

**THE PROHIBITION ON RESTORATION OF MARRIAGE  
IN DEUTERONOMY 24:1-4**

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The purpose of this article<sup>1</sup> is to re-examine the law in Deuteronomy 24:1-4 forbidding a man to remarry the wife whom he had divorced and whose subsequent marriage has now come to an end, and to propose a new solution to the problem that has troubled commentators both ancient and modern: what was the rationale behind this curious rule?

Although it later became the basis for the general principles of divorce in Jewish law, the text itself is concerned with a very narrow set of circumstances, which are set out in great detail:

When a man takes a wife and marries her, if then she finds no favor in his eyes because he has found some indecency in her, and he writes her a bill of divorce and puts it in her hand and sends her out of his house, and she departs out of his house, and if she goes and becomes another man's wife, and the latter husband dislikes her and writes her a bill of divorce and puts it in her hand and sends her

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out of his house, or if the latter husband dies, who took her to be his wife, then her former husband, who sent her away, may not take her again to be his wife, after she has been defiled; for that is an abomination before the Lord, and you shall not bring guilt upon the land which the Lord your God gives you for an inheritance (*LSV*).

The lengthy protasis may be analyzed into eight steps which are necessary for the operation of the apodosis and which correspondingly narrow the circumstances to which the prohibition will apply:

1. The first husband (H1) marries the wife (W).
2. H1 finds "some indecency" (ערוח דבר) in W.
3. H1 therefore divorces W.
4. W marries H2.
5. H2 "dislikes" (שנא) W.
6. H2 divorces W.
7. *Alternatively* (to steps 5 and 6) H2 dies.
8. H1 tries to marry W.

In order to understand the law's rationale, it is necessary to discover what is special about this particular combination of eight circumstances. The explanations offered to date, however, all fail to take into account at least one of the circumstances listed.

1. The earliest explanation is that proposed by Philo in the *Special Laws*:<sup>2</sup>

...she must not return to her first husband but ally herself with any other rather than him, because she has broken with the rules that bound her in the past and cast them into oblivion when she chose new love-ties in preference to the old. And if a man is willing to contract himself with such a woman, he...has lightly taken upon him the stamp of two heinous crimes, adultery and pandering. For such subsequent reconciliations are proofs of both.

In other words, the wife has committed adultery and her former husband by remarrying her becomes a party thereto.

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<sup>2</sup>3.30-31.

As Yaron points out,<sup>3</sup> this rationale ignores the legal character of the text. The wife's divorce and her subsequent marriage are both perfectly legal, and she cannot therefore have committed adultery.<sup>4</sup> If Philo is suggesting that adultery during her first marriage was the motive for her divorce and second marriage, then this is certainly not reflected in the text, where the first divorce is a unilateral act of the husband, and clearly at his initiative.

2. S. R. Driver suggested<sup>5</sup> that the prohibition acted as a deterrent to hasty divorce: the first husband could not lightly send away his wife with the assurance that he could always take her back again. But here also Yaron points out the unreality of such a rule: the divorcing husband is hardly likely to have in mind the possible circumstances following the dissolution of a subsequent marriage by his wife.<sup>6</sup> Once again the protasis is far too complex for the solution offered.

3. Yaron's own proposal takes up a further point made by Driver,<sup>7</sup> namely that the woman who desired to return to her former home might be tempted to intrigue against her second husband. The object of the prohibition, in Yaron's view, is to protect the second marriage from such an eventuality, or from the first husband attempting to get his wife back. The rule is therefore

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<sup>3</sup>"The Restoration of Marriage", *JJS* 17 (1966) 1-11, at 6-7.

<sup>4</sup>We would suggest that the express mention of the bill of divorce in both cases was to emphasize the fact that both divorces were legitimate and that no question could arise of the woman not being free to remarry, i.e. her subsequent action could not be interpreted as adultery. Cf. the famous passage in Matthew 5:31-32: "It has been said, Whoever shall put away his wife let him give her a bill of divorce. But I say to you that whoever shall put away his wife, except for fornication, causes her to commit adultery". In our view, Jesus is here denying the efficacy of the bill of divorce to dissolve the old marriage (or rather, the husband's ability to dissolve and use the bill as evidence thereof), thus allowing the wife the freedom to remarry. Cf. an Old Babylonian bill of divorce (Meissner, *BAP* 91): "H has divorced his wife W. She has...her.... she has received her divorce-money. If another marries her, H will not raise claims".

<sup>5</sup>*Deuteronomy* (ICC; 2nd ed.; Edinburgh, 1896) 272.

<sup>6</sup>"Restoration" (above, n. 2) 5.

