, the layout of the folio page is irregular in three respects. First, the spacing of the first six lines is tighter than that of ll. 7–25.<sup>71</sup> Second, when Scribe A was writing ll. 1–6, he continued almost to the end of each line, leaving a margin of only ~ 1 cm on the left side of the page; beginning with l. 7, however, and continuing to the bottom of the page, he used less space on each line, leaving a margin of between 1.5 and 2 cm on the left side of the page. The transition point between the more tightly spaced lines with the smaller left margin and the less tightly spaced lines with the larger left margin is precisely the last verse of *Sûrat al-Nisâ'*, which occupies six lines of text, beginning on l. 7 and ending on l. 12. The third irregularity on folio 20b is the end-of-verse symbol following the word *alîm<sup>an</sup>* on l. 2. As noted, Scribe A generally left 1 cm of space between the end of one verse and the beginning of the next; and he filled that space with six dots arranged in three pairs (: : :). On l. 2, barely 2 mm separate the final word of v. 173 (*alîm<sup>an</sup>*) from the first word of the next verse (*wa-lâ*). There is not enough room between these two words for six dots arranged in three pairs. Instead, the verse ending is marked by four dots arranged vertically (·). One wonders why.

Our primary concern, however, is the word *al-kalâla*, the third word from the end of l. 7 on folio 20b. It is spelled *alif-lâm-kâf-lâm-lâm-hâ'* (final *hâ'* would become *tâ' marbûta* in later scripts). As expected, the medial *kâf* occupies less than half of the height of the line, and the two *lâms* occupy the full height of the line. The two *lâms* are evenly spaced and oriented on an oblique angle, leaning to the right, like the *alif* of the definite article, which has a short curved return at the base. On folio 20b, the orthography of *al-kalâla* is regular and unproblematic.

Let us turn now to folio 10b (fig. 2), which begins with the word *khâfû* in the middle of Q. 4:9 and ends with the third word from the end of 4:12 (*allâh*). Folio 10b has twenty-one lines, which is just below the normal range of lines per page. The spacing of each line is uniform and there is a regular left margin that is approximately 2 cm wide. Like folio 20b, folio 10b was written by Scribe A, but a second hand that is clearly different from that of Scribe A is visible at numerous points on the page. I refer to this additional hand as Corrector 2. The ink used by Corrector 2 is carbon-based and he wrote in a broken cursive script that Déroche calls

<sup>70</sup> Folio 20a ends with the word *al-şâlihât<sup>i</sup>* in 4:173. The verse continues at the top of folio 20b, although the first two words on l. 1 (*wa-yuwaffihim ujûrahum*) are illegible due to damage, presumably from water.

<sup>71</sup> In the facsimile edition, the first six lines of folio 20b occupy 58 mm (average = 9.66 mm), measured from baseline to baseline; the next six lines occupy 67 mm (average = 11.166 mm). The difference is 1.5 mm per line.

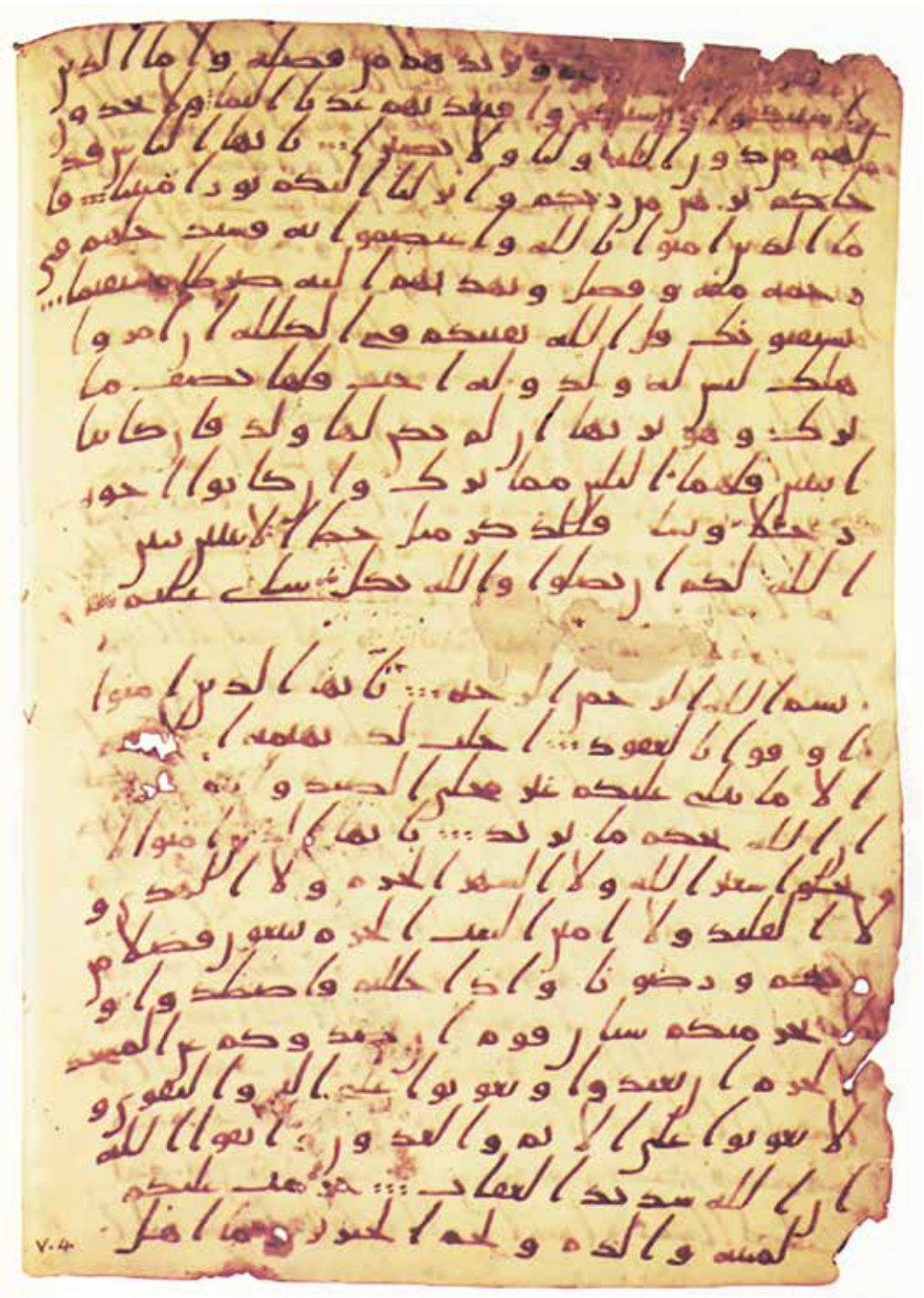


Figure 1. Bibliothèque Nationale, Arabe 328a, folio 20b

‘Abbasid book hand. Notably, the *alifs* and *lâms* are written on a vertical axis. Examples of this ‘Abbasid book hand script are found in chancery documents produced in the second/eighth century, but this script became a book hand only in the third/ninth century, and it was first used in Qur’ân manuscripts only at the end of the third/ninth century. Thus, the paleographic evidence suggests that Corrector 2 lived approximately two centuries after Scribe A.<sup>72</sup>

Corrector 2 engaged in considerable touch-up work on folio 10b, including several letters on ll. 16–18.<sup>73</sup> Our concern here is with v. 12b, which begins after the midway point of l. 17 (*wa-in kâna rajul<sup>un</sup>*) and continues to the first line of folio 11a (*wallâh<sup>u</sup> ‘alîm<sup>un</sup> ḥalîm<sup>un</sup>*). On l. 18, we find the word *kalâla* (here, without the definite article). The script used to produce three words on this line — the noun *kalâla*, the disjunctive particle *aw*, and the pronominal phrase *wa-lahu* — is anomalous; and the spacing between the word *kalâla* and the words that precede and follow it is unusual, albeit not necessarily irregular.

*kalâla*: The word *kalâla* is packed tightly between the word that precedes it and the word that follows it: Only 2 mm separate the initial *kâf* of *kalâla* from the final *thâ’* of *y-w-r-th*; and only 1 mm separates the final *hâ’* of *kalâla* from the base of the initial *alif* of *aw*. In addition to the tight spacing, there are three anomalies relating to the script. First, the initial *kâf* occupies the full height of the line, whereas elsewhere on folio 10b (e.g., *kâna* on l. 17 and *kânû* on l. 19), as throughout BNF 328a, initial *kâf* occupies less than half the height of the line. Note also that the oblique line that extends from the top of the *kâf* to the middle of the letter appears to be discontinuous at the point just before the hook of what might have been a Ḥijâzî *kâf*. Second, the two *lâms* are upright and vertical, unlike the *lâms* elsewhere on folio 10b and throughout BNF 328a, which are all written at an oblique angle. Third, the word *kalâla* was produced using a carbon-based ink which is darker than the metallic ink used by Scribe A. All this is the work of Corrector 2, who scratched out the word *kalâla* and rewrote it, presumably to enhance its legibility, using the ‘Abbasid book hand script and a carbon-based ink.

*aw*: Again the spacing is tight. Internally, only 2 mm separate the *alif* from the *wâw* of *aw*. Compare the space between the two letters of *aw* on l. 18 with that of the same word on l. 10 (first word), l. 14 (penultimate word), l. 17 (fourth word), and l. 21 (third word). On these four lines, the space between the *alif* and the *wâw* of *aw* ranges from 3–6 mm. Also noteworthy on l. 18 is the space between the *alif* of *aw* and the final *hâ’* of *kalâla* — barely 1 mm. To this, compare the space between *aw* and whatever word precedes it on ll. 14, 17, and 21 — in each instance a healthy 4–5 mm. In addition to the tight spacing between words, the script used to produce the word *aw* is anomalous: The *alif* is vertical rather than oblique; and the base of this *alif* is flat rather than curved.<sup>74</sup> Again, these anomalies are the work of Corrector 2, who scratched out an earlier Ḥijâzî *alif* (visible as undertext to the immediate left of and above the final *hâ’* of *kalâla*) and replaced it with a new *alif*, using ‘Abbasid book hand script and a carbon-based ink.

