

THE INAUGURAL JEWISH LAW FELLOWSHIP LECTURE

THE RETURN OF THE DIVORCEE

*by*

*David Daube*

*and*

*Calum Carmichael*

The Yarnton Trust  
for  
THE OXFORD CENTRE  
FOR POSTGRADUATE HEBREW STUDIES



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## Foreword

The agreement of the Governors of the Oxford Centre for Postgraduate Hebrew Studies in 1987 to establish a Fellowship in Jewish Law constituted a milestone in the Centre's history. To mark the occasion Professor David Daube and his erstwhile student Professor Calum Carmichael were invited to give the Inaugural Lecture. How appropriate that the joint appearance of a great teacher and an outstanding pupil should convey to the assembled audience of academics, which included many law dons from both Oxford and Cambridge, and other interested members of the Oxford community, the educational significance of such a Fellowship. How appropriate too that Professor A. M. Honoré, Professor Daube's successor in the Regius Chair of Civil Law at the University of Oxford, presided on the occasion at Yarnton Manor on June 10, 1987.

Some time has passed since that occasion. I have come to the end of my tenure as President of the Oxford Centre, and to my delight, at a dinner on the occasion of my retirement on October 29, 1992, the Lord Chief Justice of England, Lord Taylor of Gosforth, announced that the Jewish Law Fellowship had been named after me. Nothing could give me greater satisfaction than my association over many decades with the legal scholarship represented by Professors Daube and Carmichael. I have been anxious to see their Inaugural Lecture in print, and to this end I asked them both to submit their lectures for publication. Although Professor Daube was unable to present his in the written form that he would have wished, he kindly agreed to let us publish a transcript of his address. As readers will quickly note, it well conveys the sparkle, lightness of touch, and enormous erudition which he habitually displays on such occasions.

Both Professor Daube and Professor Carmichael have been closely associated with the Oxford Centre from its very beginning. It is a pleasure and a privilege to publish their joint Inaugural Lecture entitled "The Return of the Divorcee."

David Patterson  
Oxford Centre for Postgraduate Hebrew Studies 1993



# The Return of the Divorcee

## Part One

By David Daube

**I**t is a tremendous privilege to speak in honour of the establishment of a Fellowship in Jewish Law. This is a dream come true. I can hardly believe it, and all those who took part in its realization have my warmest thanks. I would not want to miss the opportunity here to pay tribute to David Patterson. I first came to admire him as a supremely learned, wide-ranging, and sensitive scholar, and then as the creator of a body of people devoted to Jewish learning in this university.

Now for the subject. There is a law in Deuteronomy (24:1-4), which has no parallel in the ancient world. It prescribes that if a man divorces his wife and she marries again, then even if the second husband formally divorces her, or even if he dies, he may not have her back again.

Some twenty years ago, Reuven Yaron propounded what struck me as a most persuasive explanation: the aim is to protect the second marriage. With number 1 lost for good, the woman will be less inclined to rate number 2 inferior, let alone tell him so; and certainly she cannot harass him by such hints as that he should either shape up or cooperate in a restoration of the *status quo ante*. Yaron notes that the wayward wife nostalgic for the past figures in a simile of Hosea's: one day, the prophet has God predict, the nation whoring after idols will realize that, "It was better with me than now" (Hos 2:7 ET). As is well known, there is a special affinity between Hosea and Deuteronomy.

I was not blind to a number of difficulties but judged them surmountable. (1) Under Mosaic dispensation, whereas a husband can dismiss his wife, she cannot dismiss him. So does it make sense to threaten her in the event of a break-up? The answer is that it

does, since lack of power to terminate the bond does not mean lack of power to be systematically unpleasant to her partner in the hope that he will act. We must not forget that the ladies of the Old Testament frequently have it their way unassisted by the officially prevailing rules: Sarah, Rebekah, Abigail.

(2) The ploy, of course, is inadvisable if the fellow to be got rid of has a fierce temper. In any case, it will never be a mass phenomenon. Is it important enough to provoke elaborate intervention? This objection loses in weight when we consider that the Deuteronomic code takes up quite a few shortcomings ordinarily paid little attention--transvestism, dirtiness in the camp.

(3) Why, then, is the measure so feeble, allowing her, once out of her second venture, to join anyone but her former mate? The reason may be that to condemn a woman twice divorced to permanent celibacy would be going too far; yet some curb is better than none.

(4) Even so, however, the ban on just the first husband does sound odd after the detailed description of their parting: "she would not find favour in his eyes because he found in her an unseemly thing and he wrote her a bill of divorce and he sent her from his house." Given these data, is she at all likely to reckon with reinstatement if only she can win freedom from his successor? This puzzle is soluble by assuming that, in the mind of the author, the "unseemly thing" upsetting number 1 are more often than not the eyes she makes at what is going to be number 2. Her first husband, that is, would be blissfully content; it is she who sets in motion the unfortunate business; and subsequent regrets on her part and readiness to welcome her back on his are indeed plausible.

(5) If this is the situation chiefly envisaged, it also helps to account for the strong language: "she defiled herself" through her second marriage, with the result that a retying of the previous knot would be "abomination" and would "cause the land to sin." Less surprising if she is thought of as not much better than an adulteress: an adulteress, even one who escapes more severe punishment, in many cultures counts as unfit for her old place. It should be added that Wisdom teachers are generally prone to affix labels like "abomination" to dubious conduct, so the language perhaps needs no extra justification. In Proverbs 11.20, "those crooked of heart" are designated thus, as opposed to "those perfect in their ways"; the noun occurs twenty-two times in this work. (Curiously, "defiled,"



“unclean,” ‘*tame*’, is not met once. Its antonym *tahar* appears four times.)

(6) A further obstacle to Yaron’s thesis may be seen in the phrasing of the injunction: “her first master cannot return to take her to wife.” If the purpose is to deter her from giving trouble to her second one, this warning seems directed to the wrong address. It ought to be: “she cannot return to her first master to be taken to wife.” Still, the flaw is not too serious; and one might think of ways it could come about.

(7) Pretty irreconcilable with Yaron’s *ratio legis* is the exclusion of a reunion even should the second marriage end by the spouse’s death: “or if the latter man dies who took her to him to wife.” Admittedly, a woman desperate to re-embrace the paragon that number 1 has become in memory may not shrink from stabbing number 2. But it is hard to believe that the lawgiver would contemplate so extreme an expedient. (Deuteronomy no doubt has a penchant for the drastic: 15:17, 21:20, 21, 22:21, 25:11, 12. The clause in question, however, if taken as discouraging murder, would be doing so in a subtle fashion, with no fanfare.) As it chanced, the intractability of this paragraph within Yaron’s framework did not put me off: on stylistic grounds I had long suspected it of being interpolated. Now I concluded that it was added when the original motive--protection of the second marriage--was forgotten and scrupulous avoidance of impurity took its place. I shall say more about this in an appendix.

(8) As for Hosea--he furnishes very limited support. The woman in his simile bethinks herself of the comfort at the side of her original master not because she finds her paramours disappointing but because he manages to prevent her from contacting them. The analogy with the problem Deuteronomy has regard to according to Yaron is thus verbal rather than substantial. A minor discrepancy: Hosea speaks, not of his returning to her, but of her returning to him.

