

**A Law Book for the Diaspora:
Revision in the Study of the
Covenant Code**

JOHN VAN SETERS

OXFORD UNIVERSITY PRESS

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To Gerhard von Rad
In Memoriam

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Preface

This book arises out of a personal scholarly concern for the Pentateuch that stretches over thirty years. Most of my previous research on the Pentateuch has been centered upon the non-Priestly corpus, for which I continue to use the term “Yahwist.” This includes material that some would distinguish as the Elohist, but I have strongly advocated the view that the whole of the non-Priestly corpus should be considered a single literary work. My previous historical and literary-critical study of the Yahwist has been to investigate the narrative of his work as a piece of ancient historiography, and in this identification of its genre, I stand in the tradition of Gerhard von Rad, who likewise considered the Yahwist as a historian. Yet, like von Rad, I recognize that the form of the Pentateuch in general, and the Yahwist source in particular, is not just history but also law, and in the last few years, I have turned my attention to the corpus of law within the non-Priestly and non-Deuteronomistic part of the Pentateuch. Contrary to the earlier views of the Documentary Hypothesis of the Pentateuch, I regard law in the form of the Covenant Code of Exod 20:23–23:33 as integral to the work of the Yahwist. Thus, von Rad’s assertion that the Pentateuch is both history and law is even truer than he supposed. Indeed, apart from his initial discussion of the “form-critical problem of the Hexateuch,” in which he found the origins of law within primitive Israelite liturgies and festival, he never did return to the question of the relationship of law to the work of the Yahwist.

When I began my close examination of the Yahwist in the Book of Exodus, as reflected in *The Life of Moses* (1994), I was under the common scholarly assumption that most of the Covenant Code was an older collection of laws that was taken up by the Yahwist and incorporated into his own work. Such a possibility was in no way incompatible with my supplementary view of the Pentateuch’s compositional history and the nature of the Yahwist’s work. In my earlier work on the Yahwist in Exodus–Numbers, I considered the prologue (Exod 20:23–26) and epilogue (23:20–33) as the work of the Yahwist, but the rest I set aside for later investigation. When I did finally turn my attention to the Covenant Code, I no longer viewed it under the common assumption that these laws must be early because they are embedded in early Pentateuchal sources, for I had already come to the conclusion that the larger non-Priestly narrative context was

later than Deuteronomy and the Deuteronomistic History. Consequently, in a series of studies I set about to investigate the relationship of this code to parallel laws in Deuteronomy and the Holiness Code. My early probes led to some startling results that suggested that the Covenant Code was later than the other two codes and dependent upon them in the same way that the Yahwist was later than Deuteronomy. These probes are reflected in “Cultic Laws in the Covenant Code and Their Relationship to Deuteronomy and the Holiness Code,” in *Studies in the Book of Exodus*, edited by Marc Vervenne, 319–45, BETL 126 (Leuven: University Press, 1996), and “The Law of the Hebrew Slave,” ZAW 108 (1996): 534–46. I wish to thank the editors of these publications and University Press of Leuven and the *Zeitschrift für die alttestamentliche Wissenschaft* for their permission to use the material from these articles.

This led to my sabbatical project in the winter and spring of 1998, which was spent at the Katholieke Universiteit Leuven, where I was appointed as a visiting professor and Senior Fellow of the “Onderzoeksraad” (Research Council) of the university. I wish to thank my promoter and host, Marc Vervenne, as well as Johan Lust, Antoon Schoors, and many others there, for their warm hospitality and assistance. Most of my research for the present volume was conducted in their wonderful libraries. Two preliminary articles that have appeared as a result of this research are “The Law on Child Sacrifice in Exod 22,28b–29,” *ETL* 74 (1998): 364–72, and “Some Observations on the *Lex Talionis* in Exod 21:23–25,” in *Recht und Ethos im Alten Testament: Gestalt und Wirkung; Festschrift für Horst Seebass zum 65. Geburtstag*, edited by S. Beyerle et al., 27–37 (Neukirchen-Vluyn: Neukirchener Verlag, 1999). I am happy to acknowledge the permission of the editors of *Ephemerides Theologicae Lovanienses* and the Horst Seebass Festschrift for permission to reproduce these articles, in modified form, in this volume. I would also like to thank the Society of Biblical Literature for permission to use the translation of laws from Martha T. Roth, *Law Collections from Mesopotamia and Asia Minor*, Writings from the Ancient World—Society of Biblical Literature 6 (Atlanta: Scholars Press, 1995).

Interest in biblical law in general, and the Covenant Code in particular, has proliferated, and it is hard to keep up with the latest publications. Nevertheless, I have tried to represent the broadest spectrum of views that are relevant to this study and at the same time keep it within reasonable limits. The readers for Oxford University Press have given many helpful suggestions, and the staff and officers of the Press have given me much assistance in its production, for which I am grateful. My former academic home, the University of North Carolina, Chapel Hill, provided much research support, and my current affiliation with Wilfrid Laurier University has been most helpful with library assistance and collegial association. For all these I am most grateful.

This work is dedicated to the memory of Gerhard von Rad. I was a student in his classes when he was a visiting professor at Princeton Theological Seminary in 1961, and I was greatly inspired by him. It was he who identified the Yahwist as an author and a historian, against the prevailing scholarly trend of his day, and gave to this literary master his due. While there are those, currently, who would dismiss the Yahwist as an author and dissolve his work within the morass of redaction history, my own work of the last thirty years is set against this trend. I am happy to offer this book to von Rad as an investigation of one more element within the larger masterpiece of the Yahwist’s work, which is, I believe, the key to understanding the Pentateuch as both history and law, as von Rad discerned so many years ago.

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Abbreviations

AB	<i>Anchor Bible</i>
ABD	<i>Anchor Bible Dictionary</i> . Edited by David N. Freedman. 6 vols. New York: Doubleday, 1992.
AJBI	<i>Annual of the Japanese Biblical Institute</i>
AnBib	<i>Analecta Biblica</i>
AOAT	<i>Alter Orient und Altes Testament</i>
BA	<i>Biblical Archaeologist</i>
BBB	<i>Bonner biblische Beiträge</i>
BBET	<i>Beiträge zur biblische Exegese und Theologie</i>
BETL	<i>Bibliotheca Ephemeridum Theologicarum Lovaniensium</i>
BibOr	<i>Biblica et Orientalia</i>
BKAT	<i>Biblischer Kommentar: Altes Testament</i>
BN	<i>Biblische Notizen</i>
BWANT	<i>Beiträge zur Wissenschaft vom Alten und Neuen Testament</i>
BZ	<i>Biblische Zeitschrift</i>
BZAW	<i>Beihefte zur Zeitschrift für die alttestamentliche Wissenschaft</i>
CBOTS	<i>Coniectanea Biblica, Old Testament Series</i>
ETL	<i>Ephemerides Theologicae Lovanienses</i>
EvTh	<i>Evangelische Theologie</i>
FRLANT	<i>Forschungen zur Religion und Literatur des Alten und Neuen Testaments</i>
HTR	<i>Harvard Theological Review</i>
HUCA	<i>Hebrew Union College Annual</i>
JAOS	<i>Journal of the American Oriental Society</i>
JBL	<i>Journal of Biblical Literature</i>
JCS	<i>Journal of Cuneiform Studies</i>
JJS	<i>Journal of Jewish Studies</i>
JNES	<i>Journal of Near Eastern Studies</i>
JNSL	<i>Journal of Northwest Semitic Languages</i>
JSOT	<i>Journal for the Study of the Old Testament</i>
JSOTSup	<i>Journal for the Study of the Old Testament Supplement Series</i>
LE	<i>Laws of Eshnunna</i>

- LH Laws of Hammurabi
 LXX Septuagint (Greek) translation of the Hebrew Bible
 MT Masoretic text of the Hebrew Bible
 NCBC New Century Bible Commentary
 NEB New English Bible
 NJPSV New Jewish Publication Society Version
 NRSV New Revised Standard Version
 OBO *Orbis Biblicus et Orientalis*
 OTL Old Testament Library
 OTS *Oudtestamentische Studiën*
 RB *Revue biblique*
 REB Revised English Bible
 RSV Revised Standard Version
 SBAB Stuttgarter Biblische Aufsatzbände
 SBLDS Society of Biblical Literature Dissertation Series
 ScrHier Scripta Hierosolymitana
 SR *Studies in Religion/Sciences Religieuses*
 StudBib *Studia Biblica*
 TB Theologische Bücherei
 TDOT *Theological Dictionary of the Old Testament*. Edited by G. T. Botterweck and H. Ringgren. 9 vols. Grand Rapids, Mich.: Eerdmans, 1974-.
- TLOT *Theological Lexicon of the Old Testament*. Edited by E. Jenni and C. Westermann. 3 vols. Peabody, Mass.: Hendrickson, 1997.
- TR *Theologische Rundschau*
 TS *Theological Studies*
 UF *Ugarit-Forschungen*
 VT *Vetus Testamentum*
 VTSup *Vetus Testamentum, Supplements*
 WBC World Bible Commentary
 WMANT *Wissenschaftliche Monographien zum Alten und Neuen Testament*
 ZA *Zeitschrift für Assyriologie*
 ZABR *Zeitschrift für altorientalische und biblische Rechtsgeschichte*
 ZAW *Zeitschrift für die alttestamentliche Wissenschaft*

A Law Book for the Diaspora

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Introduction

The importance of Hebrew law for understanding ancient Israelite culture and religion, as well as for the study of Judaism and Christianity, should be self-evident to anyone familiar with the Bible and these religious traditions. Biblical law makes up about one-half of the texts of the Books of Genesis to Deuteronomy, the portion of the Bible variously termed the Pentateuch, the Torah, or the Law of Moses. Traditionally, the authorship of the whole Pentateuch and the laws in particular has been ascribed to Moses, but scholarship has long disputed this claim and identified three (or four) basic literary strata within the Pentateuch.¹ Although different rubrics are used by scholars for these strata, I will greatly simplify the literary discussion of these Pentateuchal “sources” or authors by referring to them as the Yahwist (J), the Priestly Writer (P), and Deuteronomy (D). A fourth source identified by many as closely parallel to that of J is the so-called Elohist (E), but it is the most disputed and I will consider it part of the Yahwistic corpus in what follows. The literary works produced by these authors have been understood as belonging to different periods in Israelite history. The various blocks, or “codes,” of law are distributed within each of these literary works, so that they too do not reflect the time of Moses in the wilderness but instead arise out of various periods in the later history of the people. Thus, the modern critical study of the Hebrew Bible owes much to the discovery of how the various codes of law within the Pentateuch relate to each other, to the rest of the narrative in the Pentateuch and historical books, to the prophetic literature, and to Israelite history as reflected in, or critically extracted from, the Hebrew Bible.

An important breakthrough in biblical scholarship was achieved by W. M. L. de Wette in the early nineteenth century when he identified the “book of the law” that was discovered in the Temple in the time of Josiah (2 Kings 22) as Deuteronomy. Instead of being a lawbook that was preserved from hoary antiquity, Deuteronomy was understood as a work that was composed in the late monarchy for the purpose of furthering a major reform of Israelite religion, namely, the centralization of all temple worship in Jerusalem and the exclusive worship of the god, Yahweh. This reform “movement” was also seen to be reflected in the ideology of the historical work that extends from Joshua to 2 Kings, which was written in this period, such that the historian of these books was

dubbed by scholars as the Deuteronomist (Dtr) and the history book as the Deuteronomistic History (DtrH). Deuteronomy therefore became the critical “fixed point” to which the other biblical codes could be compared and related chronologically. The next major breakthrough came when a number of scholars, the most famous of whom was Julius Wellhausen, argued that the so-called Priestly Code² was not an early corpus of laws but should be viewed as later than Deuteronomy and that its outlook and form of religion were reflected in those parts of the Hebrew Bible that could be dated to the time of the Second Temple in the Persian period. It consists to a large extent of regulations having to do with the exercise of temple worship (“the cult”) in this period. Within the Priestly Code was an older corpus of laws, the so-called Holiness Code (Lev 17–26), that was closely associated with the prophet Ezekiel and therefore dated to the time of the Babylonian exile. It had some affinities with Deuteronomy, upon which it depended, but it also reflected the Priestly legal tradition that ultimately resulted in the larger Priestly Code.

This leaves the small legal code of Exod 20:23–23:33, the so-called Covenant Code, which is the primary subject of this book. This code of laws belongs within the Yahwist narrative corpus.³ In contrast to Deuteronomy and the Priestly Code, it is not so easy to associate this code with a block of texts outside the Pentateuch, so dating this code has been based upon other factors (to be reviewed below). These led to the unanimous opinion that the Covenant Code was the oldest of the Pentateuchal codes and thus that the understanding of the history of Hebrew law and religion could be based upon the following chronological sequence: the Covenant Code, the Deuteronomistic Code, the Holiness Code, and the Priestly Code. Since the publication of Julius Wellhausen’s great tour de force, *Prolegomena to the History of Ancient Israel* (1883), in both German and English, which is based upon this sequence of law codes for its reconstruction of Israelite religion, this viewpoint on Hebrew law has carried the day. The Covenant Code, therefore, is thought to reflect the oldest social and religious forms, customs, and laws of the Hebrew people. Some of its laws are thought to even predate the rise of the state. Consequently, the other law codes embedded within the Pentateuch, most notably the Deuteronomistic Code (Deut 12–26) and the Holiness Code (Lev 17–26), are thought to be much later codes, and wherever they contain parallel laws and injunctions, they are regarded as revisions and modifications of the older Covenant Code. Comparisons made between similar laws within these codes assume this chronological sequence in their discussion of the development of Hebrew law and never question the priority of the Covenant Code in the history of Hebrew law.

Yet in spite of the strength and unanimity of the consensus on the priority of the Covenant Code,⁴ there is good reason to raise some serious questions about it and to reexamine the foundations of this consensus. There are four major building blocks or “pillars” that support the traditional chronological dating of the law codes. The first of these is the Documentary Hypothesis, according to which the Covenant Code is associated with one of the early sources, usually E, and is therefore earlier than the codes within Deuteronomy and the Priestly Writer. However, there has been a major upheaval in the study of the Pentateuch within the last three decades such that the Documentary Hypothesis has come under critical scrutiny, and the “oldest sources” of the Pentateuch, J or E, in which these laws are embedded, are now regarded by many scholars not to be as old as previously claimed and may even be later than Deuteronomy. This pillar, therefore, is no longer secure.

The second major pillar for the early date of the Covenant Code is the similarity of its first half to the Babylonian law codes of the second millennium B.C.E. The very early date of the Babylonian laws suggests that the Covenant Code laws should be dated as early as possible. However, it is becoming increasingly difficult to explain any cultural continuity between the Babylonian legal tradition of the second millennium B.C.E. and the Palestinian Iron Age monarchies that arose in the tenth or ninth centuries B.C.E. in Israel and Judah. Cultural contact between Mesopotamia and Palestinian states was only reestablished, after a lapse of several centuries, under the domination of the Assyrian Empire in the eighth and seventh centuries, and it is this later Assyrian influence that is reflected in Deuteronomy, as many studies now acknowledge. Likewise, Babylonian influence on the Covenant Code could reflect contact between Jews and Babylonian culture during the Babylonian exile in the Neo-Babylonian period and therefore be late rather than early. So long as there is a vigorous debate about how to account for the similarity between Babylonian law and biblical law, a debate that we shall examine below, parallels with Babylonian laws cannot be used without qualification in support of an early date for the Covenant Code.

The third pillar for an early date for the Covenant Code is the argument from social and religious evolution. It is suggested that its laws reflect a more primitive social and religious stage in the development of Israelite culture than the later codes. As we shall see below, this evolutionist argument so popular in the late nineteenth and early twentieth centuries from Wellhausen's *Prolegomena* onward has been greatly eroded in recent years, although the consequences of its decline have not been taken seriously. The seemingly "primitive" character of the code has been badly misunderstood. Such law codes do not arise apart from the literary activity of a scribal class in urban centers. Yet this code does not reflect anything of a national state during the period of the Israelite and Judean monarchies. As the title of my book suggests, it is a lawbook for the semi-autonomous diaspora communities, especially those of the Babylonian exile. As we shall see in the pages that follow, there are many clues that point to just such a social setting.

The fourth pillar supporting the early date of the Covenant Code relates to the rise of form criticism, in which a variety of different types of laws are identified within the code, usually in blocks of laws. These are regarded as stemming from different origins and social settings such that the Covenant Code is considered to be, not a unified literary document, but the result of a long process of growth, beginning in the very early stages of the people's existence. Some of this process of growth in legal tradition is ascribed to the oral, preliterate stage of Israelite society (its tradition history); other levels of its development are attributed to literary editing (redaction history). This highly speculative discussion about the Covenant Code's prehistory assumes its original independence from its present literary context and its development from hoary antiquity like the rest of the "early sources" of the Pentateuch. Yet the practice of form criticism on the Pentateuch as a whole and its related schemes of tradition history have come in for much critical scrutiny, and the validity of this approach can no longer be assumed. As we shall see below, there are as many developmental schemes for the Covenant Code as there are scholars who propose them.

These four pillars have been so badly shaken or undermined that they cannot support the blanket assumption of the Covenant Code's early dating. It is also the case that these pillars are interconnected, so that a weakness in one directly affects the others.

Thus, if the literary source in which the Covenant Code is located is late, then it removes the basic reason for the long tradition history of its formation. Similarly, if the casuistic laws should point to a late date for their source and incorporation, then the reconstruction of the code's growth and independent character would be greatly affected. Notions about Israel's social evolution are also directly reflected in one's form-critical analysis of the Covenant Code. The only way to avoid the current weakness inherent in all of these pillars supporting the antiquity of the Covenant Code is to engage in an internal comparison of the biblical codes mentioned above.

The object of this study, therefore, is to compare the laws in the Covenant Code with parallel or closely related laws and injunctions or prohibitions within the other Old Testament law codes, the Deuteronomic Code and the Holiness Code, without assuming the priority of the Covenant Code.⁵ With the exception of my own previous studies, it has been universally assumed that the Covenant Code is the oldest code; consequently, any comparison between the Covenant Code and Deuteronomy or the Holiness Code always understood a similarity as a case of the dependence of Deuteronomy or the Holiness Code on the Covenant Code. In no case was comparison ever used to discover which of the codes was the older and which the later. To understand how this state of affairs came about in critical scholarship, it is necessary to review the history of scholarship on the Covenant Code as it relates to this particular issue of the chronological priority of the Covenant Code over the other codes. It is my intention, not to survey the whole field of research on the Covenant Code, which covers a rather vast body of literature, but to try to understand why there exists such a firm and broad consensus about the priority of the Covenant Code and how this conviction completely dominates all discussion regarding the inner-biblical comparison of law codes and ultimately the compositional history and the interpretation of the laws in the Covenant Code. The history of research in the study of Hebrew law will be the concern of chapter 1.

Once it becomes clear that in previous legal scholarship there are no adequate reasons for dissociating the Covenant Code from its setting in the literary stratum that I will refer to as the Yahwist, the interrelationship between the law code and that setting will be more fully explored in chapter 2. This setting has to do with the narrative of the theophany on Mount Sinai in Exod 19–20, in which the deity pronounces the laws to Moses alone while the people stand at a distance, followed by the reception of the law and the covenant ratification in Exod 24:3–8. The opening laws in Exod 20:23–26 can hardly be divorced from this setting and will need to be treated here as vital to understanding the connection between law and theophanic event, just as they do in Deut 4–5. While the first of these laws, which has to do with singular loyalty to Yahweh and the prohibition against images, is often viewed as a late addition, the law of the altar has long been used to date the whole of the code as early. Yet these two laws parallel the primary concerns of the Deuteronomic reform, that of absolute loyalty to Yahweh and the one central altar where he is to be worshiped. This becomes the first major test for the problem of the priority of one code over the other. The epilogue of the code (Exod 23:20–33), which looks ahead to the events that lead to the eventual conquest of the Promised Land, is often treated in isolation from the law as a late appendix. This study, however, will argue that it is an appropriate part of the larger setting of the code and belongs to the Yahwist's work.

Chapter 3 will examine the large block of casuistic laws, the *mishpatim*,⁶ that display so many parallels with the Mesopotamian law codes. A comparison with these and other Near Eastern codes is the primary concern of most legal historians who deal with the casuistic laws, and we will need to give some attention to this similarity. But often neglected is the way in which this block of laws also contains numerous parallels to the other parts of the Hebrew legal tradition. It will be precisely the confluence of these two legal traditions, the Mesopotamian and the Hebrew, and how to account for this combination within the Covenant Code that will be the main focus of our study of this block of laws. It is not my concern to give a commentary on all of the laws in this section; rather, I will show how a mistaken sense of the Covenant Code's priority has led scholars to ignore a major component in the composition of these laws.

The second half of the Covenant Code contains laws, injunctions, and prohibitions that more obviously belong to the Hebrew legal and ethical tradition and therefore parallel those in the other Hebrew codes, as well as in the prophetic literature. These laws and their parallels will be addressed in chapter 4. Many of these parallels and similarities have long been recognized, but the presumption of the Covenant Code's chronological priority has prejudiced all of the discussion about such similarities. An extensive review of all these cases and of the pertinent discussion about them will be undertaken. However, once it becomes clear that the Covenant Code may be later than Deuteronomy and the Holiness Code, then many other points of contact with the larger Hebrew legal and religious tradition come to light that have been overlooked.

Finally, the study will attempt to bring together the results and implications of this radically new evaluation of Hebrew law. The case for this revolution does not rest upon a few selected laws interpreted in such a way as to make a fit with some special thesis. It is a comprehensive study of all those laws in the Covenant Code and their parallels in the other codes that could have any significant bearing on the question under debate. Readers who are not specialists in this field of study may find some of the discussion tedious or pedantic, but the fine points are nevertheless important if the case is to be made for such a major change in the study of Hebrew law. Like a good mystery story, the devil is in the details. I plead for your patience, therefore, and hope that the results will reward the effort.

The History of Research on the Covenant Code

The “Pillars” of Priority

As indicated in the introduction, four “pillars” have been used in earlier scholarship to support the literary precedence of the Covenant Code in relationship to the other law codes of the Pentateuch. We will therefore begin our historical survey of scholarship with a review of how this consensus on the Covenant Code’s temporal priority came about. It was the New Documentary Hypothesis as advocated by J. Wellhausen in his *Prolegomena to the History of Israel* (1883) that first established the literary priority of the Covenant Code by ascribing it to one of the earlier Pentateuchal sources, the Elohist (E). The argument for the early date was based primarily on his treatment of the altar law (Exod 20:24–26) and the cultic laws (Exod 23:10–19). These laws were thought to reflect a development of Israelite religion earlier than that set forth in the law of the central altar in Deut 12 and the cultic regulations in Deut 16. The cultic laws of Exod 23:12–19 were thought to have still older parallels in the Yahwistic (J) version of Exod 34:17–26;¹ hence their attribution to E. This argument for the priority of the Covenant Code in Wellhausen is based upon his understanding of the evolution of Israelite religion from a simple agricultural religion of local festivals to the centralized cultus of Deuteronomy and the highly complex and remote cultus of the Priestly Code, including the Holiness Code of Lev 17–26. This literary priority of the document or source containing the Covenant Code remained largely unshaken for about a century.

An important new element entered into the discussion of the origins and development of Israelite law with the discovery and publication of the Hammurabi Law Code in 1902. The obvious parallels in style and content between this Babylonian code of the early second millennium B.C.E. and a block of laws in the Covenant Code shifted the focus from the religious laws in the code to those dealing with civil matters and gave further support for the antiquity of the laws and their origins in early Israel.² With the rise of form criticism in Pentateuchal studies and its search for the primitive units that constitute the basic elements from which the later literary works are only the final collections, the Covenant Code was no longer considered as the literary creation of the Elohist but as the end product of a traditio-historical process. The diversity of form and

content within the Covenant Code invited analysis of the various types of laws and the reconstruction of their social *Sitze im Leben*. It was this approach that could most easily accommodate the concern to distinguish what in the law was derived from a foreign source (the Mesopotamian legal tradition) and what was distinctively Israelite.

While there were a number of early form-critical studies of law, it was A. Alt's form-critical analysis of the Covenant Code that laid the basis for the future study of Israelite law. In his view the casuistic (civil) laws were inherited from the pre-Israelite Canaanite society, while the apodictic (religiously sanctioned) laws derive from the recently settled nomadic Israelites.³ Even if this form-critical scheme has now been modified to allow for greater diversity of type under the apodictic rubric and if there is, likewise, much debate about how these secular and religious types of law came together, the form-critical debate continues to be the point of departure for identifying the Covenant Code's political and social horizon and its compositional history.⁴ With Alt's work it was widely accepted that the casuistic laws represent an originally distinct collection of laws whose antiquity could be traced back through Canaanite intermediaries into the Bronze Age and from there to their Mesopotamian origins.

Robert Pfeiffer fully accepted and made use of the form-critical analysis of the Pentateuchal laws in general and those of the Covenant Code in particular.⁵ This led him to reject the presence of any laws in E.⁶ Instead, he proposed a rather complex tradition and composition history for the Covenant Code, which consisted of an original ritual decalogue supplemented at various times by editorial additions and laws, some before and some after Deuteronomy, with the civil and criminal legislation inserted about the middle of the fifth century.⁷ In spite of this late date for the addition of the casuistic laws, however, the laws reflect an ancient code as attested by the cuneiform law codes.

When Pfeiffer deals with the relationship of the casuistic laws of the biblical codes to those of the ancient Near East, principally Hammurabi's code, he includes in the comparison those of Deuteronomy as well.⁸ It is Pfeiffer's view that both these bodies of law go back to an older code which was similar in character to the Hammurabi Code, with which he compares the form and content of these biblical laws. He points out that there is very little overlap between the casuistic laws of the Covenant Code and Deuteronomy. Thus, while Deuteronomy has a number of family laws dealing with inheritance and marriage (Deut. 21:15–21; 22:13–29), the Covenant Code has only one (Exod 22:16–17), which partly overlaps with Deuteronomy. However, the Covenant Code has a number of laws dealing with property (21:33–22:14 [15]), which have no parallel in Deuteronomy. Yet both classes of law are included in the Hammurabi Code.

On this basis Pfeiffer reconstructs an ancient code that the Israelites inherited from Mesopotamia by way of the Canaanites, dating from before 1200 B.C.E. He suggests that Deuteronomy used this old code and not the Covenant Code for the casuistic laws of Deuteronomy. At a later point in time an editor (about 450 B.C.E.) added the casuistic laws that are not included within Deuteronomy from the old code to the Covenant Code. For Pfeiffer this is the only way that he can account for the complementarity of the two biblical codes that together deal with the range of materials in the other Near Eastern codes but are individually quite deficient.

Pfeiffer's position would seem to demand the notion of a broad diffusion of Mesopotamian culture, including its legal tradition, throughout the whole region of the Levant in a form that hardly allows for much regional variation and was also transmitted by

Israelite scribes in a fixed “canonical” form for over eight centuries, to be used as a source for the latest version of the Covenant Code. This would certainly seem to preclude any “evolutionist” notions of development within the casuistic laws, although Pfeiffer allows for a complex evolution of the law codes themselves.

The issue of the presence of casuistic laws within two of the biblical codes that are complementary is generally ignored in scholarship in the discussion of the relationship of the biblical codes to their Near Eastern counterparts. It is easier to explain how only one code, the Covenant Code, may be related to the earlier Near Eastern codes than to suggest a way by which both Deuteronomy and the Covenant Code made use of the same Near Eastern legal tradition in this coordinated fashion with very little overlap.

