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REGULATING RAPE

THE CASE OF BIBLICAL AND ANCIENT NEAR EASTERN LAWS

Rape Laws Then and Now

The legal history of rape is long and varied and includes ancient Near Eastern and biblical laws that recognize rape as a crime—which may surprise some. When people learn about the ancient codes, they typically assume that the laws of old are too limited for the contemporary world. They believe our era is far more sophisticated and advanced than the ancient cultures, and they forget that our laws developed from the earlier laws in complicated ways. It is too simplistic to dismiss the ancient legislation without reviewing it first. Although the ancient laws cannot, of course, be applied to today's cases, they raise intriguing questions that are still important to an understanding of rape in past and present society.

But before we turn our attention to biblical and ancient Near Eastern legislation, a few words are in order about today's rape laws. They are a complex phenomenon shaped by national jurisdiction. Rape laws in the United States are particularly varied because each state has its own legislation.[1] For instance, the New York State Penal Code stipulates in Article 130.35:

> A person is guilty of rape in the first degree when he or she engages in sexual intercourse with another person:
> 1. By forcible compulsion; or
> 2. Who is incapable of consent by reason of being physically helpless; or
> 3. Who is less than eleven years old; or
> 4. Who is less than thirteen years old and the actor is eighteen years old or more.
>
> Rape in the first degree is a class B felony.[2]

This quotation is part of a longer legal discussion of rape, but one grammatical aspect stands out. The terminology is gender-neutral; both rapist and victim-survivor can be female or male, an assumption made since the legal reforms in the 1970s.[3]

Some American penal codes recognize that a sexual offense occurs in the absence of consent. Lack of consent exists under a number of conditions, such as "forcible compulsion," which elsewhere is defined as physical force, the threat of physical force—expressed or implied—or the threat of kidnapping the victim or a third person. Lack of consent is further defined as involving situations in which a person is physically helpless, of young age, mentally or physically incapacitated, or imprisoned. The New York State rape law also outlines different levels of severity and differentiates among first, second, and third degrees of rape and various degrees of punishment.[4]

Other states have their own rape laws. For instance, Ohio approaches the issue differently but exhibits similar sensibilities toward the issue of consent. In Chapter 2907.02 of Title xxix (Crimes—Procedures) of the Ohio Revised Code, the law specifies rape as follows:

> (A) (1) No person shall engage in sexual conduct with another who is not the spouse of the offender or who is the spouse of the offender but is living separate and apart from the offender, when any of the following applies:
>
> > (a) For the purpose of preventing resistance, the offender substantially impairs the other person's judgment or control by administering any drug, intoxicant, or controlled substance to the other person surreptitiously or by force, threat of force, or deception.
> >
> > (b) The other person is less than thirteen years of age, whether or not the offender knows the age of the other person.
> >
> > (c) The other person's ability to resist or consent is substantially impaired because of a mental or physical condition or because of advanced age, and the offender knows or has reasonable cause to believe that the other person's ability to resist or consent is substantially impaired because of a mental or physical condition or because of advanced age.
>
> (2) No person shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force.
>
> (B) Whoever violates this section is guilty of rape, a felony of the first degree....
>
> (C) A victim need not prove physical resistance to the offender in prosecutions under this section.
>
> (D) Evidence of specific instances of the victim's sexual activity, opinion evidence of the victim's sexual activity, and reputation evidence of the victim's sexual activity shall not be admitted....
>
> (G) It is not a defense to a charge under division (A)(2) of this section that the offender and the victim were married or were cohabiting at the time of the commission of the offense.[5]

As this quotation from the Ohio law indicates, contemporary U.S. rape legislation is involved and specific. Emphasis is placed on gender-neutral terminology and the issue of consent. The Ohio law is striking for its first sentence (A.1), which limits the legislation to non-spouses, which a later paragraph (G) invalidates again. The Ohio law recognizes spousal rape in stating that marriage or living together is not a defense against a rape charge. This law also stresses that the rape victim does not need to prove physical resistance (C). As in the New York State law, age and the inability of the victim to resist or consent due to mental or physical conditions are specifically listed.[6]

Contemporary rape laws of other American states and other countries refer similarly to the issue of consent and resistance.[7] There is no doubt that rape legislation developed through a long and tedious process, and today's penal codes owe much to feminist challenges during the latter part of the twentieth century. Feminists had to argue assiduously that rape laws were steeped in patriarchal assumptions protecting the accused and making it difficult for victims to come forward with rape accusations. Still, the feminist success does not mean that androcentric bias is eliminated in contemporary U.S. court houses or in every law code.[8] The history of androcentric bias in rape legislation goes back to biblical and ancient Near Eastern laws, when a male rapist's protection was central, a women's consent disregarded, and gender-neutral terminology unimaginable. It is helpful to remember that many of the ancient laws were probably never upheld. This point is important because even today we are not always sure if rape laws are effective in regulating the crime, or if the general culture shapes the fate of the accused more than our laws do. Hence, contemporary American legal scholars wonder "about the complex connection between legal and cultural change. Which is the chicken, which the egg?"[9] In this sense, then, ancient rape legislation is of contemporary cultural interest because it has contributed to contemporary notions of rape.

The Hebrew Bible and five of the existing ancient Near Eastern law codes address the issue of rape. The biblical laws are located primarily in the book of Deuteronomy. The five ancient Near Eastern law codes are the Codex of Ur-Nammu, the Laws of Eshnunna, the Code of Hammurabi, the Middle Assyrian Laws (MAL), and the Hittite Laws. They cover the geographical territories of the ancient Babylonian, Assyrian, and Hittite kingdoms. Sophie Lafont, a commentator on ancient Near Eastern rape laws, underscores that "the sexual act enacted by physical or moral force is abundantly documented in the legal codes from the Sumerian to the Roman period,"[10] a time frame of more than two thousand years that goes well beyond the parameters of this chapter. Yet Lafont's comment indicates that rape legislation does, indeed, have a long history.

Rape Laws in the Book of Deuteronomy

Though few in number, biblical law codes contain several references to cases of rape. Some of them, widely recognized as rape legislation, are in Deut 22:25-29. Others are more contested and are not usually characterized as rape laws; they appear in Deut 21:10-14 and 22:22-24.

A Case for Marriage? The Law of the Enemy Woman

Many scholars interpret the case of the enemy woman (Deut 21:10-14) as a ruling about marriage during or after war. Accordingly, the law is often classified as a rule about "Marriage with a Woman Captured in War."[11] When the passage is discussed as part of the larger literary unit in chapter 21, exegetes sometimes define the passage more generally as a text on "Issues of Life and Death: Murder, Capital Offenses, and Inheritance,"[12] which regulates the "treatment of a woman taken as a captive in war and subsequently married by her captor, or purchaser."[13] Such definitions are based on an empiricist-positivist epistemology that advances androcentric ideology.

Although commentators do not usually elaborate on their hermeneutical perspectives, except perhaps to say that they rely on historical and literary methodologies, interpretations of the legal materials take on an aura of objectivity and inevitability. Such interpretations claim to present "the" meaning of the law as it was understood in its original context, a position that usually softens the soldierly claim for the "enemy woman" and emphasizes the need for marriage as the law's noble intention. That the marriage is coerced does not become problematic for the commentators. For instance, Duane L. Christensen appreciates the law as advice on abstinence in premarital consensual relationships. He explains that the law stresses "the importance of a husband and wife sharing common spiritual values as the proper basis of a lasting union." He suggests further, "We would do well to follow the example here in deliberately delaying commitment in marriage for a period of time to assure that the decision to marry is not based primarily on physical lust."[14] By asserting that the law of Deut 21:10-14 is morally and spiritually commendable, Christensen not

only ignores its particularities—for example, a soldier "desiring" an enemy woman—but also disregards that in such cases the woman has no choice but to convert to the soldier's habits and religion. Christensen's interpretation mutates this rape law into a benign and even desirable ruling on marriage.

Ronald E. Clements also minimizes the coercion in the biblical law: "Even when the marriage was to a woman who had been taken as a captive and turned into a slave, that marriage could never be reduced simply to a master/slave relationship."[15] For Clements, marriage, rather than coercion, is the important lesson, although he does not provide a reason for the claim. He assumes the omniscient stance of an objective, universal, and value-neutral observer who does not disclose his hermeneutical interests. His assumptions remain hidden, and his perspective claims to present objective information, although in the case of Deut 21:10-14 he advances the perspective of the male soldier.

Other interpreters, too, focus on marriage and explain that this law regulates a specific kind of union, in which a male soldier wants to marry an enemy woman after the end of war. This position is perhaps most extensively and comprehensively developed in Carolyn Pressler's study on women in Deuteronomic law.[16] Pressler asserts that Deut 21:10-14 does not regulate a rape situation during war—a position she claims dominated earlier scholarly treatments.[17] In Pressler's view, the law regulates marriage between a male soldier and a foreign captive woman *after* war, providing the legal means for marriage when "normal procedures for contracting marriage are impossible."[18] The law also depicts a ritual necessary for the "former captive"[19] so that the soldier becomes legally qualified to marry her. Pressler stresses that the law regulates only a marriage between a male soldier and a foreign captive woman. It does not prohibit a "man from engaging in sexual relations with the woman without marrying her."[20]

Like other interpreters, Pressler does not disclose her hermeneutical interests. She proceeds as if reading from "nowhere," wanting to read the text as a "window to historical reality"[21] but only illuminating the perspective of the male soldier and the original legislators. Pressler's reading is grounded in the modern fallacies of objective literalism, scientific value-neutrality, and apolitical detachment.