<sup>7</sup>*Deuteronomy* (above, n. 4).

concerned with the stability and continuation of the second marriage, not the first.<sup>8</sup>

Yaron's theory, unlike its predecessors, accounts for the importance of an intervening marriage as a condition for the prohibition, but there remains one circumstance in the protasis that it fails to cover, namely the possibility of the second marriage ending with the death of the husband.<sup>9</sup> It is understandable that the law might wish to prevent the second marriage being terminated by divorce, but there is no reason for it to intervene where an external event has brought that marriage to a natural end. The express mention of this alternative shows, in our view, that marital discord was not the situation that the law had in mind.<sup>10</sup>

4. Another approach is to look at the motive clauses at the end of the apodosis. Wenham compares these to the motive clauses of the prohibition against incest in Leviticus 18 and 20 and concludes that the Deuteronomic text actually regards the restoration of marriage as a type of incest.<sup>11</sup> His reasoning is as follows: the incest prohibition applies to certain relations created by marriage, and may even survive the end of the marriage that created the forbidden affinity. In the Bible, a wife was regarded as her husband's sister. Divorce did not terminate this relationship; she is counted as a very close relative. If a divorced couple remarry, it is an incestuous union, like a man marrying his sister.

We shall not enter here into a discussion of the validity of Wenham's analysis of the incest laws or of the nature of the marital relationship. It is sufficient to say that his analysis cannot possibly apply to the Deuteronomic law because it completely ignores the intervening marriage. The law does not, as Wenham assumes, prohibit remarriage as such, and there is no way

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<sup>8</sup>"Restoration" (above, n. 2) 8-9.

<sup>9</sup>As pointed out by G. J. Wenham, "The Restoration of Marriage Reconsidered", *JJS* 30 (1979) 37-40, at 37.

<sup>10</sup>The idea that the wife might consider murdering her second husband is too far-fetched and is not considered by Yaron, but Rashi (*ad loc*) suggests that she contributes to his death.

<sup>11</sup>"Restoration Reconsidered" (above, n. 9).

that we can see of the second marriage being a factor in the creation of an incestuous affinity.

5. A final explanation is that there is a natural repulsion<sup>12</sup> against taking back a wife who had cohabited with another man. Yaron, however, points out that the Deuteronomic prohibition is unparalleled in any other legal system, which would suggest the opposite. Nonetheless, C. Carmichael attempts to show that such an attitude did exist in ancient Israel and thus provided the rationale behind the law.<sup>13</sup> He finds evidence in a comparison of the two cases in Genesis where Abraham passes off Sarah his wife as his sister, first to the Pharaoh (chap. 12) who takes her as his wife, and then to Abimelech (chap. 20) who is prevented from doing so by a timely warning in a dream. According to Carmichael, the author of the second passage is reacting against the situation in the first, where Sarah is actually taken as a wife, because he finds it offensive that Sarah could be taken by another man and then restored to Abraham. The Deuteronomic source shares this sensibility, which it transfers to the legal sphere.

Carmichael's analogy is inexact. The act which is found offensive by both sources is adultery. It is committed by the Pharaoh and he is severely punished for it.<sup>14</sup> (Sarah, of course, is not punished, being under duress.) Abimelech is stopped on the verge and spared punishment. Carmichael attempts to overcome this objection by suggesting that Abraham had *de facto* divorced Sarah, thus re-establishing the analogy to the Deuteronomic law. But if Sarah was divorced, why punish the Pharaoh or threaten to punish Abimelech? As Wenham points out,<sup>15</sup> Carmichael's interpretation virtually reinstates Philo's view that the second marriage is adulterous, after that view had been discredited by Yaron.

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<sup>12</sup>See, e.g., H. Junker, *Das Buch Deuteronomium* (Bonn, 1933) 100.

<sup>13</sup>*The Laws of Deuteronomy* (Cornell, 1974) 203-207.

<sup>14</sup>The punishment is vicarious: the killing of members of Pharaoh's family is considered punishment of the head of the household.

<sup>15</sup>"Restoration Reconsidered" (above, n. 9) 37.

We would suggest that, far from there being a natural repulsion, both biblical and ancient Near Eastern sources find nothing untoward in a man resuming relations with his wife after she has had relations with another, even amounting to marriage, providing no other factor makes resumption of the marriage improper.

Our first piece of evidence is the very same source that Carmichael relies on, Genesis 12. The Pharaoh marries Sarah, the marriage is *prima facie* valid but in fact void due to a hidden defect. When the defect is discovered, Sarah is returned to her first husband and the first marriage continues as if nothing had happened. The varying degrees of moral turpitude of the parties involved do not affect the validity of the marriage.