Then, starting in 1974, came Calum Carmichael’s publications on the Deuteronomic laws. For him, they constitute a commentary on events from Genesis to Kings and it is on this basis that we can make sense of their notoriously puzzling contents and sequence. The ban on ploughing with an ox and ass together, for example, alludes to the attempt of a Hivite noble Hamor, “Ass,” to win the hand of Dinah, daughter of Jacob--whose epithet was “Ox.” The prohibition forms

part of a lengthy series reviewing the sexual episodes from Abraham to Joseph. Calum has established his case and thereby ushered in a new epoch in the explication of the Fifth Book of the Pentateuch. I am convinced that this general theory of Calum's is absolutely correct and it is, I think, perhaps the most major breakthrough in biblical criticism, Old Testament criticism, in this century.

No doubt details are negotiable: one may differ, say, as to the exact historical item that triggered a regulation. The gravest danger is one-sidedness. That the statutes retrace the ancient records, praising, criticising, drawing conclusions, does not place them right outside legal life. Not a few may be intended to be followed--strictly or loosely--and all inevitably reflect jurisprudential trends, in substance and in form. (Includes *imitation par opposition*.) If we today commissioned a poet who had never talked to or read a lawyer to let us have his precepts in the margins of Trevelyan's *History of England*, we should learn a great deal about the law of his world. To quote one instance, Deuteronomy is clearly at pains to ensure a public trial for certain groups originally at the mercy of their masters: the betrothed girl who maintains that the man with whom she had intercourse raped her; the bride after the wedding-night alleged by her groom not to have come as a virgin; the wife charged with adultery; and the rebellious son. Calum himself is making progressively more allowance for the law's influence on the code and for the code's aim at influencing the law. As various segments vary enormously in this respect--some sounding quite phantastic, some quite realistic and some in between--we seem to be in for a long and exciting quest.

For Calum the law about not remarrying the divorced wife once she has married somebody else refers to a story about Abraham when he visited Egypt with Sarah, and gave her out as his sister. She was taken into Pharaoh's harem and Pharaoh showered Abraham, who he thought was Sarah's brother, with gifts of all sorts. For Calum this law criticises Abraham and says that by rights he, after this pandering, should not have taken back Sarah. Now there are certain weaknesses in this particular illustration of his theory. One of them is that the prophets, when they refer to this law, refer to the relation between God and Israel. Although Israel has taken other gods as husbands, God will nevertheless take back Israel--contrary to this law, and there is surely no idea of God pandering. There is also, of course, no idea of the protection of the second idolatrous marriage. So there are weaknesses in both these detailed theories.

I think it may be useful--the law is unique, there is no parallel in any other ancient system--to note that the idea of the divorcee's return is a motif in literature, history, mythology, and so on. The idea is, indeed, widespread, and I will just give you a few examples. I think that if we want to get to the bottom of this law we might spread our net a little wider.

First of all, the title of this lecture is a bit too wide. The divorcee's return would include the divorcee who remains faithful--or one who has been left or who has been somehow put away--and reunions with her are plentiful in ancient literature and modern. In a way it starts in Greece, for example with Penelope, who thought Odysseus has left her and she does not remarry. In the Middle Ages you have Genieva, the wife that Charlemagne put away and who remained faithful to him. Then perhaps the most wonderful example of the actual divorcee who remained faithful is in Shakespeare's *Winter's Tale* where Leontes and Hermione separately grow old and in the end find one another again. Or even later, there is Ibsen's Solveig in *Peer Gynt*. In the Bible you do find at least similar cases: Hagar, who is very badly treated, runs away, and comes back to Abraham. There are a few other cases of this kind and one case that comes near it is, of course, the case of Mary according to Matthew in the New Testament. Joseph very nearly puts her away, but reunites with her when he is informed of her complete purity.

But this problem in Deuteronomy is really about the tainted divorcee: the divorcee who becomes another man's property. It is to this case that the prohibition refers. Now this case also has an enormous history in literature. In a way it starts with Helen who had her second marriage in Troy and, as anybody knows, even if he has not read the *Iliad* but knows Offenbach, Menelaus takes her back as his queen at Sparta after ten years bloody war with Troy. A case that is much nearer the present problem is a case which is not mythological but historical; a case which happened and on which we have a good deal of literature--Cato of Utica. Cato was married to a woman called Marcia and he had a friend, Hortensius. Hortensius was immensely rich and had no children at the time. He said to Cato, "Why don't you tell your daughter to divorce her husband and she can give me children." Cato said, "No, my daughter is quite happily married but why don't you take my wife? But you have to wait a little because she is just pregnant with my fifth child, so wait till we have this child." The fifth child was happily delivered, Cato

divorced Marcia, and Marcia became the wife of Hortensius and indeed she gave him children.

Marcia could clearly produce very desirable children. Cato had enough of these. Hortensius wanted some, and also Cato and Hortensius were great friends and this created another bond between them. Plutarch praises this arrangement in the very highest terms. Caesar--Julius Caesar who, of course, was down on Cato--said that Cato acted from the dirtiest motives. Cato was rather short of money--he was after all the great moralist and moralists are always short of money--Hortensius was immensely rich and he was elderly, probably 78 or something, and when Hortensius died and Marcia returned to Cato she brought enormous wealth to Cato.

That is the Carmichael theory, and that was Julius Caesar on his side. Calum also has Philo on his side. He interprets Deuteronomy as referring to pandering as Calum does, and, of course, these things did happen in Philo's time. Cato lived a little before then. By the way, today I went to the Pusey Library and found that the Oxford Classical Dictionary is down on Cato because of this affair and says he cannot have been an agreeable character. But, at the time public opinion never wavered in its enormous respect for Cato. His position in public opinion was just unshakeable, and, of course, we have situations like this. I am sure that if President Reagan were to lend Nancy to Gorbachev his popularity in America would not go down one bit! At any rate, to come a bit nearer modern times, as an unrepentant modernarian I have to quote Brünhilde. Siegfried conquers Brünhilde and then he is given a drink of forgetfulness--lame excuse--and he marries Kriemhild. But then on the point of death his memory comes back that Brünhilde is his sacred wife. Brünhilde returns, she has never felt well with her second husband, Gunther, and she dies with Siegfried. In a way the greatest novel in the English language has a not very different theme. Heathcliff by his behaviour and by leaving Catherine, drives her into the arms of a more bourgeois contender, and they reunite in death so to speak. It is about the same time as Wagner, or a bit before, and equally Gothic, but it is the same idea. If you want a modern example, where the theme occurs, take the remarriage of Liz Taylor and Richard Burton. Of course, the difference as Calum would point out, there the profit all went to her, not to him as in the case of Abraham. She got the diamonds and so on. But it's the same theme.

Well, what about the Bible? We have similar situations.

Whenever you want to find out anything about marital complications you go to the story of David. There is practically no marital complication that did not occur in his life. It is even rumoured that he had a gay relationship, but I am not dealing with that. His first wife is Michal, Saul's daughter. He then leaves Michal to go on all sorts of adventures, and Saul gives Michal to another husband. Later David, after Saul's death, demands Michal back and reunites with her. By that time Michal's enthusiasm for the young adventurer has cooled for various reasons and this reunion ends tragically.