*wa-lahu*: Just beyond the midpoint of l. 18, the *lâm* of *wa-lahu*, like the two *lâms* of *kalâla* earlier on the same line, is again oriented on a vertical axis rather than being written at an oblique angle. Notice also that the *lâm* and *hâ’* of *wa-lahu* are raised slightly above the base line. Again, this is the work of Corrector 2.

<sup>72</sup> Déroche 2006, p. 217; cf. Déroche 1992, pp. 34–47.

<sup>73</sup> See, for example, on l. 16, the *wâw* of *walad*; on l. 17 the *tâ’*, *wâw*, and *ṣâd* of *tâṣûna*, the *yâ’* and *nûn* of *dayn*, and the *wâw* of *wa-in*; and on l. 18 the *râ’* and *thâ’* of *y-w-r-th*.

<sup>74</sup> On l. 21, the *alif* of *aw* is also flat. This is the work of Corrector 2.



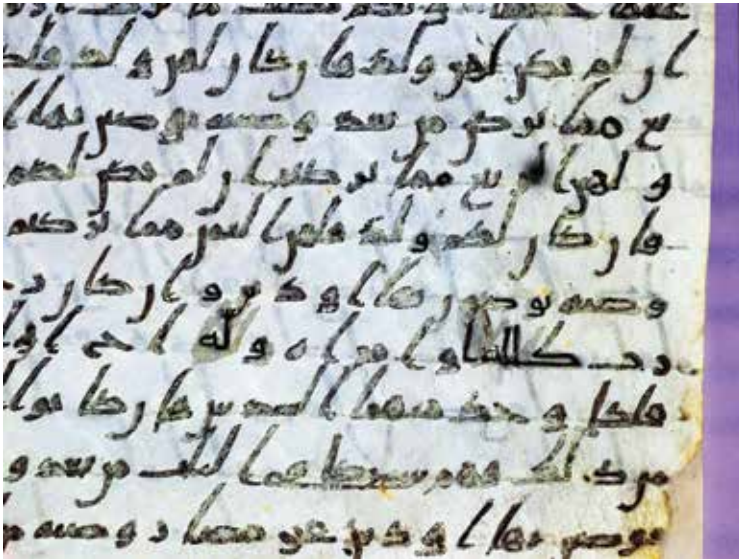


Figure 3. Folio 10b (ultra-violet)

Corrector 2, it is recalled, lived approximately two centuries after Scribe A. As best I can tell, the changes introduced by Corrector 2 were intended to improve the legibility of the text. He does not appear to have made any changes to the consonantal skeleton.

Examination of BNF 328a points to an earlier stage of revision carried out by a scribe-editor whom I call Corrector 1. There is good reason to believe that Corrector 1 is Scribe A. Some of the work performed by Corrector 1 is visible to the naked eye as shadow or undertext. Access to the visual undertext can be enhanced with digital images taken with ultraviolet and infrared light. On folio 10b, below the erasures and changes made by Corrector 2 (dark ink), one can see traces of some of the work done by Corrector 1 (shadow; fig. 3).

*kalâla*: To the immediate left of the irregular *kâf* and visible as undertext is a single Hijâzî *lâm* which, as expected, is – or was, prior to its erasure – written at an oblique angle, leaning back toward the right side of the page. Notice that the anomalous extension of the *kâf* is parallel to the single Hijâzî *lâm* which was scratched out but is still visible as shadow. Also visible as undertext approximately 6 mm to the right of the leftmost point of the irregular *kâf* is a short stroke that was written at an oblique angle. This would have been the hook of an earlier Hijâzî *kâf*.

*aw*: No change by Corrector 1 (see above).

*wa-lahu*: Underneath the ‘Abbasid book hand *wa-lahu*, also the work of Corrector 2, one sees the residue of an earlier erasure. Clearly visible to the right of the ‘Abbasid *lâm* is a Hijâzî *lâm*, written at an oblique angle. Clearly visible to the left of and above the ‘Abbasid *hâ*’ is a Hijâzî *alif*, written at an oblique angle. These two letters would have been connected by a Hijâzî medial *hâ*’. In addition, barely visible between the ‘Abbasid *lâm* and *alif* is what may be a final Hijâzî *hâ*’. That is to say, underneath the ‘Abbasid book hand *lahu* are both a Hijâzî *lahu* and a Hijâzî *lahâ*. It remains to be determined which form is original and which is secondary.

Other work performed by Corrector 1 is not immediately visible to the naked eye when one examines folio 10b. But all is not lost. Parchment is translucent and metallo-gallic ink is corrosive; thus, the chemicals in the ink penetrate the surface of the parchment and remain embedded in the vellum even after erasure. Some of the writing that lies beneath the erasures on folio 10b,

l. 18 is still visible on the recto of folio 10 — that is to say, on folio 10a. In this instance, no special camera or equipment is needed. It is necessary only to lift folio 10 to a vertical position and expose it to light. Holding the folio aloft, one can examine folio 10b from the vantage point of folio 10a, that is to say, from behind. The evidence visible (in reverse) on folio 10a is as follows:

*kalâla*: Viewed from the vantage point of folio 10a, the irregular extension of the initial *kâf* on folio 10b was a *Ḥijâzî lâm* before it was recycled by Corrector 2 to produce an ‘Abbasid book hand *kâf*. This *lâm* was produced by Corrector 1, who inserted this additional, non-original letter by manipulating the original *Ḥijâzî kâf* written by Scribe A. The original *kâf* — like all of the initial *kâfs* in BNF 328a — would have occupied less than half the line and would have had a short extension at the top written at an oblique angle (see again the initial *kâf* of *kâna* on l. 17 and of *kânû* on l. 19). Corrector 1 made this short extension the basis of a *Ḥijâzî lâm* that occupied the full height of the line and leaned backwards toward the right side of the page. The new *lâm* eliminated part of the original initial *kâf*, and it was therefore necessary for Corrector 1 to create a new *kâf*. He did this by inserting a new short extension, written at an oblique angle, approximately 5 cm to the right of the old one (see figure 3). He now produced a new *Ḥijâzî kâf* which, on its right side, approached the final *thâ’* of *y-w-r-th*, from which it is separated by only 2 mm. The tight spacing is noteworthy although not necessarily irregular.<sup>75</sup>

*wa-lahu*: Scribe A wrote *wa-lahâ* by mistake — no doubt because this word follows two nouns with feminine endings. Shortly thereafter, Corrector 1 fixed the mistake by erasing the final *Ḥijâzî alif* of *wa-lahâ* and replacing it with a final *Ḥijâzî hâ’*, thereby creating the word *wa-lahu*.

When the evidence visible on BNF 328a, folios 10a–b is combined, the result is as follows:



Figure 4. Folio 10b, l. 18

The original spelling of *kalâla* was *\*kalla* — with only one *lâm*. As for *wa-lahu*, this is the work of Corrector 1, who corrected Scribe A’s *wa-lahâ*. Figure 4 represents my attempt to recover the original text.

The original consonantal skeleton of BNF 328a, folio 10b, l. 18 differed from what would become the standard consonantal skeleton at a single point: *\*kalla* (with only one *lâm*) instead of *kalâla* (with two *lâms*). The consonantal skeleton and performed reading of \*4:12b, l. 1a may be represented as follows, using boldface to identify a spelling that differs from the standard spelling, and a question mark to identify a performed reading that remains to be determined (inasmuch as there were at that time no vowel signs, one cannot speak of *vocalization*):

1a *wa-in kâna rajul<sup>un</sup> yûr?thu kallat<sup>an</sup> aw imra’at<sup>in</sup>*

The syntax of this conditional clause suggests a performed reading that differs at two points from what would become the standard vocalization: *\*yûrithu* (active verb) instead of

<sup>75</sup> On folio 10b, one also finds an interval of only 2 mm between *al-niṣf* and *wa-lâ* (l. 6) and between *in* and *kâna* (l. 7).



*yûrathu* (passive verb); and \**imra'at<sup>an</sup>* (accusative) instead of *imra'at<sup>un</sup>* (nominative). Viewed in this manner, the causative verb \**yûrithu* is followed immediately by a compound phrase that is the direct object of the verb.<sup>76</sup> Thus, we have a total of three changes to v. \*12b: one revision of the consonantal skeleton and two revisions of the performed reading. The original consonantal skeleton and performed reading of the opening line of \*4:12b may be represented as follows:

1a *wa-in kâna rajul<sup>un</sup> yûrithu kallat<sup>an</sup> aw imra'at<sup>an</sup>*

1b *wa-lahu akh<sup>un</sup> aw ukht<sup>un</sup>*

1c *fa-li-kull<sup>i</sup> wâhid<sup>in</sup> minhumâ al-sudus<sup>u</sup>*

In order to determine the meaning of l. 1, it is necessary to define the word \**kalla* in l. 1a. This is no simple task, as \**kalla* does not exist in the Arabic language. Notice, however, that the Form IV active verb *yûrithu* is followed by two nouns in the accusative case: \**kallat<sup>an</sup> aw imra'at<sup>an</sup>*. This phrase bears a striking resemblance to a phrase that occurs in matrimonial adoption tablets produced in ancient Nuzi in the middle of the second millennium BCE.

## Adoption Contracts in Nuzi<sup>77</sup>

In the ancient Near East, there was no abstract term for adoption; rather, an adult man or woman would take a male into *sonship* or a woman into *daughtership*. The new relationship, recognized as the equivalent of the natural filiation between a biological parent and his or her legitimate child, was created informally without the participation of any official or representative of the state. The biological parent and the adoptor entered into an agreement with one another that was sometimes recorded in a private contract. As a consequence of this agreement, the adoptee took the name of the adoptor and became responsible for care of the new parent in his or her old age. In addition, mutual rights of inheritance were created between adoptor and adoptee.

