Course Reading

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INTRODUCTION

THE CHARACTER OF ANCIENT NEAR EASTERN LAW

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Prolegomenon

The Ancient Near East and Legal History

Law has existed as long as organized human society. Its origins are lost in the mists of prehistory: we can only speculate as to what kind of law our early ancestors practiced. It was not until the advent of writing that lawmaking could leave durable traces, a record from which modern historians may reconstruct what were once living institutions. Writing was first invented toward the end of the fourth millennium B.C.E., in the ancient Near East. A few hundred years later, the earliest recognizably legal records appear. The ancient Near East is thus home to the world's oldest known law, predating by far the earliest legal records of other ancient civilizations, such as India or China.

The ancient Near East also has the distinction of being the cradle of the two great modern Western legal systems, the Common Law and the Civil Law, and in consequence of modern law in general.[1] Its influence has left few visible traces apart from the Hebrew Bible, the one relic that survived the collapse of its constituent civilizations and whose hold on the minds of Western lawmakers continues to this day. Rather, the connection is indirect, through the intermediary of the classical systems of Jewish, Greek, and Roman law. The legacy of these systems to the two great modern law traditions is

[1] By modern law I mean law based upon the Common Law or Civil Law traditions, as mediated by the Enlightenment of the eighteenth century and consequently characterized by restless innovation. The two traditions have been carried, in part by imperialism and in part by their own intellectual force, to virtually every corner of the globe. Today they are the basis, directly or indirectly, of the legal systems of most of the member states of the United Nations and of international law. The only other widely prevalent legal traditions are conservative systems: local customary law and religious law.

well known; the legacy of much more ancient cultures to classical law is only now coming to light.[2]

The law of the ancient Near East is by no means that of a single system; it is the product of many societies, with different languages and cultures, that flourished, declined, and were replaced by others over the course of thousands of years. This *History* is the first attempt to produce a comprehensive analytical survey of their law, through the collaborative effort of twenty-two scholars.

Scope and Structure

The *History* covers an area situated in what is now called the Middle East, extending from Iran to Egypt, and concentrated in an arc of territories sometimes known as the Fertile Crescent. It begins with the earliest intelligible legal records, from Sumer in the twenty-eighth century B.C.E., and ends toward the close of the fourth century B.C.E., after the conquest of Alexander had made the ancient Near East part of the wider legal world of the Hellenistic period.[3] Such are the variations in quantity and quality of sources that a neat division into separate legal systems, as in classical or modern legal history, is not feasible. Each chapter is designed to cover the sources of a geographical area often defined more in cultural or political terms than by the formal criteria of a sovereign legal system—a military outpost at Elephantine for example, or a trading colony in Anatolia. The chronological division is likewise based on cultural or political criteria current among historians or simply by virtue of the availability of archives. The lack of continuity in the sources means that a "history of events" is not possible. At most, a series of snapshots, scattered at random in time and place, can be compiled.

Within each chapter, the subject matter is divided into legal categories that cover all the structural and substantive aspects of a legal

[2] For example, the Roman concept of the universal heir was a fundamental characteristic of inheritance in the ancient Near East, traceable to the earliest sources. On a more specific level, the Talmud contains a rule that on divorce, a former widow receives half the amount of compensation to which a virgin bride is entitled (Mishna Ketuboth 1.2). That same rule is already found in a Sumerian law code from the third millennium B.C.E. (LU 9–10).

[3] All dates henceforth are B.C.E. unless otherwise stated. The chapters on Demotic Law and the Neo-Babylonian and Persian period contain some later material, reflecting the continuation of their legal traditions into the Hellenistic period.

system (excluding International Law, which is dealt with in separate chapters): the machinery of justice, such as the administration and the courts, and the rules that would be applied by those institutions in the resolution of conflicts. Within those parameters, all legal rules presented as such by the sources, whether real or ideal, are included. The question of their practical application is discussed later in this introduction and, where appropriate, in the following chapters. Institutions that would not be regarded as part of modern legal systems, such as divine courts and supra-rational evidentiary procedure, are taken into consideration if regarded by the societies in question as part of their normal machinery of justice. On the other hand, sacral law, i.e., structures and rules dealing with the cult, festivals, ritual purity, relationships between humans and divinities, etc., has been excluded, except insofar as it sheds light on non-sacral law.

Since the political map of the area was subject to many alterations over the long period of time under review, historians have adopted the convenient but anachronistic convention of dividing it into regions according to the provinces of the later Roman Empire: Mesopotamia, Anatolia, Syria, Palestine, and Egypt. This nomenclature is used here to group the chapters geographically into three sections that roughly coincide with major cultural spheres: Mesopotamia, Anatolia and the Levant (Syria-Palestine), and Egypt. The chapters are likewise arranged chronologically by millennium, juxtaposing the major cultural spheres in each of the three millennia. The division is not entirely artificial, since the end of the third and of the second millennia saw something of a hiatus in the flow of records, followed by major political and cultural changes. The close of the third millennium is marked by the demise of the Old Kingdom in Egypt and by the end of Sumerian as a living cultural force in Mesopotamia. The close of the second millennium sees the breakup of the club of great powers that had dominated the region, including the total destruction of the Hittite empire, to be replaced in the first millennium by a succession of superpowers: Assyria, Babylonia, and Persia. Culturally, the first millennium is witness to the gradual rise of Aramaic as a lingua franca and the spread of new writing systems: alphabetic scripts in Western Asia and Demotic in Egypt.

In total, the survey covers more than a score of legal systems (in the loose sense described above), based on different languages, cultures, and political regimes, scattered over a period of nearly three thousand years. Each chapter reflects the special expertise and approach

of the individual contributor, but at the same time it is hoped that the *History*'s standardized system of classification will enable the reader to compare a given legal institution with relative ease across the different systems and periods.

In the light of such variety and lack of continuity, it may well be asked whether the ancient Near East is an appropriate forum for this type of intellectual inquiry: whether it is a coherent subdivision in the history of human law. Is it possible to speak of "ancient Near Eastern law" in any meaningful sense? In my opinion it is (although my view is not shared by all historians of the ancient Near East nor even by all the contributors to this volume). Notwithstanding the autonomous nature of the different systems, they demonstrate a remarkable continuity in fundamental juridical concepts over the course of three millennia. Without wishing to press too far more recent historical models, such as the spread of Roman law or of the English Common Law, I would argue that all the ancient Near Eastern systems belonged in varying degrees to a common legal culture, one very different from any that obtains today. At the very least, they shared a legal ontology: a way of looking at the law that reflected their view of the world and determined the horizon of the lawmaker.[4] The question is bound up with the fundamental issue of the nature of the ancient legal sources.

1. Sources

In the context of a history of law, the term "source" has two meanings. In an historical sense, it refers to written records from which historians obtain evidence of legal rules and institutions. In a legal sense, it is those norms, written or unwritten, from which the courts drew authority for their decisions. (In modern law, the latter are items like statutes, precedent, and treaties.) From an historical point of view, the test of validity for a source is its credibility; from a jurisprudential point of view, the test is its authoritativeness. It is therefore necessary to consider the sources in turn from each of these two viewpoints—as historical records and as legal authority.

[4] For a contrary view, distinguishing between Israel and Mesopotamia, see Finkelstein, *The Ox That Gored*, 39–46.

1.1 *Historical Records*

1.1.1 *Distribution*

1.1.1.1 The vast bulk of our records come from Mesopotamia, in the form of clay tablets inscribed with cuneiform writing. The reason is the chance circumstance that clay, when baked or at least dried, is a very durable material. Paradoxically, the destruction of a city by fire would help to preserve the tablets under a mantle of ash and rubble until unearthed by the archaeologist's spade. Tens of thousands of legal records in this form have been excavated, and more are discovered every year. They are unevenly distributed over time, being concentrated mainly in two periods: the Old Babylonian period (nineteenth to sixteenth century) and the Neo-Babylonian/Persian period (sixth to fourth century).

1.1.1.2 In Syria and Anatolia, a growing number of cuneiform tablets have been discovered from the third and second millennia. In the first millennium, alphabetic scripts on perishable materials were adopted in these areas, which cease thenceforth to be a significant source of records. Some compensation is provided by the Hebrew Bible, a major source of law for Syria-Palestine of the first millennium. It differs, however, from other records in deriving from a continuous manuscript tradition, rather than excavation. Special problems arise from its not being a strictly contemporary source, especially as regards the chronology and practical application of the legal rules that it contains.

1.1.1.3 Records from Egypt are mostly in the form of papyri, with a necessarily small supplement of inscriptions from tombs, monuments, and temples. Due most probably to the accidents of preservation, their number is tiny until the Hellenistic period.

1.1.1.4 The uneven distribution of sources creates an innate distortion in any survey of ancient Near Eastern law. The focus of attention will inevitably fall on Mesopotamia, by reason of the sheer abundance of records available. Egypt had no less law in quantity or complexity, but large areas of it are lost to us or are represented by isolated pieces of evidence. Unevenness of distribution in the type of records available gives rise to further distortions.

1.1.2 *Type*

Two admittedly rough and sometimes contradictory criteria may be employed in assessing the credibility of the historical records. The primary criterion is whether they provide *direct or indirect evidence* of legal norms. The distinction is not a sharp one; it is rather a question of degree, depending on the origin of the document (public or private) and whether it expounds an actual norm or principle or merely alludes to one. A secondary criterion is the *self-consciousness* with which a source presents the law. Ancient sources (and not only ancient ones) are not necessarily neutral in their presentation of legal norms. Paradoxically, the most direct statement of a law may be a distortion, by reason of ideology, self-interest, or idealization. The more incidental a value judgment of the law in question is to the purpose of the source, the less it is likely to be biased in its report.

The various types of legal sources found in the ancient Near East are presented here in roughly descending order of directness.

1.1.2.1 *Decrees*

The source most closely identifiable with what we would think of today as statutes are royal decrees, at least those which were of general application. There are many references to such decrees, but only a few actual texts are preserved.

The earliest known text is from Sumer: the Edict of King Irikagina of Lagash, dating from the twenty-sixth century. It is not found in an independent document, but in the body of several dedicatory inscriptions as part of an historical narrative reciting the abuses of former times and the reforms undertaken by the king. The extant versions post-date the actual reforms by some years.

The Old Babylonian period has furnished the texts of three decrees, from kings of the Hammurabi dynasty. Two are fragments: the Edict of Samsu-iluna from the late eighteenth century, and an edict of an unknown king (Edict X). The most complete exemplar is the Edict of Ammi-ṣaduqa from the late seventeenth century, with twenty-two paragraphs preserved, including a preamble.

From Anatolia, the texts of two royal decrees have been preserved. The earlier is the Edict of King Telipinu, from the late sixteenth century. There are nine copies in Hittite and two fragmentary copies in Akkadian, all dating from several hundred years later. It is probable that Akkadian was the original language of the decree, which was then translated into Hittite. The later decree is the Edict of King Tudhaliyah IV from the late thirteenth century, which exists in one contemporary copy, in Hittite. Not royal, but apparently a decree, is a document containing rules concerning the assembly of an Old Assyrian trading colony (see 1.2.3.1 below).

From Egypt comes the Edict of King Horemheb (Eighteenth Dynasty), from the beginning of his reign, toward the end of the fourteenth century. It is in the form of an inscription on the Tenth Pylon at Karnak, but there were probably other contemporary copies. There is a preamble, a main section containing about ten provisions, and an encomium of the king's achievements in the matter of justice, possibly referring to further provisions.

1.1.2.2 *Instructions*

A special type of text found in the late second millennium is royal instructions. These are directives by the king to persons or classes of persons within the administration—civil, religious, and military—on the performance of their duties of office. They are mostly represented by Hittite texts, directed, for example, to the commander of the border guards, to princes, to governors, and to temple functionaries.

Comparable are a number of decrees from the palace of the Middle Assyrian kings concerning the conduct of members of the royal harem—wives, concubines and eunuchs.[5]

1.1.2.3 *Trial Records*

Trial records are academic or practical. The first category is represented by "model court cases" found in a handful of documents from Old Babylonian Nippur. The principal published exemplar records three trials: a dispute over an office, the seizure of a slave girl, and a homicide. It derives from a scribal school, and the homicide trial exists in several copies. The latter is the only trial record to document discussion of the legal grounds for the judgment, although a comparable discussion is found in the account of the trial of Jeremiah in the Bible (Jer. 26). All other trial records are records of fact: the

[5] A text from Nuzi (AASOR 16, no. 51) may be classified in the same genre, but contains only a single directive. It is a royal proclamation directed to palace slaves (which is more likely to mean simply royal officials than actual slaves), forbidding them to give their daughters into certain professions without the king's permission.

parties, the claims, significant evidence, and the verdict. They serve practical purposes, private or official.

The majority of cuneiform trial records were of civil disputes. They were drafted for the benefit of the successful litigant, to provide documentation of rights acquired as a result of the case. In most cases, the document was kept by the litigant. Sometimes only an interim record is made, of the claims and evidence, without the outcome. Their purpose is not certain but may be linked to ongoing litigation or to litigation that has been suspended, for some reason.

The hieratic ostraca from the tomb workmen's village at Deir al Medinah in Thebes (New Kingdom) contain many trial records. Scholars do not agree on whether they were official documents or memoranda for litigants.

Trial records from the Neo-Sumerian period, known as di-til-la ("case completed"), after the notation with which they typically end, differ slightly from later records in that they appear to have been an official record kept in official archives. Nonetheless, they concern mostly civil disputes and contain essentially the same information as later private litigation documents, which suggests that they were also designed to document private rights.

1.1.2.4 *Law Codes*

The "law codes" are a particular genre of literature, consisting of collections of legal rules. Although few in number, examples are found in various parts of the region and from all three millennia.[6] They are recognizable by similarities of style and content, although as physical records they are preserved in a number of different forms.

1. The Laws of Ur-Namma (LU), from Ur in southern Mesopotamia, in Sumerian and dating to around 2100.
2. The Laws of Lipit-Ishtar (LL), from Isin in southern Mesopotamia, in Sumerian and dating to around 1900.
3. The Laws of Eshnunna (LE), from a city of that name in northern Mesopotamia, in Akkadian and dating to around 1770.
4. The Laws of Hammurabi, from Babylon (LH), in Akkadian and dating to around 1750.
5. The Middle Assyrian Laws (MAL), from Assur, in Akkadian and dating to the fourteenth century.

[6] The major exception is Egypt, where no law code has been found. On the other hand, the late Demotic "Legal Code of Hermopolis" (= P. Mattha) has features which suggest that the same literary tradition existed (see 1.1.2.5 below).

6. The Neo-Babylonian Laws (NBL), from Sippar in central Mesopotamia, in Akkadian and dating to the seventh century.

The examples from Mesopotamia are all written in cuneiform.

7. The Hittite Laws (HL), from Anatolia, written in cuneiform script in Hittite and dating between the sixteenth and the twelfth centuries.

Two codes (or possibly fragments of codes) have been identified in the Hebrew Bible:

8. The Covenant Code (CC), found in chapters 21 and 22 of Exodus.
9. The Deuteronomic Code (DC), scattered over chapters 15–25 of Deuteronomy, with the main concentration in chapters 21 and 22.[7]

There is no consensus among scholars as to the date of the biblical codes, but the majority would place the Deuteronomic Code in the seventh century.

The best known of the codes, LH, is a large diorite obelisk, at the top of which is carved a representation of King Hammurabi before Shamash, the god of justice. Covering the rest of the stone is an inscription consisting of a prologue, the collection of legal rules, and an epilogue. It was one of several such obelisks set up in temples in various parts of the kingdom. It was recovered by archaeologists from Susa, whither it had been brought as booty at some point. The Laws of Ur-Namma and of Lipit-Ishtar have the same tripartite structure and were apparently copied from monuments. The original context of the Laws of Eshnunna was probably the same, although no epilogue is preserved and it begins with a date rather than a prologue. LU, LL and LE are preserved in copies on clay tablets which were, in fact, scribal exercises, forming part of the school curriculum of trainee scribes. Similar versions exist of sections of LH, which was excerpted and copied as a regular part of the scribal curriculum until well into the first millennium. The Neo-Babylonian Laws are likewise a scribal copy.

The Middle Assyrian Laws, on the other hand, give no indication of having originally had a monumental form, nor are they a school exercise. They are associated with royal archives and may

[7] Scholars have associated scattered laws found in Leviticus and Numbers with a similar law code, mostly concerned with sacral law (Priestly Code). The Ten Commandments do not belong to this genre; they are a unique source, perhaps not to be associated with positive law at all.

well have served some official purpose. It is true that they exist in an eleventh century copy of a fourteenth century original, but it is not clear that this was a school activity. A further copy was made in the seventh century for the library of King Assurbanipal.

Similar considerations apply to the Hittite Laws, whose text history is even more complicated. They exist in many copies, all apparently from the royal archives. Four are Old Hittite, dating to the sixteenth century; the rest are Middle Hittite or New Hittite (fifteenth to twelfth centuries). There is thus some revision of language between the versions. Certain versions also record changes in the law.

The biblical collections are placed in a narrative frame (the journey of the Israelites to the Promised Land and the revelation on Mount Sinai) designed to establish their divine origin in the distant past. Although it is unlikely that they were created together with the frame narrative, the context in which the individual codes were originally compiled is not known. The manuscript witness itself cannot be traced back further than the Dead Sea Scrolls of the first century B.C.E.

1.1.2.5 *Lexical Texts*

A form of intellectual activity for cuneiform scribes was the compiling of "dictionaries," lists of Sumerian words and phrases together with their Akkadian equivalents. These were collected in series, according to subject matter—for example, lists of flora, fauna, and types of stone—which came to form a canon of scribal learning. Among the canonical series were lists of legal terms and phrases. These are found in two main sources:

1. The lexical series *ana ittišu* (MSL 1), from the library of King Assurbanipal (seventh century). Dedicated exclusively to legal material, it contains many standard clauses that scribes might be expected to use in drafting legal documents. It also contains small narratives that provide an explanatory context to the clauses.
2. Tablets I and II of the canonical series ḪAR.ra = *ḫubullu* (MSL 5), most copies of which come from Assurbanipal's library but which has forerunners dating back to the early second millennium. Their content overlaps that of *ana ittišu*.

An earlier variant of the same genre is a number of scribal exercises in Sumerian from the early Old Babylonian period.[8] They contain a mixture of paragraphs: some appear to be excerpts from a law code; others are clearly clauses from standard contracts.

[8] See LOx, SLEx, and SHLF in Roth, *Law Collections* . . ., 40–54.

The same mixture of law-code paragraphs and contractual forms is found in the Demotic Law Code of Hermopolis (P. Mattha), from Egypt of the Hellenistic period. The document is evidence that a similar scholastic tradition must have existed in Egypt, earlier manifestations of which have not survived.

1.1.2.6 *Transactional Records*

The overwhelming mass of legal sources consists of records of legal transactions—contracts, testaments, grants, treaties, etc. Most of these are in Sumerian or Akkadian from Mesopotamia and Syria, but a sprinkling of documents is found in other languages and scripts, such as hieratic, Demotic, and Aramaic. On the one hand, these documents are a highly credible source of evidence about the law; they are a contemporary record of the law in practice, untrammeled by any literary or ideological distortions. On the other, it should be remembered that private contracts and comparable transactions do not make law; they function within a framework of the existing laws. A contract is not direct evidence of legal norms but of the reactions of the parties to those norms. A contract seeks to exploit laws, it may even to try to evade laws, but (except perhaps for international treaties) it cannot make or alter laws by itself. The norms of positive law remain a shadowy presence behind the terms of the individual transaction, still to be reconstructed by the historian.