A quite different attempt to assimilate the new form-critical approach of Alt to the Documentary Hypothesis may be seen in the views of M. Noth, which are quite important to the later study of Hebrew law.⁹ Noth follows Alt’s form-critical analysis of the principal types of law in the Covenant Code and the early history of their coalescence into a law code. He puts forward the suggestion: “It is probable that this collection [Exod 20:22–23:33] once formed an independent book of law which has been inserted into the Pentateuchal narrative as an already self-contained entity.”¹⁰ Such an independent work was, in his view, not related to either of the Pentateuchal sources, J or E. His reason for judging it as an independent piece is rather remarkable. Although he admits that “20:22 is indeed connected without a break to the narrative which precedes it,”¹¹ the fact that it contains a reference to the divine name Yahweh means that the connection could not be original because, in his view, both 20:18–21 and 24:1–2, 9–11 belong to the E source. This severs the connection between the Covenant Code and E found by the earlier literary critics. However, Noth acknowledges that 24:3–8, which also speaks of the words of Yahweh contained in the “Book of the Covenant” (24:7), does go with the Covenant Code and so is also part of this special source. This means that both the Covenant Code and the covenant making in 24:3–8 were inserted between the theophany account and the making of the covenant in 24:1–2, 9–11.

Furthermore, Noth suggests that this insertion occurred at a rather late stage because 23:20–33, which is “evidently secondary,”¹² can be identified by its style to be Deuteronomistic, and yet it must have been part of the Covenant Code before the law code’s insertion into the Pentateuchal narrative. Thus, the Covenant Code was only included into its present place in the Pentateuch after Deuteronomy. This late date for the inclusion of the code does not affect the assessment of the code’s antiquity, which Noth continues to date to the time of the settlement before the rise of the state.

It is most important to recognize that Noth has laid down in brief compass the few basic principles for the analysis of the Covenant Code that will become dogma in many of the later studies. These are (1) that the Covenant Code is an independent work inserted into the Pentateuch and has no original connection to the Sinai theophany; (2) that the Covenant Code is very early in date and has its own history of development before it became part of the Pentateuch; and (3) that it received a Deuteronomistic redaction and did not become part of the Pentateuch prior to such a redactional process.

Yet as often as these principles are accepted as given, little attention is paid to the literary foundation of source analysis that underlies them. In the last few decades, however, many have questioned Noth’s particular source division or the very existence of an E document, or even the Documentary Hypothesis. Everything for Noth rests on the

shift from the use of “God” (Elohim) in 20:21 to “Yahweh” in verse 22, and yet within the Covenant Code both designations of the deity occur. Furthermore, there is no narrative continuity from 20:21 to 24:1–2, which also contain references to “Yahweh” in 24:1–2 but “God” in 24:9–11. As we shall see below, the relationship of the law code to its narrative context is of vital importance for the understanding of the Covenant Code.

A major preoccupation that arose in the 1960s in the study of biblical law had to do with its relationship to Covenant. With the studies of G. E. Mendenhall and K. Baltzer, to be followed by many others,¹³ it was suggested that to properly understand both the origins of covenant in early Israel and its significance and meaning throughout its history, one must compare it with Hittite suzerainty treaties of the Late Bronze Age, which were its model and inspiration. Such treaties, made between a great king and his vassals, contained within them the declarations of the parties to the treaty and their historical relationships (prologue), the stipulations to which the vassal must adhere, a list of the gods as guarantors of the treaty, and the curses that would follow any violation of the terms of the treaty.

This model was then applied to the Sinai pericope, which was understood as a tradition reflecting the time of Israel’s origin as a united confederation of tribes under Yahweh and in which the promise of covenant based upon Yahweh’s prior deliverance from Egypt (Exod 19:3–6), the stipulations in the form of the Decalogue and the Covenant Code, and the ceremony of covenant ratification in 24:1–11 were understood as conforming to this model. While the merits and shortcomings of this proposal were being debated, new discoveries of first-millennium treaties, notably the Sefire treaty¹⁴ and the Neo-Assyrian treaties and loyalty oaths of Esarhaddon and Assurbanipal,¹⁵ came to light that shifted the primary focus away from the Exodus texts to those of Deuteronomy, which seemed much closer in language and form than the Exodus texts.

There is no need to review in detail the very extensive literature on this debate. It is now generally accepted that the present form of the Sinai pericope does not rest on such a conception of treaty covenant, because the components that were used for comparison too greatly strained the limits of the similarities being suggested. Yet some remarks should be made about the relationship of law to this covenantal model because it was used as support for the antiquity of the Exodus laws and their close association with the larger Near Eastern cultural pattern. The primary focus of the discussion of those who supported the Hittite treaty model of covenant was upon the Decalogue as covenant law. Alt’s thesis that apodictic law, such as reflected in the Decalogue, was Israelite, as distinct from casuistic Canaanite law, was qualified to suggest that the treaty form of apodictic stipulations was transformed and used in a cultic context by early Israel to express its absolute loyalty to Yahweh. Thus, for W. Beyerlin, the Decalogue form of apodictic law that is also thought to be reflected in the cultic laws of Exod 34:10–26 and 23:14–19 goes back to the primitive covenantal basis from which the Covenant Code grew.¹⁶

The Alt-Beyerlin thesis that the apodictic laws of the Decalogue could be traced back to a primitive Israelite cultic setting came under serious attack by E. Gerstenberger.¹⁷ He argued that the apodictic prohibitives do not necessarily arise in a cultic context but can be better explained from their close association with wisdom in the form of admonition and instruction of the young, very likely at the clan and family level. Any use in

the religious context is secondary. He also disputed that the Decalogue form of a series of ten laws was primary or had the significance attributed to it by Alt and Beyerlin.

With respect to the laws of the Covenant Code, Gerstenberger further suggested that even though, like the treaty forms, they contain a mixture of conditional stipulations and direct commands, there are still some fundamental differences.¹⁸ The conditional stipulations of treaties are directed in a personal way at the vassal, often using second person (“if you . . .”), and relate specifically to the political relations between the two states or other related vassals. The casuistic laws of the Covenant Code are impersonal, like those of the law codes, not the treaties. Similarly, the apodictic commands are also of quite a different character, being in the nature of universal principles of behavior and not treaty specific in any way. Their range and variety do not relate to the kinds of stipulations laid down in treaties. This, of course, still leaves open the relationship of the laws to the theme of covenant making within the narrative context in Exodus, a matter that will need to be taken up in a later discussion.

In an often cited article based upon the work of H. Petschow on cuneiform law,¹⁹ V. Wagner argues that the Covenant Code, in the section dealing with the casuistic laws, follows principles of composition similar to those found in the cuneiform codes. The exceptions to this are the laws in Exod 21:12–17 and the *lex talionis* in 21:23b–25, which are viewed as substitutions for the original material. Wagner also has trouble with Exod 22:15–16 (a single law on the seduction of an unbetrothed virgin), which does not seem to fit with the rest. It hardly corresponds to the material in the Hammurabi Code on marriage and the family, and its connection with the preceding is awkward. The whole seems to be a torso of the original law. Thus, Wagner states in the summary: “The codex Ex 21,2–22,16 shows the same structural principles for the laws dealt with, as they have been proved for the Codex Hammurabi. The occurrence indicates the tradition of an ancient Near Eastern school in which the author of the codex in Ex found himself, and furthermore it indicates that there was a scholarly reflection on law in ancient Israel.”²⁰ It is important to see how a number of scholars have taken up this view to account for the similarity between biblical and Near Eastern law. In particular, E. Otto has developed his view from this perspective. Otto’s remarks about “drafting techniques” follow this view very closely. One ought also to consider the remarks made earlier about the work of Pfeiffer, who anticipated much of Wagner’s discussion.

G. Liedke likewise takes up the study of the forms and terms for Old Testament laws, especially those that occur in the first half of the Covenant Code.²¹ The two types of laws within this corpus from Exod 21:1–22:19 [20] that he focuses on are the *בְּשֵׁפֶטִים*, which he identifies with the casuistic laws, and the *קִיָּה*, which he links to the participial prohibitions (21:12, 15–17; 22:18–19 [19–20]). Liedke assumes the great antiquity of the Covenant Code and both of these types of laws within it as products of the pre-state period, on the basis of Alt’s form-critical discussion. This form-critical approach also implies the original independence of the laws from their present narrative context. However, Liedke departs from Alt in his discussion of both types of laws in some important ways.

The first important difference from Alt is that Liedke does not see the casuistic laws as merely a corpus of laws that were taken over from the Canaanites as a block after the Israelites settled in the land. Instead, he posits that the casuistic laws in Mesopotamia originated in specific cases that became precedents and were generalized to form a cor-

pus of such cases. The similarity of Hebrew and Mesopotamian law is based on a similar social development within the two regions, which therefore gives rise to a similar development in law. The casuistic laws are not the pronouncements of a central authority but the result of arbitration that takes place between aggrieved parties in the local context of “justice in the gate” to restore social equilibrium. They derive from the rather primitive conditions before the rise of the state and even go back to nomadic law.

There are a number of important issues in this presentation. First, it is not at all clear to what extent Mesopotamian law is derived from specific cases as precedents and how much is legal tradition. Second, if Israelite law arises out of a social context similar to Mesopotamia, then the form-critical argument for an early dating of the Hebrew law based on the similarity to Mesopotamian law does not have the force that it has in Alt’s discussion of law. It is just as possible for such legal activity to give rise to law codes after the rise of literacy in the later period of the Israelite state, since the Israelite monarchies were much more modest versions of statehood than the other Near Eastern states with law codes. Third, the form-critical argument overlooks any discussion of legal content that might support a specific tradition of law within a scribal tradition. The issue of similarity to Mesopotamia will need to be addressed again below.

On the matter of Alt’s second major form-critical category of law, the apodictic laws, Liedke argues for a distinction between (a) the type of negative verbal command “you shall not . . .” in second-person singular (as in the Decalogue) and (b) the participial prohibition “the one who does . . .” or the relative clause (אִישׁ אִשֶׁר) followed by the emphatic “shall be put to death” (מִוֶּתֶת יָמוּתָהּ). Another variant of the latter is the curse series, as in Deut 27. It is the participial type (b) that is his primary concern and it is this type that he regards as apodictic in the true sense. He concludes that the examples in the Covenant Code and in the old narratives (by which he means J and the pre-Dtr sources of the historical books) are the oldest possible material since the short form of these statements attests their antiquity. Using a narrative example, such as Gen 26:11, which he regards as very old, following Noth, he suggests that the authority behind these laws is the royal edict of a king or, in a pre-state society, the major authority in a legal jurisdiction. From the concrete situation of a judgment dealing with a serious offense, an authority imposes a new institutional limit, not just the resolution of a grievance as in casuistic law. For the primitive pre-state period the authority was the paterfamilias, and for Liedke this may be seen in the oldest example: Exod 21:12, 15–17. This early dating of such laws in the Covenant Code also makes the parallels in the Holiness Code early as well. The Hebrew term for such apodictic laws is אִשְׁמֵר, as suggested earlier by Morgenstern but for somewhat different etymological reasons.²² It is important also to note that for Liedke both the casuistic laws and the apodictic laws in this more limited sense derive from the political or secular realm and only secondarily become priestly and religious.

Throughout this discussion of apodictic laws, there are no new arguments for the early dating of these laws. The antiquity of the Covenant Code as a whole and of these laws within it is assumed and this governs the whole form-critical exposition of these laws. The review of all the parallels does nothing to change this picture. However late the narrative source or code, the form-critical judgment that the law form is early makes all the later examples early or dependent upon old tradition. Such form-critical speculation, based upon assumptions about the social development of early Israel, however, is

no longer taken for granted in the present climate of biblical scholarship, and a quite different form of comparison will be undertaken in the following chapters.

Lothar Perlitt likewise follows Alt and Noth in seeing the Covenant Code as an originally separate composition, primarily on form-critical and traditio-historical bases rather than on literary-critical source analysis.²³ In fact, he suggests that Exod 20:18–21 was a bridge piece to tie the law into the Sinai pericope. Concerning the source designation of Exod 24:1–2, 9–11, Perlitt notes the great diversity of opinion among scholars and the lack of decisive criteria and leaves the matter open.²⁴ These literary judgments on Exod 20:18–21 and 24:1–2 contradict Noth, however, and rather seriously undermine the only basis that Noth suggested for the literary independence of the Covenant Code. Perlitt's own contribution to the discussion of biblical law was to suggest that the theme of a covenant between Israel and the deity was a rather late development of Deuteronomic theology and that the association between covenant and law in Exod 19–24 and 32–34 was made under this Deuteronomic influence.

At the outset of his general discussion of the Covenant Code, B. S. Childs points to a "growing consensus" that the code was an older collection independent of the other Pentateuchal sources and with a possible connection to E.²⁵ The primary focus of Childs's discussion, therefore, becomes the question of how to account for the place of the Covenant Code within the Sinai narrative. This problem is dealt with on two different levels, the literary and the oral, which, however, lead to somewhat contradictory results. On the literary level, the independence of the Covenant Code means that the unit in 20:18–21 cannot be an introduction to the laws that now follow but must have originally preceded the Decalogue, with the sequence 19:19; 20:18–21; 20:1–17.²⁶ This means that 20:22, which now directly follows 20:21, must be a redactional transition that was modeled on Deut 4:36 and therefore Deuteronomistic and that "served to join the Covenant Code to the Sinai theophany."²⁷ At the same time, Childs holds that the order of events in Deut 5 rests upon this later revision in which the people's request for Moses' mediation comes *after* the Decalogue. This is a contradiction; he cannot have Exod 20:22 dependent upon Deut 4:36 and therefore post-Dtr, and yet have Deut 5 dependent upon the present order of the text in Exodus, including Exod 20:22. The "original" sequence proposed above also makes it necessary to understand the "words of Yahweh" in 24:3 as referring to the Decalogue, with the present text in 24:3–8 reshaped by a redactor to make it fit the Covenant Code.²⁸ Yet Childs admits that the relationship between the Covenant Code and the Sinai narrative cannot be decided on the literary level and moves to what he considers to be the "oral" tradition.

Childs, following Alt, distinguishes two different styles within the Covenant Code, the casuistic style in the first half and the apodictic style in the second half. It is with the latter that he is primarily concerned because it is these laws that are most especially Israelite and in them he finds "signs" pointing to a cultic use that is the clue to their tradition history. He argues for the cultic origin on the basis of the use of the second-person "you," the divine address, some of the content dealing with exclusive worship of Yahweh (22:19 [20]), the humanitarian laws, etc. He associates these with his proposal of a connection between the Covenant Code and the "Mosaic office of covenantal mediator," which has to do with the reconstruction of primitive festivals of covenant renewal in early Israel.²⁹ He also sees in the secondary parenthesis and in the cultic prescriptions in 23:10–19, which are parallel to Exod 34:18–26 in a context of covenant

renewal, further signs of this special cultic function in the apodictic laws of the Covenant Code.

Yet, such a connection between Moses and covenant or covenant renewal cannot be supported without linking the supposedly independent Covenant Code with the narrative context in Exod 19–20 and 24:3–8, which makes the whole discussion circular. The traditio-historical reconstruction completely contradicts the previous literary-critical assessment of a post-Dtr connection. Childs does not discuss Perlitt's critique of Beyerlin nor Perlitt's suggestion that the whole covenant theology is in fact Deuteronomistic and not primitive at all. As we will see, the increasing tendency to judge much of Childs's evidence for a covenantal context as Deuteronomistic makes his presentation problematic.

Childs views the casuistic laws as belonging to an independent corpus that was only later incorporated into the text. It arose out of early contact with Canaanite society but reflects "the daily village life of an unsophisticated, agricultural people."³⁰ It was Hebrew national law with little direct influence from cuneiform law. For Childs, the incorporation of this casuistic law into the Covenant Code took place on the literary level after the apodictic laws had already received a place within the Sinai narrative. This "redactor" then probably rearranged some of the laws, such as placing the altar law before the mishpatim. Such an addition of casuistic laws is dated "considerably before the formation of the Deuteronomistic laws."³¹ However, we have seen earlier that he makes the first connection between the Covenant Code and Sinai the work of a post-Dtr redactor.

This attempt to combine a traditio-historical explanation of primitive legal and narrative "oral" traditions with a literary-critical analysis of much later literary strata is completely contradictory. If the apodictic laws were associated with Moses and Sinai at the oral level of the tradition, then this must be prior to E (or J) and there is no reason to suppose that there ever was a version of E that placed the Decalogue after 20:18–21, which means that the Sinai narrative was never separate, at the very least, from the apodictic laws of the Covenant Code. But then 20:22 is also not a redactional bridge by a later redactor. Nor can this redactor be regarded as both Deuteronomistic and a person who did his work long before the formation of the Deuteronomistic laws. Childs's study points up the fact that assumptions about the great antiquity of the laws in the Covenant Code and the priority of this code over Deuteronomy create serious, if not insoluble, problems for the literary analysis of Exod 19–24.

Similar to Childs's view with its emphasis upon tradition history, but quite independent from him, is the work of J. Halbe.³² Halbe's treatment of the Covenant Code is made within the larger context of his discussion of what he calls the "privilege law of Yahweh" in Exod 34, which is expressed in a set of covenant demands that form the basis of a community's special relationship with this deity. Halbe supports the view of Beyerlin, against Perlitt, that the parenetic passages in Exod 34:10–27 are pre-Deuteronomistic and that the oldest stratum of these covenantal demands (*Bundesworte*) is premonarchic. The parallels to these covenant requirements in the Covenant Code are viewed by Halbe as attesting to the importance of this text within the same tradition of the privilege law of Yahweh. Yet it contains much more, and he sets out to consider how the rest of the legal material, especially the casuistic, or civil, laws of the first half, relate to this privilege law tradition. This is an issue that he sees already raised by Pfeiffer but left unanswered. For Pfeiffer, the fact that the casuistic laws contained no parenetic material, which is scattered throughout the second half of the Covenant Code and which Pfeiffer re-

garded as Deuteronomistic, suggested to him that the casuistic laws were added to the Covenant Code as late as 450 B.C.E. Halbe accepts the importance of this observation about the casuistic laws but rejects the dating.³³

Halbe's approach to the relationship of Exod 34 to the Covenant Code is not along the lines of the Documentary Hypothesis, which identifies the former as J and the latter as E. While he accepts Exod 34, in its present form, as the work of the Yahwist in the Solomonic period, he says virtually nothing about E and the place of the Covenant Code within this work. Instead, he proceeds from a formal (synchronic) analysis of the present structure and organization of the Covenant Code to a traditio-historical (diachronic) analysis of its compositional growth. He argues, first, for a carefully constructed literary work that contains various framing devices, breaks, and repetitions, which disclose six main sections constructed in a concentric pattern:

- 20:22–26, images and altar (cultic)
- 21:1–11, mishpatim I (six-seven pattern: release)
- 21:12–22:19 [20], mishpatim II
- 22:19 [20], midpoint: sacrifice to Yahweh alone (cultic)
- 22:20 [21]–23:9, the “stranger” collection
- 23:10–12, Sabbath (six-seven pattern: fallow year)
- 23:13–19, festivals and offerings (cultic)

followed by an epilogue in 23:20–33

Having established that this structure is not haphazard and the result of arbitrary redactional additions, he then is faced with the question of why the parenetic texts predominate in the second half alone, and this leads him to investigate the diachronic strata (*Schichtung*) in the composition of the Covenant Code. He begins with the second part. Here the breaks and transition texts (22:20 [21], 30 [31]; 23:9, 13) are not only indications of structure but the basis for analyzing the components. Using the parallel text from Exod 34, Halbe extracts from the Covenant Code the oldest layer (*A-Schicht*) based on the form of the privilege law (*Privilegrecht*) that he has previously argued for in Exod 34. For him this is not a direct literary dependence of one text upon another but a common tradition shared by Yahweh sanctuaries. The fact that the cultic requirements of Exod 34:18–26 are found in the oldest level of the Covenant Code (20:24a, 26a; 22:27–29 [28–30]; 23:10–12a, 14–19) while the prologue of Exod 34:10–15a is parallel to the Covenant Code's epilogue (23:23–24, 31b–33) suggests to Halbe that this latter material originally formed the prologue and introduction to the law and was later displaced in the process of compositional growth.

Two further expansions fill out the Covenant Code. The first expansion (I) consists of the humanitarian laws (22:27 [28]–23:7, 13). These broadened but did not significantly change the character of the privilege law and left the previous law in the oldest layer unchanged. The second expansion (II) consists of the inclusion of the major section in the first half, which is composed primarily of casuistic laws (21:1–22:19 [20]), and further expansion of the second half. The original prologue became an epilogue and this demanded a new prologue, which is to be found in 20:22–23, with the placement of the altar law alongside the law against images and its expansion in 20:24b. Unlike Noth and others,

Halbe does not see 20:22–23 as a literary bridge to the present narrative context because he believes that the statement about “speaking from heaven” does not fit that context. With the reference to Moses in verse 22, however, few can follow Halbe in this. Halbe does not pursue the question of the code’s relationship to the narrative context further.

Thus, Halbe traces a long history of development from a set of covenant demands (*Bundesworte*) that were combined with a few cultic and festival laws and underwent some further expansions in the premonarchy period, all as part of a deliberate process within the same tradition. By the early monarchy period the self-contained Covenant Code in 20:22–23:33 attained its present form. Halbe insists that the location of this legal activity was not in the royal court or state, and talk of the law as royal reform is rejected. He is very vague about how the typically Near Eastern casuistic laws came into this combination, which he attributes to the “judges of Israel” and such figures as Samuel. For him, the context of the law is the local sanctuary, and the law is traditional-personal law combined with the privilege law to express the law given by Yahweh.

The whole reconstruction of the Covenant Code’s compositional development rests upon the claim for the antiquity of the privilege law in Exod 34 and with it the parenetic elements that have been so often viewed as Deuteronomistic. A review of this issue and those studies that make use of the notion of a “privilege law” has been undertaken by E. Blum.³⁴ He comes to the opposite conclusion: that Exod 34 is “almost at the end of the biblical Torah tradition.”³⁵ If one removes the similarities between Exod 34 and the Covenant Code as a way of determining the oldest level of the Covenant Code and the subsequent development of this nucleus, then there is little left of Halbe’s scheme. Nevertheless, one legacy of Halbe’s treatment of the Covenant Code is his attention to the present structure of the Covenant Code as a clue to the nature of its composition. The fundamental question to be decided is: Does the structural arrangement of diverse materials and laws reflect the work of a single author or is it the result of a long process of tradition history or literary redaction? Different assessments have been given to the significance of these structural clues in later studies.

Hans J. Boecker, in *Law and the Administration of Justice in the Old Testament and the Ancient Near East*,³⁶ follows Noth and others in asserting without argument that the Covenant Code was “inserted into the Sinai tradition between the theophany related in Exod. 19:1–20:21 and the conclusion of the covenant narrated in Exod. 24:1–11.”³⁷ He admits that “as the text stands” the reference to the “words of Yahweh and all the mishpatim” in 24:3 and their inclusion in a “Book of the Covenant” can only refer to the preceding set of laws, but he still regards it as “questionable” that the Covenant Code is the original point of reference for Exod 24:3–8. The reasons for doubting the connection, however, are not given.

On the question of how the Covenant Code, as an independent corpus, became part of the Sinai pericope, Boecker offers no answers but only the comment that the issue is extremely controversial. He merely opts for the position, against Noth and with the majority, that the Covenant Code was part of the E source, which does not address the question of whether E is also to be found in the rest of the Sinai theophany account. The limits of the Covenant Code for Boecker are 20:22–23:19, with 23:20–33 as a “secondary appendix.” When it was added is not specified.

Boecker acknowledges that in style and subject matter the Covenant Code is not a unity, as is broadly acknowledged. This leads Boecker to suggest that its composition

was based upon a process of growth and interpretation. His suggestions about the code's basic components and the stages in their development follow: (1) He first suggests a prologue in two parts 20:23 + 24–26 and an epilogue of cultic prescriptions in 23:10–19, laws having to do with relations with the deity that enclose those dealing with interpersonal relations. (2) The “bulk of the book (Exod. 21:2–23:9)” is subdivided into two main parts: 21:2–22:16 [17] and 22:17[18]–23:9. This is a simplification of Halbe's scheme.

For the first section of laws in 21:2–22:16 [17], Boecker adopts Wagner's treatment, in which this largely casuistic material is ordered (except for 21:12–17) in a manner similar to cuneiform law codes: a slave law (21:2–11), laws relating to bodily injuries (21:18–32), laws on agriculture and manual labor (21:33–22:14 [15]), and marriage law (22:15–16 [16–17]). Two problems are acknowledged in this scheme. First, the slave law in 21:2–11 does not deal with guilt and punishment or compensation for noncompliance and so differs from the rest of those in the group. Second, the lone marriage law in 22:15–16 [16–17] hardly seems adequate when compared with its Near Eastern counterparts and leads to some speculation by Boecker that does not solve the problem. The second section (22:17 [18]–23:9) is apodictic in style combined with parenesis and is regarded as the result of a different tradition history, a position that follows Beyerlin and Halbe, with some slight differences with the latter on the internal structure of the code.³⁸ Boecker then addresses how these two main parts came together. There are two choices: either the theological sections were added as a framework to the casuistic law collection, or the casuistic laws were inserted “into an existing structure of cultic prescriptions, commandments and prohibitions with parenetic additions.” Boecker does not decide between these two options but merely asserts that this combination happened and as such, being the oldest code, “becomes a paradigm of OT law.”³⁹

On the matter of dating the “definitive redaction” of the Covenant Code, Boecker reviews the various options put forward and chooses the view that it belonged to the early settlement period when Israel first encountered Canaanite civilization. At this time the body of apodictic law, which he regards as nomadic law and the oldest part of the code from a period before the tribes settled in Canaan,⁴⁰ was combined with those regulations that were necessary for life in the settled land. This scheme obviously rests on theories about Israelite origins and what we can know about them, which are in dispute today. Boecker rejects out of hand any suggestion that there could have been a single author of the Covenant Code: “No one person had such authority in Israel at the time in question [pre-state period] that he could have drawn up and promulgated a law collection like this one.”⁴¹ Following Noth, Boecker attributes the development of the laws in the Covenant Code to the institution of “judge” associated with the twelve-tribe confederacy, or some modified version of this scheme.

On the style and character of casuistic law Boecker largely follows Alt, but he raises two important issues.⁴² The first has to do with the origin of the legal form. He states, following Liedke, that casuistic law “is not the product of learned juristic writing, but is rooted in the procedures of courts of law.”⁴³ This is the theory that the laws are related to specific cases in which judicial sentences were passed down as a body of tradition either orally or in written form with the aim of establishing precedents for future cases. The specific cases were abstracted into impersonal generalizations.

These notions about the origins of casuistic law give rise, in the second place, to questions about the relationship of the Covenant Code to cuneiform law. Following the eminent legal historian P. Koschaker, Boecker adopts the view that there is no direct dependence of the biblical code on the cuneiform codes, only that they went through the same social evolution in their development of law.⁴⁴ Any direct connection between cuneiform law and Israelite law is ruled out because of the great separation of the two cultures from each other, especially at such an early stage in Israelite history. However, placing the origins of law in pre-state village society without literacy also seems to rule out any role of Canaanite law as the medium through which Near Eastern legal practice came into Israel.

Important Dissenting Voices

A number of dissenting voices in the area of form-critical analysis of Hebrew law have raised important issues related to the inner-biblical comparison of laws and law codes. While the studies to be mentioned below are often cited, they are seldom taken seriously in the larger reconstruction of the history of Hebrew law. Two such studies have to do with the so-called motive clauses that are sometimes found within biblical law. Legal prescripts are often strengthened by the addition of a motive clause, which gives the reason for carrying out such a law or requirement. In the past, scholars have usually regarded such motive clauses as secondary expansions, but this was challenged in an important article by B. Gemser,⁴⁵ who disputed the secondary character of motive clauses in Hebrew law. His view was upheld in the dissertation of R. Sonsino.⁴⁶ This is an important issue because a number of laws in the Covenant Code contain motive clauses that are similar to motive clauses used in Deuteronomy and the Holiness Code. For this reason they have often been relegated to secondary “Deuteronomistic” status in order to maintain the priority of the Covenant Code. In our subsequent study, we will examine a number of such cases in detail.