I have gone a little through all these cases in literature. In most one has to admit that these reunions do not turn out well, especially if you cut out the reunions in death. Of course in the case of Brünhilde where Siegfried, dying, sings, "Brünhilde heilige Braut," and she then jumps on the pyre--that raises no problems to speak of. But in the cases where they have to live together, like David and Michal, in general these reunions seem not to work too well. Another story from the life of David that in fact should be seriously considered here is the story of the concubines whom he abandons in the city, when he runs away with his troops and retainers during Absalom's revolt. He leaves his concubines behind and Absalom seizes them as a sign that he is now the King, and the harem belongs to him. He sleeps with them and when David comes back, the text remarks expressly that he no longer touches them. Although they are now his again, he is not uniting with them.

A full treatment would have to make many special sorts of reservations. For example, it may not be without significance in the case of Abraham that it is kings to whom he cedes Sarah. It is clear that at some stage in ancient times it was considered an honour if your wife spent a night with King or God. That, of course, explains the *jus primae noctis* which played such a part in *The Marriage of Figaro*, where the seignior, the prince or the Lord of the Manor, has the right to the first night with the newly wed wife of any retainer. When I became Regius Professor at Oxford, I assumed that the Law Faculty, the younger members you see, would have to concede that right to me, but I don't know whether my successor has been any more successful than I.

I think I have talked too long already. I do not want to withhold from you, however, a dirty trick I played on Calum. When Calum first came with the theory that this law criticises Abraham trafficking in Sarah and getting all these advantages from the kings who have

her in the harem, I thought, My God, as if we haven't enough such stories. Think of Isaac giving Esau the blessing of the firstborn because he can't distinguish between Esau and Jacob; of Jacob wrestling with the angel and being left arthritic for the rest of his life--that sort of thing. At that time I did not want to hear of this, and sent him the following limerick:

Said an impudent Sunday School brat:  
Old Isaac was blind as a bat.  
Poor Jacob was limping,  
and Abraham was pimping.  
Who'd want three Fathers like that?

Thank you.

## Appendix

### À propos of Deut 24:3

Now and then, the case envisaged by a Biblical law is formulated thus: “or if so-and-so does so-and-so.” For example: “or if a man digs a pit.” The “if” may be omitted: “or he [somebody’s ox] gores a son [of another man] or he gores a daughter [of another man].” Naturally, a case with this formulation is always preceded by another--the basic one which it supplements. “And if a man opens a pit, or if a man digs a pit.” “And if an ox gores a man or a woman and they die...or he gores a son or he gores a daughter.” The second case, that is, is an afterthought. Indeed, mostly, I think, the two are separated by an interval in time: “or if so-and-so does so-and-so” is a later addition. Mostly does not mean always.

Exod 21:31. In 29f. it is laid down that if an ill-natured ox gores to death a man or a woman, his owner, provided he was notified of the beast’s fierce disposition, is to pay with his life, though there is room for ransom. Then comes: “or he [the ox] gores a son or he gores a daughter, according to this judgment shall be done to him [the owner].” Long ago, D. H. Müller explained the paragraph as directed against a practice upheld by the Code of Hammurabi: if a house collapses, killing a son, the builder’s son, not the builder himself, will be executed. An earlier version of the Mishpatim imposed such “ruler punishment,” punishment of the person in power by smashing or taking from him his subject. Verse 31 dismisses the innocent from the collision, exacting retribution from the person in power in person. It may be noted that the standard of precision is slightly relaxed. The appendix does not repeat the requirement “and they die.” It is, of course, understood. The Laws of Eshnunna, 58, ordain that if a wall looks like collapsing, the ward authorities make it known to the owner, he does nothing about it and it collapses and kills another man’s son “[it is a matter of] life, decree of the king.” Nowhere else do the Laws speak of such a decree. My impression is

that here, too, a previous custom of the kind found in Hammurabi is being combated.

Exod 21:33. "And if a man opens a pit, or if a man digs a pit, and he does not cover it and an ox or an ass falls therein, the owner of the pit shall make it good." The first case is an everyday one: you own a cistern or a waste-hole and you fail to protect it after use. The second one is the opposite from everyday: you forget to protect a cistern or waste-hole you have just installed. Nor is rarity of occurrence its only remarkable feature: in a sense, it is *de trop*. Suppose it were not mentioned and did occur: you dig a pit, you do not cover it and my animal perishes in it. Surely, I would sue you under the first heading, "and if a man opens a pit and does not cover it"; and on commonsensical interpretation, I would win. It requires a pretty sophisticated level of jurisprudence for you to have a chance of acquittal because you did not literally open the pit, you excavated it right now with your own hands. It is at this stage that special reference to the second case becomes advisable. The Rabbis, proceeding from commonsense, had a hard time working out a reason for its appearance. It was not always part of the code.

Exod 21:36. In 35 we learn that if one man's ox kills another's, the two owners are to share the loss: each gets one half of the dead ox and one half of the price from sale of the live one. 36 goes on: "or it is known that he has been an ox wont to gore from yesterday and ere and his owner does not guard him, he shall make good ox for ox and the dead one shall be his." It should be remarked at the outset that the entire section, i.e., both 35 and 36, must be secondary. One would expect it to follow 28 to 32, about an ox killing a human, but it is affixed after 33f., about somebody else's animal falling into your pit. Moreover, the advanced character of 35f. comes out in the broader definition of the ox's action: in 28 he "gores," in 35 he "hurts"--whether with his horns or otherwise. (For the unruly ox, 36 takes over the older section's term "wont to gore.") Again, there has been a move towards lesser formality. According to 29, full responsibility for a vicious ox arises if "it is testified to its owner," according to 37 if "it is known." The latter may mean that it is known to him or that it is public knowledge; either condition is looser than the need for a declaration before witnesses. Evidently, if verse 36, "or it is known..." post-dates 35, we have to do with an appendix to an appendix. Not impossible. When ox fights man, the likelihood is that the former is the aggressor; and



it makes sense to warn an owner if a particular ox is repeatedly implicated in such an affair. When ox fights ox, it is less easy to locate guilt; nor is it equally urgent to take steps even where serious unsociability can be established. It would be quite understandable, therefore, if a regulation on the lines of 29 took a long time developing. The Laws of Eshnunna, 53, let us note, with a provision strikingly like 35, contain no parallel to 36. Having gone so far, I go further: it is in the cards that 36 is due to the same subtle mind that inserted the new pit in 33. Perhaps he is also behind the abolition of ruler punishment in 31?

Lev 5:2, 3 and 4. The opening verse of the chapter deals with failure to give testimony when it is a sacred duty. Apparently some mitigating unwittingness is involved which enables expiation by sacrifice. ("To bear one's iniquity" has regard to an unwitting sin also in 5:17.) Unwitting sins are definitely the subject of the next three verses, showing the form here under discussion. That they are tacked on is likely from the start--verse 2 hangs in the air: "or a person who touches any unclean thing..." (The Samaritan Pentateuch understandably substitutes "if.") 3 has a similar topic: "or if he touches the uncleanness of a human..." 4, on the other hand, reverts to something closer to 1, "or a person if he swears..."; another indication that this little group is an import.