The adoption of a son served two fundamental purposes: first, to keep property within the family by securing a male heir when there was no natural son; and, second, to provide for the care of adoptive parents in their old age and to make arrangements for their proper burial. To insure that wealth would remain within the family, the adoptor might arrange for the adoptee to marry his daughter. In such cases, the adoptee — who was both a son (*mar'u*) and a son-in-law (*ḥatanu*) — became a full member of the household, and he often was given part or all of his father's inheritance.<sup>78</sup>

<sup>76</sup> In the canonical text of the *Qur'ân*, it is recalled, a bifurcated compound phrase (*rajul<sup>un</sup> ... aw imra'at<sup>un</sup>*) is the subject of a passive verb (*yûrathu*).

<sup>77</sup> The following summary of adoption practices in the ancient Near East relies on Westbrook 2003a, pp. 50–54.

<sup>78</sup> Adoption served other functions as well. A man who wished to transfer the family gods to someone who was not a blood relative first had to incorporate the desired heir into the family through adoption. The male who was adopted often acquired the status of a legitimate heir and the right to inherit from

the adoptor. Adoption also was a means by which a man could confer legitimacy on natural children born to him by a slave concubine. A slave owner could manumit a slave and then adopt him as his son. Adoption was also used to facilitate the transfer of land between people who were not blood relatives. In some ancient Near Eastern societies, ancestral property could not be alienated outside of the family. A landowner who wanted to sell his property to a stranger might adopt the purchaser and convey the land to him as an inheritance, with immediate possession; in return, the adoptee/purchaser would compensate

Adoptions were recorded in written contracts inscribed on clay tablets. These contracts have a stereotypical form that invariably includes a preamble, stipulations, and a penalty clause.<sup>79</sup> An adoption contract for a son is called *tuppi marûti* — that is, a document of sonship. The contract could be terminated by either party, unilaterally, by the performance of a speech act. An adoptive parent who wished to dissolve the relationship needed only say, “You are not my son.” If the adoptee wished to dissolve the relationship, he was required to say, “You are not my father” or “You are not my mother.” Many adoption contracts contained a penalty clause designed to prevent unilateral dissolution. In those cases in which the adoption agreement had assigned an inheritance share to the adoptee, the party that dissolved the agreement forfeited that share. In certain cases, the adoptor was required to concede to the adoptee not only the share to which he was entitled but also the entire estate.<sup>80</sup>

Females were also adopted. A female adoptee became subject to the authority of her adoptive parent, who might secure a husband for the girl and provide her with a dowry. More than sixty matrimonial adoption contracts have been recovered from Nuzi, a Hurrian settlement located on the east bank of the Tigris River near the city of Arrapha (modern Kirkuk).<sup>81</sup> Matrimonial adoption falls into three categories:<sup>82</sup>

## 1. Adoption in Daughtership

A *tuppi mârtûti* is a tablet of adoption in daughtership in which a father (or mother) gives a daughter to a man (or woman) who adopts her. The adoptor pays a sum of money (usually ten to twenty-five shekels) to the biological parent and stipulates that he (or she) arrange for the adoptee to marry. The adopting parent usually selects a free man as the adoptee’s husband, although some tablets mention marriage to a slave. The arrangement sometimes took place between close relatives, e.g., a girl whose mother had died might be given in adoption to the mother’s husband or to her sister’s husband or to her brother’s wife’s brother. At

---

the seller/adoptor with a filial gift that was equivalent to the value of the land. Alternatively, an elderly person might adopt a nonrelative and award him his estate in return for a pension; or a creditor might adopt a man or woman who owed him money and clear the debt in return for a pension. In such cases, the adoption was a legal fiction. See Van Seters 1969, pp. 385–86; Frymer-Kensky 1981; Westbrook 1998; and 2003a, p. 51.

<sup>79</sup> The preamble contains the names of the adoptor and the adoptee and a record of the act of adoption. This is followed by the conditions of the specific contract, e.g., a statement designating the adoptee as heir; a safety clause protecting the inheritance of the adoptee in the event that the adoptor subsequently produces a natural son; and the obligation of the adopted son to care for his adoptive father in old age. The contract ends with a penalty clause specifying the monetary consequences that follow from

---

dissolution of the adoptive tie. See Westbrook 2003a, pp. 53–55. Cf. Van Seters 1969, pp. 385–86.

<sup>80</sup> Westbrook 2003a, p. 53; Westbrook 2003b, pp. 673–75; Márquez Rowe 2003a, p. 711; and 2003b, pp. 728–29.

<sup>81</sup> Nuzi was destroyed by fire in the middle of the second millennium BCE. In 1925, an archaeological excavation was conducted on the site by Edward Chiera, who discovered more than one thousand tablets inside the ruins of an ancient house. These tablets, written in the cuneiform script and the Akkadian language, record the personal affairs and business transactions of a single family over the course of four generations. Many of the tablets deal with adoption and inheritance. See *Joint Expedition with the Iraq Museum at Nuzi*; cf. *Excavations at Nuzi Conducted by the Semitic Museum and the Fogg Art Museum of Harvard University*. The practices documented at Nuzi were widespread throughout the ancient Near East.

<sup>82</sup> On matrimonial adoption, see Grosz 1987 and Breneman 1971.

other times it took place between people who knew each other well, e.g., a client might give his daughter in adoption to his patron in order to provide her with support for life in the patron's household.<sup>83</sup>

## 2. Adoption in Daughter-in-Lawship

A *ṭuppi kallatûti* is a tablet of adoption in which a father gives his daughter in daughter-in-lawship to a man who marries the girl to his son. Thus, the girl becomes the adoptive father's daughter-in-law (*kallatu*).<sup>84</sup>

## 3. Adoption in Daughtership and Daughter-in-Lawship

The first and second types of adoption, i.e., the *ṭuppi mârtûti* and the *ṭuppi kallatûti*, might be combined into a *ṭuppi mârtûti u kallatûti*, i.e., a tablet of adoption in daughtership and daughter-in-lawship. Wealthy individuals used this type of adoption to acquire the lifelong services of a female dependent. Most adoptees came from poor families and were given away in adoption because of economic hardship experienced by the biological parents. In this type of adoption, a parent gives a daughter to a free man or woman who marries the girl to a slave. If the first husband dies, the master reserves the right to marry her to a second slave, then to a third, and so on. The contract stipulates that the adopted child remains in the adoptor's house. Any wealth acquired by the adoptee during the period of the adoption belongs to the adoptor — and not to the adoptee's children or any other heir.<sup>85</sup>

Our concern here is with the third type of adoption contract, the *ṭuppi mârtûti u kallûti*, or adoption in daughtership and daughter-in-lawship. The Akkadian phrase *mârtûti u kallûti* ("daughtership and daughter-in-lawship") is the abstract form of *mârtu u kallatu* ("daughter and daughter-in-law"). The Akkadian phrase is similar but not identical to the Arabic phrase *\*kallat<sup>an</sup> aw imra'at<sup>an</sup>* in Q. \*4:12b. Let us begin with the differences: The order in which the two nouns occur in the Akkadian phrase is reversed in its Arabic counterpart; and the Akkadian phrase contains the word *u* ("and"), whereas the Arabic phrase contains the word *aw* ("or"). Apart from these differences, the similarities are striking: Akkadian *mârtu* and Arabic *imra'a* are derived from the same root (*m-r-*), share the same morphology (*fa'lat<sup>un</sup>*), and have a similar meaning (the Akkadian noun signifies "daughter, girl, woman," while the Arabic noun signifies "woman, wife"). Likewise, Akkadian *kallatu* and Arabic *\*kalla* are derived from the same root (*k-l-l*) and share the same morphology (*fa'lat<sup>un</sup>*). The homology would be complete if the Arabic noun *\*kalla* signified "daughter-in-law" as does its Akkadian and other Semitic counterparts. Is there any reason to believe that the Arabic language once contained a kinship term *\*kalla* that signified "daughter-in-law"?

Linguists have long recognized that the Semitic language family, which includes Akkadian, Ugaritic, Hebrew, Aramaic, Syriac, South Arabic, Ethiopian, and Arabic, contains a shared lexicon in certain core areas, such as natural phenomena, anatomy and physiology, social organization, working methods, feeding habits, economy, and religion. Kinship terms are an important component of this common lexicon. All of the Semitic languages share pairs of words that signify male and female relationships of consanguinity, for example, son/daughter, father/mother, brother/sister, and paternal uncle/maternal uncle.<sup>86</sup> The Semitic languages also share

<sup>83</sup> Grosz 1987, pp. 133–41.

<sup>84</sup> Grosz 1987, pp. 141–45.

<sup>85</sup> *Ibid.*, pp. 145–50.

<sup>86</sup> Zammit 2002.

a common stock of terms that denote the relationship of affinity created between one spouse and the blood relatives of the other spouse. These terms also occur in pairs, for example, father-in-law/mother-in-law, bride/groom, and son-in-law/daughter-in-law.<sup>87</sup> Our interest here is in this last pair: son-in-law/daughter-in-law. Let us begin with the masculine term.

In the Semitic kinship lexicon, the noun that signifies *son-in-law* is invariably derived from the root *ḥ-t-n*. A noun derived from this root and signifying *son-in-law* is found in Akkadian (*ḥatanu* or *ḥatnu*), which is an East Semitic language,<sup>88</sup> and in all West Semitic languages: Ugaritic (*ḥatnu*);<sup>89</sup> Middle Hebrew (*ḥâtân*); Jewish Aramaic, Syriac, Christian Palestinian Aramaic, and Samaritan (*ḥatna'*); Nabataen (*ḥtn*);<sup>90</sup> Mandaic (*hatna*);<sup>91</sup> Old South Arabic (*ḥtn*); and Arabic (*khatan*).<sup>92</sup> All these words share the same root, morphology, and meaning; this particular kinship term is common to all Semitic languages, including Arabic.<sup>93</sup>

The feminine counterpart of *son-in-law* is *daughter-in-law*. In the Semitic kinship lexicon, the noun that signifies *daughter-in-law* is usually derived from the root *k-l-l*. The word for *daughter-in-law* in Akkadian, as we have seen, is *kallatu*.<sup>94</sup> A noun derived from the same root and sharing the same morphology is found in most — but not all — West Semitic languages: Ugaritic (*kl̄t*),<sup>95</sup> Hebrew (*kallâh*),<sup>96</sup> Syriac (*kalltâ*),<sup>97</sup> and Aramaic (*kalltâ*),<sup>98</sup> as well as in Northwest Semitic (*klh*)<sup>99</sup> and South Arabic (*kela/o/un*).<sup>100</sup> The exception is Arabic, where one might expect to find a kinship term derived from the root *k-l-l* and sharing the same morphology as Akkadian *kallatu*, Hebrew *kallâh*, and so on. This would be our hypothetical *\*kalla*. In

<sup>87</sup> Botterweck and Ringgren 1974–2004, s.vv. *ḥâtân*, *kallah*.