Interestingly, however, Pressler does hint at the possibility that the law is a rape law. Firmly rooted in the reconstruction of authorial intent, she suggests that the law's drafters might have viewed the marriage as an imposition on the woman because it violated the woman "in some way." For Pressler, the original authors used the verb *'innâ* (ענה) in v. 14 to hint at the violation.[22] In other words, Pressler proposes that the original writers recognized that the woman does not consent to the marital act and indirectly regarded Deut 21:10-14 as a regulation on rape.

Harold C. Washington writes from a more tentatively argued empiricist-positivist framework and clearly defines Deut 21:10-14 as a rape law. In a study on violence in biblical narrative, he maintains that readings are always located "somewhere" even if they presume to read from "nowhere." Accordingly, Washington attempts to connect contemporary lawsuits with biblical constructions of rape law: "My aim . . . is to contribute to the genealogy of this peculiar legal subject who appears in the courts even today—the man who by 'virtue' of his violence confirms his control of a feminine subject. . . . My interest is not in the juristic application of these laws in ancient Israel. . . . Instead I am concerned with the discursive capacity of these laws to construct gender."[23] This is not a historical reconstruction of the legal approach to rape cases in ancient Israel, but a more broadly conceived study of the historical discourse of gender as it emerges from the ancient laws. Washington writes from a "poststructuralist view of gender as a discursive product"[24] and examines the ancient laws as "foundational texts of Western culture . . . [that] authenticate the role of violence in the cultural construction of gender up to the present day."[25]

Washington's interpretation covers several legal texts in the Hebrew Bible, but it includes Deut 21:10-14. According to Washington, this law serves the following purpose: "The primary effect of the law is to assure a man's prerogative to abduct a woman through violence, keep her indefinitely if he wishes, or discard her if she is deemed unsatisfactory. . . ."[26] Unlike other interpreters, Washington recognizes the violence to which the woman is exposed, as outlined in the law. The woman is the object of the soldier's action, and Washington emphasizes the effect of the law on the woman's ability to be in control:

"The fact that the man must wait for a month before penetrating the woman . . . does not make the sexual relationship something other than rape. . . . Only in the most masculinist of readings does the month-long waiting period give a satisfactory veneer of peaceful domesticity to a sequence of defeat, bereavement, and rape."[27] For Washington, the law is about rape, and he criticizes readings for being "masculinist" and charges them with favoring the soldier's perspective.

Yet, despite this strong language and the interpretative focus on gender as a "discursive product," Washington still locates the legal meaning of Deut 21:10-14 primarily within the ancient text. The law is the agent, and so Washington writes: "By authorizing the violent seizure of women, this law takes the male-against-female predation of warfare out of the battlefield and brings it to the home." In Washington's view, the law *itself* creates meaning as if it advanced male violence in the home, ignored the women's perspective, authorized androcentric bias, and was not the basis for a reader's rejection or support of androcentric policy. When Washington addresses the particularities of 21:10-14, he succumbs to an empiricist-scientific epistemology as if readers were not in charge. Still, Washington's analysis is a rare example because it exposes androcentric bias in other interpretations, considers a woman's perspective, and illustrates the potential of multiple meanings in the biblical law. Hence, in contrast to other interpreters, Washington does not promote Deut 21:10-14 as a marriage law. He acknowledges that this legal case is about rape.

The Death Penalty for Adultery? The Legislation in Deut 22:22-29

The debate about the meaning of biblical rape laws is contested also in the legislation found in Deut 22:22-29, although most scholarly interpreters search for authorial intent and hesitate to characterize these laws as rape legislation. They attempt to reconstruct the original intent of the ancient legislators without acknowledging that their reconstructions, in fact, rely on androcentric assumptions. What appears to be the undisputed, fixed, and singular meaning of the laws is actually complicated and dependent on the hermeneutical assumptions being

employed. When the perspective emphasizes rape, Deut 22:22-29 contains four rulings on rape and not on adultery, as many commentators contend. The four cases are v. 22; vv. 23-24; vv. 25-27; and vv. 28-29, and they are part of a larger section on what interpreters variously call "family and sex laws,"[28] "Marital and Sexual Misconduct,"[29] "Miscellaneous Laws, relating chiefly to Civil and Domestic Life,"[30] or "a subset of the general law of adultery preceding them in Deut. 22:22."[31] As these titles indicate, in the history of interpretation these four rulings have rarely, if ever, been regarded as rape legislation.

The first case appears in v. 22. Here, a man and a wife of another man receive the death penalty after they are found "lying" together. The question is if their "lying" is consensual, an ambiguity that the literature does not emphasize. Many interpreters assume that the law addresses consensual sex, and so they characterize it as a rule on adultery. For instance, Jeffrey H. Tigay entitles his interpretation of the law "Adultery with a Married Woman."[32] He relates the law to a ritual procedure described in Num 5:11-31, in which a husband suspects his wife's adultery. Tigay also relates the Deuteronomic law to Lev 20:10, which orders capital punishment for adulterous behavior. Similarly, Tikva Frymer Kensky, following Tigay's lead, characterizes Deut 22:22 as a law against adultery.[33]

The situation is not as simple as it appears, however. The prose in Deut 22:22 is terse and does not provide conclusive information on the precise nature of the relationship between the man and the woman. The law focuses on the punishment and not on the description of the crime; it does not specify if the "lying" is consensual or forced, and it elaborates only on the consequences of the man "lying" with the woman. It is possible to conjecture that the man threatened or forced the woman and that she did not consent, but the focus of the law is on the penalty. It prescribes that both parties are to be put to death. Many interpreters believe that the penalty suggests the consent of the woman. She is guilty too and receives the appropriate penalty as an adulteress. It is also possible, however, to argue that the penalty does not indicate her guilt. Rather, the penalty is based on androcentric jealousy that punishes a woman for any sexual activity outside of marriage and disregards her consent completely.

A comparison with ancient Near Eastern laws in cases of assumed adultery shows that the biblical law is actually quite harsh in prescribing the death penalty for the woman, regardless of her consent. In ancient Near Eastern laws, sex between a man and a married woman does not necessarily entail the death penalty, but these laws prescribe a range of options that are left to the offended husband. He must determine the severity of the penalty. For instance, Middle Assyrian Law (MAL) 15 stipulates:

> 15. If a seignior has caught a(nother) seignior with his wife, when they have prosecuted him (and) convicted him, they shall put both of them to death, with no liability attaching to him. If, upon catching (him), he has brought him either into the presence of the king or into the presence of the judges, when they have prosecuted him (and) convicted him, if the woman's husband puts his wife to death, he shall also put the seignior to death, but if he cuts off his wife's nose, he shall turn the seignior into a eunuch and they shall mutilate his whole face. However, if he let his wife go free, they shall let the seignior go free.[34]

Like the Deuteronomic law, this law focuses only on the moment when a husband finds his wife with another man. In both cases, the emphasis is on the post-discovery phase and the husband determines the form of punishment. The husband may even decide to let the woman go free, which automatically frees the other man. Still, the law also leaves undetermined what the precise nature of the crime is. Is it adultery or was the woman forced by the other man? It is unclear. What matters to the law is that the husband is the offended party who determines the extent of the conviction. In this sense MAL 15 differs from the biblical parallel. The ancient Near Eastern law authorizes the husband to determine the form of the penalty, which ranges from the death penalty for both to cutting off the woman's nose and the other man's testicles, or no penalty at all. The husband is in charge in MAL 15, whereas the Deuteronomic law establishes the penalty independently from the husband.

A similar case appears in §129 of the Code of Hammurabi, which also offers various penalty options that range from drowning

to leniency. It, too, emphasizes the post-discovery phase and does not detail whether the woman consented. The scholarly literature classifies this law as one on adultery, although the actual crime is not specified.

> 129. If the wife of a seignior has been caught while lying with another man, they shall bind them and throw them into the water. If the husband of the woman wishes to spare his wife, then the king in turn may spare his subject.[35]

Again, the emphasis is on the penalty options, and the law allows the husband to spare his wife and consequently the other man. In other words, ancient Near Eastern laws do not exclusively prescribe the death penalty for cases that scholars usually categorize as laws on adultery. These laws present several penalty options, whereas Deut 22:22 is more limited and orders much harsher punishment.[36] It is noteworthy that neither the biblical nor the ancient Near Eastern laws identify the transgression as adultery; the question of the woman's consent is left to the readers. It is possible to consider these laws as rape cases in which androcentric jealousy condemns a woman as guilty regardless of her consent.[37] Yet only the ancient Near Eastern laws give an offended husband some leeway in letting his wife off the hook, whereas Deut 22:22 prescribes one option, the death penalty, even if the woman may have been raped. It is a case of androcentric ideology gone awry.