Lev 5:21 and 22. All five wrongs listed here constitute sacrilege and the first three are subsumed under one heading, "to deceive one's neighbour." "A person if he...committed sacrilege and he deceived his neighbour about a deposit or about a trust-object or about a loot (forswearing himself)." The remaining two, though the heading fits them no less, are granted independent sentences: "or he extorted from his neighbour or he found a lost object and he deceived about it." It would have been easy to continue "or about an extortion or about a lost object." The nouns "extortion" and "lost object" were obviously available: they figure, we shall see presently, in verse 23. A further incongruity is the unnecessary repetition of the heading in connection with the lost object, "and he deceived about it," doubly incongruous seeing there is no repetition in connection with extortion. These two offences, then, are latecomers--no doubt because their inclusion was less urgent. The development is confirmed by, and accounts for, the disarray in verse 23, where return of the unjust gain is ordained. The trust-object is dropped altogether, and the other four cases are offered in the sequence: loot,

extortion, deposit, lost object. The interpolator is untidy.

Lev 13:16: "or if the raw flesh turns again and changes into white." A sub-case of a sub-case, hence it would not be surprising if it were a postscript. But I know too little about leprosy to feel confident.

Lev 13:24: "or flesh if there is in its skin a burn through fire...." This ordinance, from 24 to 28, is a sub-case to 18 to 23. Once again, as I am not familiar with the evolution of the leprosy regulations, I must be content with a *non liquet*.

Lev 22:4 and 5. The first part of 4 forbids an Aaronide with leprosy or gonorrhoea to eat of the holy things. Conditions excluding for a day follow, beginning with "and he touching anything unclean through a corpse." The action, as often, appears in a participle. At this point, however, towards the end of 4, comes "or," with a different structure extending throughout 5: "or a man from whom seed goes out or a man who touches a creeping thing." Here the finite verb is employed. The intrusion is borne out by the fact that verse 6, which tells us what is to happen, flagrantly omits the emission of semen: "the person who touches it...shall not eat of the holy things." The filler-in of the protasis has neglected making the logical adjustment in the apodosis.

Num 35:18, 20, 21, 22, 23. All these injunctions belong to a catalogue clarifying the distinction between murder and accidental homicide. (The latter's subsumption under error in 11 and 15 is a magnificent *tour de force*.) There are three parts, an older one, 16 to 19, where the tool involved serves as criterion--e.g., an iron one proves murder--and two progressive ones, 20f. and 22f., with emphasis on the inner state, premeditation or absence of it. In so important a matter, surely amendments are to be expected also within each part. According to 16f., an implement of iron and equally a stone tool if suitable for killing--note the qualification in this case--are proofs of murder. 18: "or if with a wood tool suitable for killing he smote him, he is a murderer." The original drafters, I guess, did not go so far: had they done so, they could have summarized the three possibilities by putting "a tool suitable for killing." Verse 20 embarks on the subjective standard: "and if in hatred he thrusts him or he threw [something] on him in pursuit and he died." In this instance, there is no reason to postulate intervention; the two clauses fit together in content and in form. This is not true of 21: "or in enmity he smote him with his hand and died." Immediately suspect

on account of its isolation from 20: had it been laid down at the same time, the words "or in enmity he smote him with his hand" would stand directly after "or he threw [something] on him in pursuit" and there would be no call for a second "and he died." Recognition of this "or..." as superimposed in fact helps to reconstruct a complicated process. In 16 to 18 we hear only of killing with a tool--iron, stone, wood. Why not of one's hand? Because in that period, that this is murder went without saying. Accidental killing with the bare hand is practically a never-never, and ancient lawgivers are apt to be silent about the self-understood. Then fixed external criteria were shed and, no matter what tool was wielded, murder was assumed only, and always, if there was evil intent. Accordingly, no particular tools were singled out in 20, such differentiations have become irrelevant, any "thrusting" or "throwing" falls under the novel system. Even now, however, the murderous nature of killing with the hand is taken for granted. The reform, that is, confines itself to the area of 16 to 18. That "he thrusts" no less than "he threw" contemplates killing with a tool is evident from the very insertion of 21, filling the gap. The interpolator, alive to the universal validity of the new division, scrupulously brings in the case so far left on one side, spells out that killing with one's hand is murder if prompted by enmity. Significantly, it does not re-emerge in 22f., devoted to accident. That would have been too unrealistic. Going on now to these two verses, whereas in 20f. the focus is on the murderer, here it is on his counterpart. 22: "And if suddenly, without enmity he thrust him or he threw on him any implement in pursuit." Describing the opposite of 20, and just as in 20 the "or" clause goes well with its antecedent. The trait "suddenly," in prominent position, has its full, native force: the terror of an unforeseen disaster. We may contrast it with what has been brewing "from yesterday and ere": Deut 4:42, 19:4, 6, Josh 20:5. Remember also the ox wont to gore "from yesterday and ere" in Exod 21:29, 36. "Enmity," instead of "hatred" as in 20, may be a corruption, having crept in from 21 or perhaps 23 (see further on) in the course of transmission. "To hate" is found in Deut 4:42, 19:4, 6, Josh 20:5. There is no distinction in substance. The emphatic "any implement" stresses the abolition of the automatic guilty on the basis of a dangerous tool. One can say a little more. *Keli*, here translated "implement," is adopted from verse 16, the star case of the old regime, with the worst *prima facie* look, "implement of iron." The present legislator, then, is implying that, in the absence of malice,

even in this situation the accused will be safe. Lastly, 23: "or with any stone suitable for killing without seeing, and he caused it to drop on him and he died and he was not an enemy to him and he did not seek his harm." Certainly an addendum. It harks back to verse 17, replacing "stone tool" by "any stone"; instead of "to throw" met in 19 and 22, we find "to cause to drop"; and the depiction of his peaceableness at the end is not only prolix but altogether superfluous after "without seeing." Above all, 23 makes no contribution. It is worth observing that Deut 19:4ff., a juristic masterpiece, propagates the advanced decision-making according to inner attitude by means of the most effective conceivable illustration: accidental homicide with an iron axe. A terrific weapon, yet the author makes it very plausible that a killing with it could be absolutely innocent. He is in line with Num 35:22, celebrating, we saw, the abandonment of the regulation of 35:16. Finally, an aside concerning Abimelech of Shechem. As he was about to set fire to a tower full of rebels, a woman defender "threw a millstone on his head," Jud 9:53. The Hebrew for "to throw" is the same as in Num 35:20 and 22--not "to cause to drop" as in 23. A good example of possibilities that existed; a Romanist will of course think of *res deiectae vel effusae*. There was a complication: he was not quite dead at once, so asked his armourbearer to stab him lest people might say that he was slain by a woman. I wonder whether, had she dropped that millstone on him by accident when there was no civil war, he would have felt the same anxiety. Probably not.

Deut 24:3. Verses 1f. start off "If a man takes a wife...and he sends her out of his house...and she becomes another man's." Verse 3: "and the other man hates her and he writes her a letter of divorcement and he gives it into her hand and he sends her out of his house, or if the other man dies who took her to wife." However this law is explained, the "or" portion is an intrusion. Right away there is a stylistic sign. Were it devised together with the rest, there would be no second "if." This separate introduction interrupts the flow, betrays the proud innovator. Some day I may get down to details.