<sup>88</sup> CAD, s.v. *ḥatanu*.

<sup>89</sup> Gordon 1965.

<sup>90</sup> *Corpus inscriptionum semiticarum*.

<sup>91</sup> Drower and Macuch 1963.

<sup>92</sup> Ryckmans (ed.) 1950, pp. 402–03, n. 4878, line 2.

<sup>93</sup> Botterweck and Ringgren 1974–2004, s.v. *ḥâtân*.

<sup>94</sup> CAD, s.v. *kallatu*.

<sup>95</sup> del Olmo Lete and Sanmartín 2003, p. 441.

<sup>96</sup> In the Hebrew Bible, *kallâh* denotes both the relationship of a young woman to her (future) husband (“bride”) and her relationship toward her husband’s father or mother (“daughter-in-law”). In the first sense, it can also signify a woman entering into marriage and, in the second, a woman who is already married, sometimes even a widow (Gen. 38:6–10; Ruth 1:4ff.). The abstract noun *k’lâlôt* occurs once, in Jer. 2:2, where it signifies the “state of being a bride,” just as the Akkadian abstract noun *kallātu/kallatātu* signifies “status as daughter-in-law or bride.” *Kallâh* is used in the Hebrew Bible in three different ways. (1) *As a legal term*: Lev. 18, the so-called Holiness Code, contains a list of the women with whom a man may not have sexual relations. Lev. 18:15 states: “Do not uncover the nakedness of your daughter-in-law (*kallatkâ*): she is your son’s wife; you shall not uncover her nakedness.” (2) *As an identifier*: Ruth is the *kallâh* or daughter-in-law of Naomi, and Tamar is the *kallâh* or daughter-in-law of Judah. Similarly, Gen. 11:31 reads:

“Terah took his son Abram, his grandson Lot the son of Haran, and his daughter-in-law (*kallatô*) Sarai, the wife of his son Abram.....” (3) *As a symbol or metaphor*: *kallâh* in the sense of “bride” usually appears in tandem with *ḥâtân* or “bridegroom”; whenever this combination occurs, the *kallâh* and *ḥâtân* invariably appear as typical representatives of people who are especially happy. For example, the rising sun is compared to a bridegroom leaving his chamber (*ḥuppatô*) (Ps. 19:6). In Joel 2:16, the bride and bridegroom are summoned from their chambers to participate in the penitential liturgy: “Let the bridegroom go forth from his chamber (*me-ḥedrô*) and the bride from her canopy (*ḥuppatâ*). The word *kallâh* occurs thirty-four times in the Hebrew Bible, as follows (according to usage): Wife or daughter-in-law of the speaker: Gen. 11:31, Gen. 38:11, 16, and 24, Lev. 18:15, I Sam. 4:19, Micah 7:6, Ruth 1:6–8, and 22, Ruth 2:20, 22, Ruth 4:1, I Chron. 2:4. Used in parallelism with *ḥtn*: Is. 61:10, Is. 62:5, Jer. 7:34, Jer. 16:9, Jer. 25:10, Jer. 33:11. Context does not provide the meaning: Lev. 20:12, Is. 49:18 (one adorning herself, possibly bride), Jer. 2:32 (one adorning herself, possibly bride), Ezek. 22:11, Hos. 4:13–14. Song of Songs: 4:8–12, 5:1. See Botterweck and Ringgren 1974–2004, s.v. *kallâ*, 7:165.

<sup>97</sup> Payne Smith 1902, s.v. *kalltâ*.

<sup>98</sup> Jastrow 1950, s.v. *kalltâ*.

<sup>99</sup> Hoftijzer and Jongeling, p. 510, s.v. *klh*, citing texts from Palmyra.

<sup>100</sup> Leslau 1958, p. 26: *kelân* (Soqoṭri), *kelôn* (Mehri), *kelun* (Šḥauri), *kellan* (Dhofar), *kulân* (Hadramaut).

Arabic, however, the word for *daughter-in-law* is *kanna* (pl. *kanâ'in*), which the lexicographer Ibn Manẓûr (d. 711/1312) glosses as *imra'at al-ibn*, or *the wife of one's son*.<sup>101</sup> Thus, the morphological and semantic pattern associated with the pair *h-t-n/k-l-l*, a pattern that otherwise is common to all Semitic languages — east, northwest, and south — breaks down in Arabic, where we encounter a linguistic shift from *k-l-l* to *k-n-n*. Conversely, in no other Semitic language do we find a kinship term derived from the root *k-l-l* that has the same meaning as the Arabic *kalâla*. Thus, the Arabic kinship term *kalâla* (“collateral relatives”) is lexically unique with respect to other Semitic languages. It is also a *dis legomenon* in the Qur’ân.

## The Revision of Q. 4:12b (cont.)

We have identified two interrelated linguistic anomalies: the absence in Arabic of a hypothetical kinship term *\*kalla* that signifies *daughter-in-law*, and the absence in Semitic languages other than Arabic of an equivalent of the Arabic kinship term *kalâla* that signifies collateral relatives. On linguistic grounds, there are strong reasons to make the following four assumptions about l. 1 of v. \*12b:

1. During the lifetime of the Prophet, the word for *daughter-in-law* in Arabic was *\*kalla*, a kinship term that was part of the shared Semitic lexicon.
2. The noun *imra'a* in l. 1a signifies *a wife*.<sup>102</sup>
3. The man mentioned in l. 1a is childless.
4. The siblings mentioned in ll. 1b and 1c are the closest surviving blood relatives of the deceased.

If these four assumptions are sound, then the original meaning of Q. \*4:12b would have been as follows:

- 1a. If a man designates as [his] heir (*yûrithu*) a daughter-in-law or wife,
- 1b. and he has a brother or sister,
- 1c. each one of them is entitled to one-sixth.
2. If they are more than that, they are partners with respect to one-third,
3. after any legacy that he bequeaths or debt, without injury.
4. A commandment from God.
5. God is all-knowing, forbearing.

In l. 1a, the active verb *yûrithu*, which means *to make someone an heir*, indicates that the verse deals with testate succession. Line 1a envisages two scenarios: (1) A childless man designates his daughter-in-law as his heir or (2) a childless man designates his wife as his heir.<sup>103</sup>

<sup>101</sup> Ibn Manẓûr 1981, s.v. *k-n-n*; cf. Smith 1903, pp. 161–62, 209 n. 1. The basic meaning of this root is *to conceal*.

<sup>102</sup> Ibn Manẓûr 1981, s.v. *m-r-'*.

<sup>103</sup> This is why the pronoun suffix attached to the preposition *li-* on l. 1b must be masculine, i.e., *lahu* (“and he has”). The pronoun suffix refers back to the *rajul*, or “man,” mentioned on l. 1a. Accordingly, the “brother” and “sister” mentioned on l. 1b must be the siblings of the *testator*; they cannot be the siblings of the designated heir.

In either case, the designated heir is a female who is not a blood relative of the deceased. This was an extraordinary situation. In the absence of clear instructions from the testator, the siblings would have inherited the entire estate. The purpose of the rule formulated in v. \*12b is to prevent a testator from totally disinheriting his closest surviving blood relative — in the present instance, siblings. The rule teaches that persons disinherited in this manner have a legal claim against the estate for up to one-third of its value. The law strikes a balance between the personal wishes of the deceased and the entitlement of the testamentary heir, on the one hand, and the rights of the testator's closest surviving blood relatives, on the other.<sup>104</sup> It does this by awarding the siblings a share of the estate not to exceed one-third. As for the testamentary heir, the size of her inheritance varies depending on how many of the testator's siblings are alive at the time of his death. If the testator is survived by two or more siblings, the testamentary heir inherits two-thirds of the estate; if he has only one sibling, she inherits five-sixths of the estate; and if he has no siblings, she inherits the entire estate.<sup>105</sup>

The meaning of v. \*12b was transformed by the addition of an extra *lâm* to the word \**kalla*. The addition of the extra consonant was accompanied by two changes to the performed reading. Whereas the opening clause of v. \*12b was *wa-in kâna rajul<sup>un</sup> yûrithu kallat<sup>an</sup> aw imra'at<sup>an</sup>*, the opening clause of v. 12b was *wa-in kâna rajul<sup>un</sup> yûrathu kalâlat<sup>an</sup> aw imra'at<sup>un</sup>*. It was the revised version of this verse that was accepted as canonical, that was inherited by the Muslims in the second half of the first century AH, and that became the starting point of all future discussions of the meaning of v. 12b. At the end of the first century AH, the Muslim community attempted to make sense of v. 12b. The earliest exegetes made two important decisions: First, they took the phrase *yûrathu kalâlat<sup>an</sup>* and moved it — mentally — to a position following the word *imra'at<sup>un</sup>*; in other words, they pre-positioned this phrase in the sentence. Second, they taught that the masculine singular pronoun *-hu* in *wa-lahu* refers back to both the “man” and the “woman” mentioned earlier in the sentence.<sup>106</sup> These two exegetical decisions made it possible to generate the following understanding of v. 12b:

If a man's heirs are someone other than a parent or child or [if] a woman's heirs are someone other than a parent or child, and he [or she] has a brother or sister, each one of them is entitled to one-sixth. If they are more than that, they are partners with respect to one-third, after any legacy that is bequeathed or debt, without injury. A commandment from God. God is all-knowing, forbearing.