1.1.2.7 *Letters*

Both public and private letters may be a source of law. If the sender is a person in authority acting in his official capacity, then the letter can be a direct source of law—a judgment, directive, command, or response regulating the rights of an individual or group of persons. The only qualification is that the very individuality of the letter's focus may leave obscure the legal principles on which the authority's decision was based. If the sender is a private individual, then the evidence it provides, while often of great value, is indirect. Nonetheless, a complaint or petition may invoke a particular law, and many references, conscious and unconscious, to laws are found in private correspondence. This is particularly so for the merchants of the Old Assyrian period, whose copious correspondence provides deep insight into the legislative and judicial activity of the authorities that governed them.

1.1.2.8 *Historiographical Documents*

A certain amount of legal material is to be gleaned from the monumental inscriptions in which kings recounted their exploits, some of which related to their legal activities. The same is true of annals, autobiographies and the like (e.g., the statue of Idrimi of Alalakh and the apologia of Hattusili III of Hatti), and of the historical books of the Hebrew Bible. The defect that these sources share is that they are tendentious literature, and the criterion of self-consciousness as regards the law needs to be applied.

1.1.2.9 *Literature*

The rich storehouse of myth, legend, and wisdom from the literatures of the ancient Near Eastern civilizations also contains a good deal of legal material. The obvious caveats apply as to their connection with the reality of ordinary mortals.

1.2 *Legal Authority*[9]

1.2.1 *Written and Oral*

Sources as historical evidence of law are of necessity documentary; sources as legal authority may be written or oral. Therefore, before listing the sources of legal authority, it is necessary first to consider the relationship between orality and writing in ancient Near Eastern law.

In developed legal systems, writing may play a number of roles. It may be necessary to the validity of a legal act, as for example in wills, treaties, and legislation. In these cases it may be said that the document is the legal act. While not necessary, a written document may, when used, still constitute the legal transaction, as where a contract is negotiated purely by correspondence. It may be irrefutable evidence of an oral legal act, as is a marriage certificate or an affidavit. Finally, it may be mere evidence of an oral legal act, cogent evidence indeed, but no more compelling than other forms of evidence, such as the minutes of a meeting.

In the ancient Near East, although writing was widely used to document legal acts, orality played a far more important role than in modern systems. Speech acts, ceremonies, and solemn oaths were

[9] See the essays in Theodorides, ed., *La Formazione* . . .

the means used to create legal obligations. Except perhaps toward the very end of our period, documents had no independent role in this regard. The thousands of "contractual" documents preserved are not contracts as such; they are protocols of oral transactions made usually before witnesses. The names of the witnesses to the oral proceedings were then appended to the document to ensure its authenticity but also to provide a reference should a dispute arise. The court would normally rely on the document as decisive evidence, but that evidence could be rebutted by the testimony of the witnesses to the transaction. Even international treaties, some of which were committed to writing on tablets of silver and gold, derived their authority from the solemn oaths taken by the parties before witnesses. In this case, the documentation may have reached the level of irrefutable evidence, but it was still no more than evidence of an oral proceeding.

The situation of legislation and administrative orders is less clear. A letter from the king giving an order was an oral statement dictated to a scribe, to be repeated to the recipient by another scribe. Laws were committed to writing in monumental form or in multiple copies for distribution and are sometimes referred to as "the word of the stele/tablet." They could equally be referred to as "the word of" the lawgiver. The ambiguity of the evidence is epitomized by HL 55, which records that in response to a delegation of feudal tenants, "the father of the king [stepped] into the assembly and sealed a deed (regarding?) them: 'Go! You shall do like your colleagues.'" Was the procedure therefore oral, or written, or both?[10]

Accordingly, in assessing the sources of legal authority in the ancient Near East, we must not only take into account oral as well as written forms. We must also recognize that the document in which the source is now found would not necessarily have played the same role as in modern law and may not have been identical with the authoritative source itself.

[10] The historical preamble of the Edict of Telipinu is separated from the normative rules by the statement: "Then I, Telipinu, called an assembly in Hattusa" (§27:34). Neither here nor in HL 55 is the particle of direct speech used for the decree.

1.2.2 *Precedent and Custom*

There is some evidence that previous decisions were regarded as a source of law. In the epilogue to his law code, Hammurabi advises one who is wronged to consult the list of his "just judgments" on the stele so as to know his rights. Etiological narratives in the Hebrew Bible trace the origin of certain rules of law back to an earlier judgment in an individual case, which then became a rule of universal validity (Num. 27:1–11; 1 Sam. 30). In the trial of Jeremiah (sixth century) the acquittal of an earlier prophet on a similar charge is cited before the court in his favor (Jer. 26:17–19). Otherwise, citation of cases before a court as in modern systems is not attested.

Much of the law applied by the courts was probably customary law, derived not from known cases but from timeless tradition. The Hittite Instructions to the Commander of the Border Guard demonstrate respect for local custom (iii 9–14):

> Furthermore, the Commander of the Border Guard, the town governor, and the elders shall judge cases carefully and bring them to closure. As from olden times, as the binding rule has been followed regarding abomination in the districts: in any town in which they have practiced execution, let them continue to execute; in any town where they have practiced banishment, let them continue to banish. . . .

1.2.3 *Legislation*

Legislation is used here to include all orders issued by the sovereign, his officials or the local authorities. Most of these would not meet the criterion set out by John Austin for legislation:

> . . . where it obliges generally to acts or forbearances of a class, a command is a law or rule. But where it obliges to a specific act or forbearance, or to acts or forbearances which it determines specifically or individually, a command is occasional or particular.[11]

The ancient Near Eastern orders are ad hoc commands, mostly concerning the rights of individuals, or temporary expedients to meet

[11] Austin, *The Province of Jurisprudence Determined* (1832), 25–26. The example given by Austin is of great relevance: "If Parliament prohibited simply the exportation of corn, either for a given period or indefinitely, it would establish a law or rule: a kind or sort of acts being determined by the command, and acts of that kind or sort being generally forbidden. But an order issued by Parliament to meet an impending scarcity, and stopping the exportation of corn then shipped in port, would not be a law or rule, though issued by the sovereign legislature."

an immediate problem. As the scope of the orders widens to the level of universal decrees, so their number diminishes precipitously, and it is clear that legislation in the Austinian sense was not a major source of new law.

Three main areas are covered by general decrees: constitutional law, administrative law, and economic activity. A single decree may contain provisions concerning more than one area; the Edict of Irikagina covers all three.

1.2.3.1 In the sphere of constitutional law, the Edict of Telipinu lays down rules for succession to the Hittite throne. The Edict of Irikagina restructures the royal control of some of the temples. A unique document from the Old Assyrian trading colony at Kanish, the "Statutes of the Colony," sets out rules for convening the assembly of the colony and for its making decisions.

1.2.3.2 A source of administrative law was the genre of royal instructions, noted above, which were issued to various high officials in the administration but also to such purely household institutions as the Hittite royal bodyguard and the Assyrian royal harem. The administration also figures prominently in reform edicts, which contained provisions directed at corrupt and oppressive officials (e.g. Irikagina, Horemheb). Regulation of operations under the control of the palace is also a concern, such as the saffron harvest mentioned in the Edict of Horemheb and the royal granaries mentioned in the Hittite decrees.

1.2.3.3 Decrees regulating economic matters had a wider scope, affecting ordinary subjects directly. It was the practice of rulers to issue decrees fixing the prices of commodities and services. Royal inscriptions boast of this activity, the tariffs apparently being affixed in a public place such as the city gate, but unfortunately no actual examples have been preserved.[12] Nor do we know how strictly they were applied by the courts or what the sanctions were for disobedience.

The broadest and most complex form of legislation was debt-release decrees, which cancelled not only taxes and debts owed to the crown but also debts arising out of private transactions, as well

[12] The law codes contain some price lists; see below.

as land and persons pledged, sold, or enslaved in direct consequence of debt. They could apply to particular cities or to the population as a whole; one manner of referring to them is to say that the king has "established equity for the land." While most of our information, and actual texts, comes from the Old Babylonian kings, it was a widespread practice, to which there are copious references from all parts of the region with the exception of Egypt. The text of a Hittite decree of Tudhaliyah IV, although mainly concerned with administrative reforms, includes several debt-release provisions. The Bible records a decree by Zedekiah in the sixth century releasing debt slaves during the siege of Jerusalem (Jer. 34:8–10). There are references in litigation, letters and petitions to the effects of a debt-release decree, but the most frequent mention is in contracts. A clause is often inserted in the contract to ward off the effects of a decree, by stating that the transaction has taken place after the date of the decree or affirming that it is outside the purview of the decree. A petition from the Old Babylonian period reveals that a whole administrative apparatus was established to execute the provisions of the decree: peripatetic commissions of judges and high officials examined private contracts to determine whether they fell within the terms of the decree or not (AbB 7 153).

Debt-release decrees are the clearest example of legislation as we would understand it today, issuing directly from a sovereign and applied by the courts. Their limitation from a modern point of view is in their duration. Being for the most part retrospective in effect, they did not do what legislation most typically seeks to achieve, namely establish norms to control conduct in projected future situations.[13]

1.2.4 *Law Codes*

The law codes are considered separately here for two reasons: firstly because they are so important and secondly because it is a matter of considerable debate among scholars whether they were normative legislation at all.[14]

[13] Two sets of laws in the Bible, Lev. 25:8–16, 23–54 and Deut. 15:1–2, purport to do just this, providing for release of debts, land, and slaves in the future, every seven and fifty years. The impracticality of these measures is obvious, and most biblical scholars dismiss them as utopian.

[14] The scholarship is reviewed in Fitzpatrick-McKinley, *Transformation . . .*; Renger, "Noch einmal . . ."; and in the essays in Lévy, ed., *Codification . . .*

1.2.4.1 The provisions of the law codes are direct statements of legal norms. Unlike demonstrably legislative sources such as decrees and instructions, they cover most areas of legal relations between individuals. They are also widely distributed in time and place and, at the same time, closely related in form and content.

1.2.4.2 The form is casuistic. The law is expressed as a series of individual cases, the circumstances of which are put into a hypothetical conditional sentence, followed by the appropriate legal response in the particular case. For example:

> If an ox gores an ox and causes its death, the owners of both oxen shall divide the value of the live ox and the carcass of the dead ox.

While there is some variation within the framework of this form, for example, the protasis can begin "a man who . . .," or the whole rule can be cast as a direct order ("a loan of fungibles shall not be given to . . . a slave"), the approach is always the same.

1.2.4.3 As regards the content, a large number of the same cases recur in different codes. They are not necessarily presented in the same language, nor do they always have the same solution. Furthermore, they tend to be presented in sets of variants, only some of which overlap. For example, the case above of the goring ox comes from LE, which also has a variant where the victim is a person. Both variants are found in CC, but in LH only the human victim. All three sources break the identity of the human victim down into the same set of further variants; whether the victim is a man, a son, or a slave. They also share the use of the same legal distinction: between an owner who was warned by the local authorities of his ox's propensity to gore and one who was not.

1.2.4.4 The common features of these codes mark them as originating in the sphere of Mesopotamian science. The method of Mesopotamian scientific inquiry was to compile lists. We have seen above the use of this technique for lexical purposes and its application to legal words and phrases. A more sophisticated type of list attempted to classify the product of theoretical disciplines—medical symptoms and their diagnosis, omens and their significance, and conflicts and their legal resolution—by presenting them in casuistic form, a hallmark of Mesopotamian scientific style. Lists of this type consisted of hypothetical cases grouped in sets of variants.

For jurisprudence, the starting point was a legal case, perhaps a real case that had been judged by a court (as in the Nippur trial reports above) or a fictitious case invented for the sake of argument. Preferably it was a case that involved some delicate or liminal legal point that would provide food for discussion and throw into relief more commonplace rules. The case was then stripped of all non-essential facts (e.g., the names of the parties, circumstances not relevant to the decision) and turned into a theoretical hypothesis, with its legal solution. Details of the hypothetical circumstances were then altered to create a series of alternatives, for example, that would change liability to non-liability, or would aggravate or mitigate the penalty. That series of variations around a single case formed a scholarly problem, which could be used as a paradigm for teaching or for further discussion. Over time, a canon of traditional problems emerged that for several millennia was passed on from school to school and society to society.

1.2.4.5 Notwithstanding their small number, therefore, the law codes point to a significant stream of juridical scholarship running through the academies of the ancient Near East. In Mesopotamia, most of this scholarly activity took place in the scribal schools, where the cuneiform script was taught. Thus it is not surprising to find the law codes in school copies. They may well represent only a small sample of the tradition, written or oral, from which they are drawn. As we have seen, however, the codes are all associated with rulers, human or divine, some actually being promulgated by named rulers. Did this transformation also convert them into authoritative sources of law, binding on the courts, and was their transmission as much from one legal system to another as from one society to another? This was the assumption of scholars when the cuneiform codes were first discovered and continues to be the view of a number of legal historians. It was challenged, however, by certain Assyriologists who regarded them as no more than intellectual exercises, given their affinity to the scholastic products of the scribal schools.[15] As for the monumental aspect of LH (and, by implication, other codes in monumental form), it has been argued that its purpose was a typical one

[15] The seminal article was by Kraus, "Ein zentrales Problem . . .," elaborated by Bottéro, "The 'Code' . . ."

of monumental royal inscriptions, namely propaganda. The stela, set up in a temple, was intended to demonstrate to public opinion, human and divine, that Hammurabi had fulfilled his divine mandate to be a just king.[16]

The debate on the law codes turns on two issues: whether the literary contexts in which they are found, scribal schools and royal monuments, determine their function, and whether the absence of reference to their practical application in any of the sources is evidence that they were not applied by the courts. Arguments from silence should always be treated with caution, but in this instance it is a very powerful one, given the contrast with contemporary evidence for the practical application of known legislative acts such as royal decrees. At the same time, the silence of the sources is strictly true only for the third and second millennia; from about the seventh century onwards changes are noticeable in the way certain sources refer to the codes. They may point to a conceptual change that affected not only law codes but legislation in general. The very fact of that change suggests that assumptions should not be made about ancient Near Eastern law on the basis of later, familiar models.

1.2.5 *Citation and Authority*

References to decrees are to their existence; they are not citations of the text. The closest that the early sources come to citation are references to actions or decisions being in accordance with the words of the stele or tablet. By contrast, in the classical systems of the Hellenistic and Roman periods, we can see an explosion of citation. The exact words of the statute are quoted, analyzed and obeyed by the courts, or in the inverse process, a legal ruling is justified by reference to the exact words of the statute. The reason is that, as in modern law, the words of the text have become the ultimate point of reference for the meaning of the law. The text is both autonomous, meaning that once a law is promulgated, it is regarded as the lawgiver itself, and it is exhaustive, meaning that what is not in the text is not regarded as law (unless covered by another text). As a result, interpretation of statutes becomes from the Hellenistic period on a specialized form of close reading, usually requiring the services of experts trained in the law—jurists.

[16] Finkelstein, "Ammi-ṣaduqa's Edict . . ."

In the ancient Near East, on the other hand, a term for jurist is not found, not even in the long lists of professions compiled by the scribes. Those responsible for the law—judges, officials, or parties—did not "read" what legal authorities they had in the same way as we do. They did not engage in interpretation of the exact words of the text because the text was regarded neither as autonomous nor as exhaustive, irrespective of whether it was a contract, a decree, or a law code.

If a reason is to be sought for the difference, it probably lies in the realm of scientific thought. Inasmuch as the formulation of law depends upon a system of abstract reasoning, it is evident that the jurisprudence of a given society cannot be more advanced than its general scientific logic. The "science" of the ancient Near East was by the standards of Aristotelian logic a proto-science. It lacked two vital factors: definition of abstract concepts and vertical categorization (i.e., into two or more all-embracing categories, which can then be broken down into sub-categories). Instead, it has been dubbed a "science of lists," the concatenation of endless examples, grouped suggestively in associated sequences but incapable of ever giving an exhaustive account of a subject. Hence the casuistic nature of the law codes.

Just as a law code could never be exhaustive, so no particular text could ever be an exhaustive statement of a rule, even when it took the form of a peremptory order, because the mode of thinking was in examples, not principles. And without definition of its terms, application of a rule could only be approximate—by analogy, inference, or even looser associations.

Signs of a transition from this archaic jurisprudence to the system familiar to us begin to appear in the seventh century, not from the ancient centers of power in Mesopotamia and Egypt but on the periphery. References are found in the Hebrew prophets to obeying the law (*torah*) of God as an independent body of rules rather than simply the will of God. The autonomy of the law reaches a dramatic climax in the book of Daniel (written in the second century), according to which the king's decree, once written down, might not be changed, even by the king himself (Dan. 6:9). Between these two poles, there are tentative moves toward citation of the words of the legal text, as illustrated by a glossator's comment on an historical incident:

> But he did not put to death the sons of the murderers, as it is written in the book of the law (*torah*) of Moses, that God ordered: "Fathers shall not be put to death for sons and sons shall not be put to death for fathers . . ." (2 Kings 14:6 = 2 Chron. 25:4, citing Deut. 24:16).

Somewhere within this transition also lies the whole conceit of the Bible's historical narrative, assimilating the paragraphs of several codes to a single act of legislation, but projecting that act of legislation back into the distant past. It is a conceit mirrored in contemporary Greek narratives, attributing the laws of particular cities to the single legislative act of a heroic ancestor. The change in the way law was regarded points to a revolution in ideas that takes us beyond the strict limits of the ancient Near East, being centered upon the Eastern Mediterranean in the mid-first millennium. For the purposes of our history, it is the archaic system that we are concerned to describe, a system that needs to be understood on its own terms, without the overlay of later legal developments.

1.3 *The Archaic Legal System*

1.3.1 *Legal Science*

The contribution of the "science" of the law codes should not be underestimated. Statutes, in the form of edicts, orders, and decrees, would have played only a minor role in the work of a court. As we have seen, most would have dealt with narrow matters of immediate interest only; they were not a source of central tenets or basic principles of the law. Likewise, the role of precedent is likely to have been limited. Our only certain example, in the trial of Jeremiah mentioned above, is a case from recent memory adduced as a persuasive analogy, not a binding rule. The bulk of the law would have been customary, and it is here that the law codes, either in the written forms that we possess or as a larger oral canon from which the extant codes were drawn, could serve a vital function. Their achievement was to constitute an intellectualization of the amorphous mass that would have been customary law. They concretized experience in the form of individual but objectivized cases, extended its scope by analogy and extrapolation (a method still used by jurists today, especially in the Common Law tradition), and thus created a critical mass of paradigms which, collected in sequences, could infer, if they could not express, underlying principles of law and justice. Thus the parameters of liability for dangerous property, although they

could not be defined, could at least be demarcated by juxtaposing cases where there was liability for the goring ox with ones where there was not, or by juxtaposing the penalties for a goring ox with those for a vicious dog and a collapsing wall. In this way, they presented the court not with a text to be interpreted but with a font of wisdom to be accessed. We do not know whether they lay directly before the judges or influenced them indirectly as part of the expected knowledge of the educated. In either event, they offered contemporary courts and rulers a middle ground between a vague sense of justice and mechanical rules.

1.3.2 *Continuity*

It is generally assumed by scholars that the law must have changed and developed considerably over so long a period of time as is covered by this *History*. Such assumptions should not be made without examining closely the evidence, for fear of falling into the trap of anachronism. Modern law changes at a frenetic pace, but only in a desperate attempt to keep up with the pace of technological, economic, social, and ideological changes in society as a whole. Moreover, an immense investment of intellectual resources is dedicated to the task of reform, through jurists, officials, and institutions.