The second case, Deut 22:23-24, supports the interpretation of v. 22 as a rape case, although some scholars read vv. 23-24 as a case of seduction. In vv. 23-24, the law orders the death penalty for both an engaged young woman and a man who has sex with her in town. The law explains that he "met" her in town, and it finds both guilty because nobody heard the woman's cry for help.[38] Many interpreters explain that this law assumes her consent, and so they classify the case as a law on adultery. Tigay, for instance, entitles his interpretation of this and the next unit as "Adultery with an Engaged Virgin (vv. 23-27)."[39] Alexander Rofé elaborates on vv. 23-24 in a section on ancient legislation on adultery,[40] and Duane

L. Christensen talks about "the law of the seduction of a betrothed woman."[41] Nevertheless, some commentators characterize vv. 23-24 as rape legislation[42] because, to them, the law does not exclude the possibility that the woman called for help. It merely states that no one heard her, which could describe a situation of rape in which a man forces a woman to have sex while no one is there to assist her. As in the case of v. 22, the law of vv. 23-24 also stipulates the death penalty for both the woman and the man. Yet again the penalty does not address the issue of the woman's consent. The omission is part of androcentric ideology, which ignores a woman's viewpoint and distrusts her words or actions. Readers who accept this ideology do not look for ambiguity, and they miss the possibility that the woman is innocent.

After the two contested rape laws, a third case (vv. 25-27) depicts an unmistakable situation of rape—even to androcentric interpreters. In vv. 25-27, a woman is raped "in the open country," and the law recognizes her innocence because no one was able to hear her cry for help. Androcentric ideology, trusting outside witnesses rather than a woman's word, does not need to hear anything else. The rapist is declared guilty, and interpreters predictably comply with the legal opinion. Significantly, the laws in vv. 25-27 and in vv. 23-24 hint at sexual violation. The verb "to rape" (*'innâ*, ענה *piel*) appears in v. 24, and in v. 25 the man "seizes" or "catches" the woman. The verbs convey her unwillingness and his active effort to get her.[43] Similar terminology appears in ancient Near Eastern rape legislation, connoting the force of the attack.[44] Clearly, then, these laws are about rape.

The androcentric perspective, mostly taken for granted in the scholarly literature, is at its worst in the last part of the Deuteronomic rape legislation (vv. 28-29). This fourth case describes the rape of a single young woman and stipulates that her father has to receive financial compensation as a remedy for the rape, a solution that is found also in the Code of Hammurabi §156 and MAL 55. The biblical law orders that the rapist marry the young woman "because he raped [*'innâ,* ענה] her" (v. 29). Here Deuteronomic

law is considerably harsher than ancient Near Eastern law, specifically §156 of the Code of Hammurabi, which allows the raped woman to marry whomever she wants. The biblical law is also more restrictive than MAL 55, which gives the father of the raped woman several options, including one in which his daughter can be married off to the rapist. In biblical law codes, only Exod 22:16, a case of pre-marital consensual sex between a young woman and her lover, mentions a father's options. There the father is authorized to order or to refuse a wedding between the two, or to demand financial compensation.[45]

Deut 22:28-29 is unquestionably androcentric in its emphasis on the interests of the father, and interpreters of a modern scientific mind-set accept the androcentric bias without further commentary. Thus, Harold C. Washington remarks correctly: "The laws do not interdict sexual violence; rather they stipulate the terms under which a man may commit rape. . . ."[46] The problem here is that some interpreters follow this stipulation and do not question the *legal* bias that promotes male sexual violence. They perpetuate as objective, value-neutral, and universal a concern that represents only one possible reading, and they do not analyze as rhetorical constructs laws that may never have regulated ancient people's "real" lives.[47] Whether readers discuss these regulations in the context of adultery, seduction, or marriage, their interpretations assume an empiricist-positivist epistemology that drops rape as an explanation for these cases of sexual violence.

"If a Man . . . ": Rape Laws in Ancient Near Eastern Codes

Scholars of ancient Near Eastern rape laws do not show much, if any, appreciation for the notion that all exegetical work is contextualized, particularized, and localized, and that readers are central in the process of "meaning making." They assume objectivity, value neutrality, and universality for their exegetical work, and classify as sex offenses, adultery, or marriage laws what is really legislation on rape. When these laws are read in today's global rape culture, they address issues related

to rape and should be classified as such. Any other terminology obfuscates the serious problem these laws address. Interestingly, older scholarship is sometimes more open to the characterization of these cases as sexually violent, though the earlier studies also do not consistently define the laws as rape legislation.[48] For instance, an influential 1966 article by J. J. Finkelstein entitled "Sex Offenses in Sumerian Laws" differentiates between "coercive" and "consentive" Sumerian laws, and a chart defines the "coercive" laws as rape laws.[49] In his essay, however, Finkelstein uses only the term "adultery." Indirectly, Finkelstein provides a rationale for his terminological preference of "adultery" when he comments on the meaning of a text called "A Trial at Nippur (3NT403+ T340)." The first line of the Sumerian law reads:

> Lugalmelam, son of Nanna'aramugi seized Ku(?)-
> Ninšubur, slave-girl of
> Kuguzana, brought her into the KI-LAM building, and
> deflowered [*sic*] her.[50]

The key question here is, What actually happened between the man called Lugalmelam and the enslaved young woman called Ku(?)-Ninšubur? Finkelstein allows for the possibility that the woman was raped but then dismisses it as socially "immaterial" for Mesopotamian law. In his view, rape, seduction, and consensual sex were interchangeable offenses against the slave owner. He explains:

> From the juridical point of view it may be worth mentioning that the trial does not discuss the question of whether the slave-girl was raped or was a willing partner in the offense. This is unquestionably to be explained by the fact that in the eyes of Mesopotamian law, consent in such cases is immaterial. Hence, her sexual violation, whether by rape, seduction, or even by her own solicitation, is exclusively considered as a tortuous invasion against her owner, for which he may seek redress. . . .[51]

In other words, Finkelstein claims to read from the perspective of the presumed original writers ("the eyes of Mesopotamian law") when he

characterizes the slave owner as the violated person who "may seek redress." Finkelstein prefers the term "adultery" to "rape" because he claims that to the ancient lawgivers it was irrelevant whether the woman was raped, seduced, or participating in consensual sex. The law focuses on the slave owner, whom it seeks to protect. From this perspective, Finkelstein develops the legal meaning, favoring the male owner or husband and disregarding the woman's perspective, although he does not clearly acknowledge that this is what he does. Thus, Finkelstein mentions the possibility of rape and then dismisses it as an option, claiming that the "intent" of the Mesopotamian law prohibits this choice. Consequently, Finkelstein examines legal cases on "adultery" as perceived by the supposed status quo of ancient society, even though the article's title promises a study of "sex offenses."

Finkelstein's analysis has had considerable influence, and his problematic terminological choices have made their way into other studies. For instance, in an article entitled "Adultery in Ancient Law," Raymond Westbrook refers to Middle Assyrian Law 12 as an illustration of vocabulary that is sometimes used to make a point about the rights of a husband when his adulterous wife is discovered "*in flagranti delicto*."[52] To make his point, Westbrook quotes the law to explain the legality of punishing an adulterous woman. Like Finkelstein, Westbrook does not acknowledge that his attempt to connect MAL 12 and vocabulary of adultery is complicated. After all, this law is a recognized rape law. Perhaps for Westbrook, standing in Finkelstein's tradition, the difference between rape and adultery is negligible because in his view "adultery forms part of a complex of interrelated scholarly problems discussing social offenses such as seduction and rape."[53] Like Finkelstein, Westbrook assumes an empiricist-positivist epistemology that prevents him from disclosing his hermeneutical perspective and makes his study appear to be an "objective" treatment of ancient law. Westbrook can thus assume as fact that adultery and rape are linked while at the same time failing to discuss his rationale for making such a connection, which is obviously androcentric and contributes to prejudices about rape.[54] Perhaps Westbrook's argumentation would be different if Finkelstein had not made a similar case twenty-five years earlier.

Still, some scholars assume a different hermeneutical premise and maintain that ancient Near Eastern law codes address rape as a distinct problem. For these scholars, such laws are part of a long history that is "abundantly documented in the legal codes from the Sumerian to the Roman period."[55] Unfortunately, during the past century, not a single scholarly study has examined ancient Near Eastern rape laws in depth. This is most apparent in the multi-volume *Reallexikon der Assyriologie und Vorderasiatischen Archäologie*, a renowned reference work of ancient Near Eastern materials, which has yet to publish a single entry on rape.[56] We turn now to a discussion of selected laws in the Codex of Ur-Nammu, the Laws of Eshnunna, the Code of Hammurabi, the Middle Assyrian Laws, and the Hittite Laws. In this chapter they are treated as legislation on rape.

The Codex of Ur-Nammu from Sippar

The fragmentary tablet contains two laws on rape in §§6 and 8. According to Fatma Yildiz, the first paragraph reads as follows:

> 6. If a man the wife of a young man in service (*guruš*)
> whose marriage has not yet been consummated,
> using violence deflowers her,
> that male they shall slay.[57]

The particular legal situation remains grammatically unclear in this translation because of its closeness to the Sumerian original. Another, smoother translation rearranges the syntax: "If a man uses violence against the wife of a young man, who has not been deflowered, and deflowers her, this man shall be killed."[58] The ancient law describes a situation that other law codes also mention: a man "uses violence" against a woman who is in the process of getting married but has not yet had sex with her fiancé. The law orders the death penalty for a rapist who attacks a woman of this status. It is important to note that the Sumerian text relies on two verbs to communicate the action of rape, which in English are rendered as "to use violence" and "to deflower." Accordingly, the woman does not consent or volunteer to

sexual activity. She is raped. The Codex of Ur-Nammu from Sippar contains a second law, §8, about another situation of sexual violence. There a man rapes an enslaved woman.