## The Return of the Divorcee

### Part Two

By Calum Carmichael

It is almost exactly two thousand years ago that we come upon, between the school of Shammai and the school of Hillel,<sup>1</sup> a division of opinion about the meaning of the only rule in the Hebrew bible that has "legislation" respecting divorce. Similar divisions of opinion continue to this day. To those whose nightly reading does not extend to such disputes their unending nature seem a bit bewildering. The poet T. S. Eliot once got into a London taxi and, rather pleased to be recognised by the driver, asked how did he know who he was. "Oh," said the taxidriver, "I have an eye for famous faces. Just last week I picked up Bertrand Russell and I said to him, 'Well, Lord Russell, and what's it all about?,' and, do you know, he couldn't tell me!" Perhaps scholarly disputes continue because those engaged in them really do not know what is going on, for example, in regard to a rule whose origin is over 2600 years old. Still, some of us are driven by the conviction that we do know a thing or two about historical aspects of Jewish law. No doubt, such convictions, and our delusions too, will continue to perpetuate a tradition of enquiry that has gone on for such a remarkable length of time. It is surely appropriate to view in this larger perspective the establishment of a fellowship in Jewish Law at the Oxford Centre.

Let me turn to this evening's topic, to a rule that King Henry the Eighth paid some attention to but Richard Burton and Elizabeth Taylor none whatsoever. A man divorces his wife, she becomes the wife of another man, and he in turn divorces her, or he dies. The first husband cannot take her again as his wife. The rule is unique in world legal literature.

<sup>1</sup> *Mishnah Gittin* 9:10

The view of Reuven Yaron is the one in recent times that has met with approval. He holds that the rule is designed to protect the second marriage.<sup>2</sup> This supposition is perhaps based on a likely occurrence: in a small community, somewhere in rural areas I suppose in ancient Israel, a husband once divorced his wife, she married another man, and the first husband began to have second thoughts. He wanted her back. She in turn responded to his regrets. The strain on the second marriage was intolerable and the authorities devised the rule in Deuteronomy 24 to protect the second marriage. The first husband and his ex-wife might have soft feelings for each other, but that is just too bad. It is too late. She has contracted a second marriage and can never return to him again. Not even--how overwhelmingly austere is the position of the authorities--if her second husband should decide he cannot stand her and divorces her, so that she is free to marry again. Not even if he dies and she is a free woman on that account. She might contract a third marriage, and a fourth, but never must she return to the first husband. To do so would constitute a defilement of her, but on what basis, it is impossible to say.

It is strange that the law would pay attention to the sensitive feelings of the parties in question and devise a rule to render them forlorn. If the second marriage is under strain, for whatever reason, surely that is a concern to be resolved by the second husband and wife themselves, especially when we bear in mind the reluctance of early--and not so early--law to be involved in family matters.

The attempt by modern scholars to sketch the historical circumstances that prompt a rule is often really a form of storytelling. The fictional art that goes into such reconstruction of the past is disguised by the invention of as many realistic details as possible.<sup>3</sup> Its authors, not admitting such fiction making, sincerely believe that they are in touch with the past. No doubt they are encouraged in

<sup>2</sup> R. Yaron, "The Restoration of Marriage," JJS 17 (1966) 4, pp. 1-11. S. R. Driver's remarks anticipate Yaron's solution, *Deuteronomy*, ICC (Edinburgh: 1902), 272.

<sup>3</sup> I recall a conversation on the (former) BBC Third Program between C. Day Lewis and Robert Frost in which Frost said, "The three most important things are science, religion--and gossip." He then went on to discuss how the imaginative quality that goes into gossip is the same as that found in, for example, the writing of history. For a more searching enquiry, see R. G. Collingwood, *The Idea of History* (London: 1956).

this belief because sometimes historical reconstruction is doable, even though the imaginative, fictional element will still be a feature. The point I wish to make is that modern scholars are in good company. While much of what they do, for example, by way of method, might be new, a good deal is not. It is this connection to an age-old process that I wish to draw attention to. I refer to the universal phenomenon whereby ideas, opinions, beliefs, explanations are sometimes relayed as if their historical origin were known. Biblical literature is replete with examples, from the account of the origin of shame in the Adam and Eve story, through Moses' farewell speech to the children of Israel on the plains of Moab about preparations to enter conquered territory, to the extreme literary artifice of the Johannine material in which religious ideas determine the historical reporting. The invention of the past has many benefits, for example, communication is simplified, and wisdom and authority are enhanced by suggesting that some event or train of circumstances actually took place.

I proceed to what I believe to be the explanation of the rule about the return of the divorcee. The magic of storytelling is very much the crux of the matter, but not along the lines of made-up historical background. Consider, first of all, the much cited Talmudic tale about how Moses, some one thousand five hundred years after his death, turned up at a legal discussion in Rabbi Akiba's academy.<sup>4</sup> He did not understand a word but left when assured that all the rules under discussion went back to him. The story is sophisticated. The enormous role of re-interpretation, or better, misinterpretation, in the development of the law is recognised. There is probably also to be detected in the tale the influence of Pharisaic views about resurrection: he is not imagined as turning up, he turns up.

For my purpose, the story is important because of the use of the person of Moses. It is not the first time that he is conjured up to confer status on someone else's lawmaking. Already in the biblical epoch, when he is around five hundred years old, he surveys the national life of these past centuries, recalling, for example, the lives of the kings, his own eventful life and its antecedents in the lives of the ancestors, Abraham, Isaac, Jacob, Judah, and Joseph. The result is the strange, apparently haphazard compendium of judgments found in one of the most influential books of the bible, Deut-

<sup>4</sup> *Babylonian Menahoth* 29b

eronomy. Who the real author is we shall never know. He chose--and it is a most common phenomenon in antiquity--to submerge his identity by giving it over to a legendary figure of the past. No doubt secure in their own individual worth these anonymous authors could exercise boldness of imagination in pursuing their fictional aims. The phenomenon awaits exploration because it is so much more extensive than we realise. We have to wonder why King Herod can claim Jesus is John the Baptist back from the dead, why Jesus can make John the Baptist Elijah, why the Rabbis can make Balaam Laban.

The Moses who speaks just before dying in the book of Deuteronomy is intent on leaving his mark for the future, or rather that is how he is presented. The entire sweep of significant events in the history of his nation lies before him and, oddly, these events include those yet to be, for example, the later institution of monarchy and the temple cult in Jerusalem. Moses is, however, depicted as the supreme prophet. Event after event, past, present, and future, are singled out and he judges matters that arise from them. This grand scheme of judgment, which surely influenced later religious conceptions of the last judgment as one involving prior significant events in Israelite history,<sup>5</sup> is not a cosmetic gloss, as scholars who pay some, but not very much, attention to the feature have tended to think. Every law is primarily shaped by this process of Moses' judgment on issues in Israelite history. Only when the outline of this process is deciphered for each law can we ask the questions legal historians might wish to put to these laws.