Different conditions prevailed in the ancient Near East. The earliest legal records come from highly structured Bronze Age urban societies that had already been in place for hundreds of years. Their basic features underwent no radical change for the next three millennia, nor did their social or economic structure, in spite of repeated invasions and new demographic elements. Technologically, the Persian empire was little more advanced than the Sumerian city states, save for the smelting of iron.

The same is true of intellectual development. The invention of writing may have had some impact on the law, but if so, it predates our legal records and did not continue to have any noticeably innovative effect. (As we have seen, the written word remained auxiliary to the spoken in legal practice.) The proto-science that we have discussed was already well established at the beginning of the third millennium. One achievement that remained beyond the grasp of a casuistic-based jurisprudence was radical reform or restatement of the law. The ability to express the law differently through definition, categorization, broad statements of principle and similar intellectual tools is required and, as we have seen, such tools were lacking for

almost all of the period in question, until the mid-first millennium.[17]

Empirical evidence supports the theoretical picture. The huge quantity of records in cuneiform give us a reliable control, and the most striking feature of the cuneiform legal material is its static nature. The first legal documents reveal a mature system that had been developed hundreds, perhaps thousands, of years earlier. The basic pattern of contractual transactions found in the early Sumerian legal documents survives, differences of detail notwithstanding, throughout the cuneiform record. Continuity is no less evident in the law codes, where the same rules, tests, and distinctions recur in codes hundreds of years apart.

1.3.3 *Connections*

The law codes are not confined to a single culture. Their wide dispersal beyond the bounds of Mesopotamia attests to the intellectual power of their methodology and ideas. They are only one part of the spread of Sumero-Akkadian learning through the medium of cuneiform, which by the second millennium dominated all parts of the region except Egypt, which also did not remain entirely unaffected. The dominance was particularly strong in law, as attested by the universal practice in non-Akkadian-speaking cities of drafting legal documents not in the native language but in Akkadian. In areas where cuneiform prevailed, therefore, it is reasonable to speak of a common legal culture, at the level of legal science, both in its theoretical and practical manifestations.

It is possible to do so also beyond the sphere of cuneiform culture. The law codes of Israel in the first millennium are deeply embedded in the cuneiform law code tradition. Part of their dependency may be attributed to the conquest of the region by Mesopotamian powers, Assyria and Babylonia, but part has older roots. Even Egypt does not escape. For example, the technical phrase "his heart is satisfied" may be traced in contracts across the cuneiform

[17] It is no coincidence that during the first millennium major intellectual and institutional shifts characteristic of a so-called "axial age" occur, with the rise of monotheism, skepticism, and republican and democratic forms of government (see Jaspers, *Vom Ursprung* . . ., chap. 1). Developments in the law follow, as ever, with some time lag. For a trenchant critique of this "developmental" approach, see Roth, "Reading Mesopotamian Law Cases . . ." This writer cheerfully admits to being a developmentalist.

record from Sumer to the Persian period, at which time it is also to be found in Egypt, in Aramaic and Demotic contracts from Elephantine.[18] The connections may be more complex than a simple surface transmission. Special contractual clauses change over time, but some surprise us by reappearing in unconnected places, for example, a penalty clause from mid-third millennium Sumer disappears, only to resurface in mid-second millennium Nuzi.[19]

A common legal culture is, however, also discernable at a deeper level, that of structures and concepts. The judicial use of the oath is the same for all societies of the region, at all periods. The structure of inheritance is essentially the same, despite a wide variety of local customs on matters of detail. The Adoption Papyrus, which is virtually the sole adoption document from New Kingdom Egypt, reveals a conception of inheritance, family property, adoption, and the use of legal fictions that is entirely in accord with that of its counterpart systems in Mesopotamia. Doubtless certain similarities may be dismissed as inevitable coincidences in agricultural societies of a certain level of technology, comparable to developments elsewhere, such as in China or South America. Yet the correlations are too many and too specific to speak in terms of comparability rather than continuity. At the deeper level, however, it is impossible to identify any particular path of transmission, whether through trade or similar contacts and whether in historical times or much earlier.

In conclusion, perhaps the best way to describe the common legal culture of the ancient Near East is negatively. The different legal systems were indeed different. They were independent; they had rules peculiar to themselves and their own internal dynamic. Laws changed and developed within individual systems, if not at the pace or in the mode familiar to us from modern law. Nonetheless, it is impossible to say of any legal system from any place or period within the parameters set by this history, that its laws come from a conceptual world alien to the others. The same finding would not hold if we compared its laws with a classical or modern legal system. The chapters of this *History* will deal with each individual system on its own terms. The remainder of the introduction will attempt to summarize those aspects that, in my opinion, they have in common.

[18] Traced by Muffs, *Studies* . . .

[19] See Hackett and Huehnergard, "On Breaking Teeth."

2. Constitutional and Administrative Law

In the conceptual universe of the ancient Near East, there were three spheres of government: divine, state, and local. The divine and the local sphere shared the characteristic of being essentially collective. There could be a leader—the local mayor or the most senior god—but he was still one of the council, primus inter pares, and decisions were given in the name of the collectivity—the city or the gods, not the leader.[20] For the state, by contrast, the natural form of government was considered to be monarchy, with the king situated alone above his subjects and the rest of his administration.

2.1 *The King*

2.1.1 The king in constitutional terms was head of a household consisting of the population of the state. The state, unlike the town or village, was not seen as an autonomous entity nor the king merely as its representative.[21] Rather, the king was the embodiment of the state. He is sometimes called the master of his subjects and they his slaves, but this attribute has political rather than legal consequences. The king likewise may be referred to as the owner of his state's territory, but his ownership likewise tends to be political or residual, although kings did own large estates in their own right.

2.1.2 The king's right to rule, his legitimacy, derived from two competing sources: selection by the gods and dynastic succession. The first is exemplified by the Sumerian king Gudea's boast that the god had chosen him from among 216,000 people; the second by the Hittite king Telipinu's constitutional edict regulating the hereditary order of succession to the throne. Whereas the hereditary principle could be overridden by divine selection (a doctrine eagerly espoused by usurpers such as Hattisili III, who took the throne of Hatti from his nephew, and David, who took the throne of Israel from Saul's son), the opposite was not true; accession by hereditary right had, at the very least, to be ratified by the gods.

[20] Myths involving the pantheon contain many variations: between periods with no leader at all to periods when one god assumes supreme power. The council, however, is always the basic form of government.

[21] Note that the Old Assyrian ruler, who was (in theory) on a par with his people and their mere representative, was not called king but "steward" (*waklu*). Later Assyrian rulers, who were conventional kings, also retained this title as a conceit.

2.1.3 Moreover, continued legitimacy depended on the king fulfilling the mandate that the gods assigned to him, the most important element of which from the legal perspective was the duty to do justice. The justice in question is expressed by pairs of terms in Akkadian (*kittum/mīšarum*) and in Hebrew (*mišpaṭ/ṣedaqah*), the first member reflecting respectively its static aspect of upholding the existing legal order and the second its dynamic aspect of correcting abuses or imbalances that have invaded the system. In particular, the king was expected to protect the weaker members of society, such as the poor, the orphan and the widow, against the stronger. In Egyptian, the same motif is expressed through the wider concept of cosmic order (*maat*), of which justice was a part.[22]

2.1.4 The king, therefore, was not in law an absolute ruler. Although not answerable to a human tribunal, he was subject to the jurisdiction of the gods. Failure to fulfill his divine mandate could lead to divine punishment, which might affect not only himself but also his entire kingdom. As a Neo-Assyrian text puts it: "If a king does not heed justice, his people will be thrown into chaos and his land will be devastated." Although in theory a matter for divine justice alone, the king's malfeasance could in practice provide retroactive justification for rebellion or usurpation of the throne.

2.1.5 The king's constitutional role was not affected by divine kingship. In Egypt, this concept attached as a matter of routine to the office, not the individual. The same is true even in those few cases in Egypt and Mesopotamia where a king was deemed personally a god, in that he had a divine cult of himself during his lifetime. Such kings are still found worshiping the gods. It should be remembered in any case that the pantheon had a hierarchy too: the Egyptian king was explicitly referred to as a "junior god" (*nṯr nfr*).

2.2 *The Legislature*

2.2.1 The king was the primary source of legislation. If advisers were consulted beforehand, or if officials drafted the text and issued it in his name, they had no legal role and have left little or no trace

[22] See Foster, "Social Reform . . ."; Morschauser, "Ideological Basis . . ."

in the sources. The constitutional convention was that the king issued decrees in the form of personal orders, although that authority was sometimes delegated to subordinates. What appears to be lacking is a legislative branch of government, in the form of some assembly or collective body to debate, formulate, and promulgate new laws. The Hittite king announced a decision regarding feudal tenure in an assembly (*tuliya*), but the report assigns to the assembly no role other than as a forum for the royal decree (HL 55).

2.2.2 There is, however, one significant exception. In the Old Assyrian period, the city council of Assur, in which the king was a member, not only issued decrees in its collective name but also had them recorded in solemn written form, on a stone stele. The words of the legislation are referred to in their inscribed version, if not actually cited in court. It is unlikely that this legislative body was a singularity, which flourished for a short period in one city and was never adopted anywhere else. The special features of Old Assyrian kingship may derive from a telescoping of central and local forms of government. The actions of the assembly may be indicative of widespread practice in local government, which the sources normally ignore, because it was overshadowed by central government legislation and royal ideology. If so, the seeds of the modern legislative assembly may already have existed in the ancient Near East, long before the advent of the Greek *polis*.

2.3 *The Administration*

There was no distinction between the executive and judicial branches of government. The same officials or bodies made administrative decisions and judgments, and the same legal character was attributed to both. There were three levels of administration: central, provincial, and local.

2.3.1 *Central*

2.3.1.1 The king was head of a bureaucratic apparatus centered upon the palace. His rule could be more or less direct: the letters of Hammurabi reveal a deeply personal involvement of the king in day-to-day matters, while Egyptian rulers preferred to interpose another layer of bureaucracy, in the form of one or more viziers, between themselves and their citizens.

2.3.1.2 "The palace" was sometimes referred to as the ruling authority, especially in fiscal matters. It was also referred to as an owner of land and other property. It would be anachronistic to think of it in terms of modern abstract conceptions in which members of the government are mere agents of the state. The palace did, however, function as the king's administrative persona (cf. "The White House" for the U.S. president), and thus to some extent constituted a juridical entity independent of the person of the king.

2.3.1.3 The duties of royal officials (central and provincial) are set out, often in great detail, in various types of royal legislation, such as the Edict of Irikagina, the Edict of Telipinu, the Hittite Instructions, the Edict of Horemheb, and the Assyrian Harem Decrees. Their constitutional importance is that the king, in delineating the duties of his officials, places transparent legal limits on their powers. Thus the actions of officials are made subject to the rule of law. In some cases, the legislation imposes sanctions for abuse of power.

2.3.2 *Provincial*

The larger polities were divided into provinces administered by governors and sometimes further into districts with their own administrator. The governors and lesser officials were normally appointed by the king, acted as his representatives in the province, and reported to him. Some provincial officials were peripatetic and could work in conjunction with the local authorities, but unequivocally as their superiors.

2.3.3 *Local*[23]

Local authority consisted of the mayor and a council or assembly of leading free citizens, sometimes referred to as elders. These were customary bodies whose members appear to have been drawn from the local population rather than appointed from above. They acted as a collectivity, with the mayor as primus inter pares, that is, head of the council but not independent of it.

2.3.3.1 If any body attained the status of a juridical entity in the ancient Near East, it was the city, town, or village, by which was

[23] Van de Mieroop, "Government . . ."

meant the local council. The evidence is most striking in the case of Assur of the Old Assyrian period but can be seen elsewhere, for example, in Middle Kingdom Egypt, where the town had its own bureau and scribe and where property was in the hands of the "town."

2.3.3.2 The local authority was responsible for a wide range of local matters, both as an administrative and a judicial body, but had also to enforce central government orders, for example, with regard to taxation and corvée. Local officials were subject to the rule of law, as the corruption trial of Kuššiharbe, mayor of Nuzi, graphically illustrates. A series of individuals accused Kuššiharbe and his associates of crimes against the central government and against local citizens: misappropriating crown property, taxes, and corvée labor, taking bribes, misappropriating private property, intimidation, and even sexual harassment.

2.3.4 *Autonomous Organizations*

2.3.4.1 In most periods the temples were independent economic units and were autonomous or semi-autonomous entities within the state, in that they generally had jurisdiction over their internal affairs. Sometimes they constituted a branch of the government, functioning within or alongside the royal administration. In the New Kingdom and in the Neo-Babylonian period, for example, the functions of temple and royal officials could overlap.

2.3.4.2 In Mesopotamia, merchants' associations (*kārū*) had jurisdiction over their members and over transactions between them (i.e., wholesale trade). In Anatolia of the early second millennium, they were the governing bodies of autonomous Assyrian trading colonies within the local kingdoms, with whose rulers they negotiated a special status by treaty.

2.3.5 *The Courts*

As with the administration, there were central, provincial, and local courts. A court could be constituted by an official sitting alone; by an administrative body, such as a local council, temple, or merchants' association exercising judicial functions, or by persons designated solely as judges, who usually sat as a college.

2.3.5.1 The king was everywhere the supreme judge, although his judicial activity is more in evidence in some periods than in others. There was no formal machinery of appeal from a lower court; rather, a subject would petition the king to redress an injustice suffered by a lower court or official. The king could also try cases at first instance. Various law-code provisions suggest that certain serious crimes involving the death penalty were reserved for the king (e.g., LE 48; MAL A 15; HL 111), but he is also found judging apparently trivial matters.

2.3.5.2 Royal officials, whether central or provincial, exercised jurisdiction in the same manner. Provincial officials sometimes sat with the local council to constitute a court. The local courts give the impression of being ad hoc assemblies, especially with such designations as the Egyptian "court of this day" (*qnbt n hrw pn*). They could have large numbers, as the terms like Akkadian "assembly" (*puḫrum*) and Egyptian "The Thirty" suggest. The local council (*qenbet*) at Deir-el-Medina, when sitting as a court, comprised between eight and fourteen villagers, meeting after work. Jeremiah was tried before an assembly of "princes" (*śarim*), priests, prophets, and "all the people" (Jer. 26).

2.3.5.3 "The judges" seem to be different from the official- or council-based courts but remain shadowy figures in the sources. At all periods, it is a matter of debate whether the term designated a profession or merely a function. Certainly, they were not trained jurists in the manner of modern judges, but the terms "royal judges" and "judges of the city X" may point to a special status, with different hierarchical levels. Neo-Sumerian litigation records sometimes contain a number of diverse cases (presumably the day's docket), all before the same named judges, who must have sat on a more or less permanent basis.

2.3.5.4 There appears to have been no special term for courthouse before the Neo-Babylonian period. The location of the court is occasionally mentioned as a temple or temple gate, but it was by no means the universal practice and, where so situated, did not necessarily involve participation of priests in the court.

2.3.5.5 Being administrative as well as judicial bodies, the courts were not mere arbitrators but had coercive powers. They also had attached officers charged with executing their orders, for example, *ḫalzuḫlu* at Nuzi, *redû* in Babylonia, and *šmsw n qnb.t* in New Kingdom Egypt.

3. Litigation

3.1 *Parties*

Women appear to have had access to court as litigants in all periods, although their interests were often represented by a male member of the family. Slaves appear in litigation in the same way as free persons in the Neo-Babylonian period, when they acted as agents for the great merchant houses. In the documentation of earlier periods, however, slaves are rarely litigants in court.[24] Children are not attested as parties. Litigants appeared in person, but in some periods the possibility of a representative is mentioned (Egyptian *rwḏ.w*; Old Assyrian *rābiṣu*; Nuzi *puḫu*). It is doubtful if an advocate in the modern sense is meant: the Egyptian representative may have been an official who assisted the party in the preparation of his case, while the Nuzi term (lit. "substitute") suggests a representative for an absent party.

3.2 *Procedure*

If there was any distinction in procedure, it was not between criminal and civil cases (which are anyway anachronistic categories; see 8 below) but between private disputes and cases involving vital interests of the state or the public, such as an offense against the king or the gods.

3.2.1 In private disputes, the plaintiff appears to have been responsible for securing his opponent's appearance in court. Nonetheless, the court could summon a party to court, and at Nuzi there is even

[24] Slaves do appear frequently in the Neo-Sumerian court records but only on the issue of their status—claiming freedom or being claimed as slaves. The Hittite Instructions to the Commander of the Border Guard order him, on his circuit through the towns under his command, to judge the lawsuits of male and female slaves and single women (iii 31–32).

evidence of judgment by default. Some systems attest to a "seizure" of one party by another (or mutually) prior to their appearing before the judges, which may have represented a formal claim initiating proceedings.

3.2.2 There is little information on the course of a trial, which may not have followed set rules of procedure. The parties were normally responsible for marshaling their own case and bringing witnesses and other evidence. The court, however, also had inquisitorial powers: it could interrogate parties and witnesses, and could summon witnesses on its own initiative. In cases of serious public interest, the proceeding was in the nature of a judicial investigation.

3.2.3 Besides awarding damages, courts adjudicating private disputes could make a wide variety of orders. They could order the restoration or division of property, recognition of free or slave status, and enslavement for debt, and even forbid a man to consort with a named woman.

3.2.4 A party dissatisfied with a local court's ruling could seek a re-hearing by a differently constituted bench. A New Kingdom party litigated four times over compensation for the same dead donkey (O. Gardner 53). The losing party was often obliged to draft a document conceding the case and undertaking not to litigate again. Appeal of a judgment was by way of petition to a higher official and, ultimately, to the king. Whereas hearings at first instance were essentially oral, a petition could be oral (in person or through the mouth of an official) or in writing.

3.2.5 *Evidence*

The law of evidence knew no standard of proof such as "beyond reasonable doubt" because if conventional evidence failed to reveal the truth, it could be ascertained by supra-rational methods. For the same reason, and given the inquisitorial powers of the court, it is difficult to speak of a burden of proof as in modern law. Nonetheless, use was made of evidentiary presumptions, where evidence of a provable state of affairs gave rise to the presumption that a second state of affairs existed. The forms of conventional evidence were witnesses, documents, and physical evidence. The supra-rational methods were the oath, the ordeal, and the oracle. The latter were generally administered by the priests.

3.2.5.1 *Witnesses*

Oral testimony was the most common form of evidence. The parties were competent witnesses on their own behalf. Women were competent witnesses; slaves may have been, but their appearance in this role is notably rare. Testimony could include hearsay. Witnesses did not initially give their evidence under oath; the court might then order them to take an oath. It was possible to have witnesses of a trial, that is, persons present at the proceedings who at a later stage of the case or in a different case would testify about the earlier hearing.

3.2.5.2 *Documents*

Documentary evidence was usually decisive for a case but was not irrefutable. Documents recording transactions might need to be authenticated in court by witnesses, and their record could be contradicted by witnesses to the transaction, who were named on the document. Precautions were taken at the time of drafting to protect the authenticity of contractual documents, for example, encasing a clay tablet in a clay envelope on which the terms were repeated, or rolling and sealing a papyrus scroll before witnesses, whose names were appended on the outside, along with a summary of the transaction. The personal seals of parties and witnesses, impressed on documents or on tags affixed to them, were a prime means of authentication.[25]

3.2.5.3 *Physical Evidence*

Examples of physical evidence are the bloodstained sheet that attests to a bride's virginity (Deut. 22:13–17) and the remains of a sheep that a shepherd must bring to prove that it was devoured by a wild beast (Exod. 22:12). In a Neo-Babylonian trial for the theft of two ducks, the carcasses of the stolen ducks are brought into court for examination.