> 8. If a slave-girl
> who is a virgin
> a man deflowers
> with violence,
> he shall pay 5 shekels of silver.[59]

In contrast to §6, this law does not prescribe the death penalty. When a man "deflowers with violence" an enslaved young woman, he has to pay only a monetary fee. It is unclear to whom the fee is paid, and usually commentators maintain that the money goes to the slave owner. They also assert that the penalty represents the value of an average enslaved woman, who is of less value to her owner than a married woman is to her husband.[60] Moreover, interpreters explain that the rape of an enslaved woman would not raise paternity issues, whereas the first law is about an engaged virgin. Thus, in §8 the fee is low. Interpreters are silent about the fact that both laws ignore the woman's perspective, whether she is enslaved or free. They focus on the damages accrued to a husband or a slave owner, according to which the rape of a married young woman requires a more severe penalty than the rape of an enslaved woman. Like the laws themselves, then, interpreters endorse an offensive expression of classism.[61] Yet both laws entertain situations of rape—a point that the scholarly literature, tied as it is to modern-scientific epistemology and enmeshed as it is with androcentric bias, has not emphasized. And so, yet again, a recognition of rape is absent.

The Laws of Eshnunna

The Laws of Eshnunna contain two rape cases that are similar to §§6 and 8 of the Codex of Ur-Nammu. They read as follows:

> 26. If a man gives bride-money for a(nother) man's daughter, but another man seizes her forcibly without asking the permission

> of her father and her mother and deprives her of her virginity, it is a capital offence and he shall die.
>
> 31. If a man deprives another man's slave-girl of her virginity, he shall pay one third of a mina of silver; the slave-girl remains the property of her owner.[62]

In the first case, a man rapes an engaged woman, and in the second case a man rapes an enslaved woman. In the first situation, the man receives the death penalty for the "capital offense," but in the second situation he is merely asked to make a payment. Class discrimination leads to discrimination regarding the extent of the penalty.

The Code of Hammurabi

Several laws of the Code of Hammurabi relate to forced sexual intercourse, but the scholarly literature acknowledges only §130 as a rape law. It reads:

> 130. If a seignior found the (betrothed) wife of a(nother) seignior, who had no intercourse with a male and was still living in her father's house, and he has lain in her bosom and they have caught him, that seignior shall be put to death, while that woman shall go free.[63]

The law of §130 is similar to §6 of the Codex of Ur-Nammu from Sippar and §26 of the Laws of Eshnunna, but it also adds two pieces of information. First, the woman is still living with her parents, and, second, the law emphasizes that the woman is not to be punished and only the rapist shall receive the death penalty. This is clearly a rape law and recognized as such even by Finkelstein: "This case too is an act of rape."[64]

Sometimes, however, interpreters avoid the term "rape," especially when they speculate about the rationale of ancient Near Eastern marriage laws. For instance, Westbrook finds §130 of the Code of Hammurabi to be similar to §26 of the Laws of Eshnunna. For Westbrook,

both laws explain what happens under conditions of an "inchoate marriage,"[65] which is defined by "a lapse of time between conclusion of the marriage contract and the act of marriage."[66] In Westbrook's view, §130 of the Code of Hammurabi is part of a larger rubric of marriage laws; hence, he does not discuss rape there or anywhere else, despite references to this and similar laws.

Westbrook is not alone in the obfuscation of ancient Near Eastern rape legislation. Much of the scholarly literature has not identified rape as an issue. In fact, scholars often treat ancient Near Eastern rape laws as pertaining to marriage and adultery. For instance, Eckart Otto supports the notion that §130 of the Code of Hammurabi describes marital procedures.[67] Walter Kornfeld mentions "the case of a rape of a young engaged girl" in his study of adultery but refrains from further comments.[68] Similarly, Benno Landsberger's translation and commentary mention the relevant rape terminology in German, such as the verbs *vergewaltigen*, and the old-fashioned *notzüchtigen*, and the nouns *Vergewaltiger* and *Notzucht*, but he mentions these laws within the larger context of the subject of virginity.[69] Androcentric bias and modern scientific epistemology merge into a potent combination that eliminates interpretative alternatives and avoids classifying these laws as rape legislation.

Yet, when this potent combination is dismantled and interpretative interests are disclosed, the Code of Hammurabi is shown to contain additional rape laws and, more specifically, laws on incestuous rape: §§154, 155, and 156. The first of these reads as follows:

> 154. If a seignior has had intercourse with his daughter, they shall make that seignior leave the city.

If interpreters mention this law at all, they discuss it as a case of incest and not of rape. Yet it is certainly also relevant as a rape law because it refers to the problematic situation in which a father rapes his daughter.[70] The Code of Hammurabi does not prescribe the death penalty for this crime because, as scholars often explain, the rape does not threaten another man's paternal rights or legal authority. He is the man in charge, but he is, however, required to leave town.

The next law, §155, describes another situation of incest.

> 155. If a seignior chose a bride for his son and his son had intercourse with her, but later he himself has lain in her bosom and they have caught him, they shall bind that seignior and throw him into the water.

In this case, the father has sexual intercourse with the fiancée of his son. Is it imaginable that the bride consented? The law stipulates that the father has to be drowned if he is caught in the act of raping his son's bride. Does this mean that the father would go free if he were not caught? The law does not consider this possibility and only mentions what happens if he is caught. As always, the perspective of the young woman remains conspicuously absent from the law. Does she go free and marry the rapist's son?

Another incest law focuses on the bride of a father's son.

> 156. If a seignior chose a bride for his son and his son did not have intercourse with her, but he himself has lain in her bosom, he shall pay to her one-half mina of silver and he shall make good to her whatever she brought from her father's house in order that the man of her choice may marry her.

This law portrays a situation in which a bride did not yet have sex with the man whose father rapes her. Accordingly, the father is only required to pay a fine, and the bride is free to marry whomever she wishes to marry. This is a surprising offer, since other laws prescribe a marriage between the woman and the first man who had sex with her, whether or not the sex was violent.[71] Nor does this case mention whether the bride consented. It is a potential rape law that grants decision-making power to a woman.[72]

The Middle Assyrian Laws

The Middle Assyrian Laws describe four such scenarios, all of which refer to overt situations of a man raping a woman. In §§12, 16, and 23, the woman is married, and in §55 she is young, single, and lives in the parental home.

> 12. If, as a seignior's wife passed along the street, a(nother) seignior has seized her, saying to her, "Let me lie with you," since she would not consent (and) kept defending herself, but he has taken her by force (and) lain with her, whether they found him on the seignior's wife or witnesses have charged him that he lay with the woman, they shall put the seignior to death, with no blame attaching to the woman.[73]

This law depicts an indisputable rape scene. A married woman is attacked by a man in the street. She resists, but he succeeds in raping her. This is the classic rape scenario, and the Akkadian terminology is unambiguous. The phrase *emûqa sabâtu* is usually translated as "to take by force."[74]

The punishment for the rapist is the same as in other ancient Near Eastern laws. He receives the death penalty only if—and this is the androcentric limitation of this particular law—other people witness the crime and incriminate the rapist for it. The charge depends on others because a woman's word does not suffice. Still, the *very existence* of the law demonstrates that rape was seen as a problem, even if this law was never legislatively observed in the Middle Assyrian empire.[75]

The law in §16 presents a rape case next to one on adultery. The first case refers to a married woman who invites a man to have sex with her; this is an example of adultery. The second case mentions a man who forces a woman to have sex with him; this is possibly a situation of what we now call acquaintance rape. In the second situation, the husband has the authority to decide the fate of the other man, but it remains unclear if the woman is handed over to her husband's authority or if she is considered innocent. The second case in MAL 16 reads:

> 16. . . . If he [a seignior] has lain with her [another seignior's wife] by force, when they have prosecuted him (and) convicted him, his punishment shall be like that of the seignior's wife.[76]

The hermeneutical problem is, of course, that the law mentions adultery, rape, and the various penalties in one long law. As in other cases, the husband, but not the raped wife, appears as the offended party, which reflects an androcentric bias that Western laws have overcome only in recent decades.

Yet another law (§23) portrays the rape of a married woman. The second part refers to a situation in which a wife is invited to the house of another woman, where she is raped by a man who is already in the house. The wife is declared innocent if she decides to press charges, but the other woman and the rapist receive the death penalty. If, however, the raped woman does not press charges, her husband has the authority to penalize her. In either case, the other woman and the rapist receive the death penalty. The section reads as follows:

> 23. . . . However, if the seignior's wife did not know (the situation), but the woman who brought her into her house brought the man to her under pressure and he has lain with her, if when she left the house she has declared that she was ravished, they shall let the woman go free, since she is guiltless; they shall put the adulterer and procuress to death. However, if the woman has not (so) declared, the seignior shall inflict on his wife such punishment as he sees fit (and) they shall put the adulterer and the procuress to death.[77]

In contrast to the rape laws of MAL 12, 16, and 23, in which the woman is married, MAL 55 refers to the rape of a young, single woman who lives with her parents.