The standard version of v. 12b, which awards siblings a minimum of one-sixth and a maximum of one-third of the estate, was now fused together with v. 12a, which awards fractional shares of the estate to a surviving husband (one-half or one-fourth, depending on whether or not there are children) and to one or more widows (one-fourth or one-eighth, again depending on whether or not there are children). Verse 12 (a-b), in turn, was fused together with v. 11, which, I believe, was the original *âyat al-fard*, or *inheritance verse*.<sup>107</sup>

<sup>104</sup> The Qur'anic rule may be compared with the *actio ad supplendam legitimam*, a reform of Roman inheritance law introduced by Justinian. See Powers 1986, p. 44 and n. 40.

<sup>105</sup> For a similar rule in Near Eastern provincial law, see Paradise 1972, p. 242: if a man dies and his closest surviving blood relatives are one or more brothers,

the latter customarily would succeed him — unless he previously had designated his adopted son as the *ewuru* heir, thereby sending a signal to his brothers that the *ewuru* heir would inherit not only his property but also his legal role and status as head of the household.

<sup>106</sup> Powers 1986, pp. 24–25, and 2009, pp. 210–16.

<sup>107</sup> See further Powers 2009, Appendix 3.

The consolidation of vv. 11, 12a, and 12b into a single legal unit, referred to collectively as *âyat al-farḍ* or the *inheritance verse*, produced the following cluster of rules for the division of property:

God commands you concerning your children: A male is entitled to the share of two females. If they are females above two, they are entitled to two-thirds of what he leaves. If there is one, she is entitled to half. Each of his parents is entitled to one-sixth of what he leaves, if he has a child. But if he does not have a child, and his parents are his heirs, his mother is entitled to one-third. If he has brothers, his mother is entitled to one-sixth, after any legacy he bequeaths or debt. Your fathers and your sons, you know not which of them is closer to you in usefulness. A commandment from God. God is knowing, wise. ∴ You are entitled to half of what your wives leave, if they do not have a child; but if they have a child, you are entitled to one-fourth of what they leave, after any legacy they bequeath or debt. They are entitled to one-fourth of what you leave, if you do not have a child; but if you have a child, they are entitled to one-eighth of what you leave, after any legacy you bequeath or debt. *If a man's heirs are someone other than a parent or child or [if] a woman's heirs are someone other than a parent or child, and he [or she] has a brother or sister, each one of them is entitled to one-sixth. If they are more than that, they are partners with respect to one-third, after any legacy that is bequeathed or debt, without injury. A commandment from God. God is all-knowing, forbearing.*<sup>108</sup> (Italics mine-DSP)

## Conclusions

The evidence of BNF 328a points to at least one instance in which the consonantal skeleton of the Qur'ân was revised during the process of text redaction. In this instance, the addition of a single consonant transformed the meaning of a verse dealing with inheritance. If BNF 328a was produced in the third quarter of the first century AH — as Déroche has argued — then the consonantal skeleton and performed reading of the Qur'ân would have remained open and fluid until the end of the first/eighth century. It is easy to imagine that changes like this one would have led to disagreements, caused members of the community to accuse one another of infidelity, brought the community to the verge of civil strife, and justified the destruction of all codices that were not in conformity with what became the canonical text.

The opening clause of Q\*4:12b originally read as follows: *wa-in kâna rajul<sup>un</sup> yûrithu kallat<sup>an</sup> aw imra'at<sup>an</sup>*. This clause signified, “If a man designates a daughter-in-law or wife as [his] heir.” For reasons that remain to be determined, the consonantal skeleton and performed reading of this clause were revised as follows: (1) A second *lâm* was added to *\*kalla*, thereby creating a new word, *kalâla*, which had not existed previously in Arabic and for which there is no equivalent in any Semitic language; (2) the performed reading of *y-w-r-th* was changed from active (*yûrithu*) to passive (*yûrathu*); and (3) the case ending of *imra'a* was changed from accusative to nominative. The result was: *wa-in kâna rajul<sup>un</sup> yûrathu kalâlat<sup>an</sup> aw imra'at<sup>un</sup>*, which came to be understood as signifying, “If a man's heirs are someone other than a parent or child or [if] a woman's heirs are someone other than a parent or child.” The revision transforms the meaning of the opening clause by eliminating the reference to the possibility of designating an heir, the reference to a daughter-in-law, and the reference to a wife.<sup>109</sup>

<sup>108</sup> On the formation of Islamic inheritance law, see Powers 1986; 2009, Appendix 3.

<sup>109</sup> On possible causes of this revision of the consonantal text of the Qur'ân, see Powers 2009, pp. 223–24.

The early exegetes and grammarians identified six cruxes associated with Q. 4:12b. My hypothesis disposes of all six cruxes in one fell swoop:

- Crux 1: The verb *y-w-r-th* should be read as an active verb, i.e., *yûrithu*.
- Crux 2: Verse 12b originally specified *\*kalla* or *\*daughter-in-law*.
- Crux 3: The noun *\*kalla* was in the accusative case as the direct object of *yûrithu*.
- Crux 4: Likewise, *imra'a* was in the accusative case as the second direct object of *yûrithu*. Whereas in v. 12b one finds a bifurcated compound subject (“a man ... or a woman”), in v. \*12b one finds a normal compound predicate (“daughter-in-law or wife”).
- Crux 5: The subject of *yûrithu* is the “man” mentioned immediately before the verb on l. 1a.
- Crux 6: The masculine singular pronoun *wa-lahu* in l. 1b refers back to the “man” on l. 1a.

The consonantal skeleton of v. \*12b originally specified *\*kalla*, which signified *\*daughter-in-law*, as in other Semitic languages. This word was a *hapax legomenon*. Subsequently, *\*kalla* was changed to *kalâla*, also a *hapax legomenon* — until its inclusion in the verse at the end of *Sûrat al-Nisâ'* turned it into a *dis legomenon*.<sup>110</sup> It should come as no surprise that early Muslim scholars did not know the meaning of *kalâla* in v. 12b. *Kalâla* is a nonce word, that is to say, a linguistic invention. The meaning of this word can be determined only by its usage in vv. 12b and 176. In v. 12b *kalâla* is used adverbially; in v. 176 it is a simple noun. This is why *kalâla* has a different meaning in these two verses.<sup>111</sup> Although a few key members of the early community of believers may have been aware of the textual change discussed above, the rest of the community appears to have been unaware of — or forgotten — the original consonantal skeleton and performed reading of Q. \*4:12b and the meaning of the word *\*kalla*.<sup>112</sup>

<sup>110</sup> See Powers 2009, pp. 182–93, where I argue that Q. 4:176 is a post-Muhammadan interpolation that was made necessary by the revision of Q. 4:12b.

<sup>111</sup> The establishment of the meaning of the word *kalâla* was a long and sometimes tortuous process that has now been carefully and painstakingly reconstructed in Pavlovitch 2016.

<sup>112</sup> Following the revision of Q. \*4:12b, the word *\*kalla* in the sense of *daughter-in-law* disappeared from Arabic, leaving virtually no trace of its existence. Henceforth, when speakers of the Arabic language wanted to refer to a *daughter-in-law*, they used the word *kanna* (pl. *kanâ'in*) (see, e.g., Khalîl b. Aḥmad 2004, s.v. *k-n-n* and Ibn Manzûr 1981, s.v. *k-n-n*) or the *iḍâfa*-construct *imra'at al-ibn* (“wife of a son”). As

a result, the concept of *daughter-in-law* was detached from the root *k-l-l* and shifted to the root *k-n-n* — the shift from *-l-* to *-n-* is a well-known linguistic phenomenon in the Semitic language family. In this instance — which merits further study — the linguistic shift was driven by historical factors. On this consonantal shift, see Brockelmann 1908, p. 47; Moscatti 1980, p. 32 (par. 8.26). N.B.: The Arabic *sijill* in Q. 11:82 and *sijil* in 21:104 may be related to *sijîn* in Q. 83:7–8; and both words may be related to the Latin *sigillum*, the diminutive form of *signum*, which signifies *seal*. See Selms 1977, pp. 99–103. For examples of Qur'anic terms that are rarely used in classical Arabic, see Brunschvig 1956, pp. 19–32.



## Bibliography

- al-Balâdhurî  
 2001 *Ansâb al-ashrâf*. Volume 4:2. Edited by ‘Abd al-‘Azîz ad-Dûrî and ‘Iṣâm ‘Uqla. Biblioteca Islamica 28e. Beirut: Das Arabische Buch.
- Botterweck, Gerhard J., and Helmer Ringgren  
 1974–2004 *Theological Dictionary of the Old Testament*. Translated by David E. Green. Grand Rapids: Eerdmans.
- Breneman, J. Mervin  
 1971 Nuzi Marriage Tablets. PhD dissertation, Brandeis University.
- Brockelmann, Carl  
 1908 *Kurzgefasste vergleichende Grammatik der semitischen Sprachen: Elemente der Laut- und Formenlehre*. Berlin; New York: Reuther & Reichard; Lemcke & Buechner.
- Brunschvig, Robert  
 1956 “*Simple remarques négatives sur le vocabulaire du Coran.*” *Studia Islamica* 20: 19–32.
- Corpus inscriptionum semiticarum*  
 1881– e Reipublicae Typographeo.
- Crone, Patricia, and Martin Hinds  
 1986 *God’s Caliph: Religious Authority in the First Centuries of Islam*. Cambridge: Cambridge University Press.
- Déroche, François  
 1992 *The Abbasid Tradition: Qur’ân’s of the 8th to the 10th Centuries A.D.* Nasser D. Khalili Collection of Islamic Art 1. London: Nour Foundation in association with Azimuth Editions and Oxford University Press.  
 2006 *Islamic Codicology: An Introduction to the Study of Manuscripts in Arabic Script*. Translated by Deke Dusinberre and David Radzinowicz. Edited by Muhammad Isa Waley. London: Al-Furqân Islamic Heritage Foundation.  
 2009 *La transmission manuscrite du Coran aux débuts de l’islam: Le codex Parisino-petropolitanus*. Leiden: Brill.
- Déroche, François, and Sergio Noja Nosedá  
 1998 *Sources de la transmission manuscrite du texte coranique, I: Les manuscrits de style hiǧâzî*. Le manuscrit arabe 328(a) de la Bibliothèque nationale de France. Lesa: Fondazione Ferni Noja Nosedá.
- Drower, Ethel S., and Rudolf Macuch  
 1963 *A Mandaic Dictionary*. Oxford: Clarendon Press.
- Dutton, Yasin  
 2001 “An Early *Muṣḥaf* According to the Reading of Ibn ‘Âmir.” *Journal of Qur’anic Studies* 3/1: 71–89.
- Excavations at Nuzi Conducted by the Semitic Museum and the Fogg Art Museum of Harvard University*  
 1929– Harvard Semitic Series. Volumes 5, 9, 10. Cambridge: Harvard University Press.
- al-Nadîm  
 1970 *The Fihrist of al-Nadîm: A Tenth-Century Survey of Muslim Culture*. Translated by Bayard Dodge. New York: Columbia University Press.
- Frymer-Kensky, Tikva  
 1981 “Patriarchal Family Relationships and Near Eastern Law.” *Biblical Archaeologist* 44/4: 209–14.
- Gilliot, Claude  
 2006 “Creation of a Fixed Text.” In *The Cambridge Companion to the Qur’ân*, edited by Jane Dammen McAuliffe, pp. 41–58. Cambridge: Cambridge University Press.
- Gordon, Cyrus H.  
 1965 *Ugaritic Textbook*. Rome: Pontifical Biblical Institute.
- Grabar, Oleg  
 2006 *The Dome of the Rock*. Cambridge: Harvard University Press.