3.2.5.4 *The Oath*[26]

The declaratory oath was a solemn curse that the taker called down upon himself if his statement were not true. Two types of oath are attested in the sources.

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[25] See Gibson and Biggs, eds., *Seals and Sealing* . . .

[26] On the oath, declaratory and promissory, see the essays in Lafont, ed., *Jurer et maudire.*

3.2.5.4.1 The first type of oath is almost universal in its application. It invokes the name of a god and is taken at the temple or before a symbol of the god. It is imposed by the court upon one of the parties only, and/or his witnesses. The oath is deemed irrefutable proof, so much so that records of litigation often end with the court's decision to send a party or witnesses to the oath. The theory was that fear of divine retribution would constrain the oath-taker to speak the truth. (If later uncovered, a false oath could also lead to punishment by the court.) Indeed, so great was the fear in practice that persons sometimes refused to take the oath, or the parties reached a compromise rather than proceed with the oath. In earlier records, particularly from the Neo-Sumerian period, much of the court's adjudication is directed toward deciding on which side to impose the oath. It should be noted, however, that by the Neo-Babylonian period the courts, even the temple courts, seem to show a marked reluctance to proceed beyond rational evidence.

3.2.5.4.2 The second type of declaratory oath is much less common. It is an oath taken at the litigant's initiative during the trial, usually invoking the king only. Apparently, it could be taken by both parties. Its function is not altogether clear; it was not decisive proof but may have been persuasive evidence. It may also have indicated a preliminary to the ordeal.

3.2.5.5 *Ordeal*[27]

The ordeal was not so much a means of giving evidence as a referral of the issue to a higher court—that of the gods. Clear examples are found only in Mesopotamia and Anatolia, where it took the form of a river ordeal, the river being conceived of as a divinity. The trial could involve one or both parties. The mechanics are not well documented, but it seems that ordeals were carefully monitored and could involve swimming or carrying an object in water a certain distance. At Mari, the use of substitutes for the parties is attested. Drowning indicated guilt, but the unsuccessful subject could be rescued prior thereto and punished. The issue need not be criminal; already in the third millennium, disputes over property could be settled by ordeal.

[27] Frymer-Kensky, The Judicial Ordeal . . .; Durand, "L'ordalie."

3.2.5.6 *Oracle*

The oracle was a divinatory procedure, a means of consulting a god on a specific question—in principle, one that could be answered yes or no. It could thus be used in non-judicial contexts as well as trials. Oracular procedures to decide judicial matters are attested for certain only in Egypt and Israel. In Egypt, it involved interpreting the movements of an image of the god carried on a litter; in Israel, the casting of lots.

3.2.5.7 *Presumptions*

The court might avoid resort to supra-rational procedures by use of evidentiary presumptions. A number are found in the law codes: a buyer is presumed a thief if he cannot identify the seller (LE 40); a woman is presumed to have consented to intercourse in the city (because she could have cried out) but not in the country (HL 197; Deut. 22:23–25); a baby is presumed abandoned, not lost, if it has not been cleaned of amniotic fluid (LH 185).

4. Personal Status

The first historian of ancient law, Sir Henry Maine, observed that the progress of law "has been distinguished by the gradual dissolution of family dependency and the growth of individual obligation in its place."[28] In his celebrated dictum, it was "a movement *from Status to Contract.*"[29] The notion of such a movement is not borne out by the evidence from the ancient Near East, where a dense network of contracts between individuals existed alongside status, some even impinging upon the rules of status (as in marriage and adoption) in a way that would be unacceptable to modern systems. Nonetheless, Maine's observation contains a profound insight: in ancient law, the role of status was altogether more important and far-reaching in its consequences.

The societies of the ancient Near East were strongly hierarchical in structure, with little social mobility. The place of an individual in the hierarchy determined his legal rights and duties not only with

[28] Maine, *Ancient Law* . . ., 163.
[29] Ibid., 165.

respect to public and family law but also in areas that modern law would regard as incongruous, such as contract and criminal law.

The basic unit of society was the household. Ideally, it comprised an extended family that could cover three generations and additional dependants, such as slaves, apprentices, and persons in debt bondage, although in practice it might exist with only fragments of these components. The head of household was typically the father (a household is often called "house of the father"), but again there were many variations according to circumstances. The head of household himself might be ranked by class, feudal tenure, or profession.

Society was in some sense a coalition of households, but it would be a mistake to apply the analogy of international law and to regard the household as replacing the individual, as Maine and many others have.[30] Nor is the image of a paterfamilias with arbitrary power of life and death over his family at all appropriate. The walls of the household were not, legally speaking, impermeable. The law applied to individuals; it regulated inner-household relations as well as relations between heads of household. What the hierarchy within the household meant was that the head of household could to some extent use the subordinate members of household, even the free ones, as the objects of legal transactions. He could certainly enter into legal obligations on their behalf. By the same token, the subordinate members had limited legal capacity when acting on their own behalf but could, as agents, create rights and duties in the head of household. They might also suffer the consequences of his criminal acts, through the doctrines of vicarious and collective liability (see 8 below).

4.1 *Citizenship*

4.1.1 There was a definite notion of belonging to a political unit, which, if not having the clear-cut contours of citizenship in the modern sense, was associated with privileges and duties, and attended by legal consequences. It was expressed from two perspectives: a broad and a narrow concept of citizenship. Where monarchy was

[30] "Ancient jurisprudence, if a perhaps deceptive comparison may be employed, may be likened to International Law, filling nothing, as it were, except the interstices between the great groups which are the atoms of society. In a community so situated, the legislation of assemblies and the jurisdiction of Courts reach only to the heads of families, and to every other individual the rule of conduct is the law of his home, of which his Parent is the legislator" (ibid., 161).

the constitutional form, citizenship in the broad sense meant being a subject of the ruler. The subjects of rulers were called their "slaves," even when they were personally free. Within this broad perspective, a narrower definition was that of freeborn native, as opposed to foreigner. The native population was described in two ways:

1. by place of birth, for example, "son of Idamaraz," "daughter of Ugarit," "sons of the land," or as an abstract, for example, "Hanigalbatship";
2. by ethnicon, for example, "Akkadian," "Amorite," "Assyrian" or "Assyrianess," "Hebrew," or "son of X" (a tribal ancestor).

The importance of the distinction is that freeborn natives had citizenship by right (and did not lose it merely by the fact of being enslaved). Foreigners, chattel slaves, and others lacking citizenship by right could acquire it by the king's discretionary power. In theory, they could be included simply by virtue of becoming a subject of the ruler. The ruler, however, might choose to assimilate them artificially into the category of freeborn natives, for example, by granting "Hanigalbatship." Private arrangements could also lead to inclusion in an ethnic group, through marriage or adoption. They were thus indirect means of acquiring citizenship.

4.1.2 The difference between the "native" and "subject" perspectives is illustrated by the contrast in the practice of imperial Persia and Deuteronomic Israel. In the latter, citizenship was strictly on an ethnic basis, with foreign residents being given a separate status, albeit with limited possibilities of acquiring citizenship by ethnic assimilation, for example, by marriage. By contrast, in the Persian garrison of Elephantine in Egypt, Jews, Aramaeans, Khwarezmians, and other ethnic groups were all regarded as subjects of the Persian emperor and, as such, on an equal footing with the native Egyptians.

4.1.3 A non-citizen had no protection under the local law, except insofar that as a foreign citizen of a friendly state, he was protected by the rules of international law. A citizen, by contrast, was entitled in theory to expect protection under the law and the respect of his legal rights even by his monarch. A ruler could grant special protection to resident aliens (Akk. *ubaru/ubru*; Heb. *ger*). Once granted resident status, foreigners appear to have had equal access to the local courts. Separate courts for foreigners were a Hellenistic innovation, as with the separate Greek and Demotic courts in Egypt.

The Old Assyrian trading colonies in Anatolia were a special case in that they obtained extra-territorial status, including the right to constitute their own courts, through treaties made with local rulers. Native Anatolians, it should be noted, had access to the Assyrian courts in their disputes with Assyrian merchants.

4.1.4 There are very few legal rules recorded that distinguished between citizens and non-citizens. The most important were provisions for the relief of debt and debt slavery, and for the protection of debt slaves or pledges from further abuse. These social justice measures, found in a number of systems, often limited their benefits exclusively to citizens. Another possible area of distinction was in landholding. In some systems there are indications that foreigners needed permission of the ruling authorities in order to acquire landed estates. Thus in Genesis 23 Abraham as a resident alien in Hebron seeks the intermediary of the city council in order to purchase land from an individual. The king at Ugarit makes a royal land grant to a beneficiary designated as an Egyptian (RS 16.136).

4.2 *Class*

4.2.1 Laws did not generally distinguish between social classes. A notable exception is LH, in which a distinction is sometimes made between a gentleman (*awīlum*) and a commoner (*muškēnum*). In particular, the penalties for physical injury differed according to the respective class of the victim and the perpetrator.

4.2.2 In many periods we encounter "serfs," persons somehow tied to the land and owing loyalty to the landowner. There are cases, as in Middle Assyrian documents, where serfs pass with ownership of the land. The sources do not provide any other information as to their legal status.

4.3 *Gender*[31]

As far as the legal systems were concerned, the archetypal "person" was a male head of household. Women as a class had no special

[31] Lafont, *Femmes* . . .; essays in Matthews, ed., *Gender and Law* . . .; Johnson, "Status of Women . . ."; Müller, *Stellung der Frau* . . . (bibliography).

status in the law; rather, all subordinate members of a household, whether wives or male or female children, had more limited rights and duties. Legal capacity was therefore more a function of one's position in the household than of one's gender or age, and the patriarchal household was by no means the sole configuration possible. A household might be headed by a widow or divorcée, either alone or together with her adult sons, or brothers might together form a joint household, or a single person, male or female, might be entirely independent.

4.3.1 In theory, women had the legal capacity to own property, make contracts, litigate, and give evidence in court. In practice, they were restricted in these activities by their status as daughter or wife. Married women did act on their own account but more frequently together with or on behalf of their husbands. Examples of independent action tend to be confined to widows, divorcées, or members of the few professions open to women: priestess, prostitute, wetnurse, or taverness. Documents from Syria in the late second millennium recognize the normal disadvantage of women when applying legal fictions such as "father and mother" to a widow in order to strengthen her legal position.

4.3.2 The one area of law from which women appear to have been excluded on principle was the public sphere. Women are almost entirely absent from public office. The only public positions reserved for women were queen, queen mother, and priestess. With rare exceptions, women are not found as witnesses to contracts.

4.4 *Age*

The legal sources give no clear age of majority. MAL (A 43) mentions the age of ten for a boy, but for special purposes. Individual puberty was probably a common measure of adulthood. Although a child, especially a male child, took on more legal responsibilities with age, a legal age of majority was less important than in modern law. The vital question of whether a person was independent or a subordinate member of household did not depend on biological age. A grown man remained the son of a man in status as long as his father remained head of household, namely, until the father's death or division of his estate inter vivos. A woman remained the daughter of a

man until she married, when she assumed the status of wife of a man. If the man she married was still the son of a man, then her primary status would be that of daughter-in-law. Only where a mother was head of household did her position cease when her children came of age.

4.5 *Slavery*[32]

4.5.1 *Definition*

Freedom in the ancient Near East was a relative, not an absolute state, as the ambiguity of the term for "slave" in all the region's languages illustrates. "Slave" could be used to refer to a subordinate in the social ladder. Thus the subjects of a king were called his "slaves," even though they were free citizens. The king himself, if a vassal, was the "slave" of his emperor; kings, emperors, and commoners alike were "slaves" of the gods. Even a social inferior, when addressing a social superior, referred to himself out of politeness as "your slave." There were, moreover, a plethora of servile conditions that were not regarded as slavery, such as son, daughter, wife, serf, or human pledge.

A better criterion for a legal definition of slavery is its property aspect, since persons were recognized as a category of property that might be owned by private individuals. A slave was therefore a person to whom the law of property applied rather than family or contract law. Even this definition is not wholly exclusive, since family and contract law occasionally intruded upon the rules of ownership. Furthermore, the relationship between master and slave was subject to legal restrictions based on the humanity of the slave and concerns of social justice.

4.5.2 *Property Law*

Slaves could be purchased, inherited, hired and pledged like any other property. The purchaser of a slave had remedies for hidden defects—medical (e.g., epilepsy), moral (e.g., tendency to run away), or legal (defective title). Slaves, being owned, could not own property themselves (but could hold a *peculium*: see 4.5.4 below). The

[32] Chirichigno, Debt-Slavery . . .; Westbrook, "Slave and Master . . ." and "The Female Slave."

property aspect of slavery is most in evidence in laws protecting the owner's rights against third parties. Causing the death of or injury to a slave gave its owner a right to compensation as for loss of or damage to an economic asset, no different than for an ox. The same applied to the defloration of another's slave woman, which was treated as an economic rather than a sexual offense.

4.5.3 *Servile Conditions*

4.5.3.1 *Pledges*

At first sight, the situation of a free person given in pledge to a creditor was identical to slavery: the pledge lost his personal freedom and was required to serve the creditor, who exploited the pledge's labor. Nonetheless, the relationship between pledge and pledge holder remained one of contract, not property. Since the creditor did not own the pledge, he could not alienate him, nor did property of the pledge automatically vest in the creditor. It was in the nature of a pledge that it could be redeemed by payment of the debt, at which point the human pledge would go free. During the period of his service, failure by the pledge to fulfill his duties led to contractual penalties, not punishment under the general disciplinary powers of a master.

4.5.3.2 *Family*

Native terminology did not distinguish between "master" and "owner"; a husband was sometimes called the "owner" of his wife (and a king the "owner" of his subjects). Indeed, many of a husband's powers over his wife and children overlapped with ownership: he could sell them into slavery (but apparently only under economic duress), pledge them for debt, and discipline them. Nonetheless, a wife or son sold into slavery retained their original status and received some protection from it. Apart from this extreme case, a wife could own property independently (including slaves), and a son had a vested right to inherit his father's estate that could only be taken away for cause. Wives and children were heirs, not the object of inheritance. Causing death or injury to a wife or child or committing a sexual offense against a wife or daughter gave rise to different rights in the head of household, rights that were more than mere compensation for economic loss (see 8 below).

4.5.4 *Contract*

As with other conditions of status, slavery was frequently accompanied by ancillary contracts. When persons sold themselves or members of their family into slavery, contractual terms might be added to alter the conditions of service and of release. Those terms could considerably improve the lot of the slave or make it harsher.

A slave could act as agent for his master. In this capacity, he could make contracts with free persons and litigate. He could also manage property on his own behalf, in the form of a *peculium* given him by his master.

4.5.5 *Humanity and Social Justice*

In determining who should benefit from their intervention, the legal systems drew two important distinctions: between debt and chattel slaves, and between native and foreign slaves. The authorities intervened first and foremost to protect the former category of each—citizens who had fallen on hard times and had been forced into slavery by debt or famine. The tendency was to assimilate them for these purposes into the class of pledges, that is, persons whose labor might be exploited under a contractual arrangement but who remained personally free in terms of status. At the other end of the scale, foreigners who had been acquired by capture, purchase abroad, or some such means received little succor from the local legal system. The benefits of the law related to enslavement, length of service and conditions of service.

4.5.5.1 *Enslavement*

A citizen could not be enslaved against his will if independent or without the permission of the person under whose authority he was if a subordinate member of a household. The only exception was enslavement by court order for commission of a crime or civil wrong. Although in practice economic circumstances would often force a person into slavery, in law his act was, strictly speaking, voluntary. The foreigner, by contrast, could be enslaved through capture in war, kidnapping, or force, unless protected by the local ruler or given resident alien status. In the latter case, protection still might only be partial. As a proverb puts it: "A resident alien in another city is a slave."

4.5.5.2 *Length of service*

Three means were available for the debt-slave to gain his freedom:

1. Through redemption, that is, payment of the original debt. Where found, this appears to have been a legal right, which attached to the slave, binding subsequent purchasers. It vested in both the slave himself and in close relatives, and possibly also the king.
2. Through manumission after a period of service. The law codes where this means is attested set different periods of service, one as short as three years, which, if it had applied automatically, would have made all other measures superfluous. Probably it was not a right like redemption, but a discretion of the authorities to intervene in individual cases and free a debt slave after a reasonable length of service in relation to his debt. The fixed periods in the codes would be attempts to set a "fair" standard.
3. Through release under a general cancellation of debts. This was the most radical measure but was unpredictable, being entirely dependent on the king's equitable discretion (except in the Bible, where it is stipulated every seventh and fiftieth year). It was confined to native debt slaves.

4.5.5.3 *Conditions*

The slave was protected against three forms of maltreatment:

1. Excessive physical punishment. Even chattel slaves appear to have benefited to some extent from this protection.
2. Sexual abuse. Sexual intercourse with a woman amounted to an offense in the ancient Near East when it was an infringement of the rights of the person under whose authority she was, for example her father or her husband. Ownership of a chattel slave eliminated that authority but not entirely so in the case of a debt slave.
3. Sale abroad. Only native debt slaves were protected by this prohibition, which must in any case have been difficult to enforce in practice.

4.5.6 *Family Law*

A natural conflict existed between family law, which applied to slaves as persons, and property law, which applied to slaves as chattels. Sometimes the one institution prevailed, sometimes the other, and sometimes the rules represented a compromise between the two.

4.5.6.1 The marriage of slaves was recognized as legitimate, whether with other slaves or with free persons. Although their different rules led to conflicts, marriage and slavery were not legally incompatible. The slave's legal personality was expressly said to be split: "to X she

is a wife; to Y she is a slave." (The one exception was that a person could not be both spouse and owner of the same slave.) Where a slave owned by a third party was married to a free person, married status provided some protection against the owner's property rights. For example, LH 175–76 rule that the offspring of the marriage remain free, although this principle was often overridden by contractual clauses (cf. LU 5). Where a married couple were enslaved for debt, they would be released together, but if the master had given the slave a female slave of his own as wife, property law prevailed and he would have to leave without her (Exod. 21:2–6; LU 4).

4.5.6.2 Since a female slave was property, her owner could exploit her sexuality and her fertility like any other beneficial aspect of property. She could thus be made her owner's concubine. Where concubinage resulted in motherhood, the slave might be accorded some qualified protection from the consequences of her status as property. She and her offspring might even gain their freedom on the death of the master/father (LH 171). The intention appears to have been to accord the slave concubine some of the rights of a married woman, not including, the sources emphasize, the right of inheritance for her children.

5. Family Law

5.1 *Marriage*

Marriage was a private arrangement, involving neither public nor religious authorities. Intermarriage between different societies and cultures was not seen as anything out of the ordinary. It is not until the Persian period that the question of a religious or ethnic bar on intermarriage is raised in certain Biblical texts. A man could marry more than one wife, but in practice the incidence of polygamy (strictly speaking, polygyny) varied greatly between cultures. Slaves could make a valid marriage, either to another slave or to a free person.