Consider three examples of how laws, including the one about the return of the divorcee, came to be formulated. First is a rule that, although at first sight it might not appear so, is rather strange. If you are walking through someone's field of grain or vines you may pluck with your hand but you may not use any piece of equipment to obtain some nourishment (Deut 23:24, 25). The oddness of the rule resides in the need to state that, beyond helping oneself as a passer-by to some hand-picked crops, no implement should be used. The issue is not permission to take from another's possessions, but limitation on how much can be taken. Yet it seems inconceivable that custom would not have established such a limitation, and that it ever needed to be spelled out. Any unauthorised use of implements

<sup>5</sup> Sodom and Gomorrah, for example, will be judged (Matt 11:22).



in another's ground would be known by all to be theft. There is no indication in the rule, however, that theft is in any way the lawgiver's concern. There is no mention, for example, of sanctions for those who, for reasons far from clear in the ordinary course of events, might use implements in the belief that it is in order to do so.

It is possible to argue that somehow the issue actually arose in everyday life, despite the power of custom I have pointed to, and that the rule in question was formulated. If such an occasion in ordinary life is its origin, we can only find the rule of value for its antiquarian aspect. That on account of this background it is set down as an important rule of the great lawgiver Moses is not overly impressive.

Let me suggest another approach to the origin of the rule. In his time Moses had to confront the following problem. As the leader of the Israelites at a place near Kadesh he met with a negative response to a request that they pass through the territory of Edom (Num 20:14-21). He had appealed to Edom as a brother on account of their ancestors, the brothers Jacob (Israel) and Esau (Edom). He had assured the Edomites that in passing through their territory the Israelites would keep to the King's highway and would not stop at any well to drink water, nor would they enter any Edomite field or vineyard and take of the crops. Edom's response was open and direct: should they even try to pass through they would be put to the sword. The Israelites continued their appeal and this time mentioned that should they take water from any well they would pay for it. They did not bring up the possibility of eating and paying for Edomite grain or grapes. Edom's response this time was by action. They set upon the Israelites.

In this history, with its own focus and aims, Moses did not bring out the real underlying issue between Israel and Edom. Hundreds of years later he, in the person of the Deuteronomist, has had time to think about it and address it in the context of relations between fellow Israelites. In the original situation a claim to traverse someone's territory was made on the basis that the two groups shared a common ancestry. Nothing came of the claim because what was bothersome was that to pass through on foot was one thing but to stop and assuage thirst and hunger quite another. This problem emerges from a reading of the text. There was first Israel's assurance that no water, grain or grapes would be taken. When Edom responded negatively, Moses then communicated that any water taken

would be paid for, although he still communicated that they would just pass through on foot, nothing more. Either the Edomites did not believe a word of it, or saw that they had much more to lose than to gain from this group, which was not passing by casually but was equipped with instruments. I am reminded of the joke about the contrary situation in the city of Aberdeen where the people with great hospitality invite you for afternoon tea and there is indeed a splendid array of scones and cakes and the like. It is only when you sit down that you are told that everything is reasonably priced.

The issue in the original, extraordinary situation between Israel and Edom is much more realistic than the one that is found in the Deuteronomic law. The incident shows up well the tension between one's obligation to grant a favour in certain circumstances to fellow human beings when some common bond is asserted and one's concern about how far they will go in response.<sup>6</sup> Moses, in judging how fellow Israelites should deal with the issue, sees beyond the conflict that prevented some arrangement between the Edomites and the Israelites. He judges that passage through someone's fields and vineyards is in order and can indeed permit the picking of crops, but not on such a scale that implements can be used. His experience of the realistic fear of the Edomites is the basis for a distinction that in ordinary circumstances is unnecessary.

My claim is that the formulation of this food law if not its origin--it will have its roots in customary behaviour<sup>7</sup>--is owing to someone long after Moses' time making explicit issues that are largely implicit in the history but are readily seen to call for deeper reflection. The issue arose at that time in Moses' life when, just before the problem with the Edomites, he was denied the prospect of entering the new land. This denial was itself related to the complaint of the journeying Israelites because they lacked, among other provisions, grain and grapes (Num 20:5). How appropriate that Moses at the end of his life makes a farewell speech to his people before they enter the promised land, and presents as one of his directions a ruling about their need for food when they go on a journey.

It seems impossible to fathom why the rule about the return of a

<sup>6</sup> On the related topic of legislation that is designed to protect people's unwillingness to be generous, see David Daube, *Roman Law, Linguistic, Philosophical, Social, and Philosophical Aspects* (Edinburgh: 1969), 117-30.

<sup>7</sup> Cp. the privilege of eating with a king but guarding oneself against indulgence (Prov 23:1, 2).

divorcee should follow the food law. Conventional theory would postulate haphazard legal draftmanship. Consider, however, the view that Moses' all-encompassing eye takes in the history of his people, past, present, and future, and observes similar developments. After all, we are supposed to believe that Moses delivers these rules, not when he is five hundred years old as critical scholarship would rightly claim, but when he is one hundred and twenty years old, his eye undimmed, his natural force unabated (Deut 34: 7). Moreover, because he is taking leave of life, the belief is that it is a time of special vision. Time is telescoped, and if the Rabbinic principle that there is no before and after in scripture should not be read back into the period of Deuteronomy,<sup>8</sup> we can nonetheless claim that whoever brought Moses back then from the dead (so to speak) moved readily between one period of time and another. Thus Moses' line of reasoning was that Israel's situation at Kadesh was reminiscent of the ancestor Abraham's near the same place. Recall that Abraham, travelling in unfamiliar territory and accompanied by his beautiful looking wife, Sarah, had her agree to pass herself off as his sister so that the males of the place would be well disposed to them.

The two situations have indeed interesting parallels. Apart from the same geographical area, both Moses and Abraham needed to be welcomed by another group but both had reason to fear a hostile response. There is an even more remarkable link. In order to appeal to what in effect was a foreign group each respectively based his appeal on a tie of kinship. Moses brought up the tie between Israel and Edom--their ancestors were brothers. Abraham had in mind a prospective tie between his people and those of Gerar.<sup>9</sup> For Abraham's intent was to present his wife as his sister so that she was free to forge for each of them a new family tie with a member of the Gerar community, Sarah as the man's wife, Abraham as the brother-in-law. When his scheme was eventually uncovered, Abraham even justified his strategy by telling the king of Gerar that he and Sarah were indeed brother and sister because they had the same father.

Whoever wrote about Abraham's use of his wife to benefit himself was already exercised by the morality of the arrangement.

<sup>8</sup> For an illustration of the Rabbinic principle, see *Mekhilta* on Exod 15:9.

<sup>9</sup> Kinship ties play a dominant role in a succession of laws at this point in Deuteronomy. See C. M. Carmichael, *Law and Narrative in the Bible* (Ithaca: 1985).