The second instance in the Bible is the marriage of David and Michal, which is likewise interrupted by the marriage of Michal to Paltiel.<sup>16</sup> The narrative appears to regard it as perfectly natural for Saul to give his daughter to another husband after David has fled for his life, and for Eshbaal later to accede to David's demand for her return. The reason has been elucidated by Z. Ben-Barak from a widespread practice in Mesopotamian law.<sup>17</sup> Codex Eshnunna (CE), Codex Hammurabi (CH) and the Middle Assyrian Laws (MAL) all contain provisions whereby a person who has been forcibly detained abroad and whose wife has remarried in the interim may on his return reclaim his wife.<sup>18</sup> The second marriage, if justified by the circumstances,<sup>19</sup> was perfectly valid, and children of that marriage followed their father - in other words, they were legitimate. Nonetheless, it was voidable at the first husband's instance, should he one day return. David's demand, according to Ben-Barak, is based upon a comparable law which explains both Eshbaal's acquiescence and the second husband's inability to resist the demand.<sup>20</sup>

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<sup>16</sup>1 Sam 18:20-29; 25:44; 2 Sam 3:12-16; 6:16, 20-23; 21:8-9.

<sup>17</sup>"The Legal Background to the Restoration of Michal to David", VTSup 30 (1979) 15-29.

<sup>18</sup>CE 29, CH 133-135, MAL 45.

<sup>19</sup>CE requires only that the first husband have been absent "a long time", whereas CH requires lack of subsistence. MAL sets a two-year period (and lack of subsistence).

<sup>20</sup>"Restoration of Michal" (above, n. 17) 25-29.

The significance of the comparison from our point of view is that both in the biblical narrative and in the Mesopotamian laws a husband is found claiming the restoration of his wife after she has been married to another (and even had children by him), and nowhere is revulsion expressed at the idea. On the contrary, the law hastens to assist the original husband, at the expense of the second marriage.

Ben-Barak saw a contradiction between the law behind David's claim to restoration of his marriage and the prohibition in Deuteronomy, and concluded that the latter was not in force in David's time.<sup>21</sup> There is in fact no need to assume a contradiction, since the special circumstances of the husband's enforced absence<sup>22</sup> would constitute an obvious exception to any general prohibition. It will be our contention, however, that the prohibition in Deuteronomy was by no means so broad as to come into conflict with the practice in the case of the absent husband; it applied not to restoration of marriage as such, but to restoration in very particular circumstances.

Let us therefore return to the protasis of our Deuteronomic law and begin by examining the detail upon which so many of the theories stumble - the difference in the dissolution of the first and second marriages. In the former, the husband finds "some indecency" in his wife and divorces her; in the latter he "dislikes" her and divorces her, or in the alternative, dies. There must therefore exist some underlying factor which is on the one hand common to divorce for "dislike" and death, and on the other distinguishes these two types of dissolution from divorce for "indecency". That factor, we submit, lies in the property aspect of marriage - more exactly, in the financial consequences of its dissolution.

The Bible contains no direct evidence on this aspect of marriage, but there is sufficient evidence from both earlier cuneiform sources and from post-biblical Jewish sources to establish the existence of a continuous tradition.

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<sup>21</sup> *Ibid.*, 29.

<sup>22</sup>The first marriage is deemed dissolved by death, but the facts may turn out to be otherwise.

To take the case of widowhood first, CH 171b-172 contains the basic principles:

The wife shall be entitled to her dowry and to marital property that her (late) husband gave her in writing in a tablet....If her husband has not given her marital property, they shall make good to her her dowry and she shall take a share like one heir in the property of her husband's estate.

More than a thousand years later, paragraph 12 of the Neo-Babylonian Laws (NB ) applies the same principle, if in somewhat different measure:

A wife whose husband has received her dowry and she has no son or daughter of her own and death has carried off her husband - a dowry as much as the dowry shall be given her from her husband's property. If her husband has given her a marital gift,<sup>23</sup> she shall take her husband's gift together with her dowry and is quit. If she has no dowry, the judges shall assess her husband's property and something shall be given to her according to her husband's property.

Likewise in the Mishna, the widow is entitled not only to her dowry<sup>24</sup> but also to her "ketubah", namely the marriage settlement or the statutory minimum in the absence of a voluntary settlement.<sup>25</sup>

In the case of divorce, our earliest record of the financial consequences is Codex Ur-Nammu (CU ) 6-7:

If a man divorces his first wife, he must pay one mina of silver.

If it is a (former) widow whom he divorces, he must pay half a mina of silver.

That this was not the only payment is revealed by CH 138-140:

[138] If a man divorces his first wife who has not borne children he shall upon divorcing her give her money in the amount of her bride-money and make good to her the dowry that she brought from her father's house.

<sup>23</sup>On the problems of the terminology, see our forthcoming monograph *Old Babylonian Marriage Law* (AIO Beiheft No. 21), chap. 1.