Another important form-critical study, by H. W. Gilmer, dealt with the “if-you” form in Hebrew law and its use elsewhere in biblical and Near Eastern literature.⁴⁷ This form of law had often been viewed as a mixed form or degenerate version of the casuistic form that uses the conditional in the third person. For this reason it is often referred to as “pseudocasuistic.” Gilmer demonstrated, however, that it was a distinct form in its own right and that it was very frequently used in Deuteronomic laws that are fundamental to the character of the book itself. In Deuteronomy, but also in the Covenant Code and the Holiness Code, it is very characteristic of the humanitarian laws and it is often interchangeable with apodictic law as its direct equivalent.

These form-critical studies indicated that the specification of the intertextual relationship among the noncasuistic laws of the codes was much more complex than simply identifying a few Deuteronomic phrases in the Covenant Code as redactional. The whole matter was carried a step further in a remarkably original dissertation in 1977 by G. A. Chamberlain, who produced a comparative study of the Covenant Code and the Deuteronomic Code.⁴⁸ However, it was never published or circulated in another form and so has gained only brief reference in the scholarly literature.⁴⁹ In his introduction,

Chamberlain lays out the problem of a comparison between the two codes as a form-critical one, in terms of both the smaller forms explored by Alt and his successors but also the larger covenant form so much in current discussion at that time. He claims his study as the “first attempt to apply form-critical methods to both codes simultaneously for the purposes of systematic comparison.”⁵⁰ After an extensive review of the history of research, he summarizes his results, as follows:

- 1) The broad consensus in Old Testament studies until recently placed non-casuistic law in the framework of covenant proclamation . . . within the central cult of the tribal league.
- 2) The disintegration of the “amphictyony” hypothesis, along with other factors, has led to much more critical assessment of the relationship between the covenant and the treaty form. Much emphasis falls on the diversity of covenant traditions in the Old Testament itself.
- 3) The connection between the treaty form and the traditions of the Mosaic covenant is undeniable, but the clearest links are between Deuteronomy and the Assyrian (and Aramaic) treaties of the 8th–7th centuries. . . .
- 4) New studies on specific law types have fragmented Alt’s “apodictic” category, and called into question every attempt to derive legal forms from a treaty or covenant tradition. But these same researches may provide tools for a fresh systematic review of the relationships among the Old Testament legal collections.⁵¹

This is quite a good assessment of the situation in the late 1970s, and while Chamberlain supports the Documentary Hypothesis and works within this frame of reference even when his results suggest the need for revision, the value of his work is in his comparative form-critical approach.

In order to carry out his systematic comparison, Chamberlain looks first at those laws in Deuteronomy that are most central to the Deuteronomic movement, with an eye to (1) typical patterns of relationships between structure and content, (2) grammatical and syntactical characteristics within the laws, and (3) indications of social setting. He then looks at the larger contexts of the codes in Exod 19–24 and Deut 5–28 as they relate to covenant formulary in order to determine what features most closely resemble the Near Eastern treaty tradition, and what conclusions about the relationships between the codes can be drawn from this. Finally, he engages in a synoptic comparison of the laws themselves. I will try briefly to summarize his results.

Those laws that deal with the major Deuteronomic themes are presented primarily in second-person singular. They are in only two types: apodictic and “pseudocasuistic” (“if you”); the simple forms are often augmented with secondary clauses and hortatory additions. The apodictic laws tend to be positive and connected with cultic matters, whereas the noncultic material is in the pseudocasuistic form. The large, well-organized sections dealing with Deuteronomic themes fall within Deut 12–21, while Deut 22–26 shows little discernable organization and contains other types of laws not in the earlier sections (e.g., third-person casuistic laws) and later accretions. The Deut 12–21 laws also contain some second-person plural expansions and other Dtr additions.

In Chamberlain’s discussion of the use of covenant formulary as a context for the Covenant Code and Deuteronomy, he comes to the conclusion that the central concerns of Deuteronomy are heavily influenced by the Assyrian and Aramaic vassal treaty form. He states: “The preponderance of evidence really leaves little doubt that Deuteronomy is a covenant text built around treaty forms and concerns. . . . Deuteronomy

shows a firm outline, a strong political sense, a free use of treaty forms and language, that we must regard as conclusive.”⁵² By comparison, the unit in Exod 19–24 is not a covenant document, and it is only the narrative context and not the form of the code that gives to the whole its covenantal nature. These parts, such as Exod 19:3–8 and 24:3–8, had already become suspect in the scholarly debate as Deuteronomistic.

In Chamberlain’s synoptic comparison between the Covenant Code and the Deuteronomic Code, he makes a distinction between the casuistic collection in Exod 21:2–22:16 [17], which he regards as very old, and the rest of the Covenant Code, which shows clear signs of having been influenced by Deuteronomy and not vice versa. The Covenant Code has thus taken over from Deuteronomy certain forms—such as the apodictic statements on cult and religion, the pseudocasuistic (“if-you”) forms on social laws, and the motivation and hortatory clauses—and appended this whole portion to the much older corpus of the casuistic laws. Chamberlain accepts the view that the JE theophany story in Exod 19–20 is much older and that the covenantal elements in 19:3–8 and 24:3–8, as well as the revised and expanded law code, were all added by the Dtr author/editor.

In the comparative study that follows in the later chapters of this book, we will find that much of Chamberlain’s work is confirmed by my own analysis. What prevented him from carrying through a full-scale revolution in the study of Hebrew law is the fact that he was still committed to an early date for the JE narrative context of the Covenant Code and he fully accepted the great antiquity of the casuistic laws and therefore regarded them as older than all of their counterparts in Deuteronomy. This he did in spite of the fact that he held the view that the casuistic laws of Deuteronomy were part of a later exilic addition to Deuteronomy, which should have pointed him in the opposite direction. Because his work was not widely available and little discussed, the issue of priority in a comparison of the law codes was never raised again as it had been in Chamberlain’s study.

Recent Studies in the Covenant Code

From the above survey of views on the Covenant Code, it should now be clear that the early dating of the code has given rise to two major emphases in recent studies. One group of studies directs their primary focus upon the nature of the code’s composition, its complex tradition and redaction history, and how it relates to the larger narrative context of the Pentateuch. Another group is concerned with comparison between the laws of the Covenant Code and those of the other Near Eastern codes and how to account for the similarities and differences. Of course, there is some overlap in these concerns, especially exemplified in the work of Eckart Otto, but for convenience of discussion, one can deal with them as two distinct groups (with Otto’s work treated in both groups).

Redaction Criticism of the Covenant Code

Most literary-critical studies of the Covenant Code accept the view that the code is the product of a long redactional process,⁵³ and E. Otto is a vigorous exponent of this

position.⁵⁴ He sees the code as redacted from a number of earlier collections: 21:12–17 (laws), 21:18–32 (bodily injuries), 21:33–22:14 [15] (compensation, *ישלם*, laws), 23:1–8 (court rules). “These originally independent collections, each with a tradition history of its own, became part of two law collections in 20:24–26, 21:2–22:26* and 22:28–23:12*, out of which the predeuteronomistic BC [Book of the Covenant = Covenant Code] was formed.”⁵⁵ Even the smaller collections, such as the laws on bodily injury, are seen to have a complex redactional history such that every perceived tension or disjunction is judged to be the result of redactional activity. His particular examples will be tested in the chapters that follow.

The two law collections as set out above consisted of the civil laws of 21:12–22:16 [17] and laws on court procedures in 23:1–3, 6–8, each of which was theologically framed and interpreted independently. Thus, “social laws of God’s privilege” in 21:2–11 and the social laws of 22:20–26 [21–27] framed the first collection, which, in turn, was introduced by the altar law of 20:24–26 that gave it religious sanction. The second collection was framed by social laws of God’s privilege in 22:28–29 [29–30] and 23:10–12, with the ethical laws of 23:4–5 at its center. The final pre-Deuteronomistic redaction (20:24–23:12) combined these two collections with some additional theological grounding in Yahweh as the guarantor of the rights of the weak and the poor.⁵⁶ The indebtedness to Halbe, although with important differences in detail, is obvious.

This complex redactional process, we are led to believe, is similar to the redactional process within cuneiform law, a process that Otto also reconstructs hypothetically.⁵⁷ Yet the comparison between the development of Mesopotamian law and the complex scheme he has developed for the Covenant Code is hardly helpful or convincing. Partly, the problem is a matter of terminology. There is no need to call the compositional process that led to the formulation of the Hammurabi Code “redactional.” That prejudices the whole point of the comparison. We simply do not know whether there were multiple editions behind this particular code and the extent to which this version “reformed” an earlier one. So such suppositions cannot help us with the process of the development of Hebrew law as Otto supposes. Other scenarios are also plausible.⁵⁸

What seems self-evident to Otto as collections based on similar forms of laws and their traditio-historical growth rests on form-critical notions about primitive collections of laws that were developed by scholars in the early twentieth century but have become very much suspect today. Comparable laws of the same form and content in the other Pentateuchal codes play no role in the discussion of these collections because they are already presumed to be secondary to the Covenant Code. The whole comparative discussion with Near Eastern laws is merely used to confirm and legitimate an approach that has long developed without it.

Much of Otto’s argument depends on the way that he structures the laws within the Covenant Code and the labels that he assigns to them. These are by no means self-evident, and others have proposed quite different structural schemes. To cite but one example, Otto does not take the slave law in 21:2–11 as part of the casuistic collection but labels it among the “social laws of God’s privilege” similar to the Sabbath law of 23:12. But this categorization must depend upon understanding the law in 21:2–11 as divine speech and the second-person singular verb in verse 2 as addressed to Israel.⁵⁹ Yet this is true only if the law is taken in the larger narrative context of the Sinai pericope,

which Otto's scheme does not permit. Furthermore, elsewhere he emends the second-person singular verb in Exod 21:2 to a third-person singular, as do several other scholars, to make it conform to the casuistic pattern.⁶⁰

In his discussion of the composition history of the Covenant Code, L. Schwienhorst-Schönberger accepts the consensus view that the code is not a unity and on that basis identifies two possible models of development.⁶¹ Either it is originally divine law that incorporates into it a body of profane law (the position of Halbe), or it is a corpus of profane law that is increasingly theologized into divine law (Otto). It is the second option that Schwienhorst-Schönberger follows. Thus, for him the block of casuistic law in Exod 21:18–22:16 [17] is a structural and literary unity (with some later additions)⁶² that belongs to the genre of lawbook and was originally independent. This was transmitted from the horizon of Near Eastern and Israelite jurisprudence, originating out of concrete legal practice.

Attached to this primary corpus of law were the so-called privilege laws (i.e., those that are parallel to the older version in Exod 34), along with early prophetic social critique and various other theologizing elements, to make up the "proto-Deuteronomic" divine law.⁶³ This represents a very extensive redaction that gives to the law code a divine voice and includes a great diversity of material. In addition to this, there was a subsequent Dtr redaction that made still further additions, primarily to the proto-Deuteronomic redaction. This is a greatly simplified scheme over that of Otto.

It is, of course, not difficult to anticipate how Schwienhorst-Schönberger will deal with any comparison with Deuteronomy. For the most part, the proto-Deuteronomic version of the Covenant Code will be viewed as an anticipation of Deuteronomy, while the Dtr redaction can be used to account for late phraseology and other problems of lateness in the code. In addition, Schwienhorst-Schönberger uses the principle of change of number from singular to plural in the second-person pronouns and verbal forms, with the plural forms being viewed as the later Dtr usage. This is taken over from the study of Deuteronomy, where one also encounters such change in number, but scholars are very much divided as to how useful this principle can be in all cases. In any event, Schwienhorst-Schönberger cannot be entirely consistent in his own application of this principle in the Covenant Code. Yet, it is a principle that has been used by others also, and we will examine particular cases in later chapters.

Likewise for Y. Osumi, the Covenant Code in its present form is the end product of a lengthy composition history.⁶⁴ It was composed systematically by the hands of editors who reworked it, expanding and restructuring it according to a plan. Each compositional layer can be recognized by means of literary structural rules and elements, for example, different legal styles, number and person of those addressed, key terms, chiasm and framing structures. At the beginning of the compositional history stand two lawbooks: the religious laws of Exod 34:11–16 and the casuistic lawbook, the *mishpatim*. The largest part of the Covenant Code was constructed by combining these two lawbooks (the second-person singular layer). This produced the text of Exod 20:24–26; 21:1–22:29*; 23:1–24*, 32–33*. The *mishpatim* lawbook was retained undisturbed, while the lawbook of Exod 34:11–26 was completely reshaped and built into the structural frame of these two. Osumi does not ask further about the prehistory of the various parts of this text and is critical of Otto's redactional history of the smaller units. He is primarily concerned about their place in the present structure.

Concerning the mishpatim, Osumi sees in the subject matter the concerns of the Jerusalem court as reflected in Deut 17:8 and 2 Chron 19:10–11.⁶⁵ Osumi explains the limits of the subject matter as determined by its connection with this institution. The composition of the second-person singular layer presents a joining of purely religious law with purely profane law. This is a theologization of the whole field of social ethics and this is also associated with the Jerusalem court. It is set in the period between the fall of the Northern Kingdom and the post-Hezekiah period, influenced by the Book of Amos. The second-person plural layer reshaped the second-person singular layer without changing the formulations or order and comes from the late monarchy but still pre-Deuteronomy. The epilogue contains still later reformulations. In spite of the fact that Osumi recognizes literary parallels between the Covenant Code in Exod 20:22b, 21:1, 22:30a, and the Sinai pericope in Exod 19:3b–8, he states that a literary joining of the Covenant Code to the Sinai pericope probably came about only after the composition of the former was completed.

The studies of F. Crüsemann both anticipate and build upon the work of Osumi, his student.⁶⁶ While Osumi's study engages primarily in literary analysis, Crüsemann lays out general principles and assumptions that may be usefully reviewed here. He states at the outset of his discussion of the Covenant Code:

Every study of the so-called Book of the Covenant in Ex 20:22–23:33 can and must begin with the following assertions, which are recognized today as indisputable facts:

1. The Book of the Covenant is older than Deuteronomy and so is the oldest law book in the Old Testament. . . . This temporal sequence remains valid for the essential portions even when, as is occasionally suggested, a few passages of the Book of the Covenant (e.g. the parenetic bases for law) are said to be deuteronomistic, and hence dependent upon Deuteronomy.
2. The Book of the Covenant demonstrates all of those characteristics that distinguish biblical law . . . so profoundly from all other ancient Near Eastern legal documents. Along with the actual judicial pronouncements, there are cultic and religious, ethical and social demands together with their theological and historical foundations. The entire composition is dominated by the first and second commandments (20:23; 22:19; 23:13, 24, 32f.), and they appear as the words of God which were given to Israel through the mediation of Moses at Sinai.
3. The Book of the Covenant is in every respect, an extremely colourful portrait. Its assembled character is almost tangible. This is especially shown by—in addition to the breadth of the contents—the varied forms of the laws: [These are then listed.] All of these things are also the product of a history covering a long period of time.⁶⁷

With respect to “fact” 1, this is the reason for the almost complete absence of any discussion by Crüsemann of the parallels in the other law codes to the Covenant Code. Any traces of lateness are dismissed as redactional additions. Deuteronomy is always seen to be later because it is first assumed to be later. With respect to assertion 2, this seems to completely contradict assertion 1 by the admission that the Covenant Code is dependent upon the Ten Commandments, which is increasingly recognized as a Dtr composition. If they are so vital to the Covenant Code and if they are so closely attached to the context of the deity speaking to Moses at Sinai, a context that is also increasingly viewed as “Deuteronomistic,” then the two principles are hard to maintain

together. Most scholars dealing with the Covenant Code would want to argue with this “indisputable fact.” With respect to assertion 3, the great diversity of materials in the Covenant Code admits, for Crüsemann, of only one explanation, its long history of development. Yet most of these same forms occur also in Deuteronomy without a similar explanation for their history. There are other possibilities that have not been tested.

On the subject of the composition and literary stratification of the Covenant Code,⁶⁸ Crüsemann disputes the starting point of Otto, which emphasizes the form and tradition criticism of the small units, and takes his cue instead from Halbe and Osumi, who stress the “inner systematic unity” of the code. He also accepts Halbe’s view that Exod 34:11–26 is Israel’s oldest law and the theological basis of Israelite law to which the mishpatim have been added. Thus, Crüsemann and Osumi are in opposition to Otto and Schwienhorst-Schönberger on this point. Yet this early dating of Exodus 34 was already disputed by Peritt and is also viewed as late by E. Blum.⁶⁹

Regarding the collection of mishpatim in Exod 21:1–22:16, Crüsemann states: “It is unmistakably different in both language and character, and in form and content there is no analog in the other Old Testament legal documents. The text, however, is similar to other Near Eastern legal literature.”⁷⁰ This statement is made without qualification so that as it stands it is quite false. The slave law in Exod 21:2–6 is very similar in form and content to that in Deut 15:12–17. The form of capital punishment laws in 21:12, 15–17, and 22:17–19 [18–20] is not similar to the forms found in other Near Eastern codes but is similar to those found in the Holiness Code within Lev 20, 24. The *lex talionis* principle in Exod 21:23–25 is found in Lev 24:19–20 and Deut 19:21. The laws in Deut 22:13–29 are in the casuistic style most common in the mishpatim of the Covenant Code while at the same time covering quite a different subject matter (with only one small overlap) so that the Deuteronomistic Code laws are not derived from the Covenant Code. This overlooked evidence is enough to call into question Crüsemann’s whole approach to the mishpatim. He follows Osumi in arguing (contra Otto) for the literary unity of this block of material in spite of some form-critical diversity.⁷¹

Concerning the “place, meaning and character”⁷² of the casuistic laws, Crüsemann states: “The Mishpatim formed a legal document of the monarchic period. The great significance of slave law in the first half of the monarchic period makes this clear beyond a shadow of a doubt. Slavery first appeared in Israel during the monarchic period, and the regulations in Ex 21 were a reaction to it.”⁷³ Contrary to Crüsemann, there is much uncertainty about the history of slavery in Israel. We do not possess any undisputed texts belonging to the first half of the monarchy, and the very limited reference to slavery in the other codes of Deuteronomy and the Holiness Code make Crüsemann’s statement even more doubtful. The argument becomes completely circular. Furthermore, only if the mishpatim are dated to the monarchy period can one assert that they “originated in the royal court with its schools of scribes and jurists.” It is clear that other laws in the Pentateuch belong to the exilic period and did not originate in the royal court.

The assertion that the mishpatim belong to the Jerusalem court is based upon the mention of such a court of law in 2 Chron 19 and Deut 17. The first of these texts is so late and so anachronistic as to prove nothing. The second, Deut 17, is equally problematic because it legislates an ideal for the first time, and there is no firm evidence that it was ever implemented. How then can it be used for an earlier period? This is not evidence but supposition. Furthermore, the claim that “the Mishpatim and the legisla-

tion attacked in Isa 10:1–4 are probably identical”⁷⁴ may also be questioned. The prophetic text makes reference to “unjust laws” and “oppressive edicts,” but it is sheer speculation to suggest that these refer to the Covenant Code.

Like Osumi, Crüsemann’s view of the formation of the Covenant Code is that it consists of the laws that are drawn from Exod 34:11–26 on the exclusive veneration of Yahweh and that originate in the Northern tradition (ninth century) and the laws of the social elite from the Jerusalem court as reflected in the *mishpatim* (ninth century), together with the prophetic demands for social justice and the rights of foreigners and the poor (the humanitarian laws). The *mishpatim* were only slightly expanded with corrections, while the religious laws were reshaped and expanded, especially with the altar law (20:24–26) and the Sabbath year (23:10–11). The altar law at the beginning gave to the whole the aspect of divine speech, which is continued in 22:20–26 [21–27]. Crüsemann misses a number of earlier references in the *mishpatim*.

Concerning the significance and impact of this new legal formation, Crüsemann states: “In order that we might grasp this theological and legal conception of the Book of the Covenant upon which the rest of the Torah history is based, let us examine the formulations that include the most important new accents.”⁷⁵ His examination, however, consists of identifying key texts which he associates with his selection of a historical and social context. Thus, in his discussion of the alien and the weak in society, the parallel citations come from Deuteronomy and the early exilic texts. Yet he relates the problem of the alien to the fall of the Northern Kingdom and the vast number of immigrants who moved into the south. This speculation is not controlled by dated texts and counts for little.

Finally, Crüsemann deals with the problem of the divine speech and the personal address in the second person, found in the final form of the Covenant Code. Concerning the audience addressed he states: “In the Book of the Covenant the individual, free, property-owning male is addressed in the second person. What began in the sources was continued, so that this became a decisive legal subject through the word of God.”⁷⁶ But is this the case where second-person address is used? Does such a “property-owning male” build an altar (20:24–26) or act as a judicial authority in capital crimes (21:14, 23) or offer sacrifices (23:18)? Furthermore, according to Crüsemann, the divine voice is not necessarily related to the context of Sinai or the mediation of Moses. This is a later historicization. He must therefore look for some other way by which this divine voice could be represented. He traces this back to the Jerusalem high court with its experts and its priests and laity. About this he is very vague. He says that the coming together of all these elements created something new: “Revelation happens here as a creative association of elements of the tradition.”⁷⁷ That does not answer the problem of the form of law in which the divine voice speaks. There is not a single scrap of evidence for any institution in the monarchy that could or did issue laws in the name of the deity. If there was, then the whole process of assigning the revelation of law to the distant past cannot be explained.

In the introduction to his commentary to the Covenant Code, C. Houtman observes, with many scholars, that the code is not homogeneous and not all of it is commands and regulations; indeed, the epilogue in 23:20–33 has to do with the theme of occupying the Promised Land.⁷⁸ The divine speech to Moses, which includes regulations for Israel in this Promised Land, is related to the covenant at Sinai as mentioned in the

context of Exod 19 and 24. The law-giving at Sinai is set as an “intermezzo” within a larger historical context. The basic composition and structure of the Covenant Code, which begins (20:22–26) and ends (23:13–19) with instructions about the proper worship of Yahweh, reveal the whole lawbook to be a covenant of Yahweh with Israel. The material within this framework consists of two main parts, the mishpatim in 21:1–22:16 [17] and a collection of various cultic and social commandments in 22:17 [18]–23:12. Against most of the scholarship reviewed thus far, Houtman strongly disputes that the Covenant Code ever existed as an originally independent literary work. Its composition is to be attributed to the author(s) of the larger composition reflected in the Sinai story of Exod 19–24.

Following the form-critical division of A. Alt, the mishpatim (21:1–22:16 [17], except 21:12–17) are casuistic in form and belong to the wider Near Eastern legal tradition. As such, they are viewed as that part of the Covenant Code that could have existed independently as a source for the code, perhaps as a kind of learned scribal ideal, a handbook for judges, related to life in a sedentary, agrarian, village-size community in the early monarchy. It is hardly comprehensive by comparison even with other Near Eastern codes and is not reflected in other texts of the Old Testament outside the Pentateuch. The second body of laws, in 22:17 [18]–23:12, consist of “apodictic” prohibitions and commands according to Alt’s classification. Like the Decalogue, these are in the second person without specifying any penalties and are based upon the authority of the divine speaker, strengthened by motivation clauses. Against Alt, Houtman does not include within the apodictic group those laws formulated with an initial participle (“the one who does such and such”) followed by the death penalty (מִוֶּתֶת יָמֹתָ or the like), as in 21:12, 15–17; 22:17–19 [18–20]. This form he considers as not essentially different from the casuistic law,⁷⁹ but how they are related to the other laws is an open question. The origins of the second collection are rather vaguely related to the social critique of the prophets, the wisdom teachers, and some small series of priestly(?) laws, assembled by the same Dtr redactor(s) who put together the whole work using structural interconnections between the blocks. Thus, all the “late” elements belong to the same compositional level as the creation of the work as a whole and the final form of the larger history of Genesis–Kings in which it is placed. All of the laws, admonitions, and instructions that have their origin and setting in other contexts have now been placed together to support the idea of a special divine revelation at Sinai, and this makes the code quite different from other Near Eastern law. Both the laws that have to do with the social order and those that deal with the relationship of Yahweh to his people together constitute a divine law. This combination of materials and its attribution to the deity and not to a king are what make the Covenant Code distinctive from other Near Eastern laws and not the specific content of the laws. *This suggestion that the Covenant Code is a compositional unity by an author of the larger literary work who may have used a variety of sources to compose the code is a major departure in the literary study of the Covenant Code and a significant alternative model in understanding its literary character.*⁸⁰

If the Covenant Code is actually the work of the latest Dtr redactor of Genesis–Kings, then it raises the question of the code’s relationship to the other law codes of the Pentateuch. The answer that Houtman gives is confusing and contradictory. For him, an early date for the mishpatim is beyond dispute, and he discusses the arguments for their early dating but comes to no clear conclusion about the period of origin except to

note the local agrarian and village character of the laws. From a consideration of this block of laws within the Covenant Code, he shifts abruptly to dating the Covenant Code as a whole and states: "In any case, it is no younger than Deuteronomy."⁸¹ Yet this statement seems to apply primarily to the content of the law because he still wants to attribute its composition to the Deuteronomists, whom he views as responsible for the placement of the Covenant Code in its present position within the narrative of the events at Sinai.⁸² Nevertheless, he holds that Deuteronomy, structured as the farewell speech of Moses, is the last word and the "canonical and normative interpretation" not only of the Covenant Code but also of P and the Holiness Code as well. This law in Deut 12–26 was composed by the same persons who put together the Covenant Code. On the relationship of law-giving to the Sinai theophany, Houtman follows Crüsemann in seeing this connection as first made by P before the final Dtr author of the Covenant Code placed it in the context of a Sinai covenant. Yet this same final author/redactor is viewed by Houtman as attempting to weaken the position of Sinai by placing law-making at other times as well, with the final, definitive code, Deuteronomy, in Moab.

A number of major issues that are raised by Houtman's position need to be addressed. First, if one assumes with Houtman that the Covenant Code was never an independent composition but one created for its context in the Sinai pericope out of a number of sources, then the question arises as to what part of the Covenant Code belongs to the earlier source material and what part is later. Only the casuistic laws of 21:1–22:16 [17] are regarded by Houtman as part of an earlier independent corpus, but how is it related to the casuistic corpus in Deut. 22:13–29, for which there is almost no overlap in the Covenant Code? Both the Covenant Code and Deuteronomy have a number of apodictic and "if-you" (pseudocasuistic) laws that deal with social and humanitarian themes with considerable overlap. Does this mean that both codes had the same or similar sources available to them for their construction? Those laws in the outer frame in 20:22–26 and 23:13–19 are viewed as the closest to the Dtr author of the whole work, but they reflect some significant departures from Deuteronomy. At each of these levels, the position of Houtman would seem to demand a systematic comparison between the Covenant Code and Deuteronomy without prejudice as to the relative dating of the two, but Houtman does not give us this in his commentary. Instead, he usually assumes with other scholars that the form of the law in the Covenant Code is older than its parallel in Deuteronomy.

Second, Houtman's notion of a Deuteronomist who composed the whole of Genesis–Kings is based upon his work elsewhere⁸³ and cannot be debated here. For the present discussion, what is particularly problematic is the suggestion that the author responsible for the composition of the Covenant Code and its position in the Sinai pericope as the primary covenant is the same one who composed Deuteronomy as an official revision of that law and placed it in Moab as a second covenant. That would seem to be a very inconsistent thing for an author to do. Everything new could have been included in Deuteronomy and everything that was "revised" could have been ignored. If the Decalogue became the law of Horeb as the direct speech of Yahweh by a Dtr editor only after the Deuteronomic Code was composed as the speech of Moses in the wilderness, then it is Dtr who has elevated Horeb into prominence, and the later expansion of law at Sinai in Exodus only reinforces that view. Even though none of the

sources (D, J, or P) limits the giving of the law to Sinai, that does nothing to denigrate Sinai's final importance.