> 55. In the case of a seignior's daughter, a virgin who was living in her father's house, whose [father] had not been asked (for her in marriage), whose hymen had not been opened since she was not married, and no one had a claim against her father's house, if a seignior took the virgin by force and ravished her, either in the midst of the city or in the open country or at night in the street or in a granary or at a city festival, the father of the virgin shall take the wife of the virgin's ravisher and give her to be ravished; he shall not return her to her husband (but) take her; the father may give his daughter who was ravished to her ravisher in marriage. If he has no wife, the ravisher shall give the (extra) third in silver to her father as the value of a virgin (and) her ravisher shall marry her (and) not cast her off. If the father does not (so) wish, he shall receive the (extra) third for the virgin in silver (and) give his daughter to whom he wishes.[78]

This law is significant for several reasons. It unambiguously refers to the rape of a young, single woman.[79] It also acknowledges that rape may take place anywhere, "in the midst of the city or in the open country or at night in the street or in a granary or at a city festival." In other words, the charge of rape does not depend on the presence of other people.[80] Yet the range of penalties reflects a deeply ingrained androcentric perspective. No matter what the penalty is, the girl's father authorizes it. The father has three basic options. He may seek revenge according to "vicarious punishment"[81] and rape the rapist's wife, afterwards giving his daughter to the rapist in marriage. Alternatively, the father may accept money if the rapist does not have a wife, and he may then give his daughter to the rapist in marriage. Finally, he may choose neither of the prior options, but accept money and give his daughter in marriage to whomever he wishes. In all of these bad options, pernicious, cruel androcentrism rules while women are imagined as afterthoughts—forgotten recipients of male violence and authority.

Interpreters note the stark contrast in the penalty choices here and in the other three rape laws. For instance, Driver and Miles explain that the penalty is more lenient in §55 than in the other cases because the woman is single. "The draftsmen" of these laws "never lost" this distinction because they "always stated definitely at the outset whether the woman is unmarried or married."[82] The interpreters conclude from this consistent distinction that a "sexual offence" with an unmarried woman was "a comparatively trivial offence" in Assyrian law. The problem, however, is that these interpreters do not clearly object to this understanding of the law itself. Steeped in modern scientific epistemology, the interpreters pass off an androcentric explanation

as acceptable and perpetuate androcentric views of women and rape. Reading from an empiricist-scientific paradigm, they convey androcentric biases toward women's relations to male power as objective categories, even objective truths.

The Hittite Laws

The Hittite Laws, too, contain several texts on rape. Scholars recognize only one of them and usually classify the others as laws dealing with adultery, incest, and bestiality. The undisputed rape law, §197, is reminiscent of Deut 22:29 and reads:

> 197. If a man seizes a woman in the mountain, it is the man's crime and he will be killed. But if he seizes her in (her) house, it is the woman's crime and the woman shall be killed. If the husband finds them, he may kill them, there shall be no punishment for him.[83]

The law describes two situations.[84] In the first case, a rapist attacks a woman outside an inhabited area, "in the mountain," a location that assumes a woman's unsuccessful opposition to the attack. In the second case, the attack takes place in a house, perhaps even in "her" house. In the first scenario, the rapist receives the death penalty, whereas in the second scenario the death penalty is given only to the woman.[85] If, however, the husband discovers the couple, he has the right to kill both of them. Some commentators maintain that this option is part of a third situation that continues in §198 and is similar to other ancient Near Eastern laws such as MAL 15 or §129 of the Code of Hammurabi.[86] In this case, the husband discovers the couple and has the opportunity to decide the fate of his wife and the other man, either sparing their lives or ordering their death.

It is important to note that the Hittite term "woman" refers to a woman of any status, whether she is young and single, married, widowed, free or enslaved,[87] even when the law includes the option that a woman's husband may kill the attacker and the woman. The terminological inclusiveness indicates that rape is not only a crime when a

woman is married or in the process of getting married. According to §197, rape is punished under all circumstances when it takes place outside a town. The other part of the law is more problematic, since it announces punishment for both the woman and the man when the attack occurs in a house. The penalty seems to assume consensual sex, although the man might have forced the woman into the house. Thus, this law too reflects an androcentric worldview that privileges men over women.

Several other Hittite laws are not usually classified as rape laws, but they should be seen as such when rape is defined as "the crime of forcing another person to submit to sex acts, especially sexual intercourse,"[88] and the term "person" is expanded to include other creatures than humans only. The laws mention two cases of incest and four cases of bestiality.[89] Paragraphs 189 and 190 are the incest laws:

> 189. If a man violates his own mother, it is a capital crime. If a man violates his daughter, it is a capital crime. If a man violates his son, it is a capital crime.
>
> 190. . . . If a man violates his stepmother, there shall be no punishment. (But) if his father is living, it is a capital crime.

The law of §189 describes three cases, two of which are unmistakable cases of incestuous rape. The first case mentions a son raping his mother. The second and third cases refer to a daughter and a son being raped by their father. It is significant that the punishment is not specified, and the law does not make the penalty dependent on the father's so-called property rights. All three cases are called "capital crimes." In the law of §190, a stepson violates his stepmother, which appears to be a crime only when the father is alive. If the father is dead, the son is not punished for raping his stepmother. Enveloped in androcentric bias, this law focuses only on the son or the father and does not consider the position of the stepmother.

The Hittite codes include also four laws on bestiality (§§187, 188, 199, 200), which, according to animal advocates, could be considered rape legislation. Animals are unable to consent, but even if

they could, animal rights advocates argue that a human would not know if the creatures were consenting.[90] In fact, Hoffner identifies an eighteenth-century legal decision that declared a female donkey "a victim of [sexual] violence."[91] So perhaps it is within the realm of possibility to discuss the following laws as rape legislation:

> 187. If a man does evil with a head of cattle, it is a capital crime and he shall be killed. They will bring him to the king's court. Whether the king orders him killed, or whether the king spares his life, he must not appeal to the king.
>
> 188. If a man does evil with a sheep, it is a capital crime and he shall be killed. They will bring him to the king's court. Whether the king orders him killed, or whether the king spares his life, he must not appeal to the king.
>
> 199. If anyone does evil with a pig, (or) a dog, he shall die. They will bring them to the gate of the palace and the king may order them killed, the king may spare their lives; but he must not appeal to the king. . . .
>
> 200 (A). If a man does evil with a horse or a mule, there shall be no punishment. He must not appeal to the king nor shall he become a case for the priest. . . .[92]

The four laws illustrate that, strangely, sexual acts with cows, sheep, pigs, and dogs are punished with the death penalty, whereas sexual acts with horses or mules remain penalty free. This distinction leads to two questions. Why did these laws become necessary in the first place, and why do the laws treat the rape of horses and mules differently from other animals? The first question cannot be answered conclusively. Did the laws become necessary because bestiality was such an enormous problem in ancient Near Eastern societies that it required laws to "regulate" such practices? Did the legislators attempt to recognize an owner's property rights? Or are these laws only scribal fantasies? We do not know.

The second question, about the different treatment of horses and mules, has drawn a number of attempted answers. E. Neufeld expressed his surprise about the distinction of such different treatment and suggested that cows, sheep, pigs, and dogs were regarded as sacred in "the cult of animals." Since horses and mules were "latecomers" in the geographical area of the Hittite empire, they were excluded from animal cults and were therefore exempted from the laws.[93] Hoffner refrains from any hypothesis and simply acknowledges his inability to give a reasonable explanation for the distinction.[94] In any case, the laws provide a glimpse into the violent pattern of male sexual fantasy or practice, and as part of rape legislation they are disturbing.

Another point needs to be made here: It is important to note that these incest and bestiality laws share a crucial grammatical characteristic. They use the same Hittite verb, *katta waištai*, to communicate the action performed by the man. Different translations of the verbal phrase provide different meanings. The translation given above is found in the anthology of ancient Near Eastern texts by James B. Pritchard, which offers two translations of the verbs. In the law on incest, the Hittite verb is rendered as "to violate" and in the law on bestiality the same verb is translated as "to do evil." Other translations use the same English term for the Hittite verb. Neufeld translates the verb as "to sin." The bestiality law of §187 thus reads:

> If a man sins with a cow, (it is) an abomination, he shall die.

Similarly, the incest law in §189 is translated:

> [If a man] sins with his mother, (it is) an abomination. If a [man] sins with a daughter, (it is) an abomination. If a man sins with a son, (it is) an abomination.

Neufeld explains that the verb *katta waištai* means literally "sin together (sexually)"[95] and "denotes indecent exposure or carnal knowledge and is an idiomatic description of sexual intercourse."[96] In other words, the verb depicts the same action in incest and bestiality laws. The translation in Martha Roth's edition of ancient laws

is explicit, translating §187 as: "If a man has sexual relations with a cow . . ." and §189 as: "If a man has sexual relations with his own mother. . . ."[97] The verb is the same, and so a reader decides whether the verb implies physical and psychological violation or a moral transgression of normative behavior in Hittite culture. Does the verb connote sexual violence, an "evil" deed, or "sinful" behavior in general? These actions are characterized as *hurkel*, a Hittite noun for a sexual act that, according to Hoffner, does *not* refer to a crime involving "a sexual combination which is condemned by social mores"[98] but more generally is used for a "forbidden sexual combination, incest."[99] In other words, the act is something that is "forbidden." Was the forbidden deed an act of rape? The answer depends on a reader's interpretative outlook.