- Grosz, Katarzyna  
1987 "On Some Aspects of the Adoption of Women at Nuzi." In *Studies on the Civilization and Culture of Nuzi and the Hurrians*, volume 2, edited by David I. Owen and Martha A. Morrison, pp. 131–52. Winona Lake: Eisenbrauns.
- Gruendler, Beatrice  
1993 *The Development of the Arabic Script*. Harvard Semitic Series 43. Atlanta: Scholars Press.
- Hoftijzer, Jacob, and Karel Jongeling  
1995 *Dictionary of the North-West Semitic Inscriptions*. Leiden: Brill.
- Hoyland, Robert G.  
1997 *Seeing Islam as Others Saw It*. Studies in Late Antiquity and Early Islam 13. Princeton: Darwin Press.
- Ibn Abî Dâ'ûd al-Sijistânî, Abû Bakr  
1355/1936 *Kitâb al-maṣâḥif*. Edited by Arthur Jeffery. Cairo: al-Maṭba'at al-Raḥmâniyya.
- Ibn Manzûr  
1981 *Lisân al-'arab*. 6 volumes. Cairo: Dâr al-Ma'ârif.
- Ibn Shabba, 'Umar  
1990 *Kitâb ta'rîkh al-madîna*. 4 volumes. Edited by Fahîm Muḥammad Shaltût. Beirut: Dâr al-Turâth.
- Ibn Wahb  
1992 *al-Ġâmi': die Koranwissenschaften*. Edited by Miklos Muranyi. Wiesbaden: Harrassowitz.
- Jastrow, Marcus  
1950 *Dictionary of Talmud Babli, Yerushalmi, Midrashic Literature and Targumim*. 2 volumes. New York: Pardes.
- Jeffery, Arthur  
1937 *Materials for the History of the Qur'ân*. Leiden: Brill.
- Joint Expedition with the Iraq Museum at Nuzi  
1927–1939 *American Schools of Oriental Research, Publications of the Baghdad School, Texts*. Volumes 1–6. Paris: P. Geuthner.
- Khalîl b. Aḥmad al-Farâhîdî  
2004 *Kitâb al-'ayn*. Edited by Dâ'ûd Salmân al-'Anbakî and In'âm Dâ'ûd Sallûm. Beirut: Maktabat Lubnân Nâshirûn.
- Lecker, Michael  
1993 "Ḥudhayfa b. al-Yamân and 'Ammâr b. Yâsir, Jewish Converts to Islam." *Quaderni di Studi Arabi* 11: 149–62.
- Leslau, Wolf  
1958 *Ethiopic and South Arabic Contributions to the Hebrew Lexicon*. University of Southern California Publications in Semitic Philology 20. Berkeley: University of California Press.
- Márquez Rowe, Ignacio  
2003a "Alalakh." In *A History of Ancient Near Eastern Law*, edited by Raymond Westbrook, pp. 693–717. *Handbuch der Orientalistik* 72. Leiden: Brill.  
2003b "Ugarit." In *A History of Ancient Near Eastern Law*, edited by Raymond Westbrook, pp. 719–35. *Handbuch der Orientalistik* 72. Leiden: Brill.
- Moscato, Sabatino  
1980 *An Introduction to the Comparative Grammar of the Semitic Languages*. 3rd printing. Wiesbaden: Harrassowitz.
- Motzki, Harald  
2001 "The Collection of the Qur'ân: A Reconsideration of Western Views in Light of Recent Methodological Developments." *Der Islam* 78: 1–34.
- Olmo Lete, Gregorio del, and Joaquín Sanmartín  
2003 *A Dictionary of the Ugaritic Language in the Alphabetic Tradition*. Translated by Wilfred G. E. Watson. Leiden: Brill.
- Paradise, Jonathan S.  
1972 *Nuzi Inheritance Practices*. PhD dissertation, University of Pennsylvania.
- Pavlovitch, Pavel  
2016 *Between Scripture and Canon: The Formation of the Islamic Understanding of kalâla in the Second Century AH (718–816 CE)*. Leiden: Brill.

- Payne Smith Margoliouth, Jessie  
 1902 *A Compendious Syriac Dictionary Founded upon the Thesaurus Syriacus of R. Payne Smith*. Oxford: Oxford University Press.
- Powers, David S.  
 1986 *Studies in Qur'ân and Ḥadīth: The Formation of the Islamic Law of Inheritance*. Berkeley: University of California Press.  
 2009 *Muḥammad is Not the Father of Any of Your Men: The Making of the Last Prophet*. Divinations: Re-Reading Late Ancient Religion. Philadelphia: University of Pennsylvania Press.
- Prémare, Alfred-Louis de  
 2002 *Les Fondations de l'Islam: Entre écriture et histoire*. Paris: Seuil.  
 2005 "‘Abd al-Malik b. Marwân et le processus de constitution du Coran." In *Die dunklen Anfänge: Neue Forschungen zur Entstehung und frühen Geschichte des Islam*, edited by Karl-Heinz Ohlig and Gerd-Rüdiger Puin, pp. 179–212. Berlin: Hans Schiler.
- Robinson, Chase F.  
 2006 *‘Abd al-Malik. Makers of the Muslim World*. Oxford: Oneworld.
- Ryckmans, Gonzague, editor  
 1950 *Répertoire d'épigraphie sémitique*. Tome VII (3947–5106), pp. 402–03. Paris: Imprimerie Nationale.
- Selms, Adriaan van  
 1977 "siġġîn and siġġîl in the Qur'ân." *Welt des Orients* 9/1: 99–103.
- Seters, John Van  
 1969 "Jacob's Marriages and Ancient Near East Customs: A Reexamination." *Harvard Theological Review* 62/4: 377–95.
- Smith, William R.  
 1903 *Kinship and Marriage in Early Arabia*. Boston: Beacon Press.
- al-Ṭabarî, Muḥammad b. Jarîr  
 1969 *Tafsîr al-Ṭabarî: Jâmi‘ al-bayân ‘an ta’wîl ây al-qur’ân*. 16 volumes. Edited by Maḥmûd Muḥammad Shâkir and Aḥmad Muḥammad Shâkir. Cairo: Dâr al-Ma‘ârif.
- Westbrook, Raymond  
 1998 "Legal Aspects of Care of the Elderly in the Ancient Near East: Introduction." In *The Care of the Elderly in the Ancient Near East*, edited by Marten Stol and Sven P. Fleming, pp. 1–20. Leiden: Brill.  
 2003a "Introduction: The Character of Ancient Near Eastern Law." In *A History of Ancient Near Eastern Law*, edited by Raymond Westbrook, pp. 1–90. *Handbuch der Orientalistik* 72. Leiden: Brill.  
 2003b "Emar and Vicinity." In *A History of Ancient Near Eastern Law*, edited by Raymond Westbrook, pp. 657–91. *Handbuch der Orientalistik* 72. Leiden: Brill.
- Zammit, Martin R.  
 2002 *A Comparative Lexical Study of Qur'ânic Arabic*. Leiden: Brill.

Section IV  
Response



Response

## Law and Gender Across the Ancient Near East and Beyond

*Janet H. Johnson and Martha T. Roth, The University of Chicago\**

### Martha Roth

The first five essays in this volume are grouped under the heading “Formal Law and Informal Custom” and are responded to by Janet Johnson, who brings her expert Egyptological perspective to these papers dealing with Egypt (Muhs), Mesopotamia (Peled), Athens and Gortyn (Scarfuro), Rome (McGinn), and China (Skosey). It is my task to respond to the remaining six essays, grouped under two headings. Included in “Law, Administration, and Economy” — all within Near Eastern cultures — are papers dealing with evidence from Ur III Sumer (Culbertson), Middle Kingdom Egypt (Nelson-Hurst), and Hittite Anatolia (Beckman); and in “Family and Kin Relations” the papers examine evidence from China (Shaughnessy), Elephantine and Judean Desert archives (Ilan), and early Islamic traditions (Powers). Given that my own scholarship focuses on Mesopotamia, and in particular on the Old Babylonian and Neo-Babylonian periods, I come to these papers both with questions from my own field and insufficient knowledge of the limitations of the sources used by the contributors.