Third, I have great difficulty in understanding Houtman's compositional history of the Covenant Code. Only the mishpatim are viewed as a possible prior corpus of laws. Yet the Deuteronomic Code is viewed as a revision of the Covenant Code, but apart from the law of the Hebrew slave in Exod 21:2-11, which has its parallel in Deut 15:12-18, it is hard to see how Deuteronomy can be understood as revising the rest of the mishpatim. What exactly are the final Dtrs composing? They are responsible for the framing laws in Exod 20:22-26 and 23:13-19, but it is these that are also viewed as the most subject to revision by Deuteronomy. They are responsible for the Dtr character of the corpus in Exod 22:17-23:12, but not as a redaction of an older, independent corpus. Here is where the code has its closest comparison with the prophets as well as the other codes. Yet Houtman is adamant (against Wellhausen) that the law is older than the prophets.

Houtman's failed attempt to construct a basic compositional theory to undergird his commentary of the Covenant Code points up the pressing need for a comparison of the codes within the Pentateuch. It is contradictory to maintain that the Covenant Code is prior to Deuteronomy and revised by it and at the same time claim that the Covenant Code was composed by the final Dtr author, who also shaped Deuteronomy in its final form. One may accept with Houtman that the Documentary Hypothesis as a compositional foundation for relating the laws to each other is no longer adequate. New theories abound about the literary history of the Sinai pericope and the Covenant Code's relationship to it. Houtman is correct in his view that such theories cannot be divorced from the compositional history of the Covenant Code itself. The key to this, however, lies not in some vague notion of a final Dtr redactor of the Pentateuch that is invoked to solve all literary problems but in a renewed diachronic study of the parallel legal traditions.

Comparison with Near Eastern Codes

It will be useful to begin this discussion with a review of the work of M. Malul, *The Comparative Method in Ancient Near Eastern and Biblical Legal Studies*,⁸⁴ which treats the problem of making comparisons between the Old Testament and Near Eastern sources in general and the law codes in particular. His discussion has relevance for the present study because it raises important issues that bear on the relationship of the casuistic laws of the Covenant Code to their cuneiform parallels and this has much to say about the origin and compositional history of the Covenant Code. Malul's study lays out in a systematic way the issues and suppositions involved in comparison and will be useful in evaluating the various studies that deal with this subject. Malul is primarily concerned with the use of comparison between biblical and nonbiblical laws and does not apply the principles that he develops to comparison between the biblical law codes, although it is reasonable to believe that his principles should also apply in those cases.

At the outset Malul makes a distinction between "historical comparison" and "typological comparison." By historical comparison is meant comparisons made "between societies which belong to the same cultural context or the same 'historical stream.'" This

method is based on the assumption of a historical connection or a common tradition between the compared societies.”⁸⁵ This is the *diffusionist* approach to comparison. By *typological* comparison is meant “comparisons between societies and cultures which are far apart both geographically and chronologically”⁸⁶ and where historical connections are quite unlikely. In such cases the perceived parallels are sociological or anthropological, arising out of similar social and human conditions. This is the *evolutionist* approach to comparison. It is unnecessary for the present discussion to review the debate between diffusionist and evolutionist theories of cultural comparison; we need only recognize the usefulness of the distinction between the two types of comparison and avoid confusion between them. As we shall see below, there is a strong tradition of the evolutionist/typological approach in the comparative study of Hebrew law.⁸⁷

Of the two types of comparison, it is historical comparison that is most often assumed to apply to the parallels between the Covenant Code and the cuneiform law codes. To further clarify the application of this method, Malul makes a distinction in the nature of historical connection between contact on the *literary level* and contact on the *reality level*. By literary contact, he understands any means by which a biblical author borrowed a legal custom through the use of a literary source. By reality contact, is meant the general diffusion or sharing of a common Near Eastern cultural heritage in the practice of law, which may find its expression in biblical law at a point in time later than the many second millennium B.C.E. examples in Mesopotamia. It is also this reality level that is the least direct and the most easily confused with typological comparison. Malul also warns that all our sources of laws from the ancient Near East are literary, making them difficult to relate to the reality level of the whole region. Those that most closely reflect the reality level are the archival records of court decisions or social transactions that could be the subject of legal proceedings. While there is a great body of such texts from Mesopotamia, there are few comparable documents from the time of the Israelite and Judean monarchies.

Malul likewise discusses the types of historical connection, from direct to indirect. There may be a direct dependence of one author upon another, or a connection may be mediated through another literary work, such as a common source used by both codes, or through a common legal tradition. One frequently encounters this last type of connection in the notion of a widely diffused Near Eastern tradition of law in which it is not clear whether one is speaking about a common culture of legal practice (the reality level) or a wide diffusion of literary codes through a shared scribal tradition.

An important aspect of historical comparison, Malul argues, “is the test for coincidence vs. uniqueness” in the case of a particular similarity. When faced with the similarity, the scholar must ask: “are the similarities and/or differences discovered between the sources/phenomena the result of parallel developments, independent of each other and, therefore, coincidental, or do they point to an original phenomenon unique to the sources under comparison?”⁸⁸ This test is especially important for demonstrating direct literary dependence and works in the same way for comparisons made between biblical law codes as it does when Malul applies it to the Covenant Code and the cuneiform codes.

In order to support the belief in historical connections between biblical and cuneiform laws, one must be able to make a case for sufficient cultural contact, either direct or mediated, between the Mesopotamia of the second millennium B.C.E. law codes and the first

millennium B.C.E. biblical authors. Given the rather large chronological and geographical gaps involved, there are two types of argument used to address this issue. One argument is to suggest that there was a diffusion of Mesopotamian literary works and the scribal use of Akkadian from the Trigris-Euphrates Valley westward into the Levant during the Middle and Late Bronze Age, as attested by a number of archaeological finds of cuneiform texts. While no specific examples of Babylonian law codes have as yet been discovered in the Levant through archaeology, it is regarded as at least possible that some could have been included as part of the school texts used for the training of cuneiform scribes in the principal cities of "Canaan" in the second millennium B.C.E.

On the basis of this historical model, it must also be assumed that there was a cultural continuity throughout the region of the Levant from the Late Bronze Age to the Iron Age such that this literary heritage was transmitted and made available to the later Hebrew populations of Israel and Judah. Such an assumption, however, is the most difficult problem with this model of historical connection, for there is no evidence whatever of the continuation of such cuneiform scribal traditions into the Iron Age in the Levant. The notion, which Malul seems to accept,⁸⁹ that the monarchies of David and Solomon inherited a library of texts and a continuous scribal tradition from the Late Bronze Age through their conquest of Jerusalem and other major cities of the region is without any corroboration and has become increasingly disputed as a historical possibility. Thus, the strongest argument for the evolutionist position is precisely that there is no evidence for legal continuity between Mesopotamian law codes and an early Covenant Code.

An alternative model of historical connection is to argue for literary continuity of the legal tradition within Mesopotamia from the second millennium to the late first millennium B.C.E., for which there is firm attestation.⁹⁰ The point at which there would then be the greatest likelihood of direct cultural contact between Mesopotamia and Judah would be the exilic period in Babylonia itself.⁹¹ This possibility has never been seriously considered by any of the studies reviewed here.

In his discussion on historical "corroboration," Malul specifically rejects the notion that the similarities between biblical and cuneiform law should be understood in terms of "contacts on the reality level"; instead, they reflect merely shared legal practice.⁹² He criticizes E. Otto, among others, for his view that both cuneiform law and biblical law arise out of actual legal practice. Instead, Malul accepts the view that the Mesopotamian codes are literary texts and that meaningful comparison must assume a form of historical contact on the literary level of borrowing. In support of literary contact between Babylonian and Israelite law, Malul makes a test of his principles of comparison by using the much-discussed example of the laws of the goring ox in Exod 21:28-36 and their counterparts in the Laws of Eshnunna and the Laws of Hammurabi. We need not deal here with the details of his argument but will have reason to refer to them again later in the treatment of specific laws. Nevertheless, his conclusions are important for this preliminary survey. He states: "By applying the clear and objective criteria discussed above, this study arrives at the unmistakable conclusion that the biblical laws of the goring ox, contrary to the views held by some scholars, are closely dependent upon their Mesopotamian counterparts. Furthermore, it suggests that the biblical author or editor knew first-hand the Mesopotamian laws and that he may even have had a copy (or copies?) of them in front of him when he composed or edited his biblical version."⁹³

Such a direct literary relationship, if it proves to be the case with other laws as well, makes it very difficult to maintain the notion of a rather vague, mediated transmission of a common legal tradition in the early period of Israelite history. It also calls into question the usefulness of Otto's distinction between the originality of individual laws in the Covenant Code as based upon particular cases and the drafting techniques of their compilation into collections, which is attributed to Mesopotamian influence. The drafting techniques transmitted by scribes certainly belong to the literary level, but they could never be transmitted apart from their embodiment in a code of laws.

There is another work that must be discussed at this point, the influential article of Jean Bottéro, "The 'Code' of Hammurabi (1982),"⁹⁴ in which he engages in another kind of comparison to explain the Hammurabi Code without making any reference to the other Near Eastern codes of a similar character. After a description of the form and content of Hammurabi's "code," Bottéro raises the question of whether it is appropriate to characterize the document as a "law code." To answer this question he begins with the simple definition of a law code as "a complete collection of the laws and prescriptions that govern the land: 'the totality of its legislation.'"⁹⁵ He observes that a glance at the content of the "code" makes it abundantly clear that it is quite incomplete in terms of both the general subjects covered and the selective and partial way in which it deals with any particular subject. So it is not "a code in the true sense of the word" and he prefers to place this term in quotes. He further disputes that it is even an anthology of laws in which law is understood as "an imperative rule of social conduct, laid down and enforced by legitimate authorities."⁹⁶ In many instances, it does not deal with a true generality but only one or a few particular examples out of many possibilities, and at times a case cited in one part of the law contradicts one in another part of it. In official protocols of judgments or records of judiciary practice in Hammurabi's time, there is never any reference to the "code" as a way of settling the matter, although there are citations of the king's edicts, or "decisions."⁹⁷ They are even referred to within the "code" itself as authoritative. There are also many examples of legal decisions from Hammurabi's time that seem to depart substantially from the verdicts that are contained in the "code" and deviations from the regulations of prices and wages it sets forth.

Consequently, Bottéro argues that the Hammurabi Code contains, not pieces of legislation, but verdicts in individual cases. The cases have been generalized, and this has led in a few cases to different and conflicting verdicts in similar cases where particular mitigating circumstances are not recorded. Bottéro also accepts the claim of Hammurabi in the prologue and epilogue that this is actually a collection of his own verdicts during his long reign in support of his claim to be a just king, the upholder of justice and right rule. As such, it is a record of his achievements as ruler of a great kingdom and is comparable to his many victories, which also witness to his greatness. It is also meant as a testimony to future kings to emulate the example of his just rule in the way they govern and exercise their judiciary power.

At this point, however, we need to pause in our review of Bottéro's essay and ask some questions. First, did Hammurabi actually adjudicate in all of these hundreds of different kinds of cases? To do so he would have had to hear many thousands, which seems doubtful, even if the archival evidence does suggest that he did intervene in certain cases that resemble some of those in the "code." Second, there are some cases, such as the cases of the goring ox or the injury to a pregnant woman, that are absent

from the thousands of documented court cases and yet are dealt with here. As we have seen above, these are standard topoi in other law codes before and after Hammurabi's time, so that the verdicts on the Hammurabi stele cannot represent only his particular judgments.

From this point on in his discussion of the "code," Bottéro seems to shift to a quite different explanation of its form and content. He states that the "code" is a scientific work and belongs to the literary genre of "scientific treatises." As such, it is the work of scholars whose mode of intellectual treatment of a wide range of disciplines uses an objective and "scientific" method of observation and recording of their subject matter. Thus, in the case of a medical treatise, observations will be made concerning certain symptoms of illness in a conditional protasis clause, with a verdict or judgment on the person's condition in the apodosis. The same form of protasis and apodosis is used for many other scientific and technical subjects in which observations may be made and conclusions drawn, based upon empirical observation and the test of experience. The subjects of such encyclopedic, or list, science are also arranged into units and "chapters," with the result that various collections become a set of highly organized treatises. In terms of both the protasis-apodosis form and the organization of material into similar groupings, the "code" strongly resembles this scholarly scientific tradition. Bottéro admits that the relationship between the condition and its result is not quite the same in the "code," because the case of an offence, the protasis, does not necessarily lead to the judgment, the apodosis, as it does in the sciences. The scribes of the "code" certainly share the same kind of drafting techniques, but are they gathering and organizing a body of knowledge in jurisprudence? They are hardly very thorough if that is the case, and the resulting document is not a treatise, whatever else it is.

Bottéro also discusses the function of scientific treatises, which is to inform practitioners as to how they will carry out their work. They have a practical application directly related to the field of study. Hammurabi's "code" does claim to teach future kings how to practice justice by his example. But this is not quite the same thing. Bottéro does not want to say that those who draw up "codes" do so in order to assist judges in making the correct decisions in courts of law. On this point, it seems to me, the analogy with science breaks down. The "laws" are not just the observations of human behavior to predict what will happen in certain situations. They intervene in those situations to produce certain results. Yet one may agree with Bottéro that the "verdicts of justice" in the "code" are not the law of the land but only a reflection of a system of justice that is supported by a mass of custom and oral tradition, with only occasional acts of legislation of royal edicts to deal with pressing problems. The king could lead by example, but most of the legal activity was in the hands of local magistrates based upon unwritten law.

Two further observations need to be made at this point. The first is that Bottéro has ignored the point made by F. R. Kraus and J. J. Finkelstein that the Hammurabi Code stands within a literary tradition of law codes and that it inspired, by imitation, the production of subsequent codes.⁹⁸ The fact that the Hammurabi Code was such a classic to be preserved and emulated means that it had a powerful literary influence within the scribal tradition whatever the actual practice of law might have been throughout the long period of population changes and other social transformations in Mesopotamia.

Second, the scientific model for the development of law has some serious limitations. For instance, the same conditional form with protasis and apodosis may be found

in the early Greek Law Code of Gortyn, Crete (fifth century B.C.E.).⁹⁹ This obviously reflects a learned and pervasive scribal style, and one may debate the degree to which it is related to oral custom law. Its very public display, as with other Near Eastern and Greek law codes, makes its function a public and practical one. It is only in Roman law that the beginnings of a science of jurisprudence develop, and one must not read such developments too easily back into the early period.¹⁰⁰

The Evolutionist/Typological Approach

Let us turn now from this formal discussion of the comparative method in the study of Hebrew law to the history of its practice. The *typological* approach is well illustrated by those scholars who came into the study of biblical law from the history of law with its foundations in Roman law. One such scholar is D. Daube, who often explained certain puzzling features of the mishpatim of Exod 21–22 by corresponding occurrences in Roman law.¹⁰¹ There was never any suggestion that a direct historical relationship existed between the two, only that both societies went through a common social evolution. Daube treated references to cuneiform law in much the same way as Roman law, suggesting the same typological comparison. There is little reflection on the problem of similarity beyond its usefulness in understanding the nature of the law under consideration.

The work of the legal historian B. S. Jackson is similar,¹⁰² although he is much more reflective about the implications of the comparative method. It is not my purpose here to review the whole corpus of Jackson's work on Hebrew law in general or the Covenant Code in particular. His treatment of a few of the laws will be taken up in subsequent chapters. Instead, I want to focus on the basic issues and principles that are important for his work. The first of these has to do with the matter of foreign influence, both with respect to the formal characteristics of the mishpatim, or casuistic laws, and with respect to the very specific content of some of them. He recognizes that the laws regarding goring oxen (Exod 21:35) and an injury that results in miscarriage (Exod. 21:22–23) have parallels in cuneiform law codes that are so specific as to require some explanation.¹⁰³ But Jackson rejects "either common Semitic origin or historical contacts" and has nothing else to offer. On the matter of legal drafting techniques, however, Jackson does allow for the hypothesis "that Israel inherited an externally established standard of drafting," but he says nothing about how this came about.

On the question of the degree to which the cuneiform legal tradition actually influenced Israelite law, Otto sets forth evolutionary principles that are similar to those of Jackson.¹⁰⁴ In terms of the content of specific laws, comparison with cuneiform laws can show that typologically Israelite society went through the same process in developing its own legal statements from trial narratives and records in the indigenous local courts. In this respect, his comparative method is evolutionist. On the other hand, the particular "redactional" drafting techniques by which the individual casuistic statements came together into collections and code are explained historically as the inheritance of the cuneiform legal tradition in administrative centers and account for all such stages of the Covenant Code's development throughout a long period of the Israelite-Judean monarchy. For this aspect of Hebrew law, Otto is diffusionist.

I do not think that such a scheme will stand up to close scrutiny, as Malul indicates. The theory is merely developed to support Otto's traditio-historical and literary con-

struction. There is no reason for the drafting to be the borrowed element and the content of the law merely local, except that it fits his compositional theory. An entirely different compositional theory could account for similarity in a quite different way, and that is what will be proposed here.

There is a recent study on the sociology of law by A. Fitzpatrick-McKinley¹⁰⁵ that should be considered in this group. She begins by taking issue with Otto (and others) on two points: (1) that there is a close correlation between law and society, and (2) that the Covenant Code is a lawbook whose intention is to legislate for monarchic Israel. Fitzpatrick-McKinley accepts and builds upon the critique of Kraus and Bottéro against this legislative understanding of codes like the Hammurabi Code, but she departs from them in one significant way. As we have seen above, Bottéro defines a law code as a corpus of legislated regulations that has the closest correlation with the concerns of society and the maintenance of order within it. Using the work of the Roman historian Alan Watson and the anthropologist Jack Goody, Fitzpatrick-McKinley presents a sociology of law that understands written law codes, particularly those in ancient contexts, as largely independent from society and as the activity of learned jurists operating within a legal tradition. Their literary product has little direct impact upon a society that is largely illiterate and whose actions are governed by custom and oral tradition. She sums up her position in the following way:

In the previous chapter [chapter 2] it was shown that the relationship between written law and society is tenuous: law neither adapts to society nor society to law. Moreover, law may not be seen as reflective of the values and philosophy of the society within which it was codified. The explanation for the degree of independence between legal development and social need was found in the following characteristics of written law. First, it is the legal tradition, rather than societal concerns, which provides the impetus to legal growth. Secondly, given the frequency of legal borrowing, this legal tradition may not be related in any specific way to the borrowing society. Thirdly, the fact that the laws are in written form means that they develop, under a momentum which derives from the authoritative-ness of the written word, independently of social concerns and needs. This development is undertaken and its course is dictated by élites who alone, as specialists of the written word, can disinter texts and make decisions as to what rules or code should be borrowed.¹⁰⁶

The first two points represent a considerable departure from the views expressed by Bottéro. As stated above, he gave little consideration to the prior legal tradition. Bottéro also says little about the borrowing of foreign legal traditions, but Fitzpatrick-McKinley herself says nothing more about it in the rest of her study. One might have expected some discussion on this point as it relates to the problem of the Covenant Code's dependence on the Mesopotamian legal tradition. The third point, however, builds heavily upon Bottéro's understanding of law as science.

Fitzpatrick-McKinley then raises the question of how this sociology of law is applicable to biblical law. She has in mind the Covenant Code and its civil law almost exclusively and considers whether this collection was intended to serve as a legislative force "to influence social norms and practice and to provide a binding source of law which was to be applied by judges."¹⁰⁷ This is the predominant position of the views of Otto, Schwienhorst-Schönberger, Halbe, Osumi, Crüsemann, and others treated above. After offering a critique of the legislative model, she turns to the proposal of Bottéro that the law is to be considered as a form of science (see above). Here, however, she takes the

position of Bottéro to a somewhat absurd extreme and shows its weakness. She regards the Hammurabi Code “as a scientific treatise” and further states: “The compiler’s aims were to reach a ‘scientific grasp’ of their subject. These treatises were recopied, studied, re-edited and revised as part of the educational programme of scribes and specialist scribes who would become perhaps exclusively concerned with divination, medical or legal texts.”¹⁰⁸ This proposal would divorce the prologue and epilogue from the collection of laws, a position that Bottéro strongly rejects. Fitzpatrick-McKinley would do the same thing for the Covenant Code. Although Hammurabi’s code was recopied for over a thousand years, it is not true that it was treated to revision or other modification as she maintains. It was regarded much more like a canonical text, a model document, not something to be revised and updated but a classic to be imitated.

In applying these principles to Hebrew law, Fitzpatrick-McKinley assumes that the Covenant Code was in existence during the monarchy and then points to the fact that in certain notable situations it is not cited. Since my view is that the Covenant Code did not yet exist until the exilic period, these arguments do not apply. After this date (ca. 540 B.C.E.), one can cite texts that make specific reference to the Covenant Code (Ezra 3:2). She also characterizes the linking of the law code within the Hammurabi Code to the king as a secondary association by the king for purposes of political propaganda.¹⁰⁹ That view of the matter, however, seems to be very much at variance with Bottéro’s own position. The long tradition in Mesopotamia of associating the law codes with royalty is certainly a part of its legal tradition and not secondary to it.

Fitzpatrick-McKinley attempts to deal with the problem of similarity among law codes that are widely separated in time and space by making reference to the Hindu concept of dharma, which originated as moral advice of learned scribes and only in more recent times became understood as legislated law. Using this analogy, she finds throughout the Near East a very similar understanding of morality, a common wisdom-moral tradition that also underlies both the Covenant Code and the Near Eastern codes and accounts for their similarity. Using the study of Karel van der Toorn,¹¹⁰ she points to parallels between the morality reflected in the Decalogue, as well as in many other parts of the Old Testament, and a wide range of Near Eastern texts to demonstrate a common Near Eastern morality. Rather sparse reference is actually made either to the Near Eastern codes or to the casuistic laws of the Covenant Code. When the Covenant Code is cited, it is usually with reference to the humanitarian laws. None of this really addresses the issue of a direct literary relationship between the Babylonian law codes and the Covenant Code.

Furthermore, at the end of her discussion about biblical and Near Eastern law codes being moral advice of learned scribes, she seems to completely undercut her own position. She states: “Moreover, the proposal that the Book of the Covenant was a moral-wisdom text to be understood on the basis of an analogy with dharma does not rule out the possibility that the areas of scribal morality and law often overlapped with influences moving in both directions. In fact, such an overlap is attested by the very presence of rules in the Book of the Covenant which seem as though they must have arisen out of actual, legal situations.”¹¹¹ She does not say which “rules” she has in mind, but it is the laws in the casuistic portion of the code that are most in question here and precisely those that are closest to the cuneiform codes. Yet her earlier critique of Otto and others did not allow for such an origin for these laws.

It remains for her to explain how practical laws become combined with moral teaching. In terms of our broader discussion, this would seem to address the question of how the casuistic laws of the first part of the Covenant Code become combined with the apodictic, humanitarian, and religious laws of the second part of the code. She raises the question: "How is the presence of what may be described as positive law (e.g. Exod 21.33–37 [EVV 21.33–22.1]; 22.4 [EVV 22.5]) to be explained? It has already been noted that the scribes may have incorporated oral practice but not as law. Rather it was incorporated as wisdom teaching."¹¹² There is something odd about this statement. Why select just these texts from among the whole body of casuistic law as possible examples of the oral practice of law? In fact, these verses include the law of the goring ox (21:35–36), which is one of the strongest candidates for foreign *literary* borrowing from Mesopotamian law, which in turn was a literary creation. Her position has become quite contradictory.

She further suggests that the royal scribes who formulated royal edicts on the principles of their own moral rules to deal with "isolated decisions to real problems" may then have incorporated these into their torah texts, but only as moral teaching and not as law to be implemented in courts.¹¹³ The consultation of the king with "court wisdom scribes when faced with the resolution of disputes . . . gave the scribes the opportunity to become involved in disputes of a legal nature. In fact, it is not unlikely that the scribes set forth rules designed to deal with the most common cases in order to ease their own mission as well as that of the king."¹¹⁴ This is said to be an explanation of civil law within the much larger corpus of other kinds of law in the biblical tradition of torah. But if civil law is derived from such a process, then the whole of cuneiform law comes from the active involvement of court scribes in formulating all of the royal legal decisions that become reflected in the collections of the codes. This too contradicts her earlier position.

Fitzpatrick-McKinley then engages in sheer fantasy about the origins of the Covenant Code. She speculates that the Book of the Covenant "originated in a royal inscription" (like the Hammurabi Code?) as "a moral set of rules which was attributed to the king in order to portray him as wise and conforming to the ideals of torah."¹¹⁵ Because they existed in written form, they had the unintended consequence of achieving autonomy, and the subsequent separation of these moral rules from this context into the scribal milieu led to their transformation by a process of reflection and exegesis into law. The scribes themselves achieved independence and authority to make their moral science into law proper.

Nothing about this scheme is likely. If the model for this proposal is Hammurabi, such a separation of the laws from their attribution to this king never happened in a period of over one thousand years. And if this Judean king is Hezekiah or Josiah, as she suggests, what is the relationship of such a royal inscription to Deuteronomy, which is presumably attributed to Moses? Fitzpatrick-McKinley further describes a process of scribal expansion and transformation of laws and then cites an example in which scribes meticulously copy a text and even acknowledge lacunae in it without making changes to it because they venerate the old text.¹¹⁶ This too seems quite contradictory.

However, it is the contradiction that the laws are the result of both concrete legal situations and the detached and independent reflection of learned scribes, which is already inherent in Bottéro's position on the Hammurabi Code and is taken over by her, that is never resolved. This is largely due to the fact that in spite of her criticism of

scholars such as Otto, she has adopted their dating of the Covenant Code, their understanding of its composition as the result of multiple scribal redactions, their connection of the casuistic laws with concrete legal cases, and their dilemma about how to account for the similarity between Hebrew law and Mesopotamian law. Although she engages in a diachronic discussion of the development of law, no comparison is made between the biblical codes, and there is very little discussion of the content of the codes themselves.

The Historical/Diffusionist Approach

A scholar who is clearly and more consistently diffusionist in his treatment of comparison between cuneiform law and the Covenant Code is R. Westbrook. In a lead article, "What Is the Covenant Code?" in *Theory and Method in Biblical and Cuneiform Law*,¹¹⁷ he lays out his understanding of the nature of the Covenant Code, to which a number of scholars have written responses. It will be useful to review this discussion. Westbrook's comments have to do only with the section of the code that is contained in 21:1–22:19 [20], which he understands as that part of the work that is more properly a law code "in that its norms are justiciable in a human (as opposed to divine) court and carry sanctions enforceable by a court."¹¹⁸ The code abounds in difficulties of form, style, and syntax and in the discrepancies between laws and the ways to understand them. These discrepancies are usually explained diachronically, in that the law code underwent a long process of development, with amendment, additions, and so on, but Westbrook disagrees. He critically reviews the early form criticism of Alt, from which developed the kind of explanations that appeal to redactional fusion of different forms of law to create the present corpus. Westbrook cites Daube, Jackson, and Otto, criticizing them for their use of redaction and secondary interpolations into the text as ways of resolving problems in coherence or anomalies in style, as well as Schwienhorst-Schönberger, who starts with a "pristine casuistic code" and successive expansions. All are examples of the "historical" (i.e., evolutionary) development of law.¹¹⁹ Westbrook claims that this method is based on "no empirical evidence." The historical method shares the following premises: (1) The development of law is from primitive to sophisticated law. (2) The form of the law reveals its content and source. (3) Pristine, primitive law is clear and logical but becomes confused by additions and rearrangements, which preserve parts that no longer fit.