The difficulty in determining the meaning of these laws relates also to the limited number of existing Hittite laws. Clearly the laws on incest and bestiality describe situations of sexual harm for humans and animals. Whether or not the legislators identified these acts as "rape" is not a question we can answer, nor does the answer matter much, especially since we do not even know if these laws were ever used.[100] What matters is that ancient Near Eastern codes contain an impressive number of rape laws. Whether based in fantasy or reality, they indicate that rape was a social issue in the ancient Near East.

Toward a Conclusion, Not a Settlement

The purpose of this chapter has been to identify and explore biblical and ancient Near Eastern rape legislation and to indicate that these laws have not often been viewed as cases of rape in the recent history of interpretation. Many empiricist-positivist interpreters insist on placing these laws a safe distance away in ancient history, classifying them as laws on seduction, adultery, or marriage. Such interpreters read the legislation from "nowhere," which makes their explanations susceptible to androcentric bias and alienates those readers who are aware of the global rape culture. Usually, these commentators also suggest that hermeneutical work be limited to authorial intent and reproduce historically fixed meaning only, as if this were possible.

We face, then, a serious epistemological imbalance in the study and teaching of biblical law. If the position of empiricist-positivist scholars is that "back then rape was legal" because rape was marital, adulterous, or seductive behavior by men who were legally in charge and able to do as they pleased, it seems pedagogically problematic to teach such history without critical commentary. Yet the pedagogical impetus is entirely absent from research on ancient rape laws, even though the postmodern notion that social location shapes all interpretation largely solves these problems.

What is required is a vibrant and fresh debate on these matters. If this discussion does not take place, the terrain will be left to the increasingly dominant discourse of the Christian right, which insists on the literal meaning of the Bible, a notion that is closely aligned with scientific-objectivist hermeneutics.[101] Ancient rape laws represent a promising opportunity to debate the hermeneutical uncertainties and complexities of sacred texts such as the Hebrew Bible. This approach also enables interpreters to relate the epistemological imbalance in scholarship on ancient rape legislation to the larger arena in which we live, and to communicate the urgent need for dialogue across the hermeneutical, religious, cultural, and political divide in biblical scholarship and elsewhere.[102] Without such discussion and debate, rape itself will remain in the shadows, in a hidden place where those who perpetuate sexual violence want it to remain.

Interpretation 16 (2008): 227–62, here 249, 250. This is a highly intriguing suggestion, but is it one that will successfully prevent the powerful man, the king, from getting what he wants? After all, as Guest acknowledges in her discussion, often butches suffer from male violence and femmes are usually invisible in androcentric culture. Both face considerable difficulties in asserting their power and in gaining acceptance for it (ibid., 243–44).

4. Regulating Rape

1. For a comprehensive description of the state laws on rape in the United States, see Richard A. Posner and Katharine B. Silbaugh, *A Guide to America's Sex Laws* (Chicago/London: University of Chicago Press, 1996).

2. This New York State law is available online at http://public.leginfo.state.ny.us/frmload.cgi?MENU-46609910, where other laws can also be found (accessed November 24, 2009).

3. For informative and evaluative comments on the U.S. rape reform movement of the 1970s, see Vivian Berger, "Rape Law Reform at the Millennium: Remarks on Professor Bryden's Non-Millennial Approach," *Buffalo Criminal Law Review* 3 (2000): 513–25; Cassia C. Spohn, "The Rape Reform Movement: The Traditional Common Law and Rape Law Reforms," *Jurimetrics* 39 (1999): 119–30; Ronet Bachman and Raymond Paternoster, "A Contemporary Look at the Effects of Rape Law Reform: How Far Have We Really Come?" *Journal of Criminal Law & Criminology* 84, no. 3 (1993): 554–74; Carole Goldberg-Ambrose, "Unfinished Business in Rape Law Reform," *Journal of Social Issues* 48, no. 1 (1992): 173–85.

4. For a valuable explanation of New York State rape law, see http://www.nycagainstrape.org/survivors_legal.html (accessed November 24, 2009).

5. See online at http://codes.ohio.gov/orc/2907.02 (accessed November 24, 2009).

6. For a listing of U.S. state laws, see http://www.law.cornell.edu/topics/state_statutes2.html (accessed November 24, 2009).

7. See, for example, the German Strafgesetzbuch §177 (http://www.interpol.int/Public/Children/SexualAbuse/NationalLaws/csaGermany.asp) or the Philippine Laws Republic Act No. 8353 (http://www.chanrobles.com/republicactno8353.htm) (accessed November 24, 2009).

8. See, for instance, the rape laws in many Latin American countries: http://www.ishr.org/sections-groups/germany/latinamericanwomen.htm (accessed November 24, 2009).

9. Berger, "Rape Law Reform at the Millennium," 524.

10. One of the oldest collections is the Laws of Eshnunna, which emerged from the ancient city of Eshnunna in Mesopotamia and probably preceded the Code of Hammurabi by two hundred years, or, as other commentators suggest, was its "near contemporary." The most renowned and comprehensive law collection of the ancient Near East is the Code of Hammurabi, named after the famous ruler of ancient Babylon. It is usually dated to the reign of Hammurabi from 1728 to 1686 B.C.E. Another ancient and incompletely recovered collection is the Codex of Ur-Nammu from Sippar which dates to around 2100 B.C.E. (see S. N. Kramer and J. J. Finkelstein, "Ur-Nammu Law Code," *Orientalia* 23 [1954] 40–51). A younger collection is the Middle Assyrian Laws, which developed between 1450 and 1250 B.C.E. For a discussion, see G. R. Driver and John C. Miles, *The Assyrian Laws*, Ancient Codes and Laws of the Near East (Oxford: Clarendon, 1935).

Finally, there are the Hittite Laws, which emerged in the middle of the second millennium. They are difficult to date, but tentatively suggested dates range from 1500 B.C.E. to the thirteenth century B.C.E. For a description of the various proposals, see E. Neufeld, *The Hittite Laws* (London: Luzac, 1951), 110–13. For an overview of the various law codes and their dates, see also Raymond Westbrook, "The Character of Ancient Near Eastern Law," in *A History of Ancient Near Eastern Law*, ed. Raymond Westbrook, Handbuch der Orientalistik, Nahe und der Mittlere Osten 72 (Leiden/Boston: Brill, 2003), 8–9. Importantly, all of these law codes precede the biblical laws by several centuries. The ancient Near Eastern laws were discovered in the early decades of the twentieth century C.E., when archaeological excavations in the Middle East were fashionable and excited the wider Western public. The discoveries led to abundant research and publications. The Code of Hammurabi was recovered in 1901–1902, and the Middle Assyrian Laws were found from 1903 to 1914. The Hittite laws were found in archaeological digs of 1906–1907 and 1911–1912. The Laws of Eshnunna were found only in 1945 and 1947. The Sumerian Codex of Ur-Nammu was originally discovered in 1952 but the passages relevant to our discussion were identified only in 1979; see Fatma Yildiz, "A Tablet of Codex Ur-Nammu from Sippar," *Orientalia* 50 (1981): 87–97, esp. 87. Other ancient Near Eastern law codes exist, but they do not contain references to rape, perhaps owing to their fragmentary survival. Examples of other ancient Near Eastern law codes are the Sumerian Laws, the Lipit-Ishtar Code, the Edict of Ammisaduqa, and the Nuzi laws and customs. Ancient Egyptian legal texts do not refer to

rape, but some nonlegal texts do, such as the story of Enlil and Ninlil; see H. Behrens, *Enlil und Ninlil: Ein sumerischer Mythos aus Nippur*, Studia Pohl (Rome: Biblical Institute Press, 1978), 22.

11. Duane L. Christensen, *Deuteronomy 21:10—34:12*, Word Biblical Commentary 6B (Nashville: Thomas Nelson, 2002), 471; Jeffrey H. Tigay, *Deuteronomy [= Devarim]: The Traditional Hebrew Text with the New JPS Translation*, JPS Torah Commentary (Philadelphia: Jewish Publication Society, 1996), 194.

12. Ronald E. Clements, "The Book of Deuteronomy: Introduction, Commentary, and Reflections," in *The New Interpreter's Bible: A Commentary in Twelve Volumes*, ed. Leander E. Keck et al. (Nashville: Abingdon, 1994), 2:269–538, here 443.

13. Ibid., 445. This law was probably never observed. For instance, Harold C. Washington acknowledges that "there is reason to doubt that this law was extensively applied;" see his "'Lest He Die in the Battle and Another Man Take Her': Violence and the Construction of Gender in the Laws of Deuteronomy 20–22," in *Gender and Law in the Hebrew Bible and the Ancient Near East*, ed. Victor H. Matthews, Bernard M. Levinson, and Tikva Frymer-Kensky, Journal for the Study of the Old Testament Supplement Series 262 (Sheffield: Sheffield Academic Press, 1998), 185–213, here 202.