5.1.1 *Formation*

There were at least three possible stages in the formation of marriage:

1. An agreement between the person(s) under whose authority the bride was (i.e., parent or guardian) and the groom (or his father, if the groom was still young). The bride was the object of this agreement, the purpose of which was her release from the authority of the former into that of the latter. If the bride was independent, for example, a divorcée or a widow, she could contract on her own behalf. Provisions in several law codes declare a formal contract between the parties a necessary condition to the validity of the marriage (LE 27; LH 128).
2. Betrothal, indicated by payment of the "bride-price," an amount usually in silver or other metals, which had perhaps been settled in the preceding agreement. The consequence of the "bride-price" was to create what has been called "inchoate marriage": the couple were deemed married as far as outsiders are concerned, but the arrangement was still subject to rescission by the parties to the contract. The nature of the "bride-price" has been much debated. It is intimately linked to the nature of marriage itself, which will be discussed below. As well as initiating betrothal, the "bride-price" acted as a measure of damages (*in simplum* or in multiples) for breach of betrothal, and, in some systems, for divorce without cause. At the end of our period, in Demotic and subsequent rabbinic law, this last function takes over entirely: the bride-price is transmuted into a fictional payment, becoming in effect agreed damages payable to the bride if the husband should divorce her.
3. Completion, the point at which the bride passed *de facto* into her husband's authority. The ancient sources are remarkably reticent on the subject of what is regarded in modern cultures as the most important stage—the wedding itself—perhaps because of the prominence of betrothal in establishing the legal context. There were, it seems, religious ceremonies and elaborate celebrations, but they were not legally dispositive. It would seem that there were several alternative ways of completing marriage, according to the different circumstances of the parties:

   (a) by a speech act, such as is recorded in a marriage contract from Elephantine: "She is my wife and I am her husband from this day (and) forever" (*EPE* B28:4; cf. MAL A 41).
   (b) by entry into the husband's house, as is mentioned in Demotic marriage contracts. In LH 151–52, entry is significant as the point at which a wife becomes liable for her husband's debts. A widow is often referred to as entering the house of her second husband. A wife could, however, continue to live in her father's house, being visited by her husband occasionally (MAL A 32–34, 38).
   (c) by consummation. LH 155–56 marks consummation as the point at which marriage is complete also as regards the contracting parties, but in special circumstances: the bride had moved into her father-in-law's house already on betrothal (and evidently before puberty).
   (d) by cohabitation for a minimum period (LE 27; MAL A 34). For a widow, this can repair the lack of a formal contract (MAL A 34).

Perhaps this wide variety of possibilities reflects not so much modes of completion as modes of proof, *ex post facto*, that the bride had passed into the groom's authority.

5.1.2 *Nature*

Marriage created a relationship of status between husband and wife. The essence of that status was that the wife, while remaining a free person, became subordinate in law to her husband. The husband's authority replaced that of her father, but it was not the same in content. In order to determine its nature, it is necessary first to resolve the problem of the "bride-price" adumbrated above.

5.1.2.1 A preliminary payment from the groom's party to the bride's party is attested in most of the legal systems, signified by a dedicated technical term (Sum. nì.mí.ús.sá/ku$_4$.dam.tuku; Akk. *terḫatu*; Hitt. *kusata*; Heb. *mohar*; Aram. *mhr*; Dem. *šp n ḥm.t*). It was translated as "bride-price" by early scholars on the assumption that marriage was a purchase of the bride from her father by the groom and that this payment therefore represented the purchase price. The traditional view has been hotly contested by later scholars, including contributors to this volume, who have offered a variety of translations: "bridal gift" (on the basis that it was a mere liberality), "bridewealth" (based on modern anthropological parallels), or "betrothal payment" (on the basis of its initial effect).

5.1.2.2 On the one hand, the existence of a dedicated term might be thought to negate any connection between the world of marriage and the world of sale of goods. On the other, in a few instances sources do speak of "price" in the context of marriage, using the standard commercial term (Old Assyrian: TPK 1 161; MAL A 55: *šīm batulte* "price of a virgin"). Nevertheless, the "bride-price" did not always behave like a normal price, often finding its way into the property of the wife herself. Thus "bride-price" and commercial price were not identical, but an association between the two existed in ancient juridical consciousness.[33]

[33] It is sometimes stated that with respect to marriage arrangements (e.g., at Nuzi), in which poverty-stricken parents received a payment for their daughters, the transaction was one of sale. This may have been true in economic reality, but that is not the same as law. However pedantic it may seem, reductionism of this sort should be avoided; law is as different from social or economic reality as reality is from metaphor.

5.1.2.3 Purchase is a mode of acquiring ownership, and ancient Near Eastern law knew ownership of women. As slaves, they could be bought, used, pledged, and sold like any other property, and they could be exploited sexually. The law distinguished between wives and slaves, both in legal terminology and in the rules that applied to each. For example, unlike a slave, a wife could own property herself and have heirs. In all languages, there were entirely different technical phrases for marrying a wife and buying a slave. Where a wife herself had slave status, the law can be seen navigating between the law of property and the law of persons, favoring one or the other or finding a compromise between the two. For a master who married his own slave, it was the law of persons that triumphed: the marriage emancipated her.

5.1.2.4 Nonetheless, the boundaries between the two legal categories were not as sharp as a modern perspective would lead one to expect. The husband is sometimes called his wife's "master" (Akk. *bēlu*; Heb. *'adon*), a term that can refer to legal ownership but is looser than "owner" in modern law. If in dire financial straits, a husband was entitled to pledge his wife or sell her into slavery. It is true that she did not cease thereby to be his wife, as she would have ceased to be his property. Still, these powers demonstrate that, to some extent, the authority of a husband and the rights of an owner overlapped. Ancient jurisprudence recognized their commonality and at the same time, the limits set by the exclusive nature of marriage as a status with its own unique rules.

5.1.2.5 Of the rules for which we have evidence, the most important are the following:

1. The husband had exclusive sexual rights over his wife. They were not alienable and were fiercely protected against third parties by severe punishments for adultery and rape. By contrast, the owner's sexual rights over his slave woman were protected only by compensation for damage to property.
2. Children of the marriage were the legitimate heirs of both the husband and the wife.

3. The marriage was in theory dissoluble by a unilateral act of either husband or wife.

5.1.3 *Status and Contract*

Marriage was a status, but the many marriage documents inform us of a variety of contractual arrangements that could be made ancillary to the status. There are three types of documents:

1. A protocol of the completed marriage, sometimes containing a receipt for the "bride-price" and/or the dowry, with terms added on to the initial betrothal agreement. Those terms bind husband and wife and relate to future contingencies such as misconduct, polygamy, and divorce.
2. Adoption documents or wills that also record marriage arrangements made by the adopter or testator with regard to the adoptee and other persons under his authority.
3. Post-nuptial settlements between husband and wife.

While contractual terms could not directly abrogate rights of the husband or wife under the rules of the status of marriage, they could affect them indirectly, by imposing penalties on their exercise, for example, on divorce (see 5.1.4.1 below). Those penalties could be pecuniary, physical, or even capital. The contract was thus a prior condition for the status and an important way of fixing subordinate issues, such as property arrangements, but it was also a continuing influence on the status, the contours of which it helped to determine.

5.1.4 *Dissolution*

Marriage could be terminated by divorce, death, or desertion.

5.1.4.1 Divorce was a unilateral act, which in theory either the husband or the wife could perform. It was effected by a speech act: "You are (/she is) not my wife" and "You are (/he is) not my husband" respectively. In practice, many systems precluded the wife's right to divorce.

The right to divorce was exercisable at will but was restrained by penalties imposed by the general law or by contractual terms. Since a wife was entitled to restoration of her dowry on termination of the marriage, the consequences of her husband divorcing her would be the loss of that property together with his spouse. Typically, the contract provided for a further financial penalty upon the husband. In the absence of contractual provisions, some systems imposed

financial penalties by operation of law, although they varied in severity from the amount of the "bride-price" where there were no children (LH 138), up to the whole of the husband's property where there were children (LE 59; LH 137), to nothing (MAL A 37).

The existence of contractual penalties on its exercise proves that the wife had a right to divorce under the rules of status. The severity of the penalties varies from system to system and between individual cases within systems. In some contracts, there is effective parity between the penalties on husband and wife. Others condemn her to be sold into slavery or even to be killed, for example, "if (the wife) says (to her husband), 'You are not my husband,' she shall be thrown into the water." Clearly, this was tantamount to an absolute bar on divorce by the wife.

Penalties for divorce could be avoided if the divorcing spouse could show sufficient grounds. A husband who divorced his wife for adultery, for example, did not have to pay her compensation and could probably keep her dowry. Even when he had grounds, however, the husband might find himself obliged to negotiate a divorce settlement, as in the case of a royal divorce at Ugarit (RS 17.159).

5.1.4.2 Death of the spouse ends the marriage, but a widow might not be free to remarry a man of her own choice. Since her late husband's family did not wish to lose her dowry, contractual provisions sometimes penalize her departure from the marital home. The Middle Assyrian Laws (MAL) allow a widow to depart only when she has neither sons or sons-in-law to support her nor any relative of her husband to marry her. The biblical law of levirate obliges a childless widow to marry her brother-in-law or closest relative.

5.1.4.3 The case of a husband who is missing on active service abroad is a classic scholarly problem considered by three law codes (LE 29; LH 133a–35; MAL A 36, 45). The wife is allowed to remarry on certain conditions, notably that sufficient time has passed and that there are insufficient means in her husband's house to sustain her, but should her first husband later return, she is to return to him. Both her marriages are deemed valid, but the second is voidable on restoration of the first.

5.1.4.4 The same scholarly problem also considers the possibility that the husband has fled his city voluntarily (LE 30; LH 136). If

his wife remarries under those circumstances, he may not claim her back. Note that desertion of his wife is not the cause but abandonment of his city and his civic obligations. On the other hand, a wife who deserts the matrimonial home may be divorced without compensation (MAL A 24).

5.2 *Children*[34]

5.2.1 The father and mother had the right to give their children in pledge for their debts or to sell them into slavery. The latter right appears to have been exercised only by necessity due to debt or famine. There is no historical evidence of a "right of life and death" over one's children; all examples are from legends set in an earlier age. Deuteronomy 21:18–21 provides for the execution of a rebellious son but by court order on application by the parents.

5.2.2 It was the duty of sons and sometimes of daughters to support their parents in their old age. Some sources also mention a duty to bury them and mourn them. A term often used in this context is "honor" (Akk. *palaḫu/kubbudu*; Heb. *kbd*)—which implies that more than mere material support was expected; the child had to serve the parents with respect.

5.3 *Adoption*

5.3.1 Adoption was far more widely practiced than in modern societies. The reason is as much juridical as social. It is true that the prevalence of disease, famine, and war left many couples childless and many children orphans, with adoption as the obvious cure. But adoption was by no means confined to childless couples or to the sphere of family affection. It developed into one of the most powerful tools of ancient jurisprudence, a flexible juridical instrument that was used to facilitate matrimonial, property, and even commercial arrangements.

The relationship of parent and child is a natural, biological phenomenon. The concept of legitimacy, by contrast, is purely legal, the result of an artificial legal construct, namely marriage. A legitimate

[34] Fleishman, *Parent and Child . . .*; Westbrook, "Life and Death . . ."

son or daughter is a person with certain recognized rights and duties in law—a legal status. Only the qualifications for that status are biological. Adoption is a legal fiction that creates the same legal status for persons who lack the biological qualification. The essential quality of adoption in the ancient Near East is that it did not merely create filiation, called "sonship" or "daughtership" in the native terminology; it created *legitimate* sonship or daughtership.

The ancient law of property, inheritance, and contract contained certain limitations in the assignment of rights and duties. Legitimate filiation was a conduit for such rights and duties. Adoption was therefore used as a mode of transferring rights and duties, employing family law to circumvent limitations in other legal spheres. It could be used within a family, where gaps had appeared in its biological structure, to restore it in law to an integral unity of persons and property. It could be used beyond the family, to negotiate arrangements of mutual benefit between strangers, since adoption was not confined to children. The more the benefits incidental to filiation became the essence of the relationship between adopter and adoptee, the more the family relationship was reduced to a mere fiction. In its most extreme commercial forms, adoption became a legal fiction upon a legal fiction.

5.3.1.1 From the point of view of the adopter, adoption brought two principal benefits. Firstly, it enabled a childless person to maintain the family line. Secondly, it ensured care and support in one's old age, which was a fundamental filial duty. Not only the childless took advantage of this benefit; it might be more convenient to impose this duty on someone adopted expressly for the purpose than on one's own children.

5.3.1.2 The principal benefit for the adoptee was the right to inherit the adopter's estate, since adoption gave the status of legitimate heir. More than this, it was the only way to acquire such a right. Inheritance law knew nothing of bequests to outsiders; to inherit a share of the estate, even under a testament, the beneficiary had to be entitled already under the rules of intestate succession, which normally meant being a member of the testator's immediate family. Anyone else wishing to receive an inheritance share had first to become a member of the family, by adoption.

5.3.1.3 *Matrimonial Adoption*
A special benefit for female adoptees was to come under the authority of the adopter for the purpose of matrimony. The idea was that the adopter, as her new parent, would give her in marriage and possibly dower her.

5.3.1.4 In the light of these advantages, natural parents might give their children in adoption in order to secure their future. Their contracts stipulated that the adopter would bequeath an adopted son a share of the estate or would marry off an adopted daughter.

5.3.1.5 Adoption was a means by which a father could legitimate his natural children born to his concubine or slave. They would be entitled to a share in his estate equally with his offspring from a legitimate wife. It could also be used by a master in manumitting a slave. Manumission was a separate legal process but was often combined with adoption, to take place immediately or on the master's death. Either way, the master gained the slave's continued services for the remainder of his life.

5.3.1.6 The flexibility of adoption allowed it to be used in creating complex family settlements. A common arrangement was for a man to adopt a son and give the adoptee his daughter in marriage, making him his son and son-in-law at the same time. In rare instances it is the adoptive daughter who is married to the son. In the Adoption Papyrus from Egypt, a man secures his succession by adopting his wife, who in turn adopts both the children of a slave woman purchased by the couple and her younger brother, who then marries one of those children. In the Old Babylonian period, a certain type of priestess (*nadītum*), who could not marry, made a practice of adopting a niece, also a *nadītum*, so as to ensure continuity in both the family tradition and property. At Nuzi, adoption as a brother or sister is common, alongside adoption as a son or daughter.

5.3.1.7 Often, adoption barely conceals a purely commercial arrangement. An elderly person grants his estate to a stranger in return for a pension. A financier pays off a person's debts in return for the same. In these cases, possession of the estate may already be transferred *inter vivos*. The most extreme example is from Nuzi, where apparently it was impossible to purchase land in the conventional

way. Instead, the seller had to adopt the buyer and transfer to him the land (with immediate possession) as an inheritance share. Instead of payment, he received a "gift" from the buyer. There is little attempt to maintain the pretense: the contract also contains standard clauses from a contract of sale, and the same purchaser is adopted hundreds of times.

5.3.2 Like marriage, adoption was a purely private arrangement. It was effected by a unilateral act of the adopter. Only one mode is attested, namely a speech act by the adopter: "You are my son/daughter!" Where the adoptee was an orphan child, this act would be sufficient. Where the child had parents, a contract with them was necessary first in order to release the child from their authority. Adults could also be adopted; if independent, the adult adoptee himself made the contract with his adopter.

5.3.3 Both men and women could adopt. In some systems, it is clear that adoption by one spouse does not automatically make the adoptee the child of the other spouse. In a document from Emar, for example, a man gives children, probably by his slave concubine, in adoption to his wife. In other systems the evidence is more ambiguous, in that the documents record adoption by the father alone as head of household. Whether the adopter's wife was implied therein or whether the act of one automatically ensured adoption by both is not certain. The law makes no distinction between the adoption of relatives and strangers.

5.3.4 Adoption could be dissolved unilaterally by either party. The form was a speech act: "You are not my son/daughter," and "You are not my father (and mother)," respectively. For the adopter, it meant the loss of his investment; for the adoptee, the loss of his inheritance. The contracts therefore included clauses against these contingencies. As with marriage, the contract could not directly annul rights under the rules of status, but they could penalize their exercise. For the adopter the penalty was loss of patrimony—from an inheritance share to the whole of his property, sometimes even with an extra payment. For the adoptee, it was generally being sold into slavery, but occasionally it could be harsher, such as having hot pitch poured over his head, as prescribed in a Middle Babylonian document. Where the adoption was a business arrangement with an adult,

the penalties tended to be purely loss of property (estate or preassigned inheritance share) or pecuniary.

For a foundling adopted without a contract and brought up in the adopter's house, the latter's exercise of his right to dissolve—a real danger if later natural children were born—meant homelessness and destitution. Only LH 191 offers any relief, obliging the fickle adopter to send his erstwhile son away with an inheritance share in movable property.

6. Property

Distinct categories of property can only be inferred from their different treatment in law. Land obviously was the object of many special rules, but the distinction between land and movables was not the only significant division. Legal records of sale and pledge are attested only for certain types of property: land, temple prebends (right to a share of temple income) slaves, and occasionally farm animals (such as a cow or a donkey; not herds) and cargo boats. Their common feature is that they are all major capital assets. The reason for their special treatment is probably that they were the focus of rights of inheritance and redemption.

6.1 *Tenure*[35]

Three types of landholding are consistently attested: institutional, feudal, and private.

6.1.1 The two great institutional landowners were the palace and the temple. They controlled large tracts of arable land, which they exploited directly or through tenants.

6.1.2 The king granted land in feudal tenure: that is to say, in return for certain services. There has been a great deal of scholarly discussion about whether the term "feudal" is appropriate to the ancient Near East. In my view, it is a convenient term to describe a basic, recurrent form of landholding, as long as one does not

[35] Lafont, "Fief et féodalité . . ."; Allam, ed., *Grund und Boden* . . .; Renger, "Institutional, Communal, and Individual Ownership . . ."; Ellickson and Thorland, "Ancient Land Law . . ."

attribute to it all the special characteristics of medieval feudalism. It was more than a system for quartering troops on land; the services required could be military or civilian or could be commuted into payments. If any form of landholding is to be excluded from the category "feudal," it is outright land grants made by the king in perpetuity to a loyal servant, as, for example, those recorded in Middle Babylonian *kudurru*'s. Such grants were not conditional on any continuing services (indeed, they were often exempt from taxes) and could only be forfeited for outright treason, like any land.

The allocation of land for civilian services was essentially a means of remunerating government officials, as an alternative to allocation of rations. Land for payment, on the other hand, was functionally the same as a lease of public land, except that the tenure was not for a fixed term. The native terminology sometimes distinguished between the different types of tenure, but in many cases the categories were not exclusive to begin with or lost their original focus over time. In particular, lessees or civilian officials are often found as the incumbents of martial-sounding fiefs, such as "bowman" and "charioteer."

Land held in fief could be heritable, as long as the holder continued to provide the appropriate services. There were restrictions on alienation that varied from system to system.

6.1.3 Private ownership of land existed at all periods, although scholars have argued that in certain systems it was very restricted, for example, during the Neo-Sumerian period, where there are no extant records of private sale or inheritance of arable land. Nonetheless, even in that period the sale and inheritance of private houses and orchards is attested. The question is of little importance for the law, since the evidence is quantitative, not normative, that is, there is no evidence of a legal bar on private landholding. Only at Nuzi does there appear to have been an actual prohibition on the outright sale of private land (for unknown reasons), which was circumvented by a legal fiction.

6.1.4 A classic evolutionary theory postulated that communal ownership of land by the clan or village preceded individual ownership.[36]

[36] Maine, *Ancient Law*, 251–52; contra, de Coulanges, *Origin of Property* . . .