In contradiction to principle 1 is the fact that the preserved Near Eastern law codes already show a high degree of sophistication, and there is no reason to think that Israelite law went through this long process to arrive at the level that precedes it by thousands of years in other places. The problem as Westbrook sees it is that it is scarcely possible to deny that the Covenant Code is not influenced by the cuneiform law, and therefore one cannot deny that the level of sophistication is already there from the start. "It is difficult to see how provisions that are so closely associated with an outside source can at the same time be the product of internal development from an earlier primitive version."¹²⁰ Otto's answer, among others, is to see the cuneiform element in the Covenant Code as limited only to the framework in a common legal culture of the Near East. Against the notion that the law would undergo extensive transformation over the course of time, Westbrook argues that cuneiform law was amazingly static over a very long period of time. He warns against making judgments about the development of law based upon "assumptions about the surrounding culture and society that are not war-

ranted by the empirical evidence.”¹²¹ For Westbrook, this diffusion of law took place in hoary antiquity and the law remained so static that it is not subject to historical discussion, and he therefore discusses the laws synchronically.¹²²

Westbrook also argues that these codes are not the result of legislation or reforms, which would reflect periodic change. Rather, “it has been persuasively argued . . . by Kraus and others that the law codes were essentially academic documents, which may accurately have described the law but did not prescribe it. They were, therefore, conduits of tradition rather than of change.”¹²³ Different from the codes are the royal edicts that are reforming in nature, and present themselves as such. They were remarkably narrow in scope, for example, cancellation of debts, reorganization of the royal administration, and the fixing of prices (and penalties). Reforms within the codes may reflect such edicts. In the end he makes a distinction between the D and P codes, which share something of the intellectual ferment of the Greek world, and the Covenant Code, which “looks back to the cuneiform codes of the second and third millennia. It is in the light of that long and stable tradition that the two remaining premises as to its form and composition are to be judged.”¹²⁴

Concerning the question of form in Westbrook’s limited Covenant Code (Exod 21:1–22:19), the problem he addresses is whether the distinction between casuistic and apodictic (in 21:12, 15–17 and 22:17–19) “is of any *legal* significance, either because the laws derive from a different jurisdiction (foreign, patriarchal, sacral, etc.) or because they represent different stages of legal development.”¹²⁵ Since there are sporadic apodictic statements in cuneiform law, Westbrook argues that the mixture of casuistic and apodictic laws is not very different from the same mixture that can be found in cuneiform law. “Depending on the literary tradition, the same rule may be drafted casuistically, apodictically, or in some other fashion.”¹²⁶

Furthermore, Westbrook disputes that the model of the Justinian Code, with its massive editing, introduced into the study of cuneiform law by the legal historian Paul Koschaker, is appropriate for either the cuneiform codes or the Covenant Code. In the case of clearly documented later versions of the law as in Hittite law, the result does not produce a document with obvious clues to its redactional history. Westbrook cites, as a parallel between the Covenant Code and Deuteronomy, the law of the Hebrew slave to show that there was no inherent conservatism about retaining the precise wording of a particular law. For Westbrook: “The present text must be presumed to be clear and coherent. At most, one might argue for the minor editorial emendations and glosses that could be found in any genre of text.”¹²⁷ In his conclusion Westbrook summarizes the criticism of the historical approach to law and then states: “Interpreters of the Covenant Code need to come to terms with the fact that it is part of a widespread literary-legal tradition and can only be understood in terms of that tradition. The starting point for interpretation must therefore be the presumption that the Covenant Code is a coherent text comprising clear and consistent laws, in the same manner as its cuneiform forbears.”¹²⁸

Westbrook’s “revisionist” views have drawn a number of responses published as a collection of essays in the same volume, *Theory and Method in Biblical and Cuneiform Law*, as well as in a separate piece by B. Jackson. I will try to summarize the points at issue in the debate. The first point of dispute with Westbrook’s work is his limiting of the Covenant Code to 21:1–22:19 [20] as the only part of the present set of laws within

20:22–23:33 that is properly a set of laws.¹²⁹ This delimitation immediately raises problems for his critics, as B. M. Levinson points out, because this tacitly admits that these verses have been incorporated by redactional activity into a larger corpus and contradicts his own criticism of those who engage in redaction criticism of the code. Most of those whom Westbrook criticizes support the unity of the casuistic portion of the code with only minor changes, some of which even Westbrook would have to admit.¹³⁰ Within the rest of biblical law, Westbrook admits only Deut 21:1–25:11 as a proper legal corpus, but this body of law does not fit his definition of a code as only those laws that are “justiciable in a human court.” It contains parallels to those laws that are outside the limits imposed by Westbrook on the Covenant Code (Deut 22:1–4; cf. Exod 23:4–5), and it contains a large number of religious and humanitarian laws. By focusing on a part of the Covenant Code whose limits are defined by their similarity to laws in the cuneiform codes, Westbrook has just avoided facing the hard questions of historical criticism that he denigrates.¹³¹

Even if one accepts for the sake of argument the existence of a primitive code roughly corresponding to the limits suggested by Westbrook, as many scholars do, there still remain serious difficulties with his method of interpretation of these laws. There is, first of all, widespread dissatisfaction with Westbrook’s notion of the diffusion of a highly sophisticated “common law” from its center in Babylonia to the periphery regions of the Near East, including the whole of the Levant, resulting in a rather static and fully developed legal tradition in the region by the end of the third millennium B.C.E. Against this static diffusionist model is set the evolutionary model of legal development, for which several scholars offer specific “empirical evidence” from within both cuneiform and biblical law.¹³² Westbrook is accused by Levinson of imposing on the problematic texts a harmonistic method of interpretation in order to maintain his view of coherence, where no such coherence exists.¹³³

Another argument used against the diffusion of a common Near Eastern law is the anthropological argument, put forward by V. Matthews,¹³⁴ that during the period of Israel’s development from village culture to organized statehood there was a great deal of social change. This must have been reflected in its laws and legal practice. A set of laws covering slavery, as reflected in the Covenant Code, would simply not be applicable to the same degree throughout the whole period of Israel’s history. Samuel Greengus also argues that many of the changes that are evident in cuneiform law likewise reflect important social changes, so that the static nature of the law cannot be maintained.¹³⁵ Furthermore, Greengus suggests that the very incomplete nature of all the law codes points to the fact that a large body of the law was transmitted by means of a legal oral tradition through a system of lay judges. If this is the case, then it is very hard to see how the whole common system of Mesopotamian law could have been diffused and overcome the radical cultural break at the end of the Late Bronze Age. There is as yet no evidence of a continuity into the Iron Age of the cuneiform scribal tradition, let alone the whole social and political structure necessary to support it. It is a great stretch to suppose that the early Israelites had direct contact with both the Mesopotamian oral tradition of law and its preserved written codes such that it resulted in the law code within the Covenant Code.

Yet these reasonable objections to the diffusionist explanation of Westbrook leave unanswered how the high degree of similarity can be accounted for. Significant cultural

and political contact between Mesopotamia and the Levant is restored increasingly from the mid–eighth century B.C.E. onward after a long hiatus, but this contact was discounted in the past as being too late for the origins of the Covenant Code. It is precisely within this context that so much attention has been given in recent years to the interconnections between Assyria and the Deuteronomic Code. The evidence for such Mesopotamian influence on Deuteronomy is, however, ignored by Westbrook. Instead, Westbrook accounts for the differences between the Covenant Code and the Deuteronomic and Priestly Codes by the fact that at a later point in time they were influenced by “the intellectual ferment of contemporary Greek sources and thus some taste also for their new legal conceptions.”¹³⁶ Westbrook must regard this influence as being as early as the seventh century whereas the Covenant Code belongs to the period before this innovation and was part of the old Near Eastern system. This difference is not based upon any demonstration of Greek influence, and it certainly does not account for the fact that the Deuteronomic Code also contains a body of casuistic law similar to that of the Covenant Code. Only a systematic comparison of the Covenant Code with the other codes can elucidate the historical relationship among them and the extent to which the Covenant Code may belong to that older order of law of which Westbrook speaks.

Westbrook raises the problem of form in two different ways. The first is his definition of a law code by which he determines its *Sitz im Leben* and thereby decides what is to be included and excluded. He restricts it to those laws that could be adjudicated by a human court of law and also regards the codes, not as reform documents, but as academic school texts whose function was to preserve the tradition of law as it should be practiced for all time. Sophie Lafont takes issue with this understanding of law by suggesting that “law appears as a text proceeding from an institution vested with legislative power, enforceable for everyone and for an unlimited time.”¹³⁷ By this definition, the law could reform current practice only if the intended change was not merely a matter of temporary relief. In this sense, Near Eastern and biblical law was not static.

Yet both Westbrook’s and Lafont’s understanding of law raises some questions. It is easy to see how the cuneiform law codes could have had the force of law as they define it within the codes’ own region and during the period of their composition in the second millennium. It is more difficult, however, to understand Hammurabi’s code in this way as part of a preserved literary tradition by the mid–first millennium B.C.E. It is likewise problematic to reconstruct the authority behind the Covenant Code. The biblical tradition does not associate law-giving with the king, and contrary to the suggestion by Lafont, the king is never regarded as the successor of Moses.¹³⁸ In the present form of the tradition, prophecy is the authority and institution behind the law, for it is in Moses’ role as prophet and direct spokesman for the deity that the law is declared. It is this quite different understanding of law and the basis of its authority that makes it different from cuneiform law.

Such an understanding of biblical law as a set of norms uttered by the deity through Moses and governing the whole of life is easily recognized for the laws of Deuteronomy and the Priestly Code, but it is also clearly articulated in the narrative context of the Covenant Code. Westbrook may try to escape the implications of this by redefining the law’s limits, but even within these laws, the divine voice is evident in the first- and second-person discourse in Exod 21:1–2, 13–14, 23; 22:17 [18]. And to what authority does Westbrook attribute the prohibition in 22:19 [20], which he includes at the end of

his code? He could invoke a redactor to solve these problems but that would destroy his own criticism of such methods. As W. Morrow has pointed out, the use of the second person in some of the laws is a “generic discrepancy” that cannot be accounted for by form-critical comparison with the cuneiform law codes.¹³⁹

Dale Patrick takes the matter of the form one step further by suggesting that the sporadic uses of the second-person address are “reminders of the oral transaction taking place between the speaker and the audience.”¹⁴⁰ He sees a very close association between the whole form of the code and the context, which is presented as the delivery of the mishpatim by a speaker (Moses) to an audience. In this regard, it is perhaps significant that Ezekiel construes a divine speech having to do with distinction between the guilty and the innocent in a third-person casuistic style (Ezek 18). It is only on the form-critical assumption that the casuistic laws of the Covenant Code are very old and belong to common Near Eastern law with the same *Sitz im Leben* as the other codes that Westbrook can dismiss all the biblical testimony about the nature of biblical law that points in a quite different direction.

When it comes to the matter of Westbrook’s criticism of the redaction-critical method, as applied by Otto,¹⁴¹ I confess to some sympathy with his position. Nevertheless, his own approach, as Levinson has shown,¹⁴² is not entirely helpful. As Lafont points out, his rejection of the Justinian model of legal composition is based on a misunderstanding, because the Justinian Code is not merely a modification of previous law by a series of interpolations but is instead the result of plagiarism from an original source to construe it in a new way.¹⁴³ It is precisely this model that, in my view, needs to be tested for the Covenant Code. The many close parallels between the codes suggest that someone is plagiarizing or, perhaps more appropriately, “imitating”¹⁴⁴ someone else, and it is the direction of borrowing that is in dispute. One of the sources for the Covenant Code is the legal tradition of the cuneiform law codes, but it is not the only source, as the study in the following chapters hopes to show.

The “revisionist” approach advocated by Westbrook rejects the application of historical criticism to the Covenant Code, narrowly defined as the predominantly casuistic laws in Exod 21:1–22:19 [20]. These belong to a very static Near Eastern legal tradition that was established and fixed in antiquity and changed very little as an academic literature over many centuries. It is assumed by Westbrook that this highly static legal tradition had spread over the whole of western Asia by the early second millennium and that Israel just inherited it in the form of the Covenant Code. Such a diffusionist theory is not supported by evidence and cannot stand up to close scrutiny.

In an article published separately from the above collection, B. S. Jackson takes up his own response and critique of Westbrook’s “legal model” for the study of the Covenant Code.¹⁴⁵ This becomes a debate between the evolutionist theory as advocated by Jackson and the diffusionism and largely static theory as advocated by Westbrook. Taking a clue from M. Weinfeld, Jackson regards biblical law in general and the Covenant Code laws in particular as “wisdom-law” with a didactic, rather than a juridical, purpose. He places considerable weight upon the text of 2 Chron 17:7–9, which strongly suggests a didactic function of law. He also sees a move from a popular teaching to a sophisticated and speculative level as it moves toward a literary form. The process for him is a multistaged one with separate units being combined into “intermediate collections” with rather complex chiasmic patterns. He regards the final compilation and in-

corporation into the present narrative context as rather late. As to the date, he is very vague and confusing and speculates anytime from pre-Deuteronomic to Priestly based on conflicting evidence.

One may readily agree with Jackson that wisdom elements are present within the Covenant Code as they are elsewhere in the biblical laws, but that alone will not support his elaborate scheme of its historical growth. The text in 2 Chron 17:7–9 is very late and highly ideological and will not serve as evidence for the monarchic period. Nor is Jackson any clearer than Westbrook about how to account for the “foreign influence” within the Covenant Code. At what point in the compilation and drafting of the collections are we to see this influence and how does it come about? Apart from the vague statements about wisdom scribes being open to influence from foreign courts, there is no explanation of the stage at which foreign influence came in to shape the biblical laws. The evolutionary scheme seems to preclude that it happened at the early stage of individual paragraphs, which means that a complex code with many paragraphs and elaborate drafting was not inherited from the Bronze Age in Canaan. If such a code had been inherited from Bronze Age Canaan, why would it have undergone another process of editing in Israel? But if Israel did go through the whole process, then it is hard to see why the independent final products end up with so many features similar to Mesopotamian law. This is basically the same problem with Otto’s position, and it is compounded when there are specific laws whose similarity is hard to account for without the notion of direct borrowing, as Malul has argued.

It is remarkable that in all of this discussion about comparison with Near Eastern law the really hard questions are not addressed!

1. If it is acknowledged that there is a connection between cuneiform law and the casuistic corpus of law in the Old Testament, whether in the case of individual laws or in the drafting techniques or both, then some reasonable way must be proposed to account for that connection that also acknowledges the time of composition of the Covenant Code. The cultural discontinuity in the Levant between the literary, scribal tradition of the Late Bronze Age and the Iron Age is so pronounced as to make it very doubtful that such a legal tradition could have been inherited by the monarchies of Israel and Judah from the previous “Canaanite” civilization.

2. If the relationship between the cuneiform law codes and the Covenant Code is on the “literary level,” to use Malul’s phrase, then the same model of comparison ought to be used to account for the relationship between the Covenant Code and any other code of the Pentateuch. Levinson actually uses such an argument against Westbrook, but in practice all of the scholars completely isolate the comparison of the Covenant Code with Near Eastern law from any inner-biblical comparison.

3. Why is it that the so-called drafting techniques of cuneiform law that have largely survived for two thousand years and find their way into the casuistic laws of the Covenant Code are used inconsistently in the first part of the code and abandoned in the second part and largely disappear from Deuteronomy (except for a small part of the “supplementary” laws) and from the Holiness Code? Westbrook’s explanation of Greek influence will not do, because there is no clear instance of any such influence in these laws, but there is strong evidence of Assyrian influence on Deuteronomy. The early Greek laws of Gortyn in Crete (fifth century B.C.E.) more closely resemble those of the

Covenant Code than those of Deuteronomy. The effort to relegate all such casuistic laws to a foreign “Canaanite” source as distinct from Hebrew laws is frustrated by the presence within these laws of distinctly Israelite concerns. Biblical scholarship has become increasingly skeptical of a primitive Canaanite/Israelite distinction, which makes this kind of explanation for the Covenant Code problematic as well.

4. The fact that the Covenant Code is a combination of so many different types of laws, and the belief that the casuistic laws point to the antiquity of at least some of the laws in this code, have led to the method of tradition history, redaction, and interpolation as the only way to account for the present mixture of laws. This, however, is not the only possible explanation; it is not even the most plausible one. It is only the errors of the past that have compounded the problems and led to the most unlikely proposals.

Summary and Conclusion

The primary question that I have tried to address in this chapter is to uncover the reason for the almost universal assumption in all of the studies of the Covenant Code and its relationship to the other Pentateuchal codes, namely, that the Covenant Code is the oldest biblical law code. This assumption governs the treatment of all comparisons among the codes. I have tried to show by this history of research that all of the reasons used to support the priority of the Covenant Code are faulty and inadequate. The argument for priority begins with the New Documentary Hypothesis of Wellhausen, in which the Covenant Code is assigned to one of the “early” sources, usually E. Form criticism’s search for the older units of tradition behind these sources led Alt and others to identify ancient antecedent collections of laws behind the present code, usually within the social setting of the pre-state period. The newly discovered Near Eastern codes that were parallel to the casuistic laws of the Covenant Code lent credence to this early date.

This form-critical division of the code into many types of laws from different social settings, coupled with a complex tradition history, soon led to the suggestion that the code was originally independent from its present placement in the Sinai narrative and developed over a long period of time as an independent corpus (see the studies of Pfeiffer, Noth, Childs, Boecker, and others cited above). For a time, the association of the code with a covenant also supported its antiquity, but when the notions of a covenant between God and people became increasingly suspect as a late Deuteronomistic innovation, the code was then dissociated from its covenantal context as a secondary development.

In keeping with this form-critical and traditio-historical approach to law was the use of a complex redactional method for dealing with its literary complexity. This was true for the treatment of the Covenant Code as a separate entity and for its integration into its present narrative context. Even when the focus of research was on the most homogeneous block of laws, the casuistic collection, this method could still lead to suggestions about multiple redactional levels in any particular law. When the Covenant Code was viewed within the larger context of Pentateuchal law, the latest redactional levels of the code were viewed as either proto-Deuteronomistic or Deuteronomistic. Only two scholars challenged this view. Chamberlain attributed the noncasuistic laws to a Dtr author who was dependent upon Deuteronomy and who also incorporated the whole code into its narrative context as a covenant law. Houtman, likewise, seriously disputed the traditio-

historical and redactional scheme with his notion of a Dtr author for the whole, but it never seems to have affected his discussion of any particular law.

Alongside this literary-critical approach, I have noted the preoccupation of a number of legal historians with the comparativist approach, which uses similarities to the Near Eastern codes to explain the meaning and history of the biblical laws. Here the methods are split between the evolutionists, who prefer to use comparison typologically with little concern for the time and manner of contact between legal cultures, and the diffusionists, who advocate a more direct literary or scribal relationship but are still hard put to say when and how it happened. The belief in a vague transmission of the legal tradition from Mesopotamia to the Levant in the second millennium B.C.E. and hence from the “Canaanites” to the Israelites means that this comparativist method has nothing further to say about the problem of similarity between biblical codes. The simplest, most economic solution to the whole comparativist controversy is to admit that the casuistic laws of the Covenant Code were directly influenced on the literary level during the Babylonian exile. That possibility has simply never been debated.

The few form-critical studies that are not wedded to a particular traditio-historical program of searching for ancient origins (e.g., those of Gilmer, Gemser, Sonsino, and above all Chamberlain) made possible a quite different approach to comparison among the biblical and Near Eastern sources. This direction of study, however, was stillborn and was never carried through with later research. What was needed for fresh impetus in the study of the Covenant Code was the radical revision in the literary-critical study of the Pentateuch in which the non-P corpus of Exodus, including both narrative and law, cannot be assumed to be early or pre-D. There is no longer anything that can be used as an undisputed basis for the priority of the Covenant Code, and comparison with the other biblical codes must be conducted on an entirely different basis.

In the study that follows, I will attempt to set forth an entirely different model of composition from that proposed by all of the previous scholars reviewed above. I do not believe that there is any need for a long history of development or a complex redactional process to explain the nature of the Covenant Code. The whole of the law code, along with its setting in the Sinai pericope, is the work of a single author. I have elsewhere dated this author (J) to a period later than Deuteronomy and situated him in the Babylonian exile.¹⁴⁶ I will argue that he used the method of *imitation* of other literary codes at his disposal, which included other biblical laws, such as Deuteronomy and the Holiness Code. At the same time, the author had direct access to the Babylonian legal tradition, and this accounts for his use of both the form of casuistic law and his “borrowing” of specific laws from that tradition as part of his larger collection.

This literary theory has not been specially constructed to solve the problems that confront us in the Covenant Code. It is the same literary theory that is appropriate for the entire non-P corpus of the Tetrateuch, as I have tried to show in my previous studies.¹⁴⁷ The Yahwist, an author in the exilic period, elsewhere makes use of the Babylonian literary tradition, as seen in the Flood story, the Tower of Babel story, and his references to Ur of the Chaldeans and Harran, two places receiving special prominence in the time of Nabonidus, the last Neo-Babylonian king. I have also argued for his heavy dependence upon DtrH, including portions of Deuteronomy. Consequently, if the author of the Covenant Code is identified as the Yahwist, then his method of composition would be entirely consistent with the rest of his literary work. This identification

must await the confirmation of an examination of the relationship of the Covenant Code to its context, and as we have seen above, this has been a disputed topic for a long time.

Furthermore, the use of *imitation and plagiarism* as a method of composition is so common in the history of literature that as an explanation of similarity between law codes it hardly needs defense. The distinction between appropriate imitation and plagiarism received a great deal of attention in classical antiquity.¹⁴⁸ Imitation as a mode of composition is well attested in literary works of the ancient Near East and has been suggested by S. Lafont as the method used for constructing the Digest of Justinian, although she does not go on to apply this model to the Covenant Code. The most blatant example of imitation in biblical literature is the Book of Chronicles, but it is common throughout the Bible.¹⁴⁹

My literary hypothesis that there is a single author of the Covenant Code, the exilic Yahwist, will be tested in the rest of this book by offering it as a better explanation for the relationship of the Covenant Code to the other codes than those based on the assumption that the Covenant Code is the oldest code and the others are merely revisions of it.

The Framework of the Covenant Code

The Larger Narrative Context of the Covenant Code

As we have seen in the introductory survey of scholarship in chapter 1, the assumption of the Covenant Code's antiquity and priority to Deuteronomy raises many serious problems within the discussion of the code's connection to its larger narrative context. In this chapter I will focus on this particular problem to clarify the issues involved and to show how a comparison with the parallel presentation of theophany and law in Deuteronomy can point to a solution to these difficulties. For this purpose it will be helpful to begin with a brief history of the discussion to understand the current impasse in the debate.

The Search for the Covenant Code's Connection to Sinai

With the triumph of the New Documentary Hypothesis of Wellhausen and Kuenen, scholars found it difficult to make the source division between J and E in Exod 19-24 and to assign the various collections of laws to particular sources. Once it was decided that Exod 34 contains the "oldest" cultic Decalogue in verses 10-27 and therefore belongs to J, then the remaining two law codes in Exod 20-23, the Decalogue and the Covenant Code, were assigned to E.¹ The "ethical Decalogue" of Exod 20:1-17, understood as a preexisting series of ten laws, was introduced in 20:1 by E's connective: "God spoke all these words, saying. . . ." The original E form of the laws was thought to be much simpler and was expanded by Deuteronomistic and Priestly redactors. The Covenant Code was also considered to be an independent corpus, with its cultic laws in 23:12-19, which were parallel to J's laws in 34:11-27. Using the connective narrative in 20:18-22 and the covenant ceremony in 24:3-8, E incorporated this set of laws into the Sinai pericope as well.

A disturbing problem, however, remains. If Exod 19:20-25 is assigned to another source, usually J, then there is no appropriate introduction to the Decalogue. To whom is it addressed? Furthermore, 20:18-21 seems to go closely with 19:19 as its sequel. Consequently, many scholars transpose 20:18-21 to a position before the Decalogue.²

Yet this solution breaks the smooth continuity between 20:21 and verse 22, and verse 22 in turn is very awkward following directly after 20:17 as an introduction to a second speech to Moses that repeats the First Commandment in verse 23. The obvious solution to this problem is to see the whole Decalogue, with its use of P in the Sabbath law, and the preceding 19:20–25 as a late P insertion into the text. Such a move, eliminating the Decalogue from an early Pentateuchal source, was strongly resisted.

Martin Noth has a different solution to these problems. In his commentary on Exodus he eliminates the Decalogue as secondary. He acknowledges that the unit in 20:18–21 (E) is linked directly with the description of the theophany in 19:19 (E) and concludes: “The Decalogue is thus so loosely inserted into the narrative that we are led to the conclusion that from a literary aspect it is a secondary passage in the account of the theophany on Sinai.”³ This would appear to leave 20:18–21 as an introduction to the Covenant Code, but because there is a shift in the divine name from the use of “God” (Elohim) in this unit to “Yahweh” in 20:22, Noth takes this as a clue that the following Covenant Code does not belong to E. As a result, for Noth there is no law or covenant in E’s version of the Sinai pericope, only a theophany.

On form-critical grounds Noth is committed to the Covenant Code’s great antiquity and independence, but because it includes some material such as the hortatory passage of 23:20–33 in Deuteronomistic style, he “cannot imagine the incorporation of the Book of the Covenant into the Pentateuchal narrative in the period before Deuteronomy.”⁴ Included in this special source with the Covenant Code is Exod 24:3–8 with its direct references to “the Book of the Covenant,” which Moses has just received. This means that for Noth the sequel to E’s 20:18–21 is in 24:1–2* and 9–11, a text usually assigned to J. He acknowledges that the transition from 20:21 to 24:1 is very awkward and suggests that previously something had fallen out of 24:1.⁵ This hardly represents a very convincing solution.

There are three major problems with this scheme. First, Noth pays no attention to the parallel account in Deuteronomy (Deut 5:22–27), in which the people’s fearful reaction to the theophany and their request to Moses to act as intermediary are introductory to the reception of law. How are these parallel accounts related to each other? If a Deuteronomist added the Covenant Code to make the Sinai pericope conform to Deut 5, then why do both the substance of the law and its transfer to the people at Sinai instead of Moab contradict Deuteronomy?

Second, Noth places the entire emphasis of E on the theophany experience, but in Exod 20:18–21 there is also the reference to God’s speaking and Moses’ role as intermediary in receiving the words of God, all of which relates to the reception of law. No literary analysis of the pericope can eliminate this theme from the Sinai unit. What follows in Exod 24:1–2 and 9–11 does not fulfill the requirements of the narrative unit in 20:18–21, which demands this mediation of God’s words just as we have it also in Deut 5.

Third, even though Noth admits that the narrative transition between 20:21 and 22 is smooth, he places great weight upon the shift from the use of “God” in verse 21 to “Yahweh” in verse 22. Yet in the Covenant Code, both designations of deity occur; and in 24:1–2 “Yahweh” is used but in verses 9–11 “God” occurs. Noth himself acknowledges the difficulty in making source divisions between J and E in Exod 19–20, and scholars have increasingly rejected the difference in the divine name as useful in these chapters.⁶ All of this speaks strongly against Noth’s proposal.

Lothar Peritt's major impact on the discussion of the Sinai pericope was to argue that the theme of covenant, and with it the giving of the law, was a later Deuteronomic (or proto-Deuteronomic) development, so that none of the section in Exod 32–34 belongs to an older J source, thus undermining the original arguments for the documentary source division.⁷ Furthermore, Peritt accepts with Noth and others the idea that the Covenant Code was an originally separate composition, but against Noth he includes 20:18–21 as the bridge passage by which it was fitted into its present position. This suggests a firm connection with what follows in verses 22–23, but it breaks what appears to be an equally firm connection with 19:19. For Peritt, the connection between theophany and law is secondary, and the oldest form of the Sinai tradition is the theophany of Yahweh to his people. This viewpoint has had a dominant influence on the subsequent discussion of the Sinai pericope.