<sup>24</sup>The rules are complicated by the division of the wife's property into נכסי מלוג and נכסי צאן ברזל, but her basic entitlement is unquestioned. See, e.g. *m. Ketub.* 7:1.

<sup>25</sup>These principles are regarded as so self-evident that it is difficult to find a direct statement of them. For clear indirect evidence, see, e.g. *m. Ketub.* 10:1-2.



[139] If there was no bride-money he shall give her one mina of silver as divorce-money.

[140] If he is poor, he shall give her one-third of a mina of silver.

The sums set out in CU and CH are thus revealed as the minimum where there is no bride-price. The bride-price (*terhatum*) is the equivalent of the biblical מוהר, and in divorce is used as the measure of compensation, parallel to the widow's marriage settlement.<sup>26</sup> It should be added that this measure of compensation was itself in lieu of contractually agreed divorce-money, which was the norm in marriage contracts throughout the ancient Near East.

The Middle Assyrian Laws, as we shall see below, contain the principle that at least the dowry is to be returned on divorce, if not always with additional compensation.<sup>27</sup> It is in the Mishna, however, that the tenacity of the early Mesopotamian tradition is revealed. Apart from her dowry, the divorcée is entitled, like the widow, to the payment of compensation - her כתובה - which, in the absence of express agreement in the marriage contract, is a fixed minimum of 200 *zuz* for a virgin bride and one hundred for a former widow, i.e. the same distinction as in Codex Ur-Nammu, and in exactly the same proportions.<sup>28</sup> Moreover, a *beraita* in the Babylonian Talmud<sup>29</sup> reveals that these fixed sums represent the transformation of the

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<sup>26</sup>Where the wife has had children, the financial consequences are more dramatic. The principle revealed by CE 59 and CH 147 is that the husband forfeits his whole property to the wife. See Westbrook, *Old Babylonian Marriage Law* (above, n. 23), chap. 4.

<sup>27</sup>Paragraph 37 appears at first sight to allow the husband total discretion in whether to give his wife a divorce settlement, but as G. Cardascia (*Les Lois Assyriennes* [Paris, 1969] 191-196) points out, it must be read in the light of paragraphs 20 and 38, which refer to the restoration of the dowry and forfeiture of the bride-price respectively. It should also be read in the light of the husband's contractual obligations, Assyrian marriage contracts being in no way special in this respect. Possibly paragraph 37 is denying a right to a statutory minimum as awarded by CH 6-7 and CH 138.

<sup>28</sup>*m. Ketub.* 1:2.

<sup>29</sup>*b. B. Qam.* 82b.

bride-money into divorce-money, the culmination of a development<sup>30</sup> which we have already seen at an earlier stage in Codex Hammurabi, where the bride-money was the measure of divorce-money.

In summary, there is a tradition spanning the whole length of ancient Near Eastern law that upon dissolution of the marriage, whether by divorce or death of the husband, the wife was entitled to a financial settlement consisting at least of the restoration of her dowry but generally also of a payment from the husband's resources. It is reasonable to suppose, therefore, that biblical law shared the same principle.

In the case of divorce, however, there is a complication. For if the wife had committed some wrong that justified the husband in divorcing her, then the financial consequences were entirely different.

The principal marital offense that a wife could commit was adultery, but in Mesopotamia as in the Bible, the penalty was death, and not surprisingly, there is no word as to the financial consequences. On the other hand, CH also discusses cases where the wife has committed some wrong less serious than adultery.

CH 141 reads:

If the wife of a man...<sup>31</sup> accumulates a private hoard, scatters her household, slanders her husband - on being found guilty, if her husband pronounces her divorce, he may divorce her without giving her anything, not her journey-money, not her divorce-money.

If the husband can prove, therefore, that his wife has been guilty of misconduct, here mostly of a financial nature, he can divorce her without paying the usual compensation. There is no mention of her dowry, but if she is to be expelled from the matrimonial home without even money for the way, it is reasonable to suppose that the husband was not obliged to restore

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<sup>30</sup>The interim stage is represented by a custom whereby the bride's father returns the bride-price to the groom via the bride, so that it becomes part of her dowry. The *beraita* reveals how this custom became law. See M. Geller, "New Sources for the Origins of the Rabbinic Ketubah", *HUCA* 49 (1978) 227-245.

<sup>31</sup>The clause omitted contains complications which do not concern us here. See Westbrook, *Old Babylonian Marriage Law* (above, n. 23) chap. 4.

it. Further evidence for this interpretation comes from the alternative to divorce given the husband in the same law: the wife will continue to live in his house "as a slave" - which implies that she is stripped of her property.