The title of the conference organized by Ilan Peled, retained for this publication, as well as all three section headings and the titles of almost all the papers, include the conjunction “and.” It is here that I wish to begin my comments, by turning to the final volume of the Chicago Assyrian Dictionary, published in 2011, covering transcribed lemmata beginning with U and W, in which the first entry is:

**u** (*ū, wa*) conj.; and, or; from OAkk. *on*; ...

The body of the dictionary article provides only citations from lexical grammatical texts, along with a brief discussion and bibliography pointing to the inability of the cuneiform writing system used for Akkadian (as opposed to syllabic scripts used for other Semitic languages) to represent distinctly the near-homophonous connective words indicating conjunction (“and”) and alternation (“or”). The short entry (only a half-column long) belies the complex and problematic nature of this/these words. Of course, the conjunction “and” in many languages is also not confined to a single, connective usage; it is used both to separate

---

\* Editor’s note: Janet Johnson and Martha Roth kindly agreed not only to act as respondents during the conference but also to contribute the detailed and thoughtful response that concludes this volume. Their authoritative expertise in the subjects of law

---

and of gender in ancient Egypt and Mesopotamia made them the perfect people for the task. Their separate responses were joined together, resulting in several overlaps that supply interesting different perspectives on some of the issues discussed.

and to connect two or more entities or ideas. (There are more uses, of course, such as: to mark consecutive actions or serial items, to mark change in subject or topic, or, of particular interest here, the hendiadic formulation to express a new, single notion, often idiomatic, other than the cumulative sense of the two individual terms: “sick and tired,” “alive and well,” or “rock and roll.”) Thus, in phrases such as “black and white,” “right and wrong,” “apples and oranges,” “oil and water,” or (at the University of Chicago) “latke and hamantash,” the “and” separates incommensurate things. On the other hand, in phrases such as “heaven and earth,” “an arm and a leg,” “day and night,” “alpha and omega,” or “chaff and gold” — similarly to phrases using the directional “from ... to,” such as “from A to Z,” “from zero to 100,” or “from New York to California” — the “and” *links* the two parts of a single whole (“day and night” = “all day”), the essential parts of a thing (merism) (“lock, stock, and barrel” = “the entire thing”), or two extremes of a single continuum (“young and old” = “everyone”; “high and low” = “everywhere”), thereby expressing inclusion of all elements between those extremes.<sup>1</sup> As Ilan Peled, the organizer of the conference and editor of this volume, notes in his Introduction, “the research on ancient Near Eastern law and on gender in the ancient Near East are usually conducted separately” (p. 4, this volume). That is, scholars of the ancient Near East generally understand “and” in the phrase “law and gender” to *separate* rather than *link* the two spheres, and a volume on “law and gender” could have a number of papers on “law” and second set of papers on “gender.” Instead, Peled’s intention for the current enterprise is to encourage scholars to think about the intersection of “law” and “gender,” using the two terms as lenses through which to view and to interrogate one another.

## Janet Johnson

This conference asked, “What is the interrelation of law and gender in (a) society? What are the implications of this for our understanding of “structures of power” in (a) society?” Power must be understood not only as the power of the State through establishment of legal norms and punishments but also the power of society and the family using non-formal/non-state control to restrict or punish behavior. The organizer, Ilan Peled, has provided a fine brief summary of every paper in the conference; hopefully his summary encourages many potential readers of this volume to become actual readers. I see two aspects to my role as respondent: first, to see where we can tie papers together, where similar or related questions are being asked, and, second, to see what further discussions can and should be prompted by this collection of presentations/papers. I am by training an Egyptologist and have worked on the intersection of law and gender in Egyptian sources, especially documents. But that means that most of the presentations/papers are dealing with cultures and data that are somewhat or entirely beyond my knowledge. I hope that I have not misunderstood or misconstrued the data or the arguments of these colleagues.

The title for the first section, “Formal Law and Informal Custom,” (perhaps understood as “cultural ideal vs. actual/practical/societal solutions”?). reflects rather well the data and conclusions of most of the papers in the section, and perhaps all of them depending on how “informal custom” is conceived. Muhs began with a very clear and convincing presentation

---

<sup>1</sup> See Yoad Winter, *Flexibility Principles in Boolean Semantics: The Interpretation of Coordination, Plurality, and Scope in Natural Language*. Cambridge: MIT Press, 2001.

of Egyptian evidence from the New Kingdom (middle of the second millennium BCE) through the Ptolemaic period (ended 30 BCE) for the use of individual legal documents related to gendered inheritance to circumvent the normative behavior described in the legal “codes/manuals” which have been preserved, i.e., to override the normative. It has long been argued by Egyptologists that the legal documents which have been preserved, from the Old Kingdom on, reflect the unusual rather than the normal. Muhs has now given us an explanation as to why. Did “power” at the level of inheritance reside with the person who could write a legal document circumventing the norms? I would have enjoyed hearing a discussion among the participants about whether this disjuncture found in Egypt between legal “codes/manuals” and legal documents is found in other ancient civilizations and whether Muhs’ explanation for the Egyptian material is relevant for such non-Egyptian material.

The middle group of presentations/papers in this section all looked at questions of gender and law which specifically concerned sex, sex crimes, and the law — a very restricted but interesting subset of gender and law, the specifics of which seem to have been understood in each society as threats to family structure. The economic implications (i.e., women considered as property) are frequently pivotal. Peled, after a brief discussion of the relation between questions of sex and questions of gender (sex as physical distinctions between individuals; gender as culturally constructed acquired patterns of behavior, with gender including acquired psychological, social, and cultural differences, all of which may be tied to power relations, all within a historical and social context), turned to a presentation of “non-normal (i.e., non-heterosexual)” sex in the law codes of ancient Mesopotamia and the Hittite world compared with its treatment in sources such as myth, ritual, dreams, and similar aspects of Mesopotamian and Hittite culture. I would argue that this comparison of codes with sources such as dreams and myths differs from that of Muhs since Muhs’ comparative sources (legal texts) reflect day-to-day life decisions by individuals, whereas Peled’s comparative sources do not represent reliable sources for day-to-day activity. Does everything mentioned as happening in a dream reflect real life? Does behavior in a myth reflect daily life of humans? How do these behaviors relate to “power”? Muhs noted the difference between law and legal documents; by comparison, Peled discusses social devices, such as purification rituals, aimed at circumventing the “law codes.” Peled argues that this is a question of law vs. enforcement of the law; does it demonstrate the limits of legal authority? Peled seems to argue that an individual negotiated among legal/normative directives, social circumstances, and personal preference. Both scholars are trying to understand the meaning of regulations preserved in codes for the daily life and behavior of individuals, but their chosen comparative sources provide very different comparanda.

Scafuro discussed non-judicial/familial means of resolution of (certain) sex crimes; she describes these as socially binding and no less effective than official laws. But she did not comment on the important gender questions such as the lack of participation of women in the legal world or the “resolution” of rape by having the rapist marry his victim. Such a “solution” may have resolved the problems of the head of house and the family name/reputation, but it hardly resolved the problems of the victim of rape (perhaps a very modern, female-centric, as opposed to male-centric, view of the problem of rape). McGinn’s discussion of the (evolution of) ways to deal with the potential for bigamy in Roman law (monogamy was a basic social norm), including the introduction of laws concerning adultery which were relevant to a (potential) bigamist, is complemented by his discussion of the implications of these procedures for our understanding of gender relations in the Roman world. A presentation of the (lack of)



judicial role of women in the Greek world as an aspect of gender relations, such as provided by McGinn for his Roman material, would have been useful in Scafuro's study. The Greek non-judicial/familial methods of resolving sex crimes contrast with McGinn's presentation of state intervention in related matters. Does this reflect the transfer over time of certain aspects of cultural enforcement from the family to the state? Did the practice of state intervention change through time? If so, what factors were involved?

Harder for me to encapsulate is the presentation by Skosey on the ancient Chinese Treatise by Ban Gu. She argues that his Treatise should be understood/analyzed as (perhaps the oldest) example of "narrative jurisprudence," where a literary narrative is used to (attempt to) bring change to the prevailing legal system. Since a/the major turning point of the narrative is a passage involving a woman named Tiyang, the (youngest) daughter of a man brought to trial, who argues that justice should involve compassion, empathy, sympathy, and mercy — argued to be "female" traits contrasting with the "rough" traits of the men who are the officials enforcing the laws — it is possible to understand the author Ban Gu's argument as suggesting that male official behavior must be complemented by the female behavior, i.e., that there must be a mixing of the behavior and outlook of both genders (otherwise unknown in official Chinese practice). I hope that I am understanding and reflecting accurately the author's presentation of the Chinese document, the argumentation of "narrative jurisprudence," and conclusions about the relationship between gender and the law.

If Skosey's/Ban Gu's use of a narrative literary format can be seen as a challenge to formal law, then each of the papers in this section are talking about how informal/non-formal elements (whether legal texts vs. legal "codes/manuals" or rituals or family intervention or literature) may intervene to modify or overturn formal law.

The Oriental Institute postdoctoral conferences, like many conferences, produce a number of interesting papers, many potential responses to those papers from colleagues in the same field, and many more potential responses from colleagues in related, or even tangential, fields. To me, this is what is exciting about such conferences: We can all benefit from being challenged with data sets, historical conclusions, and methodological approaches with which we had not been familiar but which seem to be relevant to our own work. The challenge for such conferences is to move on with these discussions: Can we draw out the challenging ideas presented by the speakers even further? Which apparent data set comparanda are real, which are illusory, and why? Do comparisons across space and time lead to real progress in understanding ancient cultures and their interactions? What new methods of approaching our materials can actually lead to greater in-depth understanding of these ancient cultures?

For example, Tal Ilan's study of women's archives established to document their right to property ownership includes documents from Persian period Aswan, in Egypt, for which Demotic documents, including some from Aswan, contemporary with her Aramaic documents provide valuable comparative material (on property rights, marriage, inheritance rights and procedures, and so on). Careful and detailed cross-cultural study (between the Aramaic and Demotic documents from Aswan as well as between the Aramaic documents from Aswan and her later documents from the Babitha archive from the Judaeian desert) would have and could still provoke much intensive discussion and perhaps produce interesting ideas and conclusions for several aspects of the study of women and gender in the ancient world. The same is true of Powers' new reading of a Qur'anic passage, which he compared to materials from Nuzi and which begs for careful and intensive discussion among participants in this conference,

bringing their Mesopotamian and cuneiform knowledge to bear on the possible transmission and what the dynamics of such a transmission could actually have been.