14. Christensen, *Deuteronomy*, 475.

15. Clements, "Book of Deuteronomy," 448.

16. Carolyn Pressler, *The View of Women Found in the Deuteronomic Family Laws*, Beihefte zur Zeitschrift für die alttestamentliche Wissenschaft 216 (Berlin/New York: de Gruyter, 1993), 10–15.

17. Ibid., 11.

18. Ibid. See also Cheryl B. Anderson, *Women, Ideology, and Violence: Critical Theory and the Construction of Gender in the Book of the Covenant and the Deuteronomic Law* (London: T&T Clark, 2004), 47.

19. Pressler, *View of Women*, 12.

20. Ibid., 43.

21. Elisabeth Schüssler Fiorenza, *Rhetoric and Ethic: The Politics of Biblical Studies* (Minneapolis: Fortress Press, 1999), 43.

22. Pressler, *View of Women*, 22.

23. Washington, "'Lest He Die in the Battle'," 186.

24. Ibid., 192.

25. Ibid., 187.

26. Ibid., 186.

27. Ibid., 205.

28. Alexander Rofé, "Family and Sex Laws in Deuteronomy and the Book of Covenant," *Henoch* 9 (1987): 131–59.

29. Tigay, *Deuteronomy*, 204; Christensen, *Deuteronomy*, 510.

30. S. R. Driver, *A Critical and Exegetical Commentary on Deuteronomy*, International Critical Commentary (Edinburgh: T&T Clark, 1895; latest impression 1965), 244.

31. Washington, "'Lest He Die in the Battle'," 208.

32. Tigay, *Deuteronomy*, 206.

33. Tikva Frymer-Kensky, "Deuteronomy," in *The Women's Bible Commentary with Apocrypha*, ed. Carol A. Newsom and Sharon H. Ringe (Louisville: Westminster John Knox, 1998), 63; Angelika Engelmann, "Deuteronomium: Recht und Gerechtigkeit für Frauen im Gesetz," in *Kompendium Feministische Bibelauslegung*, ed. Luise Schottroff and Marie-Theres Wacker, 2nd ed. (Gütersloh: Gütersloher Verlagshaus, 1999), 73; Anderson, *Women, Ideology, and Violence*, 43–44.

34. James B. Pritchard, ed., *Ancient Near Eastern Texts Relating to the Old Testament* (Princeton, N.J.: Princeton University Press, 1969), 181. For a more recent translation, see Martha T. Roth, ed., *Law Collections from Mesopotamia and Asia Minor*, Writings from the Ancient World 6 (Atlanta: Scholars Press, 1995).

35. Pritchard, *Ancient Near Eastern Texts*, 171.

36. According to some scholars, the harsh punishment is due to the fact that, different from ancient Near Eastern law, biblical law considers all crimes as transgressions against God, the lawgiver; see, for example, Moshe Greenberg, "Some Postulates of Biblical Criminal Law," in *A Song of Power and the Power of Song*, ed. D. Christensen (Winona Lake, Ind.: Eisenbrauns, 1993), 283–300, esp. 288–89.

37. All forms of punishment mentioned in these laws are at best unreasonable from a contemporary Western perspective on rape. First, only the rapist and not the victim-survivor should receive a penalty. Second, the Universal Declaration of Human Rights gives everyone the right to life in its Article 3, which, for instance, the organization Amnesty International interprets as a rejection of the death penalty. The Charter of Fundamental Rights of the European Union explicitly rejects the death penalty in its Article 2. It is highly unlikely, however, that any of the biblical or ancient Near Eastern penalties were ever carried out (since their status as practiced law is questionable).

38. See also Middle Assyrian Law 55 and §197 of the Hittite Laws, and the discussion of these laws below.

39. Tigay, *Deuteronomy*, 207.

40. Rofé, "Family and Sex Laws," 147.

41. Christensen, *Deuteronomy*, 51.

42. Engelmann, "Deuteronomium," 74.

43. Against the view of Tikvah Frymer-Kensky ("Deuteronomy," 93), who maintains that in this context the verb means "illicit sex," that is, sex with someone with whom one has no right to have sex. Frymer-Kensky's position is also supported by Mayer I. Gruber, "A Re-examination of the Charges against Shechem son of Hamor" (in Hebrew), *Beit Mikra* 157 (1999): 119–27; and Washington, "'Lest He Die in the Battle'," 208–12. For a recent study of these and related verbs, see Sandie Gravett, "Reading 'Rape' in the Hebrew Bible: A Consideration of Language," *Journal for the Study of the Old Testament* 28, no. 3 (March 2004): 279–99.

44. Sophie Lafont, *Femmes, droit et justice dans l'antiquité orientale: Contribution à l'étude du droit pênal au Proche-Orient ancien*, Orbis Biblicus et Orientalis 165 (Göttingen: Vandenhoeck & Ruprecht, 1999), 138. For an opposing view, see Anthony Phillips, "Another Look at Adultery," *Journal for the Study of the Old Testament* 20 (1981): 3–25, here 13.

45. Against Frymer-Kensky, who considers Exod 22:16 to be a "comparable law" to Deut 22:28-29; see Tikvah Frymer-Kensky, "Law and Philosophy: The Case of Sex in the Bible," *Semeia* 45 (1989): 93–94. Her arguments stand in a long tradition of premishnaic readers; see Robert J. V. Hiebert, "Deuteronomy 22:28–29 and Its Premishnaic Interpretations," *Catholic Biblical Quarterly* 56 (1994): 203–20. Anderson also considers the act in Exod 22:16 to be consensual when she uses the term "seduction" (*Women, Ideology, and Violence*, 40).

46. Washington, "'Lest He Die in the Battle'," 211.

47. See Henry McKeating, "Sanctions against Adultery in Ancient Israelite Society, with Some Reflections on Methodology in the Study of Old Testament Ethics," *Journal for the Study of the Old Testament* 11 (1979): 57–72, here 70: "What I am suggesting, to put it in another way, is that the ethics of the Old Testament and the ethics of ancient Israelite society do not necessarily coincide, and the latter may not be represented altogether accurately by the former. Old Testament ethics is a theological construction, a set of rules, ideals and principles theologically motivated throughout and in large part religiously sanctioned. Were the principles by which real Israelites actually lived quite so closely determined by religious faith? It may be that they were, but we cannot without further ado assume so."

48. Neufeld, *Hittite Laws*, 194.

49. J. J. Finkelstein, "Sex Offenses in Sumerian laws," *Journal of the American Oriental Society* 86 (1966): 355–72.

50. Ibid., 359. The choice of translating the Sumerian verb into English as "to deflower" reflects an inherently androcentric perspective.

51. Ibid., 360.

52. Raymond Westbrook, "Adultery in Ancient Law," *Revue biblique* 97 (October 1990): 542–80, here 562.

53. In this very context, Westbrook ("Adultery," 548 n. 26) refers to Finkelstein's study.

54. The 1995 translation of ancient Near Eastern rape laws, edited by Martha Roth, exhibits a similar reliance on Finkelstein's work. The index of "Selected Legal Topics and Key Words" lists the category "sexual offenses," under which the following terms appear: "adultery and fornication, consent, defloration, flirtatious behavior, incest, procuring, promiscuity, rape and sexual assault, seduction, sodomy." Why these terms are part of the category of "sexual offenses" is clear only when one studies the history of scholarship. Still, it is hard to believe that adultery, consent, and flirtatious behavior appear as "sexual offenses" in the index of a 1995 publication. See Roth, *Law Collections*, 282.

55. Lafont, *Femmes, droit et justice*, 133.

56. Erich Ebeling and Bruno Meissner, eds., *Reallexikon der Assyriologie und Vorderasiatischen Archäologie* (Berlin/New York: de Gruyter, 1928–). Even the new edition, currently in preparation, has not yet published a volume with an article on "*Vergewaltigung*"; see also n. 68 below.

57. Yildiz, "A Tablet of Codex Ur-Nammu," 96.

58. Lafont, *Femmes, droit et justice*, 467. In the original French: "Si un homme a fait violence à l'épouse d'un jeune homme, qui n'était pas déflorée, et l'a déflorée, cet homme sera tué." The English is my translation from the French.

59. Yildiz, "A Tablet of Codex Ur-Nammu," 96–97.

60. For a discussion of the rape of enslaved women, see Lafont, *Femmes, droit et justice*, 144–45.

61. For an extensive discussion of classism in combination with androcentric co-optation of women in the Hebrew Bible, see Susanne Scholz, "Gender, class, and androcentric compliance in the rapes of enslaved women," *lectio difficilior: European Electronic Journal for Feminist Exegesis* 1 (2004): available at http://www.lectio.unibe.ch/04_1/Scholz.Enslaved.pdf.

62. Pritchard, *Ancient Near Eastern Texts*, 162.

63. Ibid., 171.

64. Finkelstein, "Sex Offenses in Sumerian Laws," 356.

65. Raymond Westbrook, *Old Babylonian Marriage Law* (Horn, Austria: F. Berger; 1988), 30. The terminology of "inchoate marriage" appeared initially in the early decades of the twentieth century; see Benno Landsberger, "Jungfräulichkeit: Ein Beitrag zum Thema 'Beilager und Eheschliessung'," in *Symbolae Iuridicae et Historicae: Martiono David Dedicatae*, ed. J. A. Ankum, R. Feenstra, W. F. Leemans (Leiden: E. J. Brill, 1968), 2:40–103, here 40–41.