CH 142 deals, in our interpretation,<sup>32</sup> with the case of a woman who refuses to marry her fiancé. If after investigation by the local court it is found that

...she is chaste and has no sin and her husband (=fiancé) is going out and greatly slandering her, that woman has no penalty; she shall take her dowry and go to her father's house.

If she is not chaste and is going out, scattering her house, slandering her husband, they shall cast that woman into the water.

The form of betrothal is known in modern scholarship as "inchoate marriage",<sup>33</sup> being very close to full marriage, and the provisions of this paragraph may therefore be extended by analogy. Indeed, there is some evidence that misconduct by a fiancée in inchoate marriage was treated more harshly than misconduct by a wife.<sup>34</sup> At all events, the misconduct here is similar to that of the wife in CH 141, and in addition includes sexual misconduct. It is unlikely that the latter actually amounted to fornication (or at least this was not proved), since the usual explicit language is lacking,<sup>35</sup> and it is cumulated with other, less serious, offenses. What is important from our point of view is the fact that the woman, if proved innocent, is entitled to keep her dowry. The necessary inference is that her misconduct would lead to its forfeiture. By analogy, if she were a wife and divorced for such conduct, she would leave without her dowry.

The same principle as regards the wife's property is found in MAL A 29. The law first recites the rule that the wife's dowry and gifts from her father-in-law are reserved for her own children; her husband's family have no

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<sup>32</sup>The interpretation of the first part of the protasis is a matter of considerable scholarly dispute. See Westbrook, *Old Babylonian Marriage Law* (above, n. 22) chap. 2.

<sup>33</sup>The term was coined by G. R. Driver and J. Miles in *The Babylonian Laws*, vol. 1, (Oxford, 1954) 262-263.

<sup>34</sup>Cf. Gen 38:24-25; Deut 22:20-21, 24.

<sup>35</sup>Cf. CH 129, 131, 132, "lying with another man".

claim to them. It continues: "But if her husband *drives her out*<sup>36</sup> he may give it to his children at his choice". A rare Assyrian verb, *puāgu*, "to drive out with force", is used instead of the standard verb for divorce, *ezābu*. According to Cardascia, the reason is that the wife is being expelled for misconduct, not merely divorced, and hence the rule that in these circumstances she forfeits her marital property.<sup>37</sup>

Finally, the principle is stated explicitly in the Mishna:<sup>38</sup>

These are they that are put away without their Ketubah: a wife that transgresses the Law of Moses and Jewish custom. What (conduct is such that it transgresses) the Law of Moses? If she gives her husband untithed food, or has connexion with him in her uncleanness, or does not set apart dough-offering, or utters a vow and does not fulfill it. And what (conduct is such that it transgresses) Jewish custom? If she goes out with her hair unbound, or spins in the street,<sup>39</sup> or speaks with any man.

The first category of transgressions - against the Law of Moses - is entirely anchored in Scripture, but the second category has no obvious biblical basis and must derive, as the Mishna claims, from ancient custom. And from the Mesopotamian sources it is clear that this custom was very ancient indeed.

Thus a second principle may be posited as common to ancient Near Eastern law (and thus presumed in biblical law as well): if the wife was guilty of misconduct, which could be in the sphere of her financial and household duties or, from the examples in CH and in the Mishna, sexual misconduct not amounting to adultery but rather in the sphere of indecency or immodesty, her husband was justified in divorcing her without the usual financial consequences. She forfeited her right to divorce-money and apparently her dowry as well.

In our text in Deuteronomy, the first divorce comes about because the husband found "some indecency" (ערות דבר) in his wife. The term has been

<sup>36</sup>Following Cardascia's interpretation, *Lois Assyriennes* (above, n. 27) 161-163.

<sup>37</sup>*Ibid.*, 163.

<sup>38</sup>*m. Ketub.* 7:6.

<sup>39</sup>This involves exposing herself. Cf. *b. Git.* 90a, which adds the example of bathing where men bathe.

the subject of much debate, beginning with the famous dispute between the schools of Hillel and Shammai in *m. Git.* 9:10. Of the modern scholars, only A. Toeg argued that the term means actual adultery, on the ground that in most occurrences in the Bible ערוה is employed as a euphemism for sexual relations (e.g. Lev 18:6).<sup>40</sup> But there can be no question of sexual connotation in Deut 23:15, the only other instance of the identical phrase ערות דבר, where the physical cleanliness of an army camp is involved. Driver noted that it must be less than actual adultery,<sup>41</sup> since this is punished not by divorce but by death (Deut 22:22), and suggested "some improper or indecent behavior".<sup>42</sup> This seems to us the correct interpretation in light of the comparative material discussed above. In our view ערות דבר is the type of misconduct referred to in CH 141-142 and in *m. Ketub.* 7:6, and therefore justifies the husband in divorcing his wife without a financial settlement.