The whole matter is taken up again in some detail by B. S. Childs, in his Exodus commentary.⁸ He accepts the consensus view that the Covenant Code is an older collection independent of the other Pentateuchal sources that was later placed within the Sinai pericope. This means that the present setting for the law in 20:18–21 cannot be the original introduction to the law, but against Noth and Peritt, Childs retains the older view that it must have preceded the Decalogue, with the sequence 19:19, 20:18–21, 20:1–17.⁹ The redactional transition in 20:22 that now follows directly on verse 21 was modeled on Deut 4:36, and therefore is Deuteronomistic, and “served to join the Covenant Code to the Sinai theophany.”¹⁰ This would make the insertion of the Covenant Code into its present context *later* than the parallel versions in Deut 4–5. This literary reconstruction rests upon the documentary division of the sources J and E, but Childs expresses some doubt about the criteria by which such divisions were made in the past, which would seriously undermine this scheme.

Consequently, Childs makes his primary argument on the level of the “oral” tradition history about Moses’ mediatorial role, which can be reconstructed largely without regard to sources.¹¹ According to Childs, the earlier form of the tradition, based upon the literary reconstruction of placing 20:18–21 before the Decalogue, had Moses acting as intermediary for all of the laws and specifically the Decalogue, whereas the later version with 20:18–21 preceding the Covenant Code has Moses serve as intermediary only after the Decalogue is given and before the rest of the laws are given in private. When we turn to Deuteronomy, it is clear that the dominant view of Deut 4 and 5 is the second version of mediation, in which the Decalogue is given to the people directly and the rest of the laws to Moses in private. In Childs’s view, Deuteronomy is dependent upon this later version in Exodus. Yet in Deut 5:4–5, there appears to be a qualification of the statement in verse 4, “Yahweh spoke to you [the people] face-to-face at the mountain out of the midst of the fire,” by the addition in verse 5, “while I stood between Yahweh and you at that time, to declare to you the word of Yahweh; for you were afraid because of the fire, and you did not go up on the mountain.” Childs sees in this qualification the retention of an older tradition and thus a confirmation of the earlier, reconstructed version of Moses’ mediatorial role in which all law, including the Decalogue, was mediated through Moses.

There are serious difficulties, however, with this scheme of things, apart from the fact that it still depends upon a dubious literary reconstruction of the E source in Exod 19–20. First, it is contradictory to propose that Deut 5 depends upon the later order of

the text in Exod 20 when Exod 20:22, which connects the Covenant Code to its context, is said to be dependent upon Deut 4:36 and therefore is post-Dtr. Second, the text in Deut 5:5 has all the marks of being a later addition to the rest of Deut 5, so that it can hardly reflect an earlier version of Moses' mediatorial role.¹² The question, therefore, remains as to why it was added to Deuteronomy in contradiction to the rest of the chapter.

Looking at the comparison of the Sinai/Horeb pericopes from the direction of Deuteronomy, A. D. H. Mayes regards the Decalogue in Exodus as a secondary insertion which interrupts the direct continuation of Exod 19:19 by 20:18–21, and he disputes that the Decalogue ever followed 20:18–21.¹³ This seriously undermines Childs's whole scheme. Yet Mayes still believes that the Decalogue was added to the account sometime before Dtr added it to Deuteronomy, so that Dtr used Exodus as a model. He admits that in its present form the Decalogue in Exodus has a number of post-Dtr modifications but still maintains that an earlier version was present in Exodus. He also does not address the fact that Exod 20:22 seems to be dependent upon Deut 4:36, which would be very difficult for his view.

An attempt to support and improve on Childs's reconstruction was made by E. W. Nicholson.¹⁴ Like Mayes, he does not regard the Decalogue as original but as a secondary intrusion between the theophany that reaches a climax in Exod 19:19 and the people's response to it in 20:18–21. As Nicholson points out, the whole presentation in chapter 19 prepares for Moses' role as mediator, and nothing in the chapter suggests the direct delivery of the law to the people. By contrast, Deut 4 and 5 place great emphasis on God's speaking directly to the people during the theophany of fire and cloud. This is fundamental to Deuteronomy's theological understanding of the Decalogue and especially of the first two commandments. Childs wants to read this Deuteronomistic understanding of the Decalogue back into the Exodus account, but the only place where it comes to the fore is in Exod 20:22–23, which in the view of Childs and Nicholson is redactional. As Nicholson points out, it is difficult to explain the reference in this text to God speaking from heaven and the relationship of this speaking from heaven to the prohibition against making other gods without accounting for this by its dependence upon Deut 4:36 and the rest of Deut 4. On this basis, Nicholson sees this reference to speaking from heaven in Exod 20:22 as directly related to the giving of the Decalogue in 20:1–17, and he therefore regards a Dtr redactor as responsible for this verse and also the one who introduced the Decalogue into its present context, using 20:22–23 as an explanation of its significance.

This solution, however, creates some problems of its own. For example, it is not clear how the Covenant Code figures into this construction. Nicholson, in contrast to Childs and many others, does not regard the redactor of 20:22–23 as the one who introduced the Covenant Code into the Sinai pericope. He sees the Covenant Code as belonging to the earlier stage of the pericope's composition and the Decalogue as secondary. But without 20:22–23 (= Dtr?), how is one to make the connection between 20:21 and 20:24? And why would a Dtr redactor introduce a version of the Decalogue that was quite different at certain points from the one in Deut 5? Does he place the Decalogue after 19:19, which would suggest, not that the words were addressed to the people, but that they were spoken to Moses? We are asked to believe that between 20:21 and 22 the transition by the redactor is seamless, whereas his placement of the Decalogue is very awkward.

A direct challenge to Nicholson's position was presented by A. Phillips. In particular, Phillips disputes the fact that the Decalogue is a late addition to the Sinai pericope.¹⁵ That is not surprising, given his prior commitment to an early dating of the Decalogue.¹⁶ The point of departure for Phillips's critique of Nicholson is that the latter has not taken seriously the necessary connection between Exod 20:22–23 and the altar law of verses 24–26 as together constituting the prologue to the Covenant Code. Since, in his view, the altar law could not be tolerated by a Dtr redactor, the prohibition on images and the command to build an earthen altar belong to a more primitive reform program.

This means that Phillips cannot accept the view that Exod 20:22 is dependent upon Deut 4:36. In fact, the dependence for him is in the other direction. He argues that in Exod 19–20 there are two viewpoints on the theophany that are set side by side and in tension with each other. In the one, God appears in a theophany of fire on the mountain (19:16–19; 20:18); in the other, God speaks from heaven (20:22). In his view, it is Deut 4:36 that has tried to reconcile these conflicting perspectives. This argument is, in my view, very weak. As E. Blum points out, there is nothing in Deut 4 that suggests any attempt at reconciling the problem in Exodus.¹⁷ The text is entirely explicable as a development toward greater transcendence within Deuteronomistic thought. If Deut 4 was concerned about reconciling Exod 19–20 with Deut 5, one would expect more indications of this. Instead, it is Exod 20:22–23 that needs explaining. Its narrative connections are very close to the preceding presentation of the theophany and its consequences in 20:18–21, where the people “see” the thunder and lightning, the sound of the shofar, and the mountain smoking, so that it is the abrupt shift in Exod 20:22 to the “speaking from heaven” that needs explaining. Furthermore, the connection between the speaking from heaven and the prohibition against images is left entirely unexplained. Only in Deut 4:9–12 and 15–19 is this connection made explicit, so that Deut 4 must be presupposed in Exod 20:22–23.

Phillips likewise notes that Exod 20:22 has direct linguistic connections with Exod 19:3–4, in which the opening statement by the deity is formulated in the same way and can hardly be coincidence:

Thus shall you say to the house of Jacob and declare to the sons of Israel: “You yourselves have seen what I did to the Egyptians. . . .” (19:3–4)

Thus shall you say to the sons of Israel: “You yourselves have seen that I have spoken with you from heaven.” (20:22)

This also corresponds to the repeated emphasis in Deut 4 on the things that “your eyes have seen” (vv. 3, 9, 36; cf. 3:21; 7:19; 10:21; 11:7; 29:2) as well as on what the people have heard (vv. 12, 33, 36; 5:23–26). While the overwhelming opinion seems to be that Exod 19:3–8 is Deuteronomistic, Phillips rejects this view in favor of the suggestion by D. Patrick that Exod 19:3b–8, 20:22–23, and 24:3–8 constitute a pre-Deuteronomistic framework for the Covenant Code.¹⁸ Since Phillips accepts that the Covenant Code is prior to Deuteronomy, there is no reason for Dtr not to have made use of it for its terminology and theology. The priority of the Covenant Code, however, is precisely what is under dispute in this study, so that this is no argument at all.

One way by which Phillips and others seek to account for Deuteronomistic language in Exodus is to speak of “proto-Deuteronomistic redactors.” The notion that the authors of Deuteronomy were dependent upon the Exodus account of the Sinai law-giving as

presented by these proto-Deuteronomists runs into a serious contradiction. It is clear in Deuteronomy that only one set of laws given directly to the people was made the basis of the covenant at that time, and this is in serious disagreement with the presentation of the proto-Deuteronomists who edited the Covenant Code. So Phillips is forced to suggest that the Deuteronomists were intent on suppressing all of the laws that were mediated through Moses and contained in the Covenant Code and the “cultic Decalogue” of Exod 34:11–27. But Moses’ role as the mediator of law is specifically mentioned in Deut 5 in the context of Horeb, which hardly looks like an act of suppression. Nor is it clear how one is to account for both the strong continuity and the discontinuity between the reforming proto-Deuteronomists and the authors of Deuteronomy.

In recent years there has been a marked tendency, in complete contrast to the proposal of Phillips, to view the incorporation of both the Decalogue and the Covenant Code as the work of late “Pentateuchal redactors.”¹⁹ Since I have given an analysis and critique of these complex reconstructions in another place, it seems pointless and tedious to repeat the discussion here.²⁰ In general, they follow the broad outline of Peritt in viewing the addition of law to the Sinai pericope as a late phenomenon. This leads to elaborate, multistaged schemes of redactional reconstruction which are widely at variance with each other. Nevertheless, they share the conviction that the Covenant Code is early and independent; its redactional connection with the narrative context is late, and there is only a rather limited amount of editing by the final redactor within the code itself. A significant exception to this trend is the work of E. Blum.²¹ Following his rejection of the Documentary Hypothesis, with its early sources of J and E and its multiple Dtr redactions, Blum has only one late, postexilic, *D-Komposition* (KD), which includes all of the non-P material in Exod 19–24 and 32–34, with only a limited amount of supplemental material added by his *P-Komposition* (KP = P). Within the KD corpus of the Sinai pericope, Blum acknowledges that there was a body of older traditional material, including much of the Covenant Code, but it was not a unified block of tradition in Noth’s sense and was only shaped into such a unity by KD. Thus, in Blum’s view, Exod 19:3–8, 20:22–23, and 24:3–8 are all clear markers of KD, but they are not redactional additions. Instead, they are part of a carefully structured composition, and he views it as extremely hazardous to try to extract the older materials from this composition.

Regarding the two law collections in Exod 19–24, Blum views the Covenant Code as well integrated into its context by KD, whereas he admits that the Decalogue is a rather poor fit. Yet he still views it as an older tradition that was loosely included by KD, and only the unit in 19:20–25 is viewed as a later addition by KP. He also acknowledges that 24:1–2 and 9–11 have an awkward fit but views these verses as an alternative tradition within KD. It seems to me that this aspect of Blum’s work is somewhat contradictory and still depends upon older views about what is ancient tradition. It would be more consistent to regard all of the awkward units as P additions and retain the rest of the non-P corpus as a unit. This approach will be proposed below. Regarding a comparison between the KD of Exodus and Deuteronomy, Blum acknowledges a shared tradition with many similarities between the two bodies of texts. Yet he fails to explain why there are some important differences, particularly the fact that the Decalogue is so closely integrated into the presentations of Horeb in Deut 4 and 5 but quite unnecessary to the presentation of KD.

Similar in many respects to Blum's position is that of C. Houtman, who regards the author of the code to be the same as the final author of the Sinai pericope and indeed of the whole Deuteronomistic corpus of Genesis to 2 Kings.²² Houtman returns to the basic issues I have discussed above and argues against any displacement of 20:18-21 before the Decalogue and in favor of its close fit within its present context. He is inclined to the view that the Covenant Code already had a place within the Sinai tradition before the inclusion of the Decalogue, which he considers to be a Deuteronomistic harmonization of the Sinai tradition. The Decalogue is used, in his view, as a way of formulating the essence of the Covenant Code. In its present form, Exod 19-20 is made to conform with the general scheme of Deuteronomy, in which the Decalogue as direct speech to the people precedes the mediation of the law through Moses. Throughout the whole unit, Moses is given a special position as mouthpiece for Yahweh. In this way, Houtman sees Exod 20:18-21 as binding the Decalogue to the Covenant Code, two collections of laws that must both be characterized as the word of God. The text emphasizes the uniqueness of the Decalogue but also extends the divine authority to the Covenant Code and explains why God has not spoken everything to Israel directly.

This solution seems to simplify the problems that I have discussed above and therefore has much to commend it. However, it still leaves open some serious problems. After acknowledging that there are two layers in the text which contain the two sets of laws, Houtman shifts to the "final form" and does not explain how the Covenant Code related to that earlier context and how one understands the whole unit without the Decalogue as part of it. There is a Deuteronomistic author who composes the Covenant Code and its narrative context in Exodus and a Deuteronomistic harmonization of Exodus to agree with Deuteronomy by the inclusion of the Decalogue. It appears that Houtman is willing to acknowledge some development in the tradition, but he is content merely to explain the text in its final form. In the end, this really ignores the diachronic problems within Exod 19-20 and between Exodus and Deuteronomy.

Literary Analysis of the Sinai Pericope

Let us now turn to the task of a diachronic analysis of the compositional development of Exod 20-24. In my view, there are two levels that clearly stand out in this material. As has often been noted, there is an interruption between 19:19 and 20:18 which suggests that the Decalogue, along with a section in 19:20-25, was a later insertion into the narrative. There is also a serious problem with contradictory instructions in 19:10-13: verses 12-13a clearly interrupt the preparation of the people and their subsequent compliance. This insertion of verses 12-13a relates directly to the material in verses 20-25, and all belong to the same source. This source can be identified in the Decalogue by the law of the Sabbath in 20:8-11, which is Priestly, and in the special concern for the sanctity of the mountain and the role of the priests and Aaron on the mountain in 19:12-13a, 20-25, which is also Priestly. This is confirmed by P's introductory formula in 19:1, which is redundant alongside verse 2. In Exod 24, verses 1-2, 9-11, and 15b-18a all interrupt the narrative continuity and may be attributed to this same source, P.²³

Once the P supplements have been removed, we are left with a text that presents a harmonious narrative sequence throughout. I have attributed this narrative to a single author, J, who is exilic in date and post-D.²⁴ Consequently, there is no need to isolate

Exod 19:3b–8 as a Deuteronomistic addition. It fits without tension in its context. Yahweh announces to Moses that he is going to enter into a covenant with his people. Moses is to play a special role in this process because it is stressed that the words and commands will be mediated through Moses (19:6–9). The point of the theophany that is to follow is that the people will hear God speaking with Moses and this will confirm Moses' role as mediator forever. Nowhere in this unit is it suggested that the deity will address the people directly. The speech of God that the people hear is the sound of the shofar and not specific words. On the mountain at the height of the theophany in 19:19 and 20:18, Moses is speaking with the deity and the deity answers in the sound of the shofar and this is what the people "see." Although they were invited to ascend the mountain, they witness the event only from a great distance and tell Moses that they do not want to converse with the deity lest they die (20:19). Nowhere is it suggested in this unit (contra Childs, Nicholson, Houtman, and others) that they actually heard the "ten words" or that God spoke directly to them. This then leads directly into Moses' second approach to the theophanic cloud to receive the laws of the Covenant Code. After God declares all the laws to Moses, the latter repeats them to the people, who promise to keep them. They are then written in a "Book of the Covenant" and made the basis of a covenant ratified by a solemn ceremony. This completes the sequence of events that began with the divine declaration in 19:3–6.

As I have suggested above, within the narrative framework of the Covenant Code in Exod 19–24 there are three passages (19:3–8, 20:22–23, and 24:3–8) that have been widely identified as Deuteronomistic. The arguments based upon language and terminology have been cited so often that there is now a fairly broad consensus about their Deuteronomistic character. However, there is no need to regard them as redactional additions unless one is already committed to the presence of early sources within the Sinai pericope. As Blum has also argued, all of these texts fit seamlessly within the narrative of the Sinai account. The exilic author J has simply made use of the Deuteronomistic accounts of the Horeb events in Deut 4–5.

Nevertheless, in a number of important respects, J has departed from his sources in Deuteronomy and therefore cannot be regarded as merely a Deuteronomistic redactor:

1. In J there is no Decalogue spoken directly to the people, and that is a major departure from Deut 4–5. The various laws that are contained in the Decalogue (the "ten words") are dispersed within the Covenant Code, beginning with a shortened version of the First and Second Commandments in 20:23. Thus, Moses receives all the laws, both the "words" (דבריים) and the "commandments" (משפטים), at the same time at Sinai, and these are all in "the Book of the Covenant," to which the people commit themselves.

2. The origin and use of the mediatorial role of Moses are treated quite differently. In Exod 19–20, the function of Moses as intermediary is proposed and planned by God at the outset so that the whole point of the theophany is for the people to witness Moses speaking with God and therefore accept his authority and word as a result. In Deuteronomy, Moses' role as intermediary only comes about as a result of the people's terror at hearing the words of God directly, so that at their suggestion God accepts Moses' role to be his mouthpiece. As scholars have long recognized, the Decalogue episode in Deut 5 is a Dtr addition. The reason for the explanation of Moses' intermediary role is to account for the existence of a prior law code alongside the Decalogue.

3. Deuteronomy does not make clear when the laws of the Deuteronomic Code were given to Moses, only that they were not transmitted to the people until the end of their journey in Moab a generation later. Thus, the Decalogue represents an earlier Horeb covenant (Deut 28:69 [29:1]). In Exod 19–24, Moses receives all of the laws in the Covenant Code during the theophany, and they become the basis of a single covenant at that time.

4. In Exod 24:7, the code of laws that Moses has received and written down is specifically called “the Book of the Covenant.” This term or its equivalent throughout the Dtr corpus always refers to Deuteronomy, so that its use here is a major departure from this tradition.

5. In Deuteronomy there is no covenant ratification ceremony either at Horeb or in the land of Moab, only a reading or recital to an assembly (Deut 31:9–13). Only in some post-Dtr additions in Deut 27 and in Josh 8:30–35 are there covenant ceremonies. To this we will return. This contrasts sharply with the ritual in Exod 24:3–8, in which the people undergo a special consecration, which relates back to the preparation declared by God and carried out by the people in Exod 19:10–11, 13b–15. The two sections are tied together so closely in language and ideological perspective that they can hardly be viewed as the work of different authors.²⁵

We still need to account for the contradictory addition in Deut 5:5 which suggests that prior to the giving of the Decalogue Moses acted as intermediary: “While I stood between Yahweh and you at that time, to declare to you the word of Yahweh; for you were afraid of the fire and you did not ascend the mountain.” This post-Dtr addition corresponds with the J version in Exodus prior to the addition of the Decalogue by P just as I have reconstructed it and was an effort to accommodate the D version of events to J’s view of the mediatorial role of Moses. It even hints at the invitation to the people to ascend the mountain in Exod 19:13, which is suggested nowhere else in Deuteronomy. Contrary to Childs, it does not represent an early tradition but is a literary modification and harmonization of the two versions. It can be explained only if Exod 19–20 is later than D, and because there are some other additions to Deuteronomy by J, it may very well be a gloss by him on the text.²⁶

In the discussion above, I have argued against the view that the Covenant Code was added to a self-contained account of the Sinai theophany by a late redactor. My view is that the whole narrative as composed by J was for the sole purpose of presenting the Covenant Code as the basis for the people’s relationship with the deity. The question remains as to whether or not the code itself was an earlier independent work that was merely taken up by J and used in his work. That will require a detailed examination of the laws themselves, which will be taken up in the following chapters. Yet one feature of the law code points strongly to this particular narrative context: the repeated use of the divine voice in the laws (20:23–26; 21:14; 22:22–23 [23–24], 26 [27], 28–30 [29–31]; 23:13–18). Since the divine voice is established at the outset, one could add to these instances all the references in the second person, since these indicate those being addressed by the deity.

A comparison with Deuteronomy on this point is instructive. Only in the Decalogue in Deuteronomy is the divine voice presented in the first person with the people addressed in the second person. In the rest of the parenetic admonition and in the law code, Moses addresses the people in the second person with the deity referred to in the

third person. This form of personal address is part of the rhetorical strategy by which the Deuteronomic Code is connected with the wilderness. The code remains the Law of Moses throughout. The Covenant Code is very different from Deuteronomy, even when the laws are parallel and use the same personal address. They are given the divine voice directly. There are a few instances in which the deity is referred to in the third person and we will have to account for these. Nevertheless, this personal speech of the deity links the Covenant Code with this particular narrative context. There is no known legal genre or *Sitz im Leben* to which it may be associated.²⁷ On the basis of this evidence, one would have to accept the view that the laws themselves are also a part of the larger composition unless strong arguments based on an examination of the laws themselves should point to the contrary.

Moses, the Lawgiver

If we accept the proposition, as I have argued it above, that the version of law-giving at Sinai by J in Exod 19–24 is later than that of Deuteronomy, then this revised version is a significant transformation of this singular event. In Deuteronomy, the law is a Decalogue of ten statements or demands, spoken by the deity during a terrifying theophany to all the people and then inscribed in stone to establish their permanence. Quite distinct from this are the Deuteronomic laws that are attributed to Moses and made the basis of a covenant between the deity and the people, with Moses as mediator, in form and language that are strongly reminiscent of Assyrian treaties and loyalty oaths. The emphasis throughout is on Israel as a specially chosen people who have been given a Promised Land on condition of absolute loyalty to Yahweh, their God; and all the laws and provisions are related to this basic principle. In Exodus, this covenantal aspect is limited to brief summary statements at the beginning and end of the corpus of laws (Exod 20:22–26; 23:13–33), whereas the rest of the laws are transformed into a “code” that is given to the people to order their general social behavior in a way no different from other Near Eastern societies. The large block of casuistic laws in the first half have made the Covenant Code’s association with the Hammurabi Code obvious since the latter was found and published almost a century ago. As in Deuteronomy, the words are still the words of Yahweh, but now they are mediated through Moses.

The similarity between the Covenant Code and the Hammurabi Code, however, goes beyond the similar laws in both codes to also include their narrative setting. In the case of the Hammurabi Code, this setting includes the prologue and epilogue, which identify King Hammurabi as the author of the laws, and the carved relief at the top of the stele, which portrays the king’s reception of the law from the god. There Hammurabi stands before Shamash, the god of justice, who is seated on a throne on a mountaintop with flames of fire coming from his shoulders and who extends the insignia of office to the king. A viewer could reasonably conclude that the deity is speaking with the king about the laws that are announced in the body of the code as well as legitimizing his authority to set forth such laws. Similarly, in the narrative setting of the Covenant Code, the people witness the deity speaking with Moses on the mountain in the mist of the theophany, first to establish his credentials as the people’s leader and then to give him the laws. It is these laws, and not the Decalogue, that are inscribed in stone (Exod 24:12). Furthermore, the model for Moses’ mediatorial role in the reception and transmission

of the laws is not just prophetic, as in Deuteronomy, but also royal. In Neo-Babylonian royal inscriptions, especially those of Nabonidus, the king is presented as one who intercedes on behalf of his people. In one inscription, Nabonidus prays to the god Sin: "Establish the fear of your great godhead in the heart of your people, so that they do not commit any sin against your great godhead."²⁸ This is very similar to the words of Moses to the people when he accepts the role of mediator (Exod 20:20): "Do not fear; for it is in order to test you that God has come [in the theophany], and that his terror may be presented before you, that you may not sin." In the Hammurabi stele relief, one also sees the king in the stance of a suppliant before the deity.

These parallels, which all depart from the version of the theophany in Deuteronomy, cannot be fortuitous. They are all interwoven with the elements of the Deuteronomic tradition so that they cannot be attributed to an earlier phase of the law, and yet they cannot be separated from the casuistic laws that follow. As in the case of the Hammurabi Code, the laws and their prologue and epilogue and the scene on the stele all go together as a complete composition. If one accepts the view that some of the casuistic laws are literarily dependent upon the Hammurabi Code, as will be argued below, then this literary borrowing took place in Babylonia during the exile. Such a conclusion seems inescapable. This is further supported by the fact that copies of portions of the Hammurabi Code have been found on clay tablets dating from various subsequent periods, including the Neo-Assyrian period (the library of Assurbanipal) and the Neo-Babylonian period. Although the stele mentioned above, along with fragments of one or two others, was found in the ruins of Susa as a trophy of war from an Elamite raid on Sippar, there is good reason to believe that a number of such stelae were carved and set up in various parts of the realm, so that one might well have survived into the late period.²⁹ The foundation stones of Hammurabi's temple to Shamash (the god on the Hammurabi stele), together with Hammurabi's building inscription, were discovered by the antiquarian researches of Nabonidus in the Neo-Babylonian period. Veneration of Babylonia's ancient past was at its height at this time and almost certainly included the great law code.

It is, therefore, not hard to find a motive for such a portrayal of Moses as the great law-giver in a manner that is comparable to that of Hammurabi by a Jew living in Babylonia. A similar strategy was used by Philo in Roman Egypt in his portrayal of Moses as the great philosopher and by Josephus in Rome in his presentation of Moses as leader and lawgiver in his history. For J, Moses is the Jewish Hammurabi, and the Jews have laws that are comparable to those of the Babylonians and that are also of great antiquity. Such a comparison would have appealed to the Jewish community within Babylonia to strengthen their own self-worth and identity. Cultural rivalry and cultural assimilation are always endemic in such situations of close proximity, and Babylonia was no exception. The Covenant Code is a good example of both.

The Opening Laws: Exodus 20:22–26

In the present text of Exodus, the Covenant Code begins with a small unit of two laws in 20:22–26 that are set off from the rest by an introductory formula in 21:1, which begins the larger block of *mishpatim*. As we have seen in the earlier discussion of these texts, most scholars view part of the opening unit, either verse 22 or verses 22–23, as

redactional and the rest as having been moved from among the later cultic laws to its present location. For reasons already given above, we will begin our study of the laws with none of these assumptions. What will be of primary concern will be the relationship of these laws to their counterparts in Deuteronomy. The subjects covered by these laws—the exclusive worship of Yahweh, the rejection of idolatry, and the altar as the focus of worship—are all dealt with in Deuteronomy. In the past, comparisons have been made between parts of this unit in Exodus and Deuteronomy, but only in piecemeal fashion and not as a whole. If the common assumption that Deuteronomy is a radical revision of the Covenant Code is correct, then we ought to be able to see clear indications of this in the code, as well as in the rest of Deuteronomy. If, however, the Covenant Code is later than both Deuteronomy and the DtrH, then it may well reflect concerns that are broader than those dealt with in Deuteronomy alone. It is the assumption of the Covenant Code’s antiquity that has prevented any such extensive comparison.

