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Foreword: Ancient Rights and Wrongs

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FOREWORD: ANCIENT RIGHTS AND WRONGS

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I. INTRODUCTION

Like a moderator introducing a panel of speakers, I view my role in this Foreword as briefly making a few points and then getting out of the way to allow the scholars to speak for themselves. This is an easy task, since the group of papers on ancient wrongs are, to my mind, the most interesting of the four groups of papers in the Symposium. Further, the authors themselves have done a particularly good job of placing their papers in the context of the traditions in which they write—and thus need little help from me. All of these papers were presented at a conference at Berkeley in March 1995, funded by the Robbins Collection at Berkeley and the Chicago-Kent College of Law.

These papers, all involving issues of wrongdoing, manage to raise a wide range of issues about ancient law generally:

(1) How did ancient laws arise?
(2) What were the functions and purposes of ancient codes and law collections?
(3) What can ancient law systems tell us about the structure and customs of ancient societies?
(4) How did the state arise and how is law related to the origins of the state?
(5) What are ancient notions of justice?
(6) Compared with modern societies, how individualist or collectivist were ancient societies?
(7) How different are ancient societies from each other?
(8) Are human beings really more or less the same throughout time or are they fundamentally different?

Obviously, we can't answer these questions in just six papers, but if you read them carefully, I think that you will be surprised how much light is shed on these issues. This set of papers, at least as well as any others in this Symposium, reflects the strengths that scholars from very different intellectual traditions can bring to the same sorts of texts and problems.

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II. THE PAPERS ON RIGHTS AND WRONGS

ROTH. In *Mesopotamian Legal Traditions and the Laws of Hammurabi*,[1] Martha Roth tackles two complementary, but related issues: the place of the *Laws of Hammurabi* in the Mesopotamian legal system and the face-slapping provisions of those laws. Roth analyzes the prologue and epilogue of the *Laws of Hammurabi* to show what Hammurabi's purpose in promulgating the *Laws* might have been: his political and military message to his audience. The prologue states that the purpose was to "provide just ways and appropriate behavior for the people of the land,"[2] as well as to prevent the mighty from wronging the weak "and to provide just ways for the wronged."[3] In the prologue, Hammurabi boasts of his accomplishments and conquests.[4] Roth suggests that the Laws' primary purpose was "to reinforce the superior position of Hammurabi among his contemporaries, both nominal equals and vassals."[5]

She then examines the influence of the Laws in ancient times, the Laws being frequently copied and displayed in public for over a thousand years. They served as a model for later law collections and as texts in the scribal tradition—an influence not unlike that of the *T'ang Code* in ancient China.[6] Roth also explores the political and psychological meaning of the monument containing the Laws, in both modern and ancient times.

Roth last engages in a brilliant and wholly persuasive analysis of the text of the face-striking provisions in the *Laws of Hammurabi*. She points out that the penalties for face-striking in Hammurabi are more serious than would seem to be reasonable for the amount of physical injury done. By a careful analysis of the wording of the provisions, Roth concludes that the high penalties reflected, not physical harm, but an insult to honor. This nicely supports her larger claim about the goals of the *Laws of Hammurabi* in setting and maintaining social power relationships.

1. Martha T. Roth, *Mesopotamian Legal Traditions and the Laws of Hammurabi*, 71 CHI.-KENT L. REV. 13 (1995).

2. *Id.* at 17 (quoting the prologue to the *Laws of Hammurabi*).

3. *Id.* at 17.

4. *Id.* at 17-18.

5. *Id.* at 19.

6. *See* Wallace Johnson, *Status and Liability for Punishment in* The T'ang Code, 71 CHI.-KENT L. REV. 217, 217 (1995).

WHITMAN. In *At the Origins of Law and the State: Supervision of Violence, Mutilation of Bodies, or Setting of Prices?*,[7] James Whitman takes on the sociological, philosophical, and historical tradition that views the origins of the state as arising from the need to monopolize violence—what legal historians call the *self-help* model. Whitman argues that this story is only partly true, a tale that is often at odds with the historical evidence in early codes and law collections. He sees the setting of just prices and the mutilation of bodies as problems for the monopolization of violence thesis.

Whitman shows that the regulation of mutilation in early codes went far beyond simple private vengeance or the talionic rule (an eye for an eye). Turning to price-setting, Whitman more fundamentally argues:

> On their face, the archaic codes belong, not to a modern world characterized by the policing of the streets, but to a pre-modern world characterized by the deeply felt need to set just prices. What early authorities arguably clamped down upon was, not violence, but the market; the great issue was not safety in the streets, but the ever-mysterious psycho-social dynamic of money—a dynamic easily linked to magico-religious beliefs.[8]

These words resonated with me, since my own paper in this Symposium uses the explicit prices set for wrongs to different social classes in ancient codes to determine the ascribed social value of those classes.[9]

At the conference at Berkeley, some of the area experts thought that it was strange that Whitman would take Hegel, von Jhering, Weber, and other promulgators of the self-help thesis so seriously. After all, the thesis was originally developed before the Mesopotamian law codes were found. Who would get their history from theorists with little knowledge of the facts? Having just suffered through several courses on sociological theory as part of my graduate training at Chicago, I can vouch for the continued primacy of the self-help thesis. Among experts in historical sociology in American universities, the view that Whitman questions is usually taught as dogma.[10] Whitman's elegant paper here is an important corrective to the half-truth of the self-help thesis.