What of the second marriage? There, the husband does not claim misconduct, but divorces his wife for "dislike". The verb, שונא, more usually rendered "hate", is found in the context of divorce not only elsewhere in the Bible but throughout the ancient Near East. J. J. Rabinowitz, on the basis of the Aramaic marriage contracts from Elephantine, claimed that "hate" in the Bible might sometimes be employed as a technical term for "divorce".<sup>43</sup> The Elephantine marriage contracts contain clauses setting out the financial consequences of divorce. The divorce itself was effected, as elsewhere in the ancient Near East, by the divorcing party pronouncing a formula, which in two of the documents is rendered "I hate PN my husband/wife".<sup>44</sup> Yaron

<sup>40</sup>"Does Deuteronomy 24,1-4 Incorporate a General Law on Divorce?", *Diné Israel* 2 (1970) v-xxiv, at p. vii. Toeg's argument is weakened by his claim that the clause is an interpolation, which relieves him of the need to find a role for it in the law.

<sup>41</sup>*Deuteronomy* (above, n. 5) 271.

<sup>42</sup>*Ibid.*, 270.

<sup>43</sup>"Marriage Contracts in Ancient Egypt in the Light of Jewish Sources", *HTHR* 46 (1953) 91-97. The biblical example that he gave, however (Deut 21:15), is not convincing and has been rejected by Yaron (*RIDA* 4[1957] 119).

<sup>44</sup>A. Cowley, *The Aramaic Papyri of the Fifth Century B.C.* (Oxford, 1923), No. 15; E. Kraeling, *The Brooklyn Museum Aramaic Papyri* (New Haven, 1953), No. 2.

accordingly translated: "I divorce...my husband/wife", noting also that divorce-money was called literally "silver of hatred".<sup>45</sup>

At first sight, this interpretation is supported by the evidence of cuneiform sources. The dissolution of adoption in cuneiform law uses the same verbal formula as marriage, *mutatis mutandis* but in an adoption contract from Ugarit, the expected formula is replaced by the verb "hates" (*zeru*).<sup>46</sup> Moreover, in an Old Babylonian marriage contract, the clauses penalizing divorce contain the following parallelism: "if H (husband) divorces W (wife).../ if W hates H...".<sup>47</sup>

The impression given by these sources is, however, a false one. For further evidence reveals that they represent only an abbreviated version of a longer formula, "hate *and* divorce". Thus in a marriage contract from Alalakh, the clause penalizing divorce begins: "if W hates H and divorces him...".<sup>48</sup> The same is found in a Neo-Assyrian marriage contract except that the conjunction is missing (a point whose significance we shall see below): "if W hates H (and) divorces...".<sup>49</sup> In the scribal dictionary of legal formulae, *ana ittisu*, the full formula is given: "if a wife hates her husband and says 'You are not my husband'..." (which is the standard divorce formula).<sup>50</sup> The

<sup>45</sup> *Introduction to the Law of the Aramaic Papyri* (Oxford, 1961) 54-55.

<sup>46</sup> *MRS* VI 54-56, No. 15.92. "If in the future A hates B, his son..." (lines 7-9). The normal repudiating formula is: "If in the future A says to B, his son, 'You are not my son'".

<sup>47</sup> CT 6 26a.

<sup>48</sup> *JCS* 8 (1954) 7, No. 94, lines 17-19: *šum-ma* H W [*i-z*]/*ir-šu* ù *i-zi-bu-šu*

<sup>49</sup> *Iraq* 16 (1954) 37-39 (No. ND 2307), lines 49-50: *šum-ma* H *e-zi-ra e-zi-pi SUM-an*, "if H hates, divorces, he must pay". This lapidary formulation has led to various interpretations. N. Postgate (*Fifty Neo-Assyrian Legal Documents* [Warminster, 1976] 105-106) reads *e-zi-pi-ši SUM-an*, "he shall pay (back the dowry) to her two-fold", but such a penalty is unknown and legally dubious. We would likewise reject interpretations based on emendations, such as the *CAD* (Vol. E, p. 422, s.v. *ezēbu*): *e-zi-b-ši*, "her dowry", and V. Jakobson ("Studies in Neo-Assyrian Law", *SKAO* 11 [1974] 116): *e-zi-b-tū* (l). As we shall see below, the parallel in Mal 2:16 proves the correctness of the unemended form.

<sup>50</sup> VII iv 1-5. *MSL* I (ed. B. Landsberger; Rome, 1937) 103.

point is made most clearly in the Elephantine documents themselves. While the two contracts cited above use the verb "hate" alone, a third has a fuller version: (a) "if H...says 'I hate my wife W, she shall not be my wife'...";<sup>51</sup> (b) "if W hates her husband and says to him 'I hate you, I will not be your wife'..."<sup>52</sup>

It is the second clause which is the operative divorce formula and which was omitted, but implied, in the other two contracts.