Traces of communal landholding have been claimed in ancient Near Eastern sources; for example, villages or towns as landowners in Late Bronze Age Syria, or joint ownership by brothers.[37] The evidence, however, is inferential and open to other explanations. At Emar, for example, the land that the town sells to private individuals has been confiscated from other individuals. Fratriarchy is explicable by the joint ownership of heirs, a transitional stage in inheritance (see 6.2.3.3 below).

6.2 *Inheritance and Transfer inter vivos*[38]

The same basic principles applied throughout the ancient Near East to the transfer of property between generations. Within that framework there were regional differences, in particular in the identity and entitlements of heirs. A major dichotomy existed between Egypt and the Asiatic systems as regards daughters as heirs, in addition to which there were diverse local customs.

Inheritance was universal, direct, and collective. The whole estate of the deceased, both assets and liabilities, passed upon death directly to the legitimate heirs, who initially held the estate in common. Division of the estate into individual shares was a subsequent voluntary act of the heirs, in principle by mutual agreement.

Natural heirs (those automatically entitled on intestacy) had a vested right to inherit, at least as regards the core property of the estate, in particular family land. The owner of the property could only disinherit an heir for cause. Application of this fundamental principle varied in its severity. According to LH 168–69, a court order was necessary for a father to disinherit his son and only after a second offense. In Egypt of the New Kingdom, a father could disinherit some of his children in favor of others.

Testamentary disposition was possible, but given the rights of the natural heirs, the ancient testament was considerably more circumscribed in its scope than a modern will.

[37] Jankowska, "Extended Family Commune . . ."; Koschaker, "Fratriarchat . . ."
[38] See Brugman, ed., *Law of Succession* . . .

6.2.3 *Intestate Succession*

6.2.3.1 *Heirs*

The heirs of the first rank who inherited automatically were the deceased's legitimate sons, namely, sons born of a legitimate marriage. Where a son had already died but had left sons, the grandchildren would take his share alongside their uncle (*per stirpes*) and divide it between them. Under Egyptian law, although the same principle prevailed, it applied also to daughters, who ranked equally with sons.

Failing sons, the estate passed to the deceased's male collaterals—brothers or their descendants. Alternatively, some Asiatic systems did allow for daughters to inherit, albeit with conditions. LL §b allows only unmarried daughters to inherit, presumably since married daughters would have already received their share in the form of a dowry. Biblical law (Num. 36:1–12) insists on their marrying their cousins, like the contemporary Greek *epikleros/patroiokos*. The biblical narrative points to a rivalry between daughters and uncles as potential heirs, a tension that the ancient legal systems had hitherto failed to resolve, given the sporadic recurrence of the issue over millennia. Possibly, the courts had a discretion that they occasionally exercised in favor of undowered daughters, especially when there were no close relatives.

A few systems allowed an illegitimate son, that is, the deceased's natural son by a concubine (MAL A 41) or even a prostitute (LL 27), to inherit in the absence of legitimate sons. How an illegitimate son ranked against a legitimate daughter is not known. Again, the courts may have had a discretion where no close relatives were available. Otherwise, the law insisted that prior to his death, the father should have legitimized the son by way of adoption, in order for him to inherit alongside legitimate heirs.

Spouses did not in principle inherit from each other on intestacy. The property and inheritance of a wife followed a separate line of devolution (see below). Nonetheless, NBL 12 gives the court the power to grant an indigent widow some property from her husband's estate, at its discretion, according to the value of the estate (cf. an analogous grant by LH 172 in special circumstances).

6.2.3.2 *Division*

The standard method was to divide the estate into parcels and cast lots for them. In principle, the heirs divided the estate into equal shares. Many systems, however, awarded the first-born son an extra

share. There were different ways of computing the extra share, according to local custom. The first-born might also have first choice of his extra share, before the regular shares were drawn by lot (e.g., MAL B 1).

6.2.3.3 *Joint Ownership*

If the children were still young, the widow might continue to administer the estate until they came of age. Even then, the heirs might postpone division, sometimes for years. In the interim, a curious legal situation prevailed in which each heir was theoretically owner of the whole estate but at the same time owner of no particular asset within it. Special problems arose that are a favorite topic of discussion in the law codes. For example, LE 16 forbids the granting of credit to an undivided son, since the creditor could claim against the whole estate. Likewise, if an undivided brother commits homicide, MAL B 2 rules that if the victim's relative accepts composition in lieu of revenge, payment can only be to the level of a single inheritance share. Deuteronomy 25:5–10 rules that if an undivided brother dies childless, his brother must marry the widow and produce an heir to the deceased's potential share, which would otherwise disappear, since it passes by survivorship, not succession. The Demotic Legal Code (P. Mattha VIII.30–31) provides for the eldest son to be manager of the estate during indivision.

6.2.4 *Testamentary Succession*

6.2.4.1 The sources are very unevenly distributed. The highest concentration is in Late Bronze Age sites, where in a comprehensive document the testator may settle not only the estate but also a wide range of family matters, appending to the basic gift related transactions such as adoption, marriage, manumission, and disinheritance. There are no examples from early Mesopotamia, but there are references to the use of deeds of gift *mortis causa*. Testaments are found in Egypt already in the Old Kingdom, but in the Demotic record they are replaced by complex post-nuptial marriage settlements between husband and wife.

6.2.4.2 The documents allude to an oral transaction but give no details. The core of the procedure appears to have been a speech act making a gift. The speech act drew its legal effect from the use

of a completed tense: "I have given. . . ." Hence the sources are frequently ambiguous: it looks as if the gift took effect immediately, whereas in fact it only vested in the beneficiary on the testator's death. The context, which would reveal whether the gift was *inter vivos* (e.g., dowry) or *mortis causa*, is not always available to us. Where the gift was in contemplation of death, many years might still pass before the testator's death gave it effect. A document might therefore be necessary to protect the rights of the beneficiaries if disputes should arise after the testator's death. The extant documents tend to record unusual inheritance patterns.

6.2.4.3 A testament was revocable, although there is no suggestion in the sources that testators did so arbitrarily. It is more likely that changes were necessitated by a supervening life event.[39]

6.2.4.4 The rights of the natural heirs meant that a father could not make a gift of family property to a stranger.[40] The gift would indeed be valid but only for the donor's lifetime, after which it would be subject to a claim by the donor's natural heirs. As we have seen, the method for giving legacies to outsiders was to adopt them. The powers of the father as testator were as follows:

1. To assign specific property to individual heirs. How far he could affect the total value of their shares in this way is not clear.
2. To transfer the extra share from the first-born to another sibling. Apparently, the father could act out of pure favoritism, at least in some systems. Note that biblical law (Deut. 21:15–17) forbids transfer from the first-born son by a hated wife to the son of a beloved wife, that is, where the father's favoritism relates to the mothers, not the sons.
3. To give his daughters an inheritance share alongside their brothers. A daughter was a potential but not automatic heir. The father already had the power to grant her a share of the family patrimony in the form of a dowry (see below). Therefore, no adoption or other special procedure was necessary. In a testament from

[39] A poignant illustration is the testator at Emar who leaves a debt to be collected by whichever of his sons survives the current plague (RE 18).

[40] For the powers of a mother, see below. In Egypt, it was possible to make a gift of land to mortuary priests to cover the cost of maintaining one's mortuary cult in perpetuity. This was a special exception to the vested rights of heirs and, in turn, had special restrictions on alienation and partition.

Alalakh (AT 87), this power is exercised in relation to the "elder daughter-in-law."

4. To give his wife an inheritance share. This was part of a husband's power to make marital gifts (discussed in 6.2.5).
5. To disinherit a natural heir, for cause. In the testament of Naunakhte from New Kingdom Egypt, the testatrix disinherits four of her children on the grounds that they failed to support her—the most common reason. A testator at Emar disinherits a son who "spoke an insult" (*AO* 5:17). A testator at Nuzi disinherits one of his sons because he has arranged for that son to be adopted by his childless uncle instead (AASOR 10 21).

6.2.5 *Female Inheritance*

6.2.5.1 *Dowry*

6.2.5.1.1 Upon marriage, a daughter received a share of the paternal estate in the form of a dowry. Although functionally the equivalent of an inheritance share, it differed insofar as it was not in law a vested right, like a son's inheritance, but depended on her father's discretion. In Akkadian, most of the technical terms for dowry are, in fact, words for "gift" (*nudunnû, šeriktu*). The difference is logical, firstly, because a daughter normally received her dowry in advance of her father's death, when the size of the inheritance shares could not be determined, and secondly, because the size of the dowry might be a matter for negotiation between the bride's family and the groom's family. Nonetheless, NBL 9 gives the daughter's interest something of the character of an inheritance share in ruling that if her father, having assigned her a dowry, suffers a decrease in his wealth, he may reduce the dowry proportionately but not arbitrarily in collusion with his son-in-law. Where the father dies before his daughter is married, the question arises whether she has a legal right to a share of the estate alongside her brothers or only has an expectation that they will dower her. Although LH assigns a share in the case of certain priestesses, there does not appear to have been a general principle of entitlement (except in Egypt). It is not surprising, therefore, that fathers often explicitly gave their unmarried daughters an inheritance share by testament.

6.2.5.1.2 The dowry enters the groom's house together with the bride, on marriage. The bride's father is often expressly said to give it to the groom. Thereafter, it is subsumed into the husband's assets

for the duration of the marriage, to be restored to the wife on divorce or widowhood. Its legal status during the marriage would appear to be that of a fund owned by the wife but managed by the husband. On his death, she is entitled to be refunded its full value prior to division of the paternal estate among the heirs. In the late period, protection of the widow's interest in her dowry is strengthened: she is preferred over her late husband's creditors, making the extension of credit to the husband a more risky business. In more than one period, we find desperate attempts to keep the dowry in the husband's family, at least temporarily: clauses in marriage contracts penalized the widow with forfeiture of her dowry if she remarried or even left her late husband's house.

6.2.5.1.3 In practice, wives are found managing assets, but it is usually impossible to tell whether the assets were specifically dowry property, wealth from earned income, or undifferentiated marital property in collaboration with the husband. Certain parts of the dowry, however, could be designated for the wife's control. The Neo-Babylonian term *quppu* ("cash-box") refers to a cash fund for the wife's exclusive use. Talmudic sources refer to a category of dowry property called *melog*, which has earlier equivalents in Akkadian and Ugaritic (*mulūgu; mlg*). It is distinguished from the rest of the dowry (which the Talmud calls "iron sheep") by the fact that its destruction, loss, or loss of value is entirely to the wife's account—which suggests that it was in her control. An obvious example would be personal slaves, whom the husband was not obliged to replace if they died.

6.2.5.1.4 On the wife's death, her dowry was divided by her heirs, just like the paternal estate. Her primary heirs on intestacy were her sons—from all her marriages, if she had contracted more than one. She was entitled to make a will separately from her husband and assign shares in her property among her legitimate heirs, including daughters. In the testament of Naunakhte mentioned above, the testatrix emphasizes that the children she has disinherited will still inherit from her husband's estate. If the wife died childless, the dowry reverted to her paternal family; under no circumstances could her husband or his family (including his children from other wives) inherit it. If she predeceased her husband, however, her children would, at least according to LH 167, have to wait until his death before dividing her estate.

6.2.5.2 *Marital Gifts*

Gifts of property from husband to wife, mostly post-nuptial, are frequently attested. The gift took effect after the husband's death, which meant that it remained the husband's property during the marriage, unlike the dowry. If the wife predeceased her husband, the gift was void. Alternatively, the husband could assign his wife a share in his estate, or even the whole of it, by testament.

The purpose in all these cases was to maintain the wife during widowhood, it being anticipated that the property would eventually pass to the children of the marriage. Her children from another marriage or her paternal family were not entitled to inherit it. The effect of such a gift was therefore only to delay devolution of the donor's estate, or part of it, on his legitimate heirs. However, a power often granted to the wife in the gift or testament could change the pattern of inheritance to some extent. She was entitled to give her share "to the son who loves her" or "the son who honors (i.e., supports) her" or the like. In consequence, the widow could disinherit some of the legitimate heirs from part of their father's estate. Indeed, it was theoretically possible for her to bequeath it to a stranger, contrary to the principles of male inheritance (and to the impression given by LH 150). Most documents of grant emphasize that she could not give the property to an outsider, but a few expressly allow her to give the property "wherever she pleases." A Nuzi testament applies this liberality only to a gift of movables such as perfumes, utensils, and sheep (HSS 5 70). But in a remarkable clause from Emar the husband states that his wife may "throw it in the water, give my estate wherever she pleases" (TBR 47).

6.2.5.3 By a long-established custom, already attested in the early second millennium, the bride's father upon marriage returned the "bride-price" to the groom, but as part of the bride's dowry. It thus became part of the wife's marital assets, although in recognition of its origins, it did not always devolve in the same way as the rest of the dowry.

7. Contracts

The ancient Near Eastern sources on contract present us with a paradox. On the one hand, contractual documents are the most prolific legal source, especially in cuneiform. On the other, the legal

basis of contract in any or all of the systems of the region remains an enigma. There are two reasons: the lack of theoretical discussion in the ancient literature, and the oral character of the contracts (see 1.2.1 above). The written record not only omits many types of oral contract; we cannot be sure that the document contains all the terms of the contract it purports to record. It is not surprising, therefore, that in spite of the many monographs written on the form of individual contracts, no scholar has addressed the theoretical question of what made a contract binding. In this brief introduction, we can only attempt some preliminary proposals based on first principles and salient features of the data.

7.1 *Principles of Contract Law*

A contract is an agreement whose terms a court is prepared to enforce. Each legal system has its own criteria for what it will recognize as a legally binding agreement and under what conditions and to what extent it will enforce its terms. It is sometimes difficult to decide when parties have reached an agreement, but the law needs to select a point at which to freeze the bargaining between the parties, making it irrevocable.[41] The simplest means from the point of view of the law—but a cumbersome one for the parties—is to require some formality. It can be *verba solemnia*, a gesture or ceremony, a written document, or the like. If the law decides to give effect to an informal agreement, the task is more complex. It may rely on mechanical presumptions[42] or await some concrete expression of the agreement, that is, actual performance by at least one of the parties (the so-called real contract), or again it may confine itself to recognizing only certain types of transaction, according to content (e.g., sale, hire, or partnership).[43] Whatever criteria were applied in the ancient Near Eastern systems can only be deduced from the documents of practice.

[41] It also needs to distinguish between agreements that are worthy of enforcement by the law and those that are not, either because the parties would not normally regard them as such (e.g., purely social arrangements) or because of the dictates of public policy (e.g., immoral purposes).

[42] As in the Common Law, where the criteria of offer + acceptance + consideration provide a crude test, which does not always distinguish between social and legal undertakings.

[43] As in Civil Law systems, which therefore present a law of contracts, with multiple criteria, rather than a law of contract.

7.2 *Features of Contract*

7.2.1 The records, whether cuneiform, hieratic, Demotic, or Aramaic, share the same basic structure: they are styled as the protocol of an oral proceeding that was performed before witnesses. The description can sometimes be extremely terse, as in debt notes, which consist merely of an acknowledgement that "A owes B x silver." More explicit parallels confirm that what is being described is the result of an oral transaction such as loan, or sale on credit, even if the particular transaction behind the debt note often cannot be identified. At the other extreme, the "dialogue documents" of the Neo-Babylonian and Persian periods give a graphic account of the oral proceeding itself, albeit still in summary form.

7.2.2 The agreements recorded fall into standard categories, easily identifiable by a key word or phrase. It is rare to find a contract *sui generis*, although a recognized type may occasionally have in addition a unique special term. Certainly, there is no question of each agreement having been drafted verbatim by the scribes. Of course, it could always be the case that standardization applied exclusively to those transactions recorded in writing, but the evidence of the decrees and law codes does not give that impression. They contain paragraphs imposing implied terms on various types of contract, including many that have left no trace in the written record and may have existed only orally.

7.2.3 There is an equally high degree of standardization in the drafting of individual clauses of the contracts, some of which may be used in more than one type of contract. Notwithstanding the fact that they change over time and place, they tend to follow collective patterns, the idiosyncrasies of individual scribes notwithstanding. The lexical lists and model contracts attest to the fact that scribal training involved learning standard contractual clauses.

7.2.4 The contracts recorded are bilateral, that is to say, with mutual obligations. With certain important exceptions, to be discussed below, they are either fully executed, with only contingent obligations outstanding, or at least one of the parties has already performed his obligations, in whole or in part. The important point is that they are not wholly executory; they do not consist solely of promises for

future performance. Likewise, the provisions in decrees and law codes that regulate contractual obligations intervene in completed or partly executed contracts.

7.2.5 HL 28–29 represent a clear exception to the above. In a contract of betrothal between the bride's parents and the groom, the law distinguishes between a daughter who is "promised" (*taranza*) and one who is "bound" (*ḫamenkanza*). The second condition results from a betrothal payment by the groom. If the parents then give their daughter to another in breach of contract, they must pay the injured groom double the betrothal payment that they received. If the parents commit the same breach in the first case, it is likewise treated as a breach of contract, even though the contract is wholly executory. They must pay the groom compensation, in an unspecified amount. Furthermore, a third party who abducts a "promised" daughter in disregard of the contract must pay the groom compensation for interference in his contractual relations.

7.2.6 Evidence from Neo-Sumerian trial records (di-til-la) suggests that the betrothal promise was more than a simple statement; it took the form of a solemn promissory oath. The promissory oath was a self-curse invoking a god or the king, by which a person imposes a strict obligation upon himself.[44] It was in its nature unilateral and was very flexible, being adaptable to any situation, contractual or otherwise. At the same time, it was a highly formal procedure.

7.2.7 One other type of contract is attested that is based purely on promissory oaths: the international treaty. Treaties were governed by the same law as private contracts, albeit with kings as parties and gods as witnesses (see 9 below). Their special features are that their provisions generally concern purely future conduct and that they can be bilateral or unilateral. Bilateral treaties are simply two sets of oaths that may or may not coincide. In parity treaties the obligations to which each side swears are identical, or at least mirror images. Vassal treaties are a list of obligations on the vassal, and only the vassal takes the oath.

[44] On the oath, declaratory and promissory, see the essays in Lafont, ed., *Jurer et maudire* . . .

7.2.8 Documents recording the standard contractual forms may also record a promissory oath by one or both parties. For the most part, the oath relates to ancillary matters: either special terms not usually found in that type of contract or (most frequently) a promise not to deny, contest, or alter the terms of the completed contract in the future. In the third millennium, oaths are sometimes recorded for central obligations of the contract, for example, repayment of a loan. This type of oath disappears in the second millennium, where only ancillary oaths are recorded. By the first millennium, it is rare to find any mention of an oath in the records of standard contracts.

7.3 *Findings*

7.3.1 So far as may be discerned from the limited evidence, a single juridical conception of contract prevailed throughout the region, though manifesting itself in autonomous forms in each society and period. In that conception, there were two ways of creating a binding contract:

1. By a bilateral, oral transaction of a standard type recognized by law, for example, sale, hire, or partnership. Its enforceability arose from the performance by one party of his obligations (possibly in part), which triggered the duty of the other party to fulfill his contractual promises (i.e., a "real" contract).
2. By solemn oath, which created a unilateral obligation. Its enforceability arose from its form, which bound the promisor from the moment of his promise. It is not certain how far mutual oaths created mutual obligations, where breach by one side would absolve the other from his oath.