Prohibition against the Manufacture of Divine Images: Exodus 20:22–23

In the first section of this chapter, I discussed the relationship of the first law regarding the manufacture of other gods with its narrative setting through the connective in 20:22. I accept the view that is widely shared and most fully articulated by Nicholson that this verse is dependent upon Deut 4:36 with its reference to speaking from heaven, as well as its close association with Exod 19:4 with its shared terminology and authorship. I also argued above that one cannot understand the connection between the speaking from heaven and the manufacture of gods apart from the theological discussion in Deut 4. There is a recent tendency to identify the law in Exod 20:23 as part of the Dtr redaction of the Covenant Code³⁰ or the work of a final Pentateuchal redactor that included both Exod 19:3b–8 and Deut 4.³¹ Nevertheless, the recognition of a literary relationship between Exod 20:23 and Deut 4 does not entirely explain the form and meaning of the text in 20:23 or its place within the legal tradition of the Pentateuch, and it is to these questions that we will now turn.

The text has given scholars a lot of trouble and produced a number of different renderings.³² It consists of three components without clear grammatical indicators between them. It states:

You shall not make (to be) with me
gods of silver and gods of gold
you shall not make for yourselves.

The unit obviously requires some punctuation in the middle line, but where to put it is a problem. It is clear that the first and third elements balance each other, whereas the second one could go with either one of these components. One simple solution that many translations follow is to split the middle element and take the “gods of silver” with the first and the “gods of gold” with the second.³³ This is not very satisfactory for two reasons. First, the phrase “gods of silver and gods of gold” looks very much like a fixed pair, and that is clearly how it was construed by MT, which put the primary break at the end of the first phrase. Second, the prohibitions in both the first and the third elements surely apply to both types of gods and do not mean that one type of god is inadmissible in the Temple and another type prohibited for personal use.

The usual alternative is to treat the first element by itself in the sense “You shall not make (anything) to be in my presence,” and the rest as belonging to the second part of the law.³⁴ However, the verb עָשָׂה , “to make,” would certainly require an explicit object. Crüsemann attempts to overcome this difficulty by reading the prepositional phrase עִמִּי (*'itti*), “with me,” as the sign of the accusative with pronominal suffix אִנִּי (*'ōti*), “me,” as object of the verb; thus, “You shall not make me.”³⁵ This seems very unlikely to me. It makes a very awkward parallel with the rest of the law, and there is no other reference to making Yahweh in the Old Testament.

I believe that the solution to the understanding of the text rests on seeing the first and last unit as complementary: “You shall not make to be in my presence [the sanctuary], nor shall you make for your private use, gods of silver and gods of gold.” The middle element thus serves as a shared object for both parts of the prohibition. If this understanding is correct, then it appears to be a cleverly constructed general principle that presupposes a broader understanding of what is entailed in both aspects of the prohibition. This becomes clear from a study of its parallels.

If we turn first to the other law codes, we find that the making of images is not actually dealt with in the Deuteronomic Code. The issue of worshiping other gods and of exclusive loyalty to Yahweh is treated in Deut 13, following the law legislating the one central altar, but it makes no mention of idolatry or the manufacture of images of deities. If Deuteronomy is a revision or expansion of the Covenant Code, this silence on making images is quite remarkable in view of the importance attached to this issue in later stages of the Deuteronomistic tradition. It is only in the First and Second Commandments of the Decalogue that the matter of making gods arises. The first prohibition in Exod 20:23a is parallel in content and meaning to the prohibition of the First Commandment (Deut 5:7; cf. Exod 20:3), but it is quite different in form. The First Commandment says nothing about “making” the other gods that are to be excluded. This is only brought out in the Second Commandment, which states: “You must not make a carved image for yourself” in any physical shape that can be treated as a god. It does not suggest the material but implies something of wood or stone. One could construe the second prohibition in Exod 20:23b as a shortened version of the Second Commandment except that the former uses second-person plural instead of second-person singular, and the method of construction is different. Nevertheless, the law seems to be a shortened rendering of the First and Second Commandments.

The theme of the First and Second Commandments is taken a step further in Deut 4:12 and 15–19, in which it is argued that because the people saw no form but only heard the voice of Yahweh, they are not to make a carved image for themselves in the likeness of any living creature. Two important differences from the Decalogue are evident in this treatment. First, second-person plural is used instead of second-person singular in addressing Israel. This is similar to the grammatical forms of Exod 20:23. Second, the discussion of the prohibition of images seems to include within it the exclusive worship of Yahweh as if the two commandments were just two aspects of the same issue. This also is similar to the way in which Exod 20:23 relates both the exclusive worship of Yahweh and the rejection of idolatry to the prohibition about making gods of silver and gods of gold.

What is not accounted for from a comparison with Deuteronomy, however, is the manner and material mentioned in Exod 20:23, namely, the “gods of silver and gods of

gold.” In fact, it is rather uncommon to see such references, perhaps because gods made of precious metals would be rare, whereas carved images of wood and stone, even if covered by precious metals, would be more common. The Holiness Code, however, does have a version of the Second Commandment that is most instructive. Lev 19:4a states: “You are not to turn to idols, and *gods of cast metal you are not to make for yourselves.*” The second part of this law has the same form (second-person plural) and word order that we find in Exod 20:23b except that in the latter case the gods of cast metal are understood specifically as gods of silver and gold.

There is one additional reason for suggesting this specific choice of the material and form of manufacture. This prohibition anticipates the story of the golden calf, which is specifically described as a molten image of gold (Exod 32:2–4). This is clearly a violation of both aspects of the command in 20:23. Given the very strong preference for the other forms of this prohibition, the particular wording of 20:23 must have been dictated by the larger narrative context.

It should also be pointed out that this concern for the making of images is not found in preexilic texts outside the Pentateuch. It comes to the fore in the exilic and postexilic periods. In an effort to find an earlier context for the law in Exod 20:23, Crüsemann and Osumi point to the very similar reference to “the idols (אֱלֹהִים) of silver and idols of gold which they have made and worship” in Isa 2:20 (cf. also vv. 8, 18).³⁶ These texts, however, have been judged by most critical scholars of Isaiah as late postexilic additions.³⁷ The same can be said for such texts as 2 Kings 17:29, 19:18, and Jer 16:20; and for Jeroboam’s golden calves, which are Dtr or later.

To sum up, one can set down the following conclusions:

1. The prohibition against the making of images cannot be proto-Dtr or preexilic but must be exilic at the earliest.
2. This law is intended as a short summary of the first two commandments of the Decalogue, and for this reason it is placed first in the Covenant Code.
3. The whole unit of Exod 20:22–23 is dependent upon Deut 4:12, 15–19, 36 and is unintelligible without it. Yet the language used in the prohibition is not Deuteronomistic.
4. The form and content of the prohibition in Exod 20:23 owes something to the parallel text in the Holiness Code in Lev 19:4, but it is also formulated to fit the narrative context to specifically anticipate the golden calf story of Exod 32.
5. All these features suggest that this law is not intended for religious instruction or as a substitute for other laws, such as the Decalogue, but is part of a larger, skillful literary composition.

The Law of the Altar: Exodus 20:24–26

The law of the altar has been regarded by many scholars as the most important piece of evidence for establishing the Covenant Code as prior to that of Deuteronomy and its law of centralization in Deut 12.³⁸ The Covenant Code’s altar law is used as a way of reconstructing early Israelite religion, with its multiplicity of altars before the Josiah reform. It has been deconstructed, reconstructed, analyzed for multiple redactional layers, and given any number of sociological and historical contexts for each of them.³⁹ Most recently, B. Levinson has proposed that Deuteronomy’s law of the centralized altar is a

conscious transformation of the law in the Covenant Code and clear evidence of the dependence of D on the earlier code.⁴⁰ I will make a number of observations that have governed my own understanding of Exod 20:24–26. The law may be rendered as follows:

An altar of earth you are to make for me and sacrifice burnt offerings and thank offerings from your sheep or your cattle. In every place where you invoke my name, I will come to you and bless you. If you make for me an altar of stones, you are not to build with hewn stones, because you would wield a tool over it and defile it. And you are not to ascend my altar by steps, so that your nakedness may not be exposed upon it.

The law begins with a command to build an altar for Yahweh as if no such altar as yet existed. In contrast to Deut 12, it does not suggest that this is a change in practice, a prohibition against certain kinds of altars, an innovation in design. All such suggestions about a reform in practice are unwarranted speculations. The law merely suggests the beginning of worship in the land to which the people are heading, and therefore it cannot be separated from its narrative setting. It is entirely possible, if not preferable, to interpret this whole law as having reference to a single altar: “An altar of earth you may make . . . but if you make an altar of stones. . . .” It is no more than guesswork to suggest that the law applies to a number of altars.

Another possibility is that the law was intended to legitimize a temporary, rudimentary altar in the Babylonian diaspora, corresponding to Ezekiel’s “temporary sanctuary” (מקדש מעט) in Ezek 11:16. The whole tone of the law is to suggest the granting of permission for an altar, but one that is of a very temporary nature. The exilic context is also strengthened by verse 24b, as we shall see below. Yet such a proposal, which would be a rather radical departure from Deuteronomy, must remain speculative.

There is much discussion as to whether the altar of earth and the altar of stones are alternatives or basically the same. Those who regard them as different in kind see verses 25–26 as a later modification of the earlier law. Yet, it has also been argued by E. Robertson that the “altar of earth” can mean a natural altar, a large stone or an elevation in the terrain, and that the second “altar of stones” is merely an extension of that.⁴¹ I see little reason to view verse 24a and verse 25 as coming from different hands.

The first-person pronominal suffix, “for me,” in verses 24a and 25a, as well as the use of first-person address in verse 24b, links this law in the closest way with the preceding divine speech. There is no need to look for some other genre of oracular speech and a hypothetical *Sitz im Leben*. The only reason for doing so is the prior conviction that the Covenant Code is early and independent from its present context. In fact, it is totally consistent with its narrative setting and must be understood as such. In the parallel instructions in Deut 27:5–7, in which Moses commands the people to build a similar altar in the new land, the references to the deity are all in the third person. To this parallel we will return below.

Much has been made of the *Numeruswechsel* from second-person plural in verse 23 to second-person singular in verses 24–26. The code clearly prefers the singular, but the plural can often be explained from the context. Thus, in verse 22 God tells Moses (second-person singular) to speak to the people (plural), so that the following verbs in verses 22b and 23 must be in second-person plural. But with the next law, the Covenant Code reverts to the singular.⁴² Schwienhorst-Schönberger uses this *Numeruswechsel* to distinguish between the proto-Deuteronomistic and the Deuteronomistic redactors.⁴³

But then he ascribes the עלותיך and the שלמיך (types of sacrifices) to Dtr in spite of the fact that the suffixes are singular.⁴⁴ In the so-called heading of the משפטים (Exod 21:1), God again addresses Moses in second-person singular and refers to the people in third-person plural, just as in 20:22, and therefore both verses must be part of the same source. The change of number is a dubious principle of source division and there are other arguments against it, as we shall see.⁴⁵ It is quite inappropriate to argue for a compositional break between verse 23 and verse 24 based entirely on the change from second-person plural to second-person singular.

The most important argument for the antiquity of the Covenant Code and its priority rests upon the interpretation of verse 24b. The text of this verse is difficult to accept as it stands. The problem is in the first person of the verb אִזְכִּיר. Since the most common meaning of the verb הִזְכִּיר is “to invoke,” with the deity as object, it makes no sense for the deity to say, “I will invoke my name,” and scholars have been ingenious in trying to invent other, more suitable meanings.⁴⁶ It is most usual for humans to invoke a god or the name of a god in the context of worship or prayer.⁴⁷ In only one instance, the god, as subject of the verb, is said to announce the name of his servant as one called from birth (Isa 49:1). But Exod 20:24b would be the only instance where the god invokes his own name. Now within the Covenant Code we do have an instance of the usual idiom in 23:13 (“you are not to invoke [הִזְכִּיר] the name of other gods”), which strongly suggests that the verb in 20:24b should be *second-person singular*.⁴⁸ Thus, I would reconstruct the text: “In every place where you invoke my name, I will come to you and bless you.”

But we can go further than this. Scholars are quick to point out that throughout the Covenant Code we have many parallel or balancing statements that give structure and cohesion to the whole. This is what we have with the two statements about invoking the name of God. On the one hand, invoking the name of Yahweh results in his presence and blessing, but on the other hand, a warning and threat are given against invoking the name of other gods. The one comes near the beginning, within the cultic laws; the other comes near the end, within the final set of cultic laws. They actually fit very well side by side, except for the change in number to second-person plural:

In every place where you invoke my name, I will come to you and bless you. (20:24b)

In everything that I say to you, you are to be attentive; the name of other deities you must not invoke, nor let (them) be heard upon your lips. (23:13)

Since this activity of invoking the name of the deity is not necessarily bound to the existence of an altar, the suggested plurality of places in verse 24b cannot be used to argue for a plurality of altars. It is better to interpret verse 24b as an act of worship apart from the sacrificial cult. The deity declares that his blessing is not restricted to the reception of sacrifices at the one altar.

Those scholars who insist that the text must be taken as it stands argue that in this instance the verb אִזְכִּיר has the meaning of revealing the name of the deity at a particular place and thus legitimating that place as an appropriate site for an altar. To support this interpretation, the example of the revelation at Bethel in Gen 28:10–22 is cited, in which Yahweh reveals himself to Jacob and blesses him, and the place is then marked

as the site of a sanctuary. There are, however, many problems with this argument: (1) One must assume a certain antiquity for the whole account of Gen 28:10-22 in its present form, including the theme of the promises to the patriarchs, which is disputed. (2) This revelation to Jacob belongs to a series of revelations to the patriarchs that are not applicable to Israelites of a later age. (3) The sequence of events in Gen 28:10-22 does not correspond to that suggested by the altar law. In the Jacob story, Yahweh comes to Jacob, reveals himself, and blesses him, but only many years later is an altar built at the site, an act that is unrelated to the blessing (Gen 35:7). In this interpretation of the altar law, the revelation of the name would presumably be followed by the construction of the altar, and in response to worship at the site the god would then come and bless his people. There is, in fact, no parallel for this. (4) The patriarchal stories offer a number of patterns, one of which is that altar sites are places where the patriarchs are said to “call upon the name of Yahweh” (Gen 12:8; 13:4; 21:33; 26:25). This expression (קרא בשם) is the direct equivalent to invoking the name in Exod 20:24b in that it points to the activity of the worshipers and not the deity.

This leads to the further question: What is the point of a law that prescribes the building of an altar in a particular manner? The older view was that this was directed against Canaanite altars that were built in a certain way, but this is speculation based on assumptions about the premonarchy period that are no longer acceptable, that is, that Israelites were distinct from, and antagonistic to, Canaanites.⁴⁹ If the law contains an element of polemic against non-Israelite practices as some believe, then it is remarkable that Deuteronomy says nothing about the manner of altar construction. Furthermore, the description of Solomon’s temple building does not have such an altar. However, we are told that on the day of the Temple’s dedication, “the king consecrated the center of the court which lay in front of the house of Yahweh; there he offered the whole burnt offerings (עלוה) and the grain offerings and the fat portions of the well-being offerings (שלימים), for the bronze altar that was before Yahweh was too small to accommodate the whole burnt offerings, the grain offerings, and the fat portions of the well-being offerings” (1 Kings 8:64). This consecrated area would certainly qualify as an altar of earth.

From the form-critical perspective, the whole law in 20:24-26 is a mixture of types. This has led to various attempts at reconstructing the “original,” but it could just as easily suggest a late legal composition. The initial divine command or instruction is followed by divine promise, similar to what one finds in Deuteronomistic parenetic motivation clauses.⁵⁰ One difference is that the promised blessing is not directly related to obedience to the command that the altar be built, or even to the cultic activity associated with the altar in verse 25. The further instructions in verses 25-26 take the form of an “if-you” qualification, a form that is most characteristic of the Deuteronomistic Code.⁵¹ As we have seen, the second-person imperative or imperfect (precativ) and the “if-you” forms are the innovation of Deuteronomy under the influence of the treaty language style. Such a mixture of forms occurs elsewhere in the Covenant Code.

Little attention has been paid to the obvious parallels to this altar regulation in Deut 27:5-7 and Josh 8:30-31 because of the prejudice of the Covenant Code’s early dating.⁵² It is always assumed that the law in Exod 20:24-26 is the precursor of the texts in Deut 27:5-7 and Josh 8:30-35, but a closer comparison may prove instructive:

Deut 27:5–6

There you are to build to Yahweh your God an altar of stones upon which you are not to wield an iron tool. You are to build the altar of Yahweh your God of unhewn stones (אבנים שלמות) and offer burnt offerings and sacrifice thank offerings. . . .

Josh 8:30–31

Then Joshua built an altar to Yahweh, the God of Israel, on Mount Ebal, as Moses, the servant of Yahweh, commanded the Israelites, . . . an altar of unhewn stones (אבנים שלמות) upon which no iron tool was wielded, and they offered upon it burnt offerings to Yahweh and sacrificed thank offerings.

The closest similarity to Exod 20:24–26 lies in the instructions regarding the use of unhewn, or whole, stones (אבנים שלמות) (the opposite of the hewn stones, נזיה, of Exod 20:25) and the prohibition against using a metal tool on the altar. Deuteronomy and Joshua also speak of offering whole burnt offerings (עולה) and peace offerings (שלמים), as in the Covenant Code. In Deut 27:5–7 the instructions which Moses gives to the people are in second-person singular, even though there is a mixture of second singular and plural in the larger context of verses 1–8 for no apparent reason.⁵³ This regulation concerning the construction of an altar comes just before the injunction about promulgating the law (v. 8). In each of these ways the Covenant Code is similar to Deut 27, even to the shift from second-person plural to second-person singular and the fact that the laws (משפטים) follow the altar instructions.

Furthermore, the sequel to the altar-building instructions is significant in both cases. Deut 27 follows the instructions about the altar and plastered stones on which the Law of Moses is to be written (vv. 1–8) with instructions about an elaborate ceremony by which the people are to be solemnly committed to keeping the law (vv. 11–26).⁵⁴ This is carried out in Josh 8:30–35, in which the altar is built, the ceremony is performed, the laws of Moses are read out loud from a book of the Law, and a copy is inscribed on the plastered stones. Deut 27, in its final form, and Josh 8:30–35, which is directly dependent upon this final form, are post-Deuteronomistic additions.⁵⁵

The law of the altar in the Covenant Code (Exod 20:24–26) and the sequel in Exod 24 follow this same sequence of events. First, the altar law is followed by the divine promulgation of the laws in 21:1: “These are the משפטים that you will set before them.” Then, after the laws have been given, Moses builds an altar, on which are offered עולה and שלמים, and he writes the laws in a book. These laws are then read to the people, and in a special ceremony the people are placed under obligation to keep them (24:3–8). Finally, Moses is instructed by the god to ascend the mountain in order to receive the “law (תורה) and commandment (מצוה) which I have written for their instruction” on tables of stone (v. 12).⁵⁶ This is the same law that Moses has already written in a book.⁵⁷ This last detail of the god inscribing the tables of stone parallels the inscribing of the Decalogue on the two tables of stone in Deut 5:22. In this case, however, it is not the Decalogue but the whole law of the Covenant Code that is intended, just as Joshua writes the whole Law of Moses on the (plastered) stones.⁵⁸ The various points of similarity between the Covenant Code with its immediate context and the texts in Deut 27 and Josh 8:30–35 are so numerous that they cannot be fortuitous.

Yet in spite of this remarkable similarity, a number of significant differences make it certain that we are not dealing merely with a late Dtr redactor. The Law of Moses re-

ferred to in Deut 27 and Josh 8 is the Deuteronomistic Code, given to the people at the end of the wilderness period, and not the laws of Horeb/Sinai. It is Moses who gives the instructions about the altar that is to be built when they enter the land, and its purpose is for use only in the special ratification ceremony. In Exodus, all the laws are given at Sinai as the direct speech of Yahweh, including the instructions about the altar. This law of the altar is no longer for the specific purpose of covenant ratification. Thus, the altar that Moses builds in Exod 24 is not in direct response to the instructions in the law of the altar. It is included by J in his narrative because he is following the model of covenant ratification in Deuteronomy and Joshua. Deut 27:2–4 speaks of writing the laws on large, plaster-covered stones on Mount Ebal after the people cross the Jordan, and this is carried out in Josh 8:32. In Exod 24 there is no need for such an inscription at Sinai since Moses writes the laws in a book and they are subsequently inscribed by the deity on stone tablets. Nevertheless, along with building the altar, Moses sets up twelve “pillars” (מַצֵּבֹת) corresponding to the twelve tribes, which imitates the setting up of the twelve commemorative stones in Gilgal after the people cross the Jordan in Josh 4:20–22. Furthermore, the ceremony of accepting the law in Deuteronomy and Joshua involves Levitical priests as the principal participants, with the people responding by reciting “amen.” But in Exodus there are no priests, and the people themselves are the consecrated participants.⁵⁹ The only inscribed law in Exodus is the one inscribed by the god at Sinai, and in J that is the Covenant Code.

It is within this larger comparative context that one must consider the specific detail about making the altar of unhewn stones. In a recent study, S. M. Olyan proposes that the concern for building an altar of whole, or unhewn, stones so that the sacred place would not be defiled is an “extension” of the notion that sacrificial animals are to be without mark or blemish when offered to the deity. He admits that the earliest evidence of this is Deuteronomy but suggests that the belief is earlier.⁶⁰ Olyan fails to make clear the relationship of Deut 27:5–7 and Josh 8:30–35 to their larger Dtr context, but Anbar, in an earlier study cited by Olyan, has argued that both texts are later additions to DtrH.⁶¹ Olyan also connects the concern for whole stones in altar building with the remark in 1 Kings 6:7 that the Temple was also built of “whole quarry stone” so that no tool was heard in the Temple while it was being built.⁶² This is also viewed as an “extension” of the altar requirements to the whole Temple. There are, however, two major problems with the text of 1 Kings 6:7. The first is that it clearly contradicts the statements about the use of hewn stone in the Temple’s construction (1 Kings 5:31 [17]; 6:36; 7:9–12), and it is difficult to imagine how it could have been otherwise. The second problem is that 1 Kings 6:7 looks like a late addition, so that the extension of the prohibition against using building stone that has been shaped by a tool to the Temple can merely limit this activity to the quarry and ban it only from the sacred site itself. This is a totally artificial compromise. Yet this fact surely points to the lateness of the “extension” of this principle to the Temple construction.

A marked contrast to such a simply constructed altar of unhewn stones is the description in Ezek 43:13–17, which certainly suggests a huge structure of hewn stone with steps. While the use of hewn stone is not specifically stated for the large altar, the tables on which the animals for sacrifice were to be slaughtered are specifically described as made of hewn stone (Ezek 40:42). Yet it is not this kind of altar that was subsequently built in Jerusalem but an altar of the kind described in Exod 20:24–26 and

referred to in Ezra 3:2–6. Here it specifically states that the altar that was built by Zerubbabel for “whole burnt offerings” was constructed according to the Law of Moses, which must refer to our text. Those who regard the altar law in Exod 20:24–26 as reflecting a primitive form of sacrificial cult in early Israelite times completely overlook the significance of this reference to altar construction in early Persian times.⁶³ Furthermore, in the Maccabean period, such altars were still being constructed for the Temple in Jerusalem according to the requirements in the law of the altar (1 Macc 4:44–47).⁶⁴ It would appear that the author of the Ezekiel Temple vision does not yet know of this altar law of Moses. Indeed, the altar law could be understood as an alternative to this elaborate and unrealistic restoration of the sacred place.

The close relationship of the altar law in Exod 20:24–26 and the requirements of the altar construction in Deut 27 and Josh 8 does not entirely account for its placement at this particular point in the Covenant Code or for its change into a general guiding principle from instructions for a specific altar for a specific purpose. Scholars have noted its curious position at the beginning of the code when it would seem to be more appropriately grouped with the other cultic laws at the end of the code and speculate that it originally belonged to such a separate collection of cultic laws. Its present position is therefore regarded by many as the result of a redactional transposition to create a prologue for the code and to incorporate the *מִפְּשִׁיִּים* into it.⁶⁵ Yet this explanation is not very convincing. The introduction to the *מִפְּשִׁיִּים* in Exod 21:1 closely follows 20:22–23 and parallels verse 22a, with a direct divine speech to Moses and with the people referred to in the third person plural. The reason the altar law begins the code is that the law of the one altar begins the Deuteronomistic Code in Deut 12. This parallel has not gone unnoticed, but the common assumption that the Covenant Code is the older code has led to the view that Deuteronomy has been influenced by, or is a conscious revision of, the Covenant Code. In a recent study, B. Levinson makes a great deal out of the similarities that he sees between the altar law of Exod 20:24–26 and the centralization of the single altar in Deut 12:13–19.⁶⁶ He begins with the assumption that the altar law in the Covenant Code is older, and he endeavors to explain how the Deuteronomistic law is a legal innovation. The similarities are very slight, having to do primarily with the act of sacrificing and the types of sacrifices, which is hardly remarkable. Levinson does not explain why Deuteronomy says nothing about the construction of the altar, nor does he account for the close similarity with Deut 27:5–7. The reason the altar law comes first in Deuteronomy has nothing to do with its position in the Covenant Code, because the Deuteronomistic Code does not otherwise follow the order of laws in the Covenant Code. The law comes first because it deals with the basic theme of Deuteronomy: the centralization of worship that is foundational to many of the laws that follow.

The major emphasis in Levinson’s comparison lies in the contrast between the phrase “in every place” in Exod 20:24b and “the place” in Deut 12:14. But the contrast works only if the term “place” (*מִקְדָּשׁ*) actually refers to altars in both texts. What the term implies is a place of worship, and this means for Deuteronomy the place where one offers sacrifices, which may be understood as a single altar, but the term “altar” is never used. In Exod 20:24b the place is not specifically the place of sacrifice but wherever the Israelites invoke the name of the deity. That is not restricted to a single place, and it is not necessarily tied to the altar of sacrifice. Far from Deuteronomy being a revision of the Covenant Code, it is the law in Exod 20:24–26 that is a revision of Deuteronomy.

From all this it seems reasonable to conclude that the Exodus law of the altar has been modeled after the late texts in Deut 27 and Josh 8 which make their injunction about constructing a specific altar into a generalization. At the same time, it has introduced a significant revision of the Deuteronomic law about a single place of worship, and all these changes reflect a quite different perspective that can no longer be called Deuteronomistic. The issue in the exilic period is no longer one of centralization of worship but one of religious survival, and a very different understanding of this law is possible. It allows for the simple construction of an altar in Jerusalem after the Temple's destruction and the continuation of the cult there or perhaps a temporary rudimentary altar in the diaspora. It does not restrict worship to that place but allows for the possibility of invoking the deity and receiving a divine blessing everywhere, especially in the diaspora. This possibility is also suggested by the prayer of Solomon in 1 Kings 8:27–53, especially in verses 46–53, which envisages those in exile praying to the deity and receiving his mercy without the benefit of altar or sacrifice. Even though it retains the Dtr language about the specially chosen place, it is an obvious modification to allow for a new reality. The law in Exod 20:24–26, especially verse 24b, may be seen as going beyond this specific act of repentance in a foreign land to invoking the deity in worship in a more general way and receiving his blessing.⁶⁷

In conclusion, a close comparison between the opening laws of the Covenant Code in Exod 20:22–26 and their parallels in Deuteronomy, the Holiness Code, and elsewhere in the Old Testament reveals that both laws in this unit belong to the same post-Dtr horizon.⁶⁸ In spite of the grammatical shift from second-person plural to second-person singular, there are no other grounds for seeing any break or tension between the law on idolatry in verse 23 and the altar law in verses 24–26. We have also seen that in both laws a close connection is made with the larger narrative context through the use of the divine voice and the various aspects of the subject matter. Furthermore, the juxtaposition of these laws at the beginning of the Covenant Code is perhaps significant. The law on idolatry can be understood as representing the Decalogue, especially in imitation of the discussion of this theme in Deut 4. The law of the altar that follows corresponds, likewise, to the initial law of centralization in the Deuteronomic Code. As we examine the following laws, we will see that the author of the Covenant Code uses the method of imitation of the other law codes as the primary means of compositional creativity.