The term "hate" is therefore an addition to the divorce formula which expresses not the divorce itself (for which there is another technical term) but some extra dimension thereof. This extra dimension must have been very common, since it was possible to abbreviate the formula already at a very early period. To understand what the dimension was, we must go beyond the realm of marriage and divorce. The verb "hate" is found in a variety of contexts in Codex Eshnunna (CE ) and Codex Hammurabi (CH ), as follows:

[CE 30] If a man hates his city and his master and flees...

[CH 136] ...because he hated his city and fled...

[142] If a woman hates her husband (-fiancé)<sup>53</sup> and says, "You shall not marry me..."

[193] If (he)...finds out the house of his father and hates his foster-father and foster-mother and goes to the house of his father...

The verb invariably appears in combination with a verb of action, providing the motivation for that action. The motivation appears to turn what might otherwise be an innocent act into a guilty one, and we therefore feel justified in applying the terminology of modern criminal law: it is the *mens rea*, the "guilty mind", which is a necessary constituent of the offense.<sup>54</sup> The verb

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<sup>51</sup>Kraeling (above, n. 44), lines 21-22.

<sup>52</sup>Lines 24-25.

<sup>53</sup>See note 32 above.

<sup>54</sup>The other being the *actus reus*, the guilty act. The terms are derived from the maxim *actus non est reus nisi mens sit rea*.

"hate" is used to show that the action arose from a subjective motive and without objective grounds to justify it - and for this reason is blameworthy.

In the context of marriage, the element of *mens rea* is explained by our earlier discussion. A husband could divorce his wife at will,<sup>55</sup> but had to pay her a heavy financial settlement. Only if he could justify his action on the objective grounds of the wife's misconduct could he escape the usual financial consequences. The verb "hate" therefore expresses the fact that the divorce in this case is for purely subjective reasons, and the financial penalties, whether by contract or under the general law, will apply.

The combination "hate and divorce" is found in the Bible not only in the Deuteronomic law, but also in Mal 2:16, and it is the latter that we wish to consider first, since our findings from the comparative material must be universally applicable to be valid.<sup>56</sup>

The passage in Malachi is a famous crux,<sup>57</sup> most of the discussion turning around the two verbs שָׂנֵא and שָׂחַק. The traditional Christian interpretation is that the verse expresses God's opposition to divorce, although this is difficult to reconcile with the form of the verbs. Thus the AV renders: "For the Lord saith that he hateth putting away: for one covereth violence with his garment...", while the *RSV* emends the text: "For I hate divorce...and covering one's garment with violence". A modern scholar, A. Tosato, has

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<sup>55</sup>And in some systems at least, a wife her husband. See Westbrook, *Old Babylonian Marriage Law* (above, n. 23), chap. 4.

<sup>56</sup>Yaron ("On Divorce in Old Testament Times", *BIDA* 4[1957]117-118) suggests a third occurrence: "abandoned and hated" in Isa 60:15. It is true that the Hebrew verb "abandon" (אָבַד) is the same root as the Akkadian verb "divorce" (*ezēbu*), but divorce does not fit the context at all, and inversion of the formula is not to be expected. Accordingly, we prefer the traditional interpretation. Yaron further suggests that אָבַד alone means divorce in two passages, Judg 15:2 and Prov 30:23, but in both cases we consider the use of the verb to be non-technical, and the situation not to be marriage but inchoate marriage. The "hatred" will (or should, in the case of Proverbs) cause the marriage not to take place.

<sup>57</sup>"This has been rightly called the most difficult section of the Book of Malachi", J. Smith, *Malachi* (ICC; Edinburgh, 1912) 47. For a summary of the research, see C. Locher, "Altes und Neues zu Malachi 2, 10-16", *Mélanges Barthélemy, OBO* 38 (1981) 241-271.



attempted to reconcile this interpretation with the syntax by taking the first verb as an imperative: "For 'Hate divorce!' the God of Israel has said, ('Hate him who) covers his own garment with violence!'"<sup>58</sup>

The Jewish interpretation, on the other hand, is that the verse recommends a husband to divorce his wife if he hates her, although this is difficult to reconcile with the obvious words of disapproval in the second part of the verse.<sup>59</sup> One modern interpretation therefore combines recommendation of divorce with disapproval: "Wenn einer nich mehr liebt, Ehe scheiden...aber derjenige besudelt mit Schande sein Gewand..."<sup>60</sup>

We prefer simply to take the two verbs as finite,<sup>61</sup> and translate literally: "For he has hated, divorced...and covered his garment in injustice". The comparative material discussed above reveals to us the true significance of the first phrase: "For he has divorced *without justification*". The criticism is not of divorce as such, but divorce for "hate", where the husband follows his own inclination and the wife has done nothing to deserve such a fate. The phrase "hated, divorced" without the conjunction has a striking parallel in the Neo-Assyrian marriage contract mentioned above,<sup>62</sup> in the clause penal-izing divorce, which suggests that it was taken from a standard legal idiom.