The introduction of the deity into the account reveals this dimension. The deity characterised Abraham's transfer of his wife to Abimelech as adultery on the part of the king, pronounced a capital sentence for the offence, and showed his displeasure by afflicting the women of Gerar with sterility. Abimelech rightly protested the deity's response because he had been deceived about Sarah's true status. The deity relented because, acknowledging Abimelech as a fundamentally decent type, he interfered just in time, by means of a dream, to prevent Abimelech actually taking Sarah.<sup>10</sup> The deity's action was prompted by his refusal to accept that Sarah's status as a wife had changed. From his point of view the condition for Sarah to be restored as Abraham's wife was that she had remained untouched by another male. Presumably, if there had been union with Abimelech, it would have constituted a defilement of Sarah and consequently a bar to her restoration as Abraham's wife.<sup>11</sup>

Whoever the ancient moraliser was who revealed his views by inventing a role for the deity, he concentrated on the results of Abraham's deception. There is no comment by the deity on the initial situation where a husband felt constrained to give up his wife because of her attractiveness to another and more powerful male. A story, after all, is directed towards an ending, and can hardly stop just as it has begun.<sup>12</sup> A lawgiver, however, can choose to be more focused and pay attention to initial developments. This is precisely what Moses does. By observing the process in question, moreover, we obtain an insight into the nature of divine law as understood by biblical writers.

Whenever theological language is introduced into a story it is usually an indication that there are spheres of influence and modes of action recognised to be beyond earthly, human capability. At best, its insertion inculcates proper values and reveals the limita-

<sup>10</sup> Unlike the position in the comparable story in Genesis 12. The difference raises important questions about possible relationships between one Genesis narrative and another.

<sup>11</sup> In line with later Jewish law, until about the early third century A.D., intercourse alone (assuming an intent on the part of the man to make her his wife and her consent) would have been sufficient to establish Sarah's status as Abimelech's wife. See David Daube, *Collected Works: Talmudic Law*, ed. C. M. Carmichael (Berkeley: 1992), 157.

<sup>12</sup> Yet, curiously, that is just the position in the non-story of Isaac and Rebecca at Abimelech's court in Genesis 26.

tions of desirable human action. It is usually beyond a lawgiver to translate the deity's response to an unacceptable situation into a rule that imitates that response. He can, however, try to reflect the same values within the limits imposed by human institutions. It is in this sense that certain biblical rules are put forward as divine law. Indeed, much of the lawgiver's motivation for constructing such rules is his aim to convert supposed supernatural intervention in human affairs into rules that, if they do not necessarily approximate the intervention, at least embody its spirit.

From the Genesis narrative Moses takes up the matter of a wife's release from her marital bond because it is to the benefit of the husband that another male seek to have her. He proceeds to handle this issue, not along the lines by which the deity handled it with Abimelech, but in the context of later Israelite life and institutions. The problem that might present itself among later Israelites is where a man divorces a wife not because he dislikes her--the usual reason for a divorce--but because he finds a vulnerability in her, namely, her attractiveness to another male, that he will do nothing about. Even though the rule is not drafted to cover the facts of Abraham's situation, its language nonetheless reflects it closely. When Abraham anticipated that the exposure of Sarah's beauty to other male eyes was a problem for him, the result for her was that as his wife she now found no favour in his eyes.<sup>13</sup> The language of the rule accurately conveys the situation in the Genesis narrative: "And she find no favour in his eyes, because he hath found the nakedness of a thing in her." What Abraham had just discovered about Sarah was not that she was good to look at, but that her good looks on display to foreign males rendered both of them defenceless in face of their likely reaction to her beauty.<sup>14</sup> The Hebrew word *'ervah* ("nakedness") well conveys this notion of defencelessness.<sup>15</sup>

<sup>13</sup> In general, prior to the introduction of a bill of divorce, divorce was effected by the husband expelling his wife. See Z. W. Falk, *Hebrew Law in Biblical Times* (1964), 154.

<sup>14</sup> In the Book of Esther Queen Vashti's refusal to expose her beauty to a (drunken) male audience is cause for her dismissal from the matrimonial home. Unlike Abraham, King Ahasuerus need not have feared the loss of his wife to another male. Indeed, his impregnable position is the very opposite of Abraham's. That both women lose their marital status, one for letting her beauty be seen, the other for refusing, is a sad comment on the treatment of women.

<sup>15</sup> See Jonathon Magonet, "The Themes of Genesis 2-3," *A Walk in the Garden*, JSOT Series 136, eds. Paul Morris and Deborah Sawyer (Sheffield: 1992), 42-44.

When we turn to the descriptions of the two divorces in the law--the woman experiences hatred from the second husband, a loss of favour from the first--their negative colouring understandably inclined interpreters to read in the phrase "the nakedness of a thing" something negative about the woman. Yet the surprising mildness of the language about losing favour in the first husband's eyes should have made them more cautious. The term *'ervah* "nakedness" almost inevitably pulls in the notion of shame, but it is crucial to note that this secondary sense only emerges when the situation in question is public and not private. Shame by its very nature only comes into being when that switch is made.

The situation of Noah, lying naked in his tent in a drunken stupor, only becomes shameful when his son looks upon him. Human excrement is not shameful, but would become so if the deity, going the rounds of the Israelite army encampment, sees it within that area of ground. In that situation the expression *'ervat-dabar*, used the one other time in the bible, in the law in Deut 23:15, takes on a negative connotation (compare the modern formulation, "Dirt is matter out of place"). Egyptian territory is open for all to see. Nothing untoward about that, but if spies are taking stock of it, as the disguised Joseph claimed his brothers were, then "the nakedness of the land" (*'ervat-ha'areš*) is cause for concern. Just as Joseph could not protect the land against the prying eyes of foreign males, so Abraham could not protect his wife's beauty against the prying eyes of foreign males. In each instance the problem was not the land itself nor the woman's looks themselves. The problem lay in wrongful looking on the part of others.<sup>16</sup> On account of their alleged ulterior motives, Joseph's brothers should not have been viewing the land, nor the foreigners of Gerar viewing Sarah.<sup>17</sup>

The expression *'ervat-dabar* as applied to the woman in the law

<sup>16</sup> Recall Ham-Canaan's looking upon his father's nakedness (Gen 9:20-27).

<sup>17</sup> Consistent with the use of *'ervah* in other contexts, in regard to the woman it refers to an aspect of nature, namely, how she looks. There is consequently no need to seek to apply it to her conduct, as translators and commentators do, for example, "indecent, improper conduct." No wonder they have difficulty in attempting to specify her offence: they make it fall short of adultery because of the rule in Deut 22: 22, but insist on some kind of sexual offence. We cannot tell from a reading of the law itself what is going on. We have to assume that the law was composed with the law narrative about Abraham and Sarah specifically under review.

will refer to a public situation, a link to someone outside her marriage. Here it is crucial to note that when she leaves the first marriage she enters upon a second. The language of the law, contrary to what the RSV makes of it, is not conditional in character. The language is not, "And if she goes and becomes," but, "And she goes and becomes." It is the one clue in the law that a second marriage is anticipated for her. We can consequently speculate that the first marriage is dissolved because another male is being encouraged to acquire her. If this speculation has merit, we can at least find readily intelligible why there is a prohibition against the first husband taking her back should the second husband divorce her or even should he die. What is being condemned out of hand is the release of the woman from a marriage because, for whatever reason, the husband anticipates a favour by letting her go to another man.<sup>18</sup> When the law goes on to say that the woman would be defiled should she return to the first husband, we can understand why this language is used. The verb *tame'*, "to defile," refers, as often, to sexual defilement. She can be so regarded precisely because the first husband had encouraged her to seek a relationship with another man. No doubt, should she become free again, he would presumably be as willing to have her back as he was opportunistic in releasing her from the first marriage. While the outward conduct is in order because of the use of the machinery of divorce, its motivation is base.<sup>19</sup>

A further puzzling feature of the law is worth commenting on. Much of its language is unnecessary. The drafting of laws at this stage of legal development is typically to the point and not inclined to spell out what can be taken for granted. There is consequently no need to set out the reasons for the two divorces or to mention how a written document of divorce is handed to the departing spouse.