7.3.2 Bilateral standard contracts and oaths might be used:

1. as alternatives, where the parties could choose either a standard contract or an oath to create the obligations;
2. successively, as in the Hittite marriage contract, which could progress from an oath-based agreement to a standard contract (based on payment of the "bride-price"), with different consequences for breach;
3. in a complementary manner, where oaths were used in standard contracts to secure ancillary obligations;
4. cumulatively, where oaths were used in standard contracts to secure fundamental obligations.

7.3.3 The documentary record gives the impression of a gradual decline in the use of the oath. Any conclusions, however, should be drawn with extreme caution. The reason could be that the relevant obligations became implied in the standard contract or that the oath was so self-evident that it did not need to be recorded. Even in the third millennium, when mention of the oath is frequent, it is not consistent. In the contract of suretyship, for example, the oath is recorded often enough to suggest that it was the basis of the surety's obligation to the creditor. Its occasional omission would therefore be attributable to brevity, not substance. Does its total omission from suretyship documents of the second millennium then mean that the oath was no longer the basis of the obligation or that it did not need any mention, being the sole basis?

7.3.4 A major difficulty is that use of the oath, in contractual and non-contractual situations, was often strictly speaking superfluous: it was used as an extra precaution where an obligation already existed on some other basis, for example, vassal status, citizenship, or even slavery. The reason is that it secured an extra level of sanctions, royal or divine. Only in fully executory situations like the betrothal contract and the treaty could it be argued that the oath was indispensable. On the other hand, if an oath not to contest an executed agreement in the future were regarded as indispensable, then the oath would be the only possible means of making an agreement into a binding contract. A slave already transferred and paid for would not be acquired unless and until the oath not to renege had been taken by one or perhaps both parties.

7.3.5 A further complication that may affect the credibility of the evidence is the possibility that the oral transactions recorded may sometimes have been fictitious. Occasionally, payments are recorded which external evidence shows not to have been received, or statement of completed performance on the envelope is contradicted by a requirement of future performance on the inner tablet. Even loans may be fictitious, masking some bookkeeping transaction (e.g., Middle Assyrian KAJ 66). While the principle of the oral contract was upheld, its role was usurped by the document, which became virtually a mode of creating contracts in its own right. Although rare (as far as we can tell), the fictitious document provided a conceptual stepping-stone to acceptance of a dispositive written contract. But could a solemn oath be taken as read?

7.4 *Typology*

7.4.1 The core contracts that are found in any modern legal system are present in the ancient Near East: sale, hire, deposit, loan, pledge, suretyship, and partnership. Exchange of land follows the pattern of land sale; barter of goods is rarely attested. (Individual chapters should be consulted for the specific terms of contracts, which vary from system to system.)

7.4.2 There were contracts that are not found in modern legal systems:

1. Contracts ancillary to status, for example, marriage, adoption, and slavery. Such contracts interfere far more profoundly with the rules of status than would be conceivable in modern law. For example, penalty clauses in a marriage contract could effectively block a spouse's right to divorce.
2. Contracts between criminal and victim (or their families) arranging a substitute penalty for a crime. Thus, a Neo-Assyrian contract arranged for the transfer of slaves in payment of the criminal's blood-debt—his liability for murder—which would otherwise have been payable with his life (ADD 321 = SAA 14 125).
3. A contract for a prostitute's services was legally binding, even if the profession was not altogether socially respectable. In Genesis 34, Judah even leaves a pledge for payment with a woman whom he supposes to be a prostitute.
4. In Egypt, a person might make a contract with a mortuary priest for the provision of cult offerings after his death, in return for an endowment of land.

7.5 *Terms*

7.5.1 The law codes have relatively few provisions regarding contract. Most of them insert implied terms into standard contracts. Some of those terms are in fact found expressed in contractual documents themselves, such as the liability of the seller of a slave for epilepsy. Most terms were undoubtedly customary law, even if not recorded in detail in the contractual document, such as the tariff for damage to parts of a rented ox (LOx). The most intrusive form of implied term is the tariffs of prices for goods and services, which are found in LE, LH, and HL. A few provisions deal with allocation of risk if the contract is frustrated, for example, if a crop is destroyed by a natural disaster (LH 45), others with penalties for breach by negligence or fraud (e.g., HL 149: fraudulent declaration that a slave died before delivery).

7.5.2 The penalties set by the contracts themselves were not confined to the pecuniary. Even pecuniary penalties could be impossibly high sums, which leads one to wonder what was the alternative to nonpayment. One definite possibility was slavery, since a party could agree directly to be sold into slavery as penalty for breach. Other penalties were mutilation or even death. Again, these are found as direct penalties for breach: "a peg shall be driven into her mouth and nose" (Old Sumerian: SRU 43); "his head shall be smeared with hot pitch" (Old Babylonian: TCL 1 237) "molten lead shall be poured into his mouth" (AT 28), "he shall put out the eyes of A. and her children and sell them" (Nuzi: JEN 449), "she shall die by the dagger" (Neo-Babylonian: Roth 5). A character in 1 Kings 20:39 reveals the link between excessive payments and cruel and unusual punishments: "Your servant went out to battle and a man came up to me and said: 'Guard this man; if he goes missing, it is your life for his, or you will pay a talent of silver.'" While such penalties are not common and tend to be imposed in situations involving status or extremes such as war, some are for breach of unexceptional commercial bargains.[45] There is an instinctive inclination to deny that they were ever applied in practice, but in a world where criminal penalties could be exceedingly harsh by modern standards, there was nothing fantastic about the penalties themselves.[46] Rather, it would appear that the sharp distinction drawn in modern penology between criminal and contractual liability did not exist. As the king of Israel expresses it in his uncomforting reply to the guard mentioned above, who had managed to lose his prisoner in spite of the terrible penalty threatened (1 Kings 20:40): "This is your sentence: you yourself pronounced it."

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[45] Cf. a penalty clause in Old Babylonian sale documents: "If there is a claimant (to the property sold), he (seller) shall pay 2 minas of silver or his tongue will be torn out" (e.g., TIM 5 19).

[46] Less credible is a cumulative list of the kind found in a Neo-Assyrian sale document: ". . . he shall pay 5 minas of silver and 5 minas of gold to (the god) Adad of Kurbail, and shall dedicate 7 male and 7 female votaries to Shala, the consort of Adad. He shall offer 2 white horses at the feet of Assur. He shall eat 1 mina of carded wool and drink a standard *agannu*-bowl. They shall strew for him 1 seah of cress-seed from the gate of Kurbail to the gate of Kalhu and he shall pick it up with the tip of his tongue and fill their seah-bowl to the brim. He shall repay the price to its owners tenfold; he shall plead in his lawsuit and not succeed" (CTN 2 15). Clearly, the penalties are *in terrorem*, but they are of a different order to the others discussed: they are not inflicted but require action by the party at fault, in the manner of a forfeit.

7.6 *Social Justice*[47]

A special feature of the ancient Near Eastern systems was the intervention of the king or the courts to unravel valid contracts of loan, pledge, or sale, in order to relieve the social consequences of debt. Intermittent royal decrees canceled existing debts and sale or pledge transactions judged to be dependent on them. These were solemn acts of general application ("the king has decreed justice for the land"), although exceptions were made, such as for commercial loans or debts owed to foreigners. We have seen above how sale of family members as debt slaves also gave rise to a right of redemption or of release after a period of service. The right of redemption also applied to family land sold under pressure of debts.

Interference in contractual rights on this basis was neither universal nor systematic and where applied, might be hedged with exceptions and qualifications. As a principle of justice, however, it was universally recognized.

8. Crime and Delict

8.1 *Sources*

Most of our knowledge of criminal law derives from the law codes, since criminal cases, if recorded at all, were seldom preserved in legal archives. This gives rise to two problems.

Firstly, the evidence is very unevenly distributed between the societies of the region, even more so than for other branches of the law. Those sites which have only produced private archives are particularly bereft of information. On the other hand, criminal law provides the most striking examples of the common intellectual tradition reflected in the law codes. The same cases recur from code to code, occasionally in almost identical language, or in recognizable variants. Standard situations, such as the goring ox and the rape of a betrothed woman, provide the strongest evidence for a canon of scholarly problems that was passed on from system to system.

Secondly, since the law codes were theoretical documents, it is difficult to know how far they represent the law in practice. The

[47] Westbrook, "Social Justice . . ."

ideological agenda of the biblical codes is obvious, but the cuneiform codes, some of which served the purposes of royal propaganda, may have been no less colored by ideology, idealization, or hyperbole. There is also the suspicion, especially strong in the case of the Middle Assyrian Laws, that some of the punishments reflect the scribal compilers' concern for perfect symmetry and delicious irony rather than the pragmatic experience of the law courts. Certainly, the few documents of practice, including those contemporary with the codes, show striking discrepancies in matters of detail, especially as regards punishments, which tend to be milder than in the codes. But they do conform to the general principles, structures, and procedures found in the law codes.

Since the intellectual method of the codes was to set out principles by the use of often extreme examples, and they were based, if at some remove, on the activity of the courts, it is probable that they inform us what the courts could do and in perfect justice should do, whereas the courts themselves, in dealing with less tidy situations, were more flexible in their judgments, within the given parameters. Accordingly, we can reconstruct a picture of how the ancients thought about crime—what they regarded as wrongs and what means they devised for redressing them—even if we cannot always be sure how they applied their ideas on a day-to-day basis.

8.2 *Development*

In considering the overall patterns of criminal law in the ancient Near East, the influence of evolutionary theories from the nineteenth century has been the cause of a great deal of confusion. The classic theory, which dates from before the discovery and decipherment of cuneiform legal records, drew upon Roman law, biblical law, diverse "primitive" systems such as medieval Germanic law, and anthropological observations of tribal customs.[48]

The theory envisaged several stages in the development of the criminal law. In the pre-state period, wrongs were redressed not by law but by feud between families or clans, a condition marked by unrestrained revenge. The appearance of organized society, with

[48] E.g., Jhering, *Geist* . . ., 127–140; Kohler, *Blutrache* . . ., 9–12; cf. Sulzberger, *Homicide* . . ., 1–6; Cherry, "Evolution . . ."

courts of law and legislatures, introduced in the first instance limits on revenge. The next stage was that composition, an agreement between the parties for a payment in substitution for revenge, was allowed. Later, the state was strong enough to impose composition on the parties, often with fixed tariffs for the loss of life or limb. In the final stage, the state took over entirely, imposing criminal sanctions.

With the discovery of the cuneiform law codes, scholars tried to impose the theory on the evolution of ancient Near Eastern legal systems, since some codes seem to embody revenge while others concentrate on payments.[49] The codes, however, do not follow the chronological order postulated by the evolutionary pattern: it is in the earliest examples of their genre that fixed payments are found. Consequently, a counter-theory was proposed: the earliest stage was payment, since human life was seen in terms of its economic value to the group. As civilization developed, human life came to be regarded as more precious and the state became stronger, leading to the development of criminal sanctions.[50] Unfortunately, the chronological pattern of the codes does not fit this theory, either. Accordingly, proponents of these theories and subsequent refinements upon them have assigned the societies of different periods and places in the region to primitive and advanced categories, or a mixture of both, depending on where the penalties in their law codes stand in the proposed evolutionary model.[51]

In my opinion, the scholarly debate over the evolution of criminal law is irrelevant to the ancient Near Eastern systems. If any such developments took place in the region, they were over and done with long before the appearance of written legal records. By that time, the civilizations to which those records attest were based on centralized states with well-established courts and settled laws. Those states may not have had a police force or all the apparatus of a modern state for imposing law and order, but they certainly could and did enforce rules punishing crimes and redressing wrongs. Consciousness of the state's responsibility was such that when the culprits could not be brought to justice for crimes such as murder and robbery, there were established procedures for compensating the victims and their families from the public purse (LH 22–24; HL 4).

[49] Driver and Miles, *Babylonian Laws* . . ., 501–2.
[50] Diamond, "An Eye for an Eye."
[51] Cardascia, "La place du talion . . ."; Finkelstein, "Ammi-ṣaduqa's Edict . . ."

If there is anywhere in the ancient Near East where pre-state conditions could be said to have prevailed, it is in relations between states, where no central authority existed. Even in that area, however, we find already in the third millennium a recognized system of customary international law and treaties governing disputes between states. It is true that self-help (i.e., through war) was the sole means of redress, but the protagonists followed the rule of law in having recourse to it or, at least, paid lip-service to the rule of law. Indeed, there were even rules of international law imposing liability on a state to investigate the robbery or murder of foreign nationals on its territory, to pursue the culprits, and if not found, to pay compensation, as in internal law. There could be no clearer manifestation of a developed criminal law with universally accepted principles.

At the same time, the ancient system bore little resemblance to modern criminal law, either in its aims or its methods. Revenge was an integral part of the system, as was composition. Justice was deemed to be served by punishments that would be unacceptable, on persons who would be considered innocent and, in some cases, for crimes that would not be recognized, in modern law.

8.3 *The Mental Element*

A basic principle of modern criminal law is that a crime must have two elements: a guilty act and a guilty state of mind: premeditation, intention, awareness, recklessness, or some other level of consciousness. In practice, there exist in every legal system crimes where the demand for a mental element is dispensed with or is very attenuated.

Again, the scholarship on ancient law has been muddled by an old theory, that of *Erfolgshaftung*. According to that theory, primitive criminal law did not distinguish between deliberate and accidental harm, attributing guilt purely on the basis of the consequences of an act. Scholars have agonized, in my view unnecessarily so, over whether this condition still prevailed in the ancient Near East.[52] There is ample evidence in the sources of distinctions between deliberate and accidental acts, and even of nuances in between, such as foreseeability of consequences. What has given grounds for confusion is that the paragraphs of the law codes do not systematically mention

[52] E.g., Cardascia, "Le caractère volontaire . . ."

the mental element. This is due, however, to their casuistic structure, which leads to a great deal of information being omitted from any given paragraph. The mental element may be omitted because the paragraph is concerned to illustrate some other aspect of the rule, or because it was regarded as self-evident in that case. Certain standard examples were used to discuss the mental element; it does not mean that it applied only to those instances.[53] Of course, there were significant offenses for which a mental element was not necessary.

8.4 *Status*

The gravity of the offense could vary according to the status of the parties, especially the victim. If the victim were a head of household, the consequences for the culprit could be considerably more serious than for a son, daughter, or wife. In some systems, even the class of the parties, aristocrat or commoner, could make a difference. A slave was considered property and did not enter into the same category of offenses at all.

8.5 *Punishments*

8.5.1 It was considered perfect justice to "let the punishment fit the crime." The most notorious example is talion (like for like). It was used most typically for physical injuries—"an eye for an eye"—where it was particularly appropriate as a judicial limitation on revenge. The death penalty was too widely employed to be regarded as specifically talionic but could be given a talionic character, as when an Old Babylonian king ordered a murderer who had thrown his victim into an oven to suffer the same death (BIN 7 10). A special form was vicarious talion: if the victim was a subordinate member of household, punishment was inflicted on a parallel member of the culprit's household, for example, a son killed for a son (LH 229–30), or a wife violated for a daughter raped (MAL A 55).

8.5.2 "Ironic punishments" sought to make a similar association, for example, severing the hand that strikes (LH 195; MAL A 8; Deut. 25:11–12), the lip that steals a kiss (MAL A 9), the pudenda

[53] The standard case concerns non-permanent injury: LH 206–8; HL 10; Exod. 21:18–19. Note that LH 207 extends the case to homicide.

of an adulterer (MAL A 15). Note stinging by bees for stealing a hive (HL 92) and the strikingly visual consequences for a prostitute who dared to veil herself in public—hot pitch poured on her head (MAL A 40).

8.5.3 There were many methods of execution, but hanging was not used, except to expose the corpse. Prison sentences were unknown, but fixed periods of forced labor could be imposed.[54]

Humiliation was a valid form of punishment, for example, adulterers might be stripped naked and led around town by a nose-rope. Flogging is often associated with offenses that call for shaming the culprit.

8.6 *Classification*

Modern law divides unlawful wrongs into two categories: crimes and civil wrongs (torts). Crimes are considered wrongs against society as a whole; it is the public authority that pursues the offender through litigation and the principal aim is to punish. Torts are considered wrongs against an individual, on whose initiative litigation depends, and the principal aim is to compensate. The same act may be a crime and a tort.

The modern classification is unhelpful for the ancient law, which had a different theoretical basis, albeit never expressed in the native sources. From the pattern of treatment and remedies, we can distinguish three main categories: wrongs against a hierarchical superior; serious wrongs against the person, honor, or property of an individual; and minor harm to an individual's person or property.

8.6.1 *Hierarchical Superior*

Acts that harm, disobey or displease a superior carry a very high level of moral culpability. The appropriate response is disciplinary, at the superior's discretion. They may be further divided into an upper level, where the cosmic order is compromised, and a lower level, where the social order is compromised. Offenses comprising the cosmic order are the following:

[54] Prison was used as an interim measure to hold persons until their punishment was decided or until they paid a penalty or debt owing.

8.6.1.1 *Offenses against the Gods*

Offenses against the gods constitute what, in modern parlance, would be called sins. Examples of direct harm to a god's interests are blasphemy, sacrilege, and (in a monotheistic system) apostasy, which was an elevated form of treason. Disobedience could be offenses against cultic rules or taboos (in Israel, work on the Sabbath), or breach of an oath sworn by a god. Practices displeasing to the gods were witchcraft, abortion, sexual aberrations such as incest and bestiality (homosexuality in some but not all systems), and adultery. Some of the latter could be victimless crimes.

The offended god would, of course, wreak divine punishment on the offender, but the consequences could be worse. Many of these offenses were thought to cause "pollution" of the surrounding area, which in itself invoked divine wrath. Pollution could affect the culprit's family or home, the local town, or even the whole populace if the culprit were a representative, such as a king. Divine punishment could then be collective, in the form of drought, pestilence, or defeat in war.

The human reaction, which is relevant to our history of law, was to forestall divine punishment by killing the offender, his family, or even a whole city (e.g., where implicated in apostasy), or else to separate the offender from the polluted area by banishment. Juridical distinctions were made between offenses that required collective punishment and those where only the offender would be affected (e.g., MAL A 2). So feared was the danger to the population from the former category that individuals were obliged to report cases of witchcraft, for example, to the authorities. Purification rituals might follow execution of the sentence.

To some extent these measures can be called punishment, but an equally valid analogy would be to drastic public health precautions.

8.6.1.2 *Offenses against the King*

Offenses against the king were treason, sedition, disobedience of orders, and breach of an oath taken in the name of the king. Corruption by royal officials would also fall under this heading. The king could impose punishment at his discretion. Treason typically involved death and confiscation of the traitor's property; it could occasionally include execution of the traitor's family (e.g., the priests of Nob, 2 Kings 9:26). In the New Kingdom Harem Conspiracy Trial, punishments ranged from enforced suicide through mutilation to a mere rebuke.

8.6.1.2.1 It is to be noted that collective punishment was a rare form of punishment, which is associated only with offenses against gods and kings.

8.6.1.3 According to Exodus 21:28, 32, an ox that gores a man to death is to be stoned and its flesh not eaten. It has been suggested that this sentence is imposed because the animal has killed a superior in the cosmic order, namely a human being.[55]

Offenses compromising the social order are:

8.6.1.4 Disobeying judges and officials, which was punishable with death (HL 173; Deut. 17:12).

8.6.1.5 Adultery was a serious offense by the wife against her husband. Called the "great sin" in a number of societies, it was regarded in some way as analogous to treason.[56] It gave the husband a broad discretion in punishing his wife, ranging from death through mutilation to divorce with confiscation of all her property. Adultery, however, was a complex crime, and other elements limited the husband's exercise of his discretion (see below).