Compared with the verse in Malachi, the use of hate and divorce in the Deuteronomic law is almost self-evident: it contrasts the second divorce, where the husband has no objective justification, with the first divorce, where the husband does have, or claims to have, such justification (ערוֹת דבר).

We therefore have before us the same distinction that exists throughout ancient Near Eastern law, and, it must be presumed, the same financial consequences. As we have seen from the comparative material, divorce

<sup>58</sup>"Il ripudio: delitto e pena (Mal. 2,10-16)", *Bib* 59 (1978) 548-553, at 552.

<sup>59</sup>See, e.g. Abarbanel, *ad loc*.

<sup>60</sup>S. Schreiner, "Mischehen-Ehebruch-Ehescheidung", *ZfN* 91 (1979) 207-228, at 217-218.

<sup>61</sup>Following Smith, *Malachi* (above, n. 57) 55.

<sup>62</sup>See above, n. 49.

with justification deprives her of that settlement. In the Deuteronomic law, divorce with justification is ranged against two alternatives: divorce without justification, and widowhood. The only feature that the latter have in common and which at the same time distinguishes them from the former is that they both result in a financial settlement for the wife. Consequently, as we submitted at the start of this discussion, it is the unspoken property aspect which runs like a thread through the whole protasis and accounts for its attention to detail and the distinctions that those details contain; it must therefore be the key to the law's rationale.

We are now in a position to reconstruct the scenario presented by the protasis. The first husband has divorced his wife on the grounds of her "indecency" and has therefore escaped the normal financial consequences - he paid her no divorce-money and most probably kept her dowry. The woman nonetheless managed to find another husband, and that marriage has ended in circumstances which leave her well provided for: her dowry (if she had received a second one from her family), possibly marital gifts from the second husband, plus divorce money or the widow's allowance. Now that she is a wealthy widow or divorcée, the first husband forgets his original objections and seeks to remarry her.

The effect would be that the first husband profits twice: firstly by rejecting his wife and then by accepting her. It is a flagrant case of unjust enrichment which the law intervenes to prevent. The prohibition on remarriage is based on what in modern law would be called estoppel. This is the rule whereby a person who has profited by asserting a particular set of facts cannot profit a second time by conceding that the facts were otherwise. He is bound by his original assertion, whether it is objectively the truth or not.

The estoppel is expressed by the phrase "after she has been defiled". A. Hurvitz has pointed out<sup>63</sup> that the form of the verb is curious and unattested elsewhere: הוּטְמָא. The *hof'al* form expresses causation, and the correct translation should be: "she has been caused to be unclean". The point is not whether the wife is in fact unclean, but that the first husband's earlier assertion that she was unclean makes her unclean now for the

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<sup>63</sup>In an oral communication.

purposes of remarrying her. Having profited from the claim that she was unfit to be his wife, he can not now act as if she were fit to marry him because circumstances have made her a more profitable match.

A final point is the Deuteronomic postscript to the law "for that is an abomination before the Lord, and you shall not bring guilt upon the land which the Lord your God gives you for an inheritance". The phraseology seems somewhat harsh for a case of unjust enrichment and has doubtless been a factor in scholars seeking the rationale for the law in some sexual taboo. But as Weinfeld notes, the word "abomination" (תועבה) is used in Deuteronomy (and in Proverbs) not in a sexual connection but essentially to emphasize the hypocritical attitude of the malefactor, the classic example being that of the falsifier of weights and measures.<sup>64</sup> The law in Deuteronomy 24:1-4, as we have explained it, is an excellent example of hypocrisy and may therefore have been used by the Deuteronomic author<sup>65</sup> not so much for its property-law implications as to illustrate an attitude that he wished to condemn.<sup>66</sup>

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<sup>64</sup>M. Weinfeld, *Deuteronomy and the Deuteronomic School* (Oxford, 1972) 267-269.

<sup>65</sup>Most probably the law was taken verbatim from an existing code and only the postscript added.

<sup>66</sup>Contrary to the views of most scholars (cf. T. R. Hobbs, *ZAW* 86 [1974] 23-29), we doubt whether Jer 3:1 has any connection with the law in Deuteronomy. The dissolution of the second marriage is not mentioned, and it is the husband in the rhetorical example who is to return to the wife, whereas in marriage it would be the other way round. The reference may therefore be to an illicit liaison between the man and his former wife.

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