7. James Q. Whitman, *At the Origins of Law and the State: Supervision of Violence, Mutilation of Bodies, or Setting of Prices?*, 71 CHI.-KENT L. REV. 41 (1995).

8. *Id.* at 81.

9. James Lindgren, *Measuring the Value of Slaves and Free Persons in Ancient Law*, 71 CHI.-KENT L. REV. 149 (1995).

10. Even worse, romantic Marxian notions about extreme collectivism and a lack of private property in ancient societies are occasionally still offered to students without correction.

LEVMORE. In *Rethinking Group Responsibility and Strategic Threats in Biblical Texts and Modern Law*,[11] Saul Levmore examines two related problems—collective responsibility and strategic threats of extra punishment ("overextraction"). First, Levmore questions the standard wisdom that group responsibility in ancient law has given way to individual responsibility in modern law. He attacks this idea on both sides. He points out that, in the Bible, individual responsibility predominates when there is a known wrongdoer. Further, he argues that modern law shares responsibility for intentional or negligent wrongs through insurance, taxes, and higher prices at stores suffering from shoplifting.

Next Levmore turns to strategic threats in the Bible and one section of the *Laws of Hammurabi*. He examines the stories of Solomon, Joshua, Jonah, and Adam and Eve, looking for hints of overextraction. Levmore posits that a sensible strategy for uncovering wrongdoers is to threaten to punish a group that contains the wrongdoer so severely that even the wrongdoer has an incentive to confess, thus sparing himself an even worse fate. Since such a strategy would appear to be efficient, Levmore wonders why it isn't more frequently used. In the story of Jonah particularly, he suggests that it may have been. As Levmore explains,

> Jonah boarded a ship in an attempt to escape his prophetic mission and God's reach. God then sends a storm so severe that the sailors initiate a lottery to see who is to blame for their imminent death. The lot points to Jonah, who confesses to them, and then insists that they overcome their reluctance to save themselves by throwing him overboard.[12]

Levmore argues that Jonah's confession may have been rational in that he confessed either to spare his fellow passengers or to increase his chances of survival through divine intervention by confession and self-sacrifice.

After his fascinating examination of strategic threats, Levmore concludes by suggesting that collective responsibility may have a modest presence in widely ranging legal systems. This supports some of his path-breaking earlier work arguing that there is a general uniformity in legal rules across ancient, modern, and local societies.[13]

11. Saul Levmore, *Rethinking Group Responsibility and Strategic Threats in Biblical Texts and Modern Law*, 71 CHI.-KENT L. REV. 85 (1995).

12. *Id.* at 115.

13. *See* Saul Levmore, *Variety and Uniformity in the Treatment of the Good-Faith Purchaser*, 16 J. LEGAL STUD. 43 (1987); Saul Levmore, *Rethinking Comparative Law: Variety and Uniformity in Ancient and Modern Tort Law*, 61 TUL. L. REV. 235 (1986).

Levmore's wonderful merger of Biblical stories, game theory, and economics shows how much insight modern Law and Economics scholars can bring to our understanding of the Bible.[14]

CARMICHAEL. In *Incest in the Bible*,[15] Calum Carmichael does his usual superb job of Biblical exegesis. His analysis of the incest rules in *Leviticus* 18 is a model of how to do close analysis of ambiguous biblical texts and to place that analysis in a larger context. Carmichael argues that the series of incest rules in *Leviticus* 18 can be understood only in the context of the history of patriarchal sexual relationships set out elsewhere in the Bible. Issues of incest arose with Abraham, Jacob, Judah, Moses, and David—or their immediate families.[16]

Carmichael argues that the purpose of the rules was not to *reflect* existing society, but rather to comment on the sexual activities of the Biblical ancestors and to *guide* sexual practices of the day. He points out that the condemnations are not heaped on the ancestors, but rather on outsiders—the Egyptians and the Canaanites.[17] This sort of boundary maintenance tends to create solidarity within the group. Thus, even if the lawgiver had the potential incestuous relations of the patriarchal ancestors in mind, he chose to ascribe incest to the influence of other groups. He does this by pointing out that some of these activities took place when the Israelites were living in a different culture (Egypt), blaming the host cultures, rather than the Israelites for the disapproved behavior. Carmichael's analysis of the social meaning of incest rules is persuasive.

As to the reasons for the incest rules, Carmichael finds that a possible increase in defective offspring does not seem to be the cause of these rules, since Carmichael finds no evidence that the ancients were aware of any biological effects of inbreeding. Instead, he shows that, even in the Bible, incest leads to fighting within the family and family breakdown.