8.6.1.6 Cursing, striking, or disobeying a parent was punishable with variable severity in different systems, ranging from death through mutilation to disinheritance (cf. Exod. 21:15, 17; Lev. 20:9; Deut. 21:18–21; LH 195).

Note that in the last two cases, the law intrudes into inner-family relations, with the courts determining the offense and limiting the disciplinary discretion of the head of household.[57] MAL further limit the right of a husband to discipline his wife by maltreatment or mutilation.

8.6.2 *Serious Wrongs*[58]

Serious wrongs comprise what in modern law would be the principal crimes: homicide, injury, rape, perjury, theft. The category also includes insult and slander, which would be regarded only as civil wrongs, and adultery. All carried a high degree of moral culpability.

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[55] Finkelstein, *The Ox That Gored*, 26–29.
[56] Rabinowicz, "Great Sin . . ."; Moran, "Great Sin . . ."
[57] Cf. Roth, "Mesopotamian Legal Traditions . . .," 26–27.
[58] Westbrook, *Studies* . . ., 39–128.

This is the most complex category, involving redress on several levels. The basic approach (in my view, and in this I differ fundamentally from the evolutionary school) was that these wrongs gave rise to a *dual* right in the victim or his family, namely to take revenge on the culprit, *or* to make composition with the culprit and accept payment in lieu of revenge. The right was a legal right, determined and regulated by the court, which set the level of revenge permissible, depending on the seriousness of the offense and the circumstances of the case. The court could also fix the level of composition payment. If it did, the effect was to make revenge a contingent right, which only revived if the culprit failed to pay. Some law codes impose physical punishments and others payments for the same offenses, while some codes have a mixture of the two. There is not necessarily a contradiction: they are two sides of the same coin. In highlighting one or the other alternative, the codes are making a statement as to their view of the gravity of the offense.[59]

Because it was a private right, the initiative in bringing a case lay with the victim. At times, however, the impersonal language used or the circumstances suggest that a public authority is pursuing the lawsuit, especially as regards homicide. Nonetheless, it would be anachronistic to think in terms of a public prosecutor bringing cases on behalf of the state. In homicide, it was obviously not the victim who brought the case; a member of his family took the role of avenger. For victims who had no one to claim revenge, the king was regarded as the ultimate avenger, as would any head of household for his subordinates. (Beyond the king, the ultimate avengers are, of course, the gods.) The situation is particularly clear in the case of foreigners, who have no one to sue on their behalf in the local courts. The king of Babylon expects the king of Egypt to avenge Babylonian merchants murdered on Egyptian territory (EA 8). The authorities might therefore be expected to intervene if the victim or his family were unable to do so.

A further complication is that some of the offenses in this category—homicide and adultery in particular—were also regarded as causing pollution, that is, they were at the same time an offense

[59] Thus CC tends to allow revenge (and thus free bargaining over composition) in cases where LE or LU would impose fixed composition. (Cf. Exod. 21:29–31 and LE 54 for death caused by a goring ox, but note that LE 58 takes the same attitude as CC where death is caused by a falling wall.)

against the gods. The pollution might not be as widespread as in serious crimes of the previous category, but the authorities had an interest in removing it. In addition, they were responsible for compensating the victims of unsolved robberies and murders, as we have seen (LH 23; Ugarit: RS 20.22:40–55; Deut. 21:1–9). Their intervention would thus be expected. It still did not amount to the role expected of the modern state—to proceed against criminals irrespective of the wishes of the victims or their families. In ancient law, the latter were the ultimate right-holders.[60]

The fundamental characteristics of the major offenses in this category are reviewed below. Not every legal system applied them in their entirety, but they formed the conceptual framework within which the different systems functioned.

8.6.2.1 *Homicide*

Murder was thought to cause the loss of the victim's blood (the symbol of his life) to the family. They could get the blood back by killing the culprit. Terms for the avenger, generally the nearest male relative, reflect this understanding: he was called the "owner/redeemer of the blood/life." Alternatively, he could accept payment. If there were mitigating circumstances, such as lack of premeditation or low status of the victim, the victim's family was entitled to a lesser penalty, for example, vicarious talion or a payment fixed by the court. A scholarly problem found in several codes was the owner's liability for death caused by a goring ox (LE 53–58; LH 250–52; Exod. 21:28–32).[61]

8.6.2.2 Injury is typically dealt with in the law codes by lists of body parts, with talionic punishments or a tariff of payments or both. Inclusion in the lists of the biting off a nose and references to an affray (Akk. *risbātum*) are indications that deliberate wounding was at issue. Furthermore, inclusion among the injuries of a slap in the face shows that these offenses were as much about insult as about injury.[62] Negligent injury was not considered, at least not in the codes, unless it was also a breach of contract. Where a surgeon's negligence caused

[60] Some biblical scholars regard biblical law as special in this regard, e.g., Greenberg, "Some Postulates . . ."

[61] Yaron, "Goring Ox . . ."

[62] See Roth, "Mesopotamian Legal Traditions . . .," 25–37.

death or injury, the punishment was "ironic"—his hand was cut off (LH 218). A scholarly problem found in several codes is a blow to a woman that causes a miscarriage (LU 23'–24'; LH 209–14; HL 17–18; Exod. 21:22–25).

8.6.2.3 *Adultery*[63]

Adultery was consensual sexual intercourse by a married woman with a man other than her husband. Husbands could have multiple sexual partners and although certain liaisons were restricted by law or morality, they were not regarded as adultery. Juridically, adultery was a triple offense. As regards the wife, it was an offense of disloyalty against her husband, which we have discussed under the first category above. As regards the paramour, it was a serious wrong against the husband, which gave the husband the dual right of revenge or payment (cf. Prov. 6:32–35). The husband could demand the death penalty, but his revenge could not exceed the punishment that he imposed on his wife, and if he forgave his wife, the paramour was to be pardoned (LH 129; MAL A 14–16; HL 198). The husband could kill the lovers if he caught them *in flagranti delicto*, on condition that he killed both (LH 129; HL 198). The concern of the law was to prevent husband and wife conspiring to entrap a third party. As regards both lovers, adultery was also an offense against the gods, especially since it often went undetected.

8.6.2.4 *Rape*[64]

Rape of a married woman (or a betrothed—a standard scholarly problem) was a serious wrong against her husband or fiancé, exactly like adultery (LU 6; LH 130; MAL A 12; Deut. 22:23–27). The difference was that lack of consent on the woman's part exonerated her from punishment for adultery. Nonetheless, the wife was not regarded merely as property for these purposes; the rape of a slave woman, which was a property offense, was treated altogether differently. In both adultery and rape, the attaint was to the husband's honor and marital rights.

Rape of an unbetrothed maiden was an offense against her father. MAL A 55 imposes vicarious talion; Deuteronomy 22:28–29 treats

[63] Lafont, *Femmes* . . .; Westbrook, "Adultery . . ."
[64] Lafont, *Femmes* . . ., 133–71.

it more like seduction, which falls into the category of minor harm (see below).

8.6.2.5 *Perjury and Slander*[65]

False accusation was considered particularly appropriate for talionic punishment: the accuser suffered the penalty that he had sought for the accused (LL 17; LH 1–4; Deut. 19:16–21). Slanderous remarks impugning the sexual honor of a man or a woman led to various penalties, especially flogging and shaming punishments (LH 127; MAL A 17–19; Deut. 22:13–19).

8.6.2.6 *Theft*[66]

Theft is, of course, not defined but seems to have covered not only actual removal but also fraudulent misappropriation of goods left in one's care or found and not reported to the authorities. The fraudulent receiver of stolen goods was treated in the same way as the thief.

As in modern law, the gravity of the offense could vary greatly according to the circumstances, especially the value of the object stolen. Aggravated forms were treated as severely as homicide or adultery, while the treatment of petty theft comes close to that of minor harm (see below).

The standard penalty for simple theft was a multiple of the value of the object stolen, but fixed sums are found as well. If the thief failed to pay, it became a debt for which he could be taken into debt bondage or sold into slavery, depending on the seriousness of the offense and the policy of the legal system. A thief at Emar gave his sister into slavery in place of himself (Emar 257).

Examples of aggravated theft were kidnapping of persons for sale into slavery (and their purchase), theft from a temple, and using fraudulent weights, all punishable by death. Where a multiple payment was imposed, the alternative for an aggravated offense was death (e.g., fraudulent avoidance of a debt-release decree: AS 7). It was thus the equivalent of fixed payment in lieu of revenge.

Two theft-related scholarly problems are found in several law codes: the innocent receiver of stolen goods (LH 9–12; HL 57–70;

[65] Lafont, *Femmes* . . ., 237–88.
[66] Westbrook, *Studies* . . ., 111–31.

Exod. 22:3), and the burglar killed while breaking in at night (LE 12–13; Exod. 22:2–3).

8.6.3 *Minor Harm*

In the category of minor harm fall offenses that carry a low level of moral culpability. The mental element is negligence or, at most, lack of foresight; the loss caused is mostly pecuniary. The penalties are also pecuniary, their primary purpose being to compensate. Failure to pay could lead to debt-slavery, however. This category is close to the modern notion of civil wrongs (torts).

8.6.3.1 Personal injury is treated in a scholarly problem that posits a case of non-permanent injury incurred in a brawl. The culprit must pay the victim's medical expenses and compensation for his period of invalidity (LH 206; HL 10; Exod. 21:18–19).

8.6.3.2 Negligent damage to property, such as flooding a neighbor's field (LH 55–56) or allowing fire or grazing animals to encroach upon it (HL 106–7; Exod. 22:4–5) results in various compensation formulas, according to the economic loss.

8.6.3.3 Crimes such as homicide, wounding, or rape, when the victim is another's slave, are treated as damage to property. The culprit must pay the owner compensation, usually based on the value of the slave.

8.6.3.4 A special case is the seduction of an unbetrothed maiden.[67] The seducer must marry her and/or pay her father for the loss of her potential bride-price (MAL A 56; Exod. 22:15–16).

9. International Law

International law has a venerable history: references to treaties and to the sanctity of international borders are already found in the twenty-sixth century. The following two millennia have so far produced copies of more than forty treaties, with references to many more.

[67] Lafont, *Femme . . .*, 93–132.

9.1 *The International System*

9.1.1 International law was not separate from internal law, as it is today. The paradigmatic form of the state was monarchy. Its theoretical basis was the domestic household, that is, the territory and population of the state constituted a household, and the king was head of household. Like any head of household, he could enter into obligations that bound his subjects and was responsible for crimes committed by and upon them. International law was therefore based on principles of law common to all the civilizations of the region. At the same time, the peculiarities of international discourse endowed it with its own special character.

9.1.2 What made the society of sovereign states special was that their kings were answerable to no human tribunal. Instead, they were under the direct jurisdiction of the gods. In practice, this meant that breach of the international rules could only be remedied by self-help; in theory, the king in doing so was acting as a human agent for divine retribution. In addition, direct divine retribution could be expected in the form of drought, plague, or defeat in battle. Since the existence of the gods was universally regarded as a fact, the divine tribunal was as real in ancient eyes as a modern court of international justice and probably not much less effective. Of course, treaties and rules were broken, but no ruler would undertake an act of aggression without seeking to justify it before his gods in terms of international law, however weak his grounds. The gods could be disobeyed; they could not be disregarded.

9.1.2.1 Given that different nations might worship entirely different gods, a certain theological tolerance was necessary for the system to work. To some extent, this could be achieved by synchretism: there was only one sun in the sky, if worshipped under different names. But there was also "recognition" of the other party's gods, who were expected to punish their own subject for his sin against them in breaching international rules. The ancient protagonists' approach, not being conceptualized, remains somewhat impenetrable but it would seem that the divine tribunal was regarded sometimes as consisting of one's own gods, sometimes of the other party's gods, and sometimes of a sort of joint committee.

9.1.3 The international system was complicated by the structure of empires, which tended to consist of a core state surrounded by vassal kingdoms, over which they exercised varying degrees of control. Vassal kings would often have not only internal autonomy but also a measure of freedom in their foreign relations. They could wage war on their own account, make alliances, and even acquire their own vassals, provided that their actions were not prejudicial to the overlord's interests. Vassal states therefore must also be regarded as the subjects of international law.

9.2 *Treaties*

9.2.1 An international treaty derived its binding character from a solemn oath sworn by the gods. The oath was a standard way of creating contractual obligations but in a domestic context is seldom found as the sole constituent of a contract. The reason for its central role in treaties is that their provisions related exclusively to future conduct. It was therefore the only possible form (see the discussion of contracts, 7 above). The oath could be by the party's own gods, the other party's gods, or both, depending on the political conditions. The promisor was more likely to fear the wrath of his own gods but an oath by the promisee's gods gave the promisee the right to intervene as his gods' representative to punish violation.

9.2.2 Conclusion of the treaty could be accompanied by ceremonies solemnizing the bargain, such as a communal meal and sacrifices. The parties were the kings, or officials acting as their agents when, as was frequently the case, they did not meet face to face. The procedure in both cases was oral. Writing was not necessary to the validity of a treaty, although a written record was often made and accorded great significance. Copies were sometimes deposited in a temple, and there are examples of important treaties being recorded on tablets of silver or gold.

9.2.3 Treaties differed from ordinary contracts in that the witnesses to the transaction were primarily gods. Unlike human witnesses, the gods had a dual role: to attest to the oaths and, at the same time, to be potential avengers of their breach. Long lists of the gods of one or both parties were appended to treaty documents, which were sometimes also impressed with seals stated to be those of named gods, in the same way as the seals of human witnesses were impressed on contracts.

9.2.4 Multilateral conventions are not attested; all extant treaties are bilateral. Scholars generally classify them as parity or vassal treaties. Parity treaties were strictly reciprocal agreements between equals. Although the two parties each took an oath that in theory bound them unilaterally, the treaty attained mutuality through the exchange of oaths to identical terms. Vassal treaties were agreements between an overlord and vassal, in which only the vassal swore an oath, undertaking unilateral obligations. Although the terms were dictated by the overlord and might have resulted from force or the threat of force, in theory, a vassal treaty was a consensual agreement freely entered into by the vassal.

9.2.5 Some treaties fall between these two pure forms, as, for example, the Hittite treaty with Sunassura of Kizzuwatna, which is styled as a parity treaty but contains unequal terms marking its true nature as a vassal treaty.[68] By the same token, an overlord might give undertakings in a vassal treaty. Even if not under oath, such undertakings would serve to make the vassal's obligations conditional upon the overlord respecting them. In any case, such conditionality might arise from the general relationship of overlord and vassal. Thus a vassal might deem himself freed from his loyalty oath (in the eyes of the gods) by an egregious act of his overlord.[69]

9.2.6 Treaties were personal contracts between monarchs that bound their respective states as would a contract made by a head of household. Theoretically, the contracting king's rights and obligations passed to his successor under the normal rules of inheritance. In practice, it was usual for treaties, especially vassals' loyalty oaths, to be renewed upon succession.

[68] Liverani, "Storiografia . . ."
[69] Altman, "On the Legal Meaning . . .," 203–5.

9.3 *Customary Law*

9.3.1 Diplomacy was conducted by envoys rather than by residential ambassadors. Envoys enjoyed immunity in the sense of inviolability of their person; there is no allusion to the modern doctrine of immunity from liability for illegal acts. The envoy of a friendly state was deemed a guest of the host monarch, to be treated in accordance with the accepted norms of hospitality. Permission of the host was required before the envoy could depart. Inordinate detention might lead to diplomatic protests but was, strictly speaking, legal. Violation of an envoy's person, on the other hand, was a *casus belli.*

9.3.2 A state was responsible for crimes committed against foreign nationals on its territory. The victims' ruler would intervene on their behalf with the ruler of the state deemed responsible. The problem arose mostly with regard to foreign merchants, who were vulnerable to murder and robbery. The state was obliged to pay compensation to the victims or their families if the culprits were not caught. The modalities of compensation might be regulated by treaty, as examples from Ugarit in the late second millennium show.

9.3.3 Kings had a natural prerogative to grant asylum to fugitives. They were under no legal obligation to return fugitives to the country from which they had fled, except under the express terms of a treaty. For this reason, many treaties contain clauses regulating extradition. Another exception may have been vassals, who would be obliged (legally, not just politically) to return fugitives to their overlord under their general duty of loyalty. Hittite treaties, however, make the vassal's duty of extradition an express term.

9.3.4 Nothing certain can be said about the rules of war. A declaration of war sometimes preceded hostilities, but there appears to have been no general obligation. Prisoners of war were at the mercy of their captors, to treat at their discretion. They were either killed, enslaved (often being blinded), or ransomed. Civilians were regarded as legitimate booty. Humane treatment seems to have depended on political expediency and internal inhibitions rather than on recognized legal rules.

10. The Legacy of Ancient Near Eastern Law

I have described the law of the ancient Near East as lacking certain features of modern law. That lack is not absolute, however: the seeds of many modern legal institutions are already in evidence. It is perhaps in these embryonic forms rather than in developed structures that the legacy of the ancient Near East to later legal systems is to be sought.

The ancient kingdoms lacked a legislature in the modern sense, but they had assemblies, which at the local level were capable of creating binding rules. They had no legal theory as we would understand it, but they developed a pragmatic science of lists, which served as a vehicle for theorization and categorization of the law, albeit by inference. They had no jurists, but the drafting of decrees, contracts and treaties reveals a dedicated legal vocabulary and an ability to manipulate terminology in the interests of guarding against eventualities. They did not have a formal system of citation, but they referred to decrees and precedents and relied upon a formalized wisdom to trace some of the contours of amorphous custom and fill some of its gaps. They did not have legalism, with its reliance on the strict letter of the law, but they showed some consciousness of the notion in their careful formulation of oaths and in their creative use of legal fictions, which maneuvered between legal categories if not yet between legal terms.

There are, however, two highly developed features of the ancient law that modern systems can truly be said to emulate. The first is case-law method, or the objectivization of cases into paradigms and the use of analogy to extend their reach—a method that is still a pillar of modern jurisprudence. The second is their view of the office of judge. The qualities expected of a judge included not only probity, but also a heightened sense of right and justice, and a special regard for the weaker elements of society. Indeed, greater stress was laid upon these qualities than in modern society, and for good reason. Modern law relies upon the absence of personal interest and adherence to the letter of the law to ensure the objectivity of its judges. Ancient judges, often administrators and wealthy local landowners, were not shielded from personal interest in disputes or from acquaintance with the parties, and could not seek refuge in the strict wording of legal texts. It therefore fell to personal qualities to achieve the same ends. As the hymn to Shamash, god of justice, declares (99–102):

. . . he who takes no perquisite, who takes up the cause of the weak,
Is pleasing to Shamash, who lengthens his life.
The judicious judge, who gives equitable judgments,
Has the palace at his command, makes the seat of princes his place.

Abbreviations

AS	Edict of Ammi-ṣaduqa
CC	Covenant Code
HL	Hittite Laws
LE	Laws of Eshnunna
LH	Laws of Hammurabi
LL	Laws of Lipit-Ishtar
LOx	Law about Rented Oxen
LU	Laws of Ur-Namma
MAL	Middle Assyrian Laws
NBL	Neo-Babylonian Laws
SLEx	Sumerian Laws Exercise Tablet
SLHF	Sumerian Laws Handbook of Forms

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PART ONE

THIRD MILLENNIUM