66. Westbrook, *Old Babylonian Marriage Law*, 30.

67. Eckart Otto, "Rechtssytematik im altbabylonischen Codex Ešnunna und im altisraelitischen Bundesbuch," *Ugarit-Forschungen* 19 (1987): 175–97, esp. 184–85. For a discussion of Egyptian texts about adultery, see C. J. Eyre, "Crime and Adultery in Ancient Egypt," *Journal of Egyptian Archaeology* 70 (1984): 92–105.

68. Walter Kornfeld, "L'adultère dans l'orient antique," *Revue biblique* 57 (January 1950): 92–109, here 98 (my translation from the French original). Other examples are Rafael Yaron, "The Rejected Bridegroom (LE 25)," *Orientalis* 34, no. 1 (1965): 23–29, here 29. The article on adultery ("*Ehebruch*") in the German *Reallexikon der Assyriologie*, vol. 2 (1938) refers to more information about rape ("*Notzucht*"). The word *Notzucht* in vol. 10 refers readers to an article on *Vergewaltigung*, the contemporary German term for rape. The volume on words beginning with *v* has not yet been published (as of November 2009), although the publishers aim to complete the revised edition of the *Reallexikon* by 2011. For editorial comments on the new edition of the *Reallexikon*, see http://www.uni-leipzig.de/altorient/projektrla.html (accessed November 24, 2009).

69. Landsberger, "Jungfräulichkeit," 53, 56, 63–64.

70. Biblical law does not address such a case; see the omission in Lev 18:6–18. James E. Miller, however, claims that this case is included in the law that prohibits a man from having sex with a woman and her daughter "which effectively prohibits sex with either daughter or step-daughter"; see his "Sexual Offenses in Genesis," *Journal for the Study of the Old Testament* 90 (2000): 41–53, here 42.

71. See, for example, §156 of the Code of Hammurabi, MAL 55, or Deut 22:28–29, as discussed above.

72. Harry A. Hoffner, "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*, ed. Harry A. Hoffner, Alter Orient und Altes Testament 22 (Neukirchen-Vluyn: Neukirchener Verlag, 1973), 81–90.

73. Pritchard, *Ancient Near Eastern* Texts, 181. Roth (*Law Collections*, 282) lists MAL 9 as a rape law in the index but the meaning of this law is vague and not included here.

74. Lafont, *Femmes, droit et justice*, 137.

75. Raymond Westbrook, "Biblical and Cuneiform Law Codes," *Revue biblique* 92, no. 2 (1985): 247–64. An early publication supports the notion of rape being a problem in the ancient Near East; see Driver and Miles, *Assyrian Laws*, 37: "If it is true that so many laws argue so many sins, this offense [adultery] must have been rife in Babylonia and Assyria; for a large number of sections in the Babylonian code and in these laws are concerned with it."

76. Pritchard, *Ancient Near Eastern* Texts, 181.

77. Ibid., 182.

78. Ibid., 185.

79. Against Driver and Miles (*Assyrian Laws*, 52–53), who, on the basis of grammatical ambiguity, argue for the possibility that §55 describes either a rape or consensual sex and is followed by the law of §56 in which "the girl is the prime mover."

80. Other laws have different views about this matter; see §197 of the Hittite Laws and discussion of it below.

81. Guillaume Cardascia, *Les Lois Assyriennes* (Paris: Les Editions du Cerf, 1969), 252.

82. Driver and Miles, *Assyrian Laws*, 37; Cardascia, *Les Lois Assyriennes*, 249.

83. Pritchard, *Ancient Near Eastern Texts*, 196.

84. Neufeld, *Hittite Laws*, 194; Jost Grothus, *Die Rechtsordnung der Hethiter* (Wiesbaden: Otto Harrassowitz, 1973), 35.

85. For a similar law with a different assessment of the significance of the location, see MAL 5 and Deut 22:23–24 and the discussions above.

86. Richard Haase, "Bemerkungen zu einigen Paragraphen der hethitischen Gesetze (§§197/98, 95, 35, 37)," *Hethitica* 12 (1994): 7–10.

87. Ibid., 7.

88. *American Heritage Dictionary of the English Language*, 4th ed. (Boston: Houghton Mifflin, 2000).

89. Biblical legislation knows of incest and bestiality; see Lev. 18:6-18; 20:11-21; and Deut. 27:20-23.

90. Carol J. Adams, "Bestiality," in *Encyclopedia of Rape*, ed. Merril D. Smith (Westport, Conn.: Greenwood, 2004), 22–23.

91. Hoffner, "Incest, Sodomy and Bestiality," 83 n. 13.
92. Pritchard, *Ancient Near Eastern Texts*, 196–97.
93. Neufeld, *Hittite Laws*, 188.
94. Hoffner, "Incest, Sodomy and Bestiality," 82.
95. Neufeld, *Hittite Laws*, 53.
96. Ibid., 188.
97. Roth, *Law Collections*, 236.
98. Hoffner, "Incest, Sodomy and Bestiality," 83.
99. Ibid., 84.
100. Raymond Westbrook, "Biblical and Cuneiform Law Codes"; see also n. 37 above.
101. Other scholars also see this connection between the Christian right and the modern worldview; see, e.g., Schüssler Fiorenza, *Rhetoric and Ethic*, 42: "In spite of their critical posture, academic biblical studies are thus akin to fundamentalism insofar as they insist that scholars are able to produce a single scientific, true, reliable, and non-ideological reading of the Bible. Scholars can achieve scientific certainty as long as they silence their own interests and abstract from their own sociopolitical situation."
102. I owe the idea of connecting the epistemological imbalance in ancient rape law to the current (U.S.) sociopolitical and religious divide to Charles Nelson, professor emeritus of German at Tufts University, Boston, Massachusetts, during a conversation on November 6, 2004.

5. Gang Raping

1. Catharine A. MacKinnon, "Crimes of War, Crimes of Peace," in eadem, *Are Women Human? And Other International Dialogues* (Cambridge, Mass.: Harvard University Press, 2006), 158.
2. MacKinnon, "From Auschwitz to Omarksa, Nuremberg to The Hague," in eadem, *Are Women Human?* 178.
3. Maria B. Olujic, "Women, Rape, and War: The Continued Trauma of Refugees and Displaced Persons in Croatia," *Anthropology of East Europe Review* 13, no. 1 (Spring 1995), http://condor.depaul.edu/~rrotenbe/aeer/aeer13_1/aeer13_1.html. See also United Nations General Assembly, "Situation of human rights in Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia" (55th session; 20 October 2000), http://www.unhcr.org/refworld/country,,UNGA,,HRV,4562d8b62,3b00f57c10,0.html (accessed November 24, 2009).
4. Joshua S. Goldstein, *War and Gender: How Gender Shapes the War System and Vice Versa* (Cambridge: Cambridge University Press, 2001), 368.

5. Human Rights Watch, "Struggling to survive: barriers to justice for rape victims in Rwanda," http://www.hrw.org/en/reports/2004/09/29/struggling-survive (accessed November 24, 2009).
6. United Nations, *Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery and Slavery-like Practices during Armed Conflict*, Final Report submitted by Ms. Gay J. McDougall, Special Rapporteur (New York: United Nations, 1998), paragraphs 7–8.
7. United Nations General Assembly, "Resolution adopted by the General Assembly: 61/143 Intensification of efforts to eliminate all forms of violence against women" (30 January 2007): http://www.unescap.org/esid/GAD/Events/EGM-VAW2007/Background%20Papers/GA%20resolution%20on%20VAW.pdf (accessed November 24, 2009).
8. "Fact Sheets" are available online at http://www.un.org/en/women/endviolence/ (accessed November 24, 2009).
9. Patrick Worsnip, "U.N. Council Urges Action on Sexual Violence In War," Reuters, April 9, 2009, http://www.alertnet.org/thenews/newsdesk/N19485901.htm (accessed November 24, 2009).
10. See Point 4 of the UN Resolution 1820, http://www.un.org/Docs/sc/unsc_resolutions08.htm (accessed November 24, 2009).
11. Goldstein, *War and Gender*, 332.
12. Ibid., 371.
13. Amnesty International, "Burundi: No protection from rape in war and peace" (2007), www.amnesty.org (accessed November 24, 2009).
14. MacKinnon, "Crimes of War," 148.
15. MacKinnon, "Turning Rape into Pornography," eadem, *Are Women Human?* (see n. 1 above), 160–68. Further, in the chapter entitled "Rape, Genocide, and Women's Human Rights," she states: "Prostitution is that part of everyday nonwar life that is closest to what we see done to women in this [former Yugoslavian] war. The daily life of prostituted women consists of serial rape, recognized war or no war. The brothel-like arrangement of the rape/death camps parallels the brothels of so-called peacetime: captive women impounded to be passed from man to man in order to be raped" (ibid., 188).
16. Quoted in MacKinnon, "Genocide's Sexuality," in eadem, *Are Women Human?* (see n. 1 above), 221.
17. Ibid., 222.
18. Ibid., 225.
19. Ibid., 225–26.
20. Ibid., 226.

SACRED WITNESS

RAPE IN THE HEBREW BIBLE

SUSANNE SCHOLZ

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