Before Skosey's presentation on "narrative jurisprudence," I was unfamiliar with this concept or scholarly methodology. It immediately raised in my mind the question of whether this concept of "narrative jurisprudence" is one which can be effectively applied to ancient Near Eastern cultures. For example, would it be appropriate and useful to apply this concept to study of the "Eloquent Peasant," a Middle Kingdom literary presentation of the ongoing appeals for justice by a peasant who was held on frivolous charges because the officials so enjoyed hearing his eloquent argumentation? What might we be able to learn about the Egyptian legal system, Egyptian literature, and Egyptian society by the use of such a theory? These same questions could be asked about application of such a methodology to study of a text such as the "Contendings of Horus and Seth," a New Kingdom literary piece "recording" the ongoing legal battle before a court of the gods between the gods Horus and Seth for the right to succeed the brother of Seth/father of Horus on the throne of Egypt. Are there literary texts in other ancient (Near Eastern) cultures which might respond to analysis following such a methodology?

The presentations in this conference also make it clear that gender should not be studied in isolation. For example, Beckman's discussion of the power of Hittite queens and the role of women in cults, along with Shaughnessy's discussion of the Dowager, make it clear that, in many situations, status may override gender. Likewise, Culbertson's discussion of the legal involvement of women in Ur III based on status, not gender, seems to me similar to clear examples of the different behaviors of high status and, especially, royal women throughout Egyptian history. Indeed, gender interacts with many other aspects of identity, such as age, status, and role of/in the immediate and extended family. But it also interacts with aspects of culture, such as the questions of law and power addressed by the participants in this conference. In some ways, just as gender can be seen as being restricted when it is linked to questions of sex, it can be seen as expanded when looked at in conjunction with other aspects of identity or aspects of society and culture such as religion, royalty, or language(s) used in society.

## Martha Roth

With my opening remarks about separating and linking in mind, I respond to the papers of the two closing sections of the volume. Laura Culbertson's contribution on "Women and Dependents in the Ur III Period" examines court records from one brief period (c. 2100–2000 BCE) from Girsu and Umma in southern Mesopotamia, with additional insights from the Laws of Ur-Namma, a composition that is almost exclusively written and reflective of the rights and concerns of elite males. By their nature, court disputes involve parties from varied social strata and occupations, all ages, free and enslaved, and both men and — usually only in so far as they have relationships with free men — women. As Culbertson notes, "[w]omen and slaves operated within the bounds of their households as prescribed by the status of husbands, fathers, and sons" and "[d]aughters and slaves were subject to the affairs of their fathers and/or household heads" (p. 118, this volume). Culbertson confronts the fundamental problem of identifying women in these texts: For a variety of reasons, beyond the foremost one that Sumerian is not a gendered language, we generally are unaware of a participant's sex (male or female) unless that fact is relevant to the matter under dispute — that is, unless relevant to

that matter is a *gendered relationship* (status) to a man such as his “daughter,” “sister,” “wife,” or “mother.” Culbertson assumes, as do all observers, that official court roles were held only by men — a well-supported position, but one that bears reexamination — while both men and women are found to participate in court matters as witnesses and litigants. Culbertson points to women’s entry into the economic sphere during this period as a factor in their appearance in these records: “Women who held office in the temples could be implicated in disputes. The fact that women could buy and sell slaves independent of their husbands also meant that they were implicated in disputes if the sales went wrong. Moreover, women retained rights over the minors of the household and their children and could sell their own children if economic emergency required it” (p. 121, this volume). Culbertson’s article meticulously details the evidence for women (including especially widows) in the legal sphere. She devotes little attention in this article to the circumstances of slaves, either male or female, and it is here — in the linking of “women and dependents” — that the ambiguity of “and” should worry us: That is, is the “and” separating (free) women from (all) dependents? Or is “and” linking (all) women with (all) dependents? Drawing on the evidence of one well-attested, high-status family from Girsu, the descendants of Lu-Nina, Culbertson remains appropriately cautious: “... the degree of participation depended on the status and dynamics of the household to which [women] belonged as opposed to an abstract notion of rights, gender equality, or individual interest” (p. 126, this volume). This leads us to speculate on the power of the larger *household* as the (or “a”) defining factor of an individual’s position in the social and legal spheres, a matter that we hope Culbertson returns to in more depth in future studies.

Melinda Nelson-Hurst’s contribution on “spheres of economic and administrative control” (that is, all areas of control [with the possible exception of political control]) in Middle Kingdom Egypt is restricted to the evidence from seals and seal impressions. This paper, like Culbertson’s, is careful to examine the available evidence before drawing conclusions, and addresses fundamental questions about titles associated with various occupations/offices. She returns to the well-known case of Tjat, a mistress and later wife of a local ruler, who bore the title *htmtyt* “sealer” (fem.; the masc. form is *htmty*). Her role as mistress/wife has been assumed in much previous literature to account for her prominence in the representations of the ruler’s tomb; Nelson-Hurst interrogates this assumption by examining the actual responsibilities of female and male sealers through the evidence of (a) seal impressions recovered at archaeological sites and (b) the “iconographic clues” from representations in tombs of Tjat and other sealers, both female and male, carrying out their duties. Their proximity to the tomb owner and family, association with female or male attendants, position inside or outdoors, and associated goods all provide suggestions of rank and status. Nelson-Hurst deftly uses the evidence and inferences to underscore the autonomous importance of women with sealing duties, independent of their sexual relationships.

Gary Beckman’s contribution to this volume maintains the view that Hittite Anatolia was strongly patriarchal in all matters. Although the evidence from the Hittite material that he draws upon does not allow Beckman to address some of the core questions of this conference, he opens by citing the Hittite Laws and the provisions that give the divorced husband preferential treatment; more information could be drawn from the Hittite Laws on marriage (§§ 28–34, 179–198) that would be relevant to this conference.

One of the only times that a woman — and not any woman, but one belonging to the royal family — might have had a defined impact, Beckman informs us, was when she was used as a pawn in a succession matter — but it is clear that she would have no opportunity to exercise

agency. Beckman devotes the bulk of his study to royal and divine women, seeking analogous behaviors. He suggests a promising future investigation when he observes the preponderance of women as “magical practitioners” (Hittite *hašauwa-*, represented by the Sumerogram MUNUS.ŠU.GI, literally “old woman”).

Ed Shaughnessy draws our attention to another “old woman” as he takes us far to the east and to the early first millennium, around 820 BCE, with his close and meticulous analysis of four Chinese bronze vessels bearing three inscriptions related to one land dispute between the senior and cadet lines of a single family. The authority who negotiates and settles the dispute is the matriarch (or the Dowager) of the family, and her mediated decision receives later ratification from the royal court. In this one small set of inscriptions — admittedly difficult to understand and open to interpretation — we are given insight into a petty family squabble, modes of mediation, and lines of authority expanding from the local directly to the palace. Whether the role of the Dowager as mediator is due to her age and seniority, her status as the only surviving member of her generation, or her personal charisma and force of personality will probably never be known. Clearly, however, as Shaughnessy shows in this case study, to have a woman in this role is noteworthy.

Tal Ilan examines two sets of data, each consisting of two archives involving women: the Tamat Yehoyishna and Mivtahiah archives from Elephantine dating to the fifth century BCE; and the Babatha and Salome archives found at Qumran and dating 600 years later, to the second century CE. Ilan convincingly demonstrates that all four archives show that women in these Jewish families needed to hold on to the documentation that secured their rights to property to fend off potential challenges and competing claims from their own and their husbands’ families. Without such documents to support their ownership rights, the women faced destitution and eviction from their homes. Ilan’s work parallels studies published by me and by Cornelia Wunsch (who presented a paper at the conference) that highlight the deliberate actions of fathers and husbands who provide deeds of ownership (by inheritance, devolution, or outright gift) to houses for their daughters and wives. More than any other property, a house — either with unencumbered ownership or limited rights (e.g., lifetime only) — was crucial to a woman’s security in her later years. As we now know, the pattern of marriage and life expectancy in the first millennium eastern Mediterranean/Western Asiatic world found women to be, on average, more than a decade younger than their husbands. If they survived childbirth, they were likely to have outlived their husbands by many years. A wise (and caring) husband would take pains to provide a proper domicile for his wife after his death, anticipating that his (and her) sons and heirs would be tempted to evict her at the first opportunity. Ilan demonstrates that the circumstances revealed by the Elephantine and Qumran archives bear little resemblance to the idealized structures represented in the Hebrew Bible; rather, they show clear affinities with the legal and cultural practices well-documented in the first millennium BCE.

David Powers finds insights for interpreting a crux in Qur’an 4:12 and 4:176 by reaching back 2,000 years to Hurrian Nuzi texts of the fifteenth century BCE. Autopsy and newly available technologies support his contention that an early Qur’an manuscript was subjected to erasure and emendation, and that the hapax legomenon *kalâla* may originally have been *\*kalla*. This allows the text to be reread as containing a parallel to the well-known terminology in Nuzi marriage and adoption contracts in which the young woman is taken *ana marūti u kallūti* “in the status of daughter and the status of daughter-in-law.” The thesis is bold, not least because even though al-Hajjaj b. Yusuf al-Thaqafi and others reportedly removed words,

altered skeletons of words, and introduced vowels and diacritical marks, modern scholars are leery of advocating for any emendations of the Qur'an. I do not believe that Powers needs to connect Nuzi to Mecca, however. Identifying \**kalla* as a word — common in Semitic languages but oddly absent from Arabic — that would have been known to the early Quranic reader as a reference to a women brought into a family by marriage (daughter-in-law) is enough to support his interpretation of these important passages on inheritance.

The papers in this volume, and in particular the excellent Introduction by Ilan Peled, individually and cumulatively make important contributions to advancing work on issues relating to gendered legal history in the ancient Near East. Although there are few threads that weave consistently throughout the papers and each contribution is limited to a particular data set from a unique cultural and historical vantage point, reading them together — and especially having the opportunity to engage in person and collegially across disciplinary boundaries at the Oriental Institute conference on “*Law and Gender*” — inspires further research on law, on gender, on gendered law, and on legal categories of gender.