Carmichael's view is roughly consistent with the conclusions of some social scientists "that all restrictions on incest and consanguineous marriage [including modern ones] exist because of social advantages to such restrictions, and that avoidance of biological effects of inbreeding is a secondary benefit that plays no major role in maintain-

14. For another merger of game theory and the Bible, see STEVEN J. BRAMS, BIBLICAL GAMES: A STRATEGIC ANALYSIS OF STORIES IN THE OLD TESTAMENT (1980).

15. Calum Carmichael, *Incest in the Bible*, 71 CHI.-KENT L. REV. 123 (1995).

16. *Id.* at 125.

17. *Id.* at 145.

ing the taboos."[18] I am somewhat skeptical of this social view when the biological explanation is so simple and the taboo is nearly universal in time and place (though its scope varies widely). Further, there is some evidence that higher primates avoid incest and that mice choose mates with different genetic tissue types, so the biological may actually drive the social behavior unconsciously.[19] It is possible to view the incest taboo as biologically driven even if the ancients were no more aware of genetic defects from inbreeding than are mice or monkeys.

LINDGREN. I would love to tell you how interesting this fellow Lindgren's paper is,[20] but since we share the same life, I must decline.

JOHNSON. Although this Symposium covers three continents and four millennia of ancient law, except for Wallace Johnson's paper, our coverage of East and South Asia is minimal.[21] Johnson discusses the most influential work in East Asian legal history, the Chinese *T'ang Code* of A.D. 653. His concern is a central one: *Status and Liability for Punishment in* The T'ang Code.[22] Johnson's fascinating paper intersects with several other papers in the Symposium concerning status and punishment, particularly those by Roth and myself.

The *T'ang Code*, which was influential in Japan, Korea, and Vietnam, set out an elaborate series of punishments: (1) beating with a light stick, (2) beating with a heavy stick, (3) penal servitude (for five different periods of time), (4) life exile (at three different distances), and (5) death (by strangulation and decapitation).[23] Each of these punishments could be redeemed by the payment of stated pounds of copper.[24] In many cases, officials could resign from office instead of being otherwise punished.[25]

Three forms of status could lessen punishment: social status, family status, and status due to age, sex, and physical and mental condition. Johnson notes that group responsibility for punishment was common. Even Buddhist and Taoist priests and nuns were treated

18. W.F. BODMER & L.L. CAVILLI-SFORZA, GENETICS, EVOLUTION, AND MAN 366 (1976).

19. *Id.* at 362 ("[M]ammals (especially the higher primates) . . . [show] some tendency toward avoiding incest."); Susan C. Alberts & Carole Ober, *Genetic Variability in the Major Histocompatibility Complex: A Review of Non-Pathogen-Mediated Selective Mechanisms*, 36 Y.B. PHYSICAL ANTHROPOLOGY 71, 81-84 (1993).

20. Lindgren, *supra* note 9.

21. My article briefly examines the *Laws of Manu* from ancient India (among many other sets of laws). Lindgren, *supra* note 9, at Tables 14-16.

22. Johnson, *supra* note 6.

23. *Id.* at 220-21.

24. *Id.*

25. *Id.* at 221.

much like families, with different punishments according to their place in the hierarchy. Although officials were sometimes punished less severely than nonofficials, at other times they were punished more severely under the concept of *pao*, "reciprocity."[26] Greater power brought greater responsibility.

Vicarious and collective punishment can also be found in interesting patterns:

> Similar to the collective punishment of family members, where one of them had committed rebellion, sedition, or treason, was the collective responsibility of officials in an office for the offenses of any one of them. Four levels of officials were punished, even though they had no knowledge of the offense, much less having participated in it.[27]

Here Wallace presents some evidence for Levmore's contentions that the strategic punishment of innocents may sometimes lead to efficient behavior—in this case to discourage wrongdoing. Yet if those who revealed others' wrongdoing were punished as well, this kind of collective punishment would not lead to increased detection, since the innocent officials would have no incentive to turn in the wrongdoer.

III. Conclusion

When I read ancient law codes and collections, I am frequently struck by two opposing impressions: people are really the same; people are really different. In ancient attitudes toward property ownership, monetary punishment, and especially status and prestige, I see more similarity with modern law than I would expect to see, given the differences in knowledge, culture, and technology. On the other hand, in ancient attitudes toward slavery, women, and mutilation, I tend to see differences so fundamental that I find it hard to understand how the ancients could have thought so differently from us. Yet I am reminded that one has to go back only a generation to see similar views about women in the United States, and two centuries to see analogous views about mutilation and slavery. Further, some of the ancient attitudes toward women are still common today elsewhere in the world, and slavery and mutilation have not been completely eradicated from the Earth.

I hope that the six papers on *Ancient Rights and Wrongs* validate the original conception that Laurent Mayali, Geoffrey Miller, and I had when we put together this Symposium—that ancient area experts

26. *Id.* at 227.
27. *Id.* at 228.

and modern scholars could profit by getting together to look at the same sources from different points of view. If you are curious about the excitement that these papers might generate for your own work, read on.