<sup>18</sup> Different is the ritual of wife-selling in 18th and 19th century England: a procedure by the poor who had no access to the actual legal code of divorce, which required an act of Parliament and could be utilized only by the rich and influential. See Ronald Paulson, *Popular and Polite Art in the Age of Hogarth and Fielding* (Notre Dame: 1979), 15.

<sup>19</sup> Compare how Jezebel, by her use of proper judicial procedure in regard to witnesses, threw a cloak of legality over her move to be rid of Naboth (1 Kgs 21:10). For examples of conduct that are outwardly worthy but inwardly wrong, see David Daube's discussion of purists and pragmatists in later Talmudic law and New Testament literature, "Neglected Nuances of Exposition in Luke-Acts," *Aufstieg und Niedergang der Römischen Welt*, II, *Principat* 25, *Religion* 3 (Berlin: 1985), pp. 2329-2356.

Only if such a written document constituted an innovation might we expect a reference to it, but there is no indication that it is an innovation. Why then such unnecessary description? To contrast, it might be suggested, the situation of Abraham and Sarah, which cannot be legislated for, with one in later Israelite life that can. The issue of divorce does not arise when Abraham and Abimelech each in turn releases Sarah from her ties to them. Only the deity could control the development that arose with them. The Israelite lawgiver, on the other hand, can only have access to a comparable situation, if the development occurred among Israelites themselves, and if it involved the legal machinery of divorce. The formulation of the law reflects this attempt to transform the unmanageable circumstances described in the Genesis tale into manageable ones. Even with this transformation we can still observe the powerful influence of the story on the law.

There is, as I have already indicated, the transfer of the notion of Sarah's exposure into the expression *'ervat-dabar*. We can also explain a crucial aspect of the interpretation that I am suggesting for the law. Why, if it really is the case of a husband encouraging his wife to seek another liason, does it not refer to a transaction between the first husband and the second? Realistically, we would expect some form of collusion between the two men. Such an indication would have put the interpretation of the rule beyond all doubt. The influence of the story on the rule has again to be reckoned with. Abraham knew only that some male would respond to his wife's good looks. He decided on his scheme before he knew the identity of the second husband. The law proceeds from a description of the first husband's release of his wife to a simple statement that she goes and becomes another man's wife. The statement leaves us wondering whether the second husband knew the woman while she was still married to the first husband, or only after she was divorced. The story has prompted the lawgiver to keep the matter open--hence the omission of any reference to collusion between the two men.

Even the double description of the woman's release from her second marriage--the husband divorces her because he hates her or he dies--may owe much to Abimelech's position with Sarah after he realised what her deception had done to him and his kingdom. He rightly protested to the deity that she claimed she was Abraham's sister and not his wife. In consequence he had occasion to change his attitude to her, from attraction to aversion. After all, a plague of



sterility had struck the women of Gerar because of his association with her. Worse, Abimelech had a death sentence placed upon him because of her presence in his house. The law contemplates two possibilities by which the woman may be released from her second marriage: she is disliked by the husband, or he dies. These two possibilities can be read as substitutes for the idiosyncratic ones cited in the story.

The law has the odd reference that sin is caused to the land because of the woman's relationships with the two men.<sup>20</sup> Abimelech protested that sin had been brought upon his kingdom because of Sarah's relationship with Abraham and then with him. The law also states that should the divorcee return to her first husband after her marriage to the second, such a move would constitute an abomination to the deity. This characterisation is wholly in line with the depiction of the deity's response to what almost transpired in the Genesis tale.

Where historical speculation has to be relied on to make sense of these rules,<sup>21</sup> it is virtually impossible to suggest the circumstances that might explain why a particular rule followed another one. Why, for example, does a rule exempting a man from military duty, or any other type of duty, for one year after marriage follow the prohibition about the divorcee? While a solution attempting historical reconstruction has not been possible, the inclination has been to observe the role of "catchwords" in the linking of rules and to pursue the problem of historical background in another way. The rules, so the reasoning goes, belong to different times and places and are linked together in this loose way. Underlying such an approach is the resolute belief that a real life situation once prompted the rule. The attempt to identify such a real life situation seems to reflect a desire to render the material "living" and to enhance its re-

<sup>20</sup> Philo comments on such a link when he discusses the earth's curse upon Cain, "For if inanimate and terrestrial nature opposes and revolts against wrongdoing..." *Ques Gen* 1.71.

<sup>21</sup> It should be clear that I cannot go along with the reading of this law as depicting the historical realities of ancient Hebrew society. Here is a typical treatment of how such a law is understood: "In pre-prophetic times all that a man had to do if his wife 'found no favor in his eyes' was to write her a bill of divorcement and send her out of his house. He might not, however, remarry her." See entry, Marriages, Law of, *Encyclopedia Americana*, 18, 1965 edition, 315.

latedness to our times, to recreate life in the ancient biblical society with a view to appropriating its values.

If we adopt the biblical writer's viewpoint that Moses delivered these rules at the end of his life, there is no need to adhere to this usual approach. The setting is not that historically someone standing in for Moses is engaged in adjudicating actual legal cases, but that Moses' death is approaching and life in the new land for his fellow-Israelites is beckoning. Situations in which death is imminent, similar to the one confronting Moses, have engaged the lawgiver's attention. In these three situations, moreover, there is a threat to the promise, so prominent elsewhere in Deuteronomy, of the blessing of fruitfulness and increase of numbers. At Kadesh Israel on its way to the new land met with a life-threatening response from the Edomites, as did Abraham near Kadesh when he and Sarah, having previously received the promise of acquiring the land (Gen 17:8), approached the males of Gerar. The threat to Abraham, which prompted his plan to let Sarah be acquired by one of these males, is also the background for the rule about the newlyweds. At Gerar Abraham and Sarah had not yet produced a child. The deity had promised them one (Gen 18:10), but at the time of his visit to Gerar Sarah had yet to conceive. Supernatural assistance to overcome Sarah's age barrier to pregnancy, as well as to prevent her loss as Abraham's spouse, is part of the history known to Moses.

Moses' task, precisely because his special relationship to the deity will not be found again, is to give rules that reflect the deity's interests. The rule about the newly married couple incorporates the issue of the threat to the man's life--in the more conventional instance drawn from later Israelite life of death on the battlefield--and the related issue of childlessness. The concern about children in the rule can be inferred from the man's exemption for one year, and from the language about his giving joy to his wife. As usual with these rules, the language echoes the tradition that has inspired their formulation. The surprising emphasis in the rule about pleasuring the woman is derived from Sarah's speaking this way when she heard that she would be made pregnant (Gen 18:12).<sup>22</sup>

<sup>22</sup> On the association with childbearing of language about giving pleasure to a wife, see my "Marriage and the Samaritan Woman," *NTS* 26 (1980), pp. 333-35. Amusingly, the authors of the article cited in the previous note translate--as does the JPS version--"Shall cheer up his wife."