The Epilogue: Exodus 23:20–33

Problems and Issues

The epilogue is a very much debated unit within the Covenant Code, and it is not my intention to engage in an extensive review of this discussion.⁶⁹ I will focus primarily upon the more recent discussion in order to clarify the major problems and issues that arise from this unit. The older view of the Documentary Hypothesis as reflected in Wellhausen and subsequent literary critics is that 23:20–22 and 25b–31a make up the older source attributed to E and that verses 23–25aa and 31b–33 are an addition attributed to the redactor of JE or to a Deuteronomist. Various indications such as repetition of motifs or awkward transitions were used to argue for these divisions. This position,

however, was not regarded as entirely satisfactory. Noth's view of the matter is simply to state: "The addition 23:20–33, which is hardly all one piece, but appears gradually to have grown to the form in which it has been transmitted, bears a generally Deuteronomistic stamp in style and content."⁷⁰ He makes no attempt to unravel the stages of growth of this unit or its relationship with Deut 7. A similar position is adopted by J. P. Hyatt: "This whole section is from the Deuteronomistic redactor. He has built upon E tradition, but we cannot now disentangle his work from E."⁷¹

Under the influence of discussion about covenantal forms and formulae in early Israelite society in the early 1960s, N. Lohfink proposed a different relationship between Exod 23:20–33; 34:11–16; and Deut 7.⁷² In spite of the many close similarities that he tabulates, he finds a direct literary relationship unlikely and offers a solution based upon the method of tradition history. He argues for a common Gilgal-covenant tradition stemming from the earliest period of Israel's history and transmitted by means of an oral "preliterary" process. This accounts for both the similarities and the differences that developed over time. It also allows Lohfink to dissect the composition of Deut 7 into those parts that he deems more appropriate to the early covenant tradition as he understands it, based on the assumption that the Exodus texts are the earlier forms of that tradition. With the rise of strong criticisms against such notions of any primitive covenant theology before Deuteronomy by Perlitt and others,⁷³ the foundations of such a traditio-historical approach have been seriously undermined.

Childs attempts a quite similar solution.⁷⁴ He raises a number of objections to the older literary-critical solutions. First, key words and phrases repeat themselves throughout the whole and overlap any simple division within the unit. Second, the whole is in the style of Deuteronomistic parenesis, not just the interpolations. These facts point to a compositional unity of the epilogue. Yet it does not make any reference back to the preceding laws, unlike the epilogues of the Holiness Code and the Deuteronomistic Code, so its connection with the Covenant Code is rather loose. However, Childs does not invoke a Dtr redactor because there is some rather distinctive terminology, such as the "messenger" motif, that does not occur in Deuteronomy, and for Childs this points to an older level in the tradition. Childs's solution is to say: "The passage was a sermon which once served a homiletical purpose in Deuteronomistic circles in connection with the occupation of the promised land. . . . The section is not really related to the whole Book of the Covenant—it is not a parenesis on obeying the law—but is a homily on the proper use of the land."⁷⁵ It is thus a composition developed on the oral level of the tradition that was common to Deut 7, but the differences suggest that the relationship with Deut 7 was not literary. Why this is so is not clear. Nevertheless, this solution seems to suggest that the epilogue is a unity in spite of all the difficulties in the text. It was originally independent and became attached to the last section of the code because of its association with the preceding laws on the land in 23:10–19. By contrast, Childs is quite willing to attribute the parallel Deuteronomistic homily in Exod 34:11–16 to a Dtr redactor.⁷⁶

A position that is heavily dependent upon Lohfink and worked out with elaborate detail is that of J. Halbe, who also emphasizes a primitive covenantal tradition. His traditio-historical method has led him to see a close association between the homiletic unit in Exod 34:11–16 and the epilogue in Exod 23:20–33.⁷⁷ Indeed, he argues that the epilogue was originally a prologue. He also considers that there are multiple levels of

composition in the epilogue. The basic level is that of 23:23–24, 31b–33, representing the old “privilege law” level, which was given a new framework in verses 20–22 and 25–27, with a secondary expansion in verses 28–31a. These different levels are based primarily on how he sees their fit within social-historical developments, the latest associated with the Davidic-Solomonic empire. This leads to radically different conclusions from that of the older Documentary Hypothesis as to what is primary and what is secondary, in which comparison with Deuteronomy plays a very small role.

In this same methodological tradition is F. Crüsemann, who modifies Halbe’s approach and gives to it a different social-historical context.⁷⁸ Crüsemann, following Osumi,⁷⁹ selects parts of 23:20–24 and 32–33 to reconstruct his original and considers verses 25–31 to be secondary, thus reducing Halbe’s three stages to two. He associates the epilogue with a historical context quite different from Halbe’s by relating the Covenant Code to social and religious developments in Jerusalem during the monarchy up to the late eighth century B.C.E. His major point, therefore, is to identify the reference to מִקְדָּשׁ, “place,” in Exod 23:20 as referring to Jerusalem and its sanctuary, thereby separating the epilogue from the basic narrative of the land settlement tradition. This interpretation of the epilogue dissociates the list of nations in verse 23 from the conquest theme, which is entirely different from their use in Deuteronomy. Crüsemann’s analysis seems very forced and has been severely criticized.

Blum has taken issue with both Halbe and Crüsemann on their early dating of this text and its division into different strata.⁸⁰ Blum begins his own reconstruction by taking the whole of the non-P basic text of Exod 19–24 and 32–34 as a unity, with chapter 34 as a fitting conclusion.⁸¹ The basic structure of the account makes this quite clear. However, there are some major additions within this corpus. He takes 34:11–27 as an “*einschub*”⁸² and argues for a break between verses 10 and 28.⁸³ This means that the divine speech in verse 10, “I am now making a covenant,” is directly linked with the concluding statement in verse 28, “He wrote upon the tables (of stone) the words of the covenant, the ten words.” The covenant referred to is therefore the Decalogue. Blum takes the insertion, 34:11–26, as an epitome of the earlier law in Exod 20:22–23:33, and the reference in verse 27 to the covenant is to be taken as a reference to the “Book of the Covenant” in chapter 24. Within this larger compositional framework, he links Exod 34:11–16 and Exod 23:20–33 closely together and proposes for them a late redaction, later than his KD and DtrG but not later than Josh 24, which he regards as an even later “Hexateuchal” redaction.⁸⁴

In keeping with this redating and reassessment of the composition of Exod 23:20–33 and 34:11–16, Blum reconstructs a very different social-historical setting for these texts. He looks to the early postexilic period and the resettling in the land. He sees a development in the concept of the nations that were destroyed by Joshua, to a focus on those nations that remained in the nonconquered part of the land, and finally to those that remained within the land itself. This is not just ancient tradition but has reference to the present reality of the author.⁸⁵ Consequently, he then fits these texts about the “peoples that remain” into the concerns of the returnees of the early postexilic period, in which “the people of the land” represent those “peoples” who still occupy parts of the territory to be claimed by the promise.⁸⁶

The problem, as I see it, with Blum’s position on Exod 34:11–27 is that it seems to contradict his claim that Exod 19–24 and 32–34 are a unit.⁸⁷ If 34:11–27 is an epitome

of the Covenant Code with a close connection to the epilogue in 23:20–33 and the covenant ratification in chapter 24, which is in turn connected with 19:3–9 and 20:18–22, then their removal as additions leaves the whole construction in shambles. Retaining 34:28 as it is, with its connection to the Decalogue in Exod 20:1–17, which Blum admits has a poor fit in its context, makes the reconstruction very hard to understand. My own proposal, which is not discussed by Blum, is to see the reference to the “ten words” at the end of 34:28 as a late attempt to interpret the “words of the covenant” as the Decalogue. The “words of the covenant” in verse 28 originally meant the covenant in verse 27 and the content of verses 11–26. The connection between verse 10 and verse 27 is obvious. The later interpretation of the “words of the covenant” as the Ten Commandments is by the same hand that inserted the Ten Commandments into the text in 20:1–17.⁸⁸ The whole of non-P is indeed a unity, and there is no need for all the redactors that Blum proposes.

A different interpretation of the Deuteronomistic character of Tetrateuchal passages is to be seen in the work of C. Brekelmans and N. Lohfink, as evidenced by their use of the term “proto-Deuteronomistic.”⁸⁹ They adopt the view that the so-called Deuteronomistic/istic passages in the Tetrateuch do not reflect dependence upon Deuteronomy but represent earlier stages in the development of the form of language and thought that came to flower in Deuteronomy, hence the term “proto-Deuteronomistic.” This proto-Deuteronomistic language is embedded in, and consistent with, what they regard as pre-Deuteronomistic literature (i.e., the early Pentateuchal sources), and thus, for them, presents a “controlling framework” by which to decide the direction of dependence between similar texts in the Tetrateuch and Deuteronomy. My own critique of this proposed proto-D corpus in the Tetrateuch is based primarily upon the fact that given the new reality in Pentateuchal studies over the last two and a half decades, there is no longer any agreement about the dating of the controlling framework within the Pentateuch, namely, the dating of the J and E sources to a pre-D period. Consequently, one would have to resort to a much broader controlling framework within the Old Testament and try to discern how the themes, ideas, and motifs developed and were used in the periods of time covered by these texts.⁹⁰

This matter of the need for a controlling framework was taken up again by M. Vervenne, a student of Brekelmans.⁹¹ Vervenne recognizes the new reality in Pentateuchal studies since the time that Brekelmans first presented his views, and he calls for a methodological clarification. He also affirms the need for a controlling framework of those texts that have Deuteronomistic features to be able to judge whether or not they are proto-D or post-Dtr by their proximity in style and content with those texts that are broadly recognized as pre-D or post-Dtr respectively.⁹²

This same methodological perspective has been brought to the study of Exod 23:20–33 in the doctoral thesis of H. Ausloos (directed by Vervenne) and the articles that have come out of it.⁹³ Ausloos wants to introduce more stringent linguistic and literary criteria in assessing the relationship between terminology in the Tetrateuch, and specifically in Exod 23:20–33, and the broadly recognized corpus of Deuteronomistic literature. It is not enough merely to have identical terminology present in the texts under comparison, but one must also consider the way that these terms and their context reflect certain theological or ideological perspectives. Ausloos also attempts to develop my notion of a controlling framework, by which he means the grouping together of those texts that reflect the same perspective and understanding of a particular term or concept. With

Vervenne and myself, Ausloos acknowledges the need to include within this controlling framework texts outside the Pentateuch because of the current difficulty in gaining agreement on the dating of Pentateuchal sources or strata. In practice, however, he seems to exclude them. His particular illustrative example is the מַלְאָךְ, “messenger,” in Exodus–Numbers and Judg 2:1–5.⁹⁴ Other texts that may refer to the מַלְאָךְ in similar ways but are not concerned with the exodus-conquest theme are thereby excluded.

There are some observations that should be made about Ausloos’s approach. First, the examination of terminology in Exodus–Numbers to distinguish it from the use of the same terms and words in Deuteronomistic literature is commendable, but the terms he uses as examples are often examined in rather narrow limits and in isolation from the larger contexts, with the result that they do not relate to the larger literary whole. This seems to contradict his methodological principles. Whether such terms under examination are proto-D or post-Dtr remains entirely inconclusive. We seem to be no further ahead. Second, I would take issue with his application of a controlling framework. What I mean by controlling framework is to understand not only what a term or concept means within its own corpus of texts but also how it relates to earlier and later understandings of the same concept insofar as this diachronic framework can be agreed upon. There will always be some disagreement about this framework—what is preexilic, exilic, postexilic, early or late—and that will affect the acceptability of the arguments put forward. Thus, to take Ausloos’s example of the מַלְאָךְ concept, it is perfectly acceptable, in my view, to include texts outside the Pentateuch if in such texts as Mal 3:1–3 the concept of the מַלְאָךְ יְהוָה bears some striking similarity to that in Exod 23:20–23. Mal 3:1–3 may be later and dependent upon Exod 23:20–23, but it at least shows that such an understanding of the concept of מַלְאָךְ was very much alive at a late period and not merely an archaic survival in ancient texts.

Finally, one needs to look at the whole range of texts within a common corpus that deal with a concept like the מַלְאָךְ and their interrelationship with other texts so that the full picture of the concept can be understood. Ausloos’s brief treatment of the concept does not do justice to either the other texts within the group he identifies or the closely related texts having to do with the guidance and protective function of the מַלְאָךְ. This will be discussed below and it will be argued that Judg 2:1–5, in spite of its similarity to Exod 23:20–23, does not belong to this corpus.

There is yet another recent trend to treat a number of so-called Deuteronomistic texts as the product of a final late redaction of the whole corpus of “PrimaryHistory” (Genesis to 2 Kings). This is the position of Houtman, who opposes my own view of a post-Dtr Yahwist and merely assigns all those texts with Dtr characteristics, including Exod 23:20–33 and 34:11–16, to his late Primary-History redactor.⁹⁵ This does not do justice to the controlling framework in which these texts stand. The invention of endless final redactors is not a literary solution to the problems of this text.

Comparative Analysis

The approach in this analysis will be to look at a number of key terms and motifs that have dominated the discussion within a set of controlling frameworks. The first is their use within the J corpus of Exodus–Numbers, as well as their use in the rest of the J corpus in Genesis. Then a comparison will be made with Deuteronomy, especially Deut 7, to

determine the Deuteronomistic character of Exod 23:20–33. Finally, a comparison with a wider controlling framework in the Hebrew Bible will be made, where appropriate, to understand the place of the themes and ideas embodied in the epilogue within the broader development of biblical thought. This method is not devised merely to explain the special problems and challenges of this particular text but is appropriate for the whole corpus of the Covenant Code under consideration here.

The “Messenger” The activity of the messenger (מַלְאָךְ) is described in verses 20–23, as follows:

²⁰I am about to send (my) messenger before you to protect you on the route and to bring you to the place that I have arranged for you. ²¹Be careful on his account to obey him and not go against him, for my “name” is within him. ²²If you will obey him completely and do all that I say, then I will be an enemy of your enemies and a foe of your foes. ²³When my messenger goes at your head and brings you into an encounter with the Amorites, the Hittites, the Perizzites, the Canaanites, the Hivites, and the Jebusites, then I will obliterate them.

The first level of reference for the figure of the “messenger” consists of the texts in Exod 3:2, 14:19, 32:34, 33:2, and Num 20:16, all of which I would ascribe to J and which have a number of points in common with the text above. There are two dominant roles that are assigned to the divine messenger. The first of these is that of a vanguard for the people, both to protect and to lead them. This role comes to the fore most clearly in Exod 14:19, where the מַלְאָךְ is identified with the pillar of cloud and the pillar of fire, both to protect them from the enemy and as a means of divine guidance from the time of their departure from Egypt throughout their desert journey (13:21–22). The מַלְאָךְ is identified, therefore, with the deity himself, who is said to be the one to go before them in the pillar of cloud and fire (13:21). Furthermore, it is stated in 14:24 that “Yahweh in the pillar of fire and the pillar of cloud looked down upon the camp of the Egyptians and threw the camp of the Egyptians into a panic.” This same motif of a divine panic that ultimately defeats the enemy is found in 23:27, here attributed directly to the deity in a text parallel to that of verse 23. This close association of the מַלְאָךְ with the pillar of fire and cloud as the guiding divine presence solves another problem in the broader context. We are told that after the golden calf episode, the promise of the מַלְאָךְ’s presence and guidance is again assured by the god in Exod 32:34 and 33:1–2, and at the end of the journey in Num 20:16 we hear again of the מַלְאָךְ who was sent by the deity and who “brought us forth out of Egypt,” which must mean the guidance and protection of the מַלְאָךְ in the pillar of fire and cloud and the divine panic as portrayed in J’s account in Exod 13–14. Yet in the context, the מַלְאָךְ has also brought them through the wilderness to Kadesh. However, through the whole of the wilderness journey, there is no mention of the guiding מַלְאָךְ. Nevertheless, we are told in Num 10:33–34 that when the people of Israel set forth from Sinai: “They set out from the mountain of Yahweh three day’s journey; and the ark of the covenant of Yahweh went before them three day’s journey to reconnoiter a resting place for them. And the cloud was over them by day, whenever they set out from camp.” The protection of the cloud and the vanguard of the pillar of cloud and fire are again mentioned in Moses’ intercession in Num 14:14. This idea of the divine guidance in the form of the pillar of fire and cloud is also men-

tioned in Deut 1:33: “[God] who went before you on the route to reconnoiter for you a resting place in the fire by night to show you the way you were to go and in the cloud by day.”⁹⁶ All of this relates very closely to Exod 23:20, where the *בְּלִיָּאֵךְ* is to be their protection and vanguard from Sinai to the Promised Land.

The texts all fall together as part of the same broad conception of divine protection and guidance in which the divine agent, the *בְּלִיָּאֵךְ*, is represented as the pillar of fire and cloud from Egypt to the Promised Land. As T. W. Mann has shown, the theme of divine guidance in the pillar of fire and cloud reflects a “vanguard motif” that is prominent in Assyrian royal inscriptions that recount military campaigns and symbolize, in the form of standards, the divine presence with the army.⁹⁷ There are a number of ideas that are associated with this vanguard motif. They have to do with the symbols of divine presence during the course of a campaign, and it is by means of these that the splendor of the god and his holy terror are revealed to the enemy and throw them into a panic. All these are present in the biblical vanguard motif as well. This would seem to confirm the fact that the *בְּלִיָּאֵךְ* motif and the pillar of cloud and fire belong closely together. Yet apart from the one text in Deut 1:33, there is no use of the vanguard motif in Deuteronomy. There is only the simple statement about Yahweh leading them through the wilderness for forty years (Deut 8:2, 15). The vanguard theme does occur in DtrH in the Book of Joshua, but only in the form of the ark as vanguard in the story of the Jordan crossing (Josh 3–4) and in the battle of Jericho (Josh 6). Obviously, the ark could not serve as a vanguard motif in the escape from Egypt, but after Sinai it is curiously combined with the pillar of cloud and fire motif in Num 10:33–36.

In a closely related study on the “pillar of cloud,” Mann points out that *עָנָן*, “cloud,” may also have the meaning of “messenger” in Ugaritic.⁹⁸ After reviewing the evidence from Ugaritic mythical texts, Mann states: “It is not difficult, then, to understand how the *ʿnn* (“messenger”) of the Canaanite storm deities could come to mean “cloud” when associated with Yahweh. Indeed, we should translate the Ugaritic passages . . . as “clouds” or perhaps “cloud-messengers.”⁹⁹ Mann further points to Ps 104:3–4, which speaks of clouds, winds, and fire as the agents, messengers, and ministers of the divine warrior, and goes on to state: “In short, we may conclude from the OT and the Ugaritic evidence that the provenance of the *עָנָן* must be found in the Canaanite mythology surrounding the storm deity, his messengers, and weapons of divine warfare.”¹⁰⁰ I think there can be little doubt that in the whole of J’s account of the Moses tradition, from the call narrative (Exod 3), the exodus from Egypt, and the rescue at the sea (Exod 13–14) to the Sinai theophany (Exod 19–24) and the journey in the wilderness, the “messenger” and the pillar of cloud and fire refer to the same entity, and the remarks about the messenger in the code’s epilogue are entirely consistent with this presentation.

Turning again to the text quoted above, the object of the divine guidance and deliverance is said to be “the place that I have arranged for you” (v. 20). This has led to much discussion about what is meant by “the place.” The present context would seem to be the Promised Land as represented by the list of the aboriginal nations in verse 23 and the subsequent description of the conquest, but this is disputed by Crüsemann. Although the exact phrase used in Exod 23:20 occurs only in Chronicles in connection with David’s preparation of the Temple and its furnishings, the idea of the divine choice of a “place” (i.e., Jerusalem), the site of the one altar, is a prominent theme of Deuteronomy. Crüsemann uses this evidence to argue for this meaning of “place” in Exod

23:20 and to reconstruct the original unit without reference to the conquest. This proposal has been strongly criticized by Blum and Ausloos as a very forced interpretation of the text.¹⁰¹ Yet they fail to cite the most appropriate parallel to explain this text. Ezek 20:6 makes reference to the Promised Land theme: “On that day I swore to them [the offspring of the house of Jacob] that I would bring them out of the land of Egypt into a land that I had reconnoitered for them, a land flowing with milk and honey, the most glorious of all lands.” After recalling Israel’s election in Egypt as Yahweh’s own people (v. 5), the prophet speaks further about the deity’s advanced scouting and selection (הוֹרָה) of a most suitable land in which they were to settle after the exodus from Egypt. This theme builds upon the Deuteronomic idea of Yahweh’s election of Israel and his oath to the forefathers in Egypt to give them “a land flowing with milk and honey,” but it extends this into a description of the deity’s *advanced preparation* by his selection of the land. It is precisely this notion of prior selection of the land that is reflected in the phrase “the place that I have arranged for you” (Exod 23:20). This is further confirmed by the fact that the vanguard motif also includes the idea of the ark/cloud going before the people on their wilderness journey to seek and find (הוֹרָה) suitable camping sites for them (Num 10:33–34; Deut 1:33). The progression in the development of this theme of election of a special land from DtrH to Ezekiel to the Covenant Code (J) is obvious.

The second feature that is associated with the messenger is his role as medium of the divine will (Exod 23:21–22). This theme of the messenger (מַלְאֲכָה) as speaker on behalf of the deity is the notion that is more familiar to us from passages in Genesis, formerly associated with the E source (Gen 21:17; 22:11, 15). It is this figure of the מַלְאֲכָה יְהוָה who appears to Moses in Exod 3:2 “in a flame of fire out of the middle of the bush.” The words of this messenger are completely identified with those of Yahweh so that no further reference is made to the messenger or the manner of his appearance. This close association of the messenger with the “flame of fire” suggests a strong connection with the pillar of fire theophany of the vanguard motif. Yet how are we to account for the continuous and future communication of this messenger from Sinai to the Promised Land? There is nothing explicitly stated anywhere in the subsequent account about the messenger appearing and speaking to the people.

There is a text that deals specifically with the continuous communication of the deity with Moses during their wilderness sojourn. This is in Exod 33:7–11, which recounts the setting up of the tent of meeting outside the camp where the deity communicated with Moses by means of the pillar of cloud. This is the same pillar of cloud that functions as the people’s divine vanguard, which is so clearly identified with the messenger. While the identity of the pillar of cloud with the מַלְאֲכָה is not made explicit in this case (Exod 33:7–11), such an identity may be assumed to lie behind Exod 23:21–22. This function of the “cloud” combined with the “glory” becomes a regular feature of P’s understanding of the continuous communication of the deity with his people (Exod 16:10; 24:16–17; 40:34–35; Lev 9:6, 23; Num 14:19; 16:19; 17:7; 20:6), although P never identifies the cloud with the מַלְאֲכָה. The situation in Deuteronomy is quite different. While Deuteronomy refers to the continuous communication of the deity with Moses after Horeb, which the people are to heed if they are to prosper in the land to which they are going (Deut 5:30–33), nothing is ever said in Deuteronomy about how this communication takes place after Horeb. The unit in Exod 33:7–11 addresses this problem of the medium of divine revelation.¹⁰²

A further comment must be made about the demand of obedience “for my name is in him.” This is usually taken to mean the identity of the messenger with the deity. Houtman renders the phrase “he is my representative.” Yet prophets such as Moses are also the deity’s representative, so something more is suggested by this phrase. The remark seems to be related to the theme of the divine presence with the people that is discussed at length in Exod 33.¹⁰³ The representation of the divine presence by means of the name instead of an image is a major theme of the Dtr tradition. The deity’s presence is to be found in “the place that Yahweh your God will choose, to make his name dwell there” (Deut 12:11) or “to set his name there” (v. 21). The Temple in DrtH is the place for the name of Yahweh but also the place for the ark of the covenant (1 Kings 8:20–21; cf. 2 Sam 7), suggesting the closest association between the ark of the covenant and the name. The Temple replaced the tent as a more permanent place for the ark, but the tent in J is the tent of meeting and the place where Moses and the people encounter the deity in the cloud. The “name” has now shifted to the messenger in the cloud. This concept is developed one stage further by P when the divine presence in the tabernacle (Exod 40:34–38) and in the Temple (1 Kings 8:11–12) is represented by the cloud that is now identified not by the “name” (שם) but by the “glory” (כבוד). Yet P makes clear that he still has in mind J’s pillar of cloud at the tent of meeting and the vanguard motif of divine presence and guidance (Exod 40:36–38). The progression from the name theology of Deuteronomy to the messenger theology of J and finally to the כבוד theology of P seems clear.

This brings us to consider Judg 2:1–5, a text that also speaks about a messenger (מלאך) and that many scholars associate closely with the text in Exod 23:20–23. There is a clear overlap of vocabulary, not only in the mention of the מלאך but also in the theme of expelling (גרש) the inhabitants and the notion that the gods of the inhabitants would become a “snare” (מלואך) to the people. It is therefore likely that there is a direct literary relationship between the two texts. However, there is good reason to dispute that they are by the same author. In contrast to the full complement of previous J texts, the messenger here has no association with the vanguard theme, the pillar of cloud and fire. Instead, it is treated in the same way as a prophet or man of God who reprimands the people for their wrongdoing and predicts divine judgment. This piece belongs closely with Judg 1 and the P texts of Joshua. The figure is modeled on Exod 23:20–23, but it is a mistake to interpret the latter by reference to Judg 2:1–5. It clearly has no connection any longer with the cloud and fire theophany or with the vanguard motif.

I have suggested that all of the messenger texts in Exodus to Numbers belong to the J corpus and complement one another in understanding this concept. We may add to these some J texts in Genesis as well. Gen 24:7, 40, and 48 speak of the divine guidance of the servant of Abraham in the procurement of a bride for Isaac even though the “angel” was not actually visible throughout the journey. In Gen 21:17–19 the “angel” rescues Ishmael, the son of Abraham, and in 22:11–12 the “angel” rescues Isaac. In the latter case (22:15–18; cf. 21:18), obedience to the angel leads to divine blessing. It is true that one can see behind some stories of angelic appearances older traditions about theophanies of divine beings. But these have been taken up and modified in a quite new conception of the מלאך as the means of symbolizing the divine presence among his people.

It is in this connection that one must also consider such late texts as Mal 3:1–3 and Isa 63:9. Even though they may be later than the J texts of Exodus through Numbers,

they may still contribute to the “controlling framework” of our discussion of the “messenger.”¹⁰⁴ Mal 3:1 seems clearly to pick up the theme of the messenger as the vanguard of fire from the use in J and applies it to the coming of Yahweh to his Temple. The aspect of the messenger as the executor of judgment, which is also reflected in Exod 23:21, is stressed here. He is likewise called “the messenger of the covenant” (Mal 3:1), which may refer both to the close association of the messenger with the Book of the Covenant, the bearer of the blessings in the epilogue, and to the connection with the ark of the covenant in the vanguard theme. This is a reading of the J tradition of the מַלְאֲכָי theme prior to the P additions. Isa 63:9 likewise speaks of “the messenger of his presence” in a manner similar to that of Exod 33:1–3 and stresses his activity of saving, protecting, and caring for his people, as in Exod 14:19–20, 24–25, and 23:20–33, as well as the people’s rebellion and its consequences. These texts stand in close proximity to the J texts and belong to the same general horizon of theological thought, whereas they do not reflect any development of such a motif in DtrH.

Comparison with Deuteronomy 7 There has been much discussion and debate about the obvious parallels between Exod 23:20–33 and Deut 7. Some argue that the similarity merely demonstrates that Exod 23:20–33 is a proto-Deuteronomistic addition to the Covenant Code, while others support the view that the parallels represent a Deuteronomistic redaction of the whole or part of the epilogue. A third possibility is that it represents neither of these two choices but is part of a post-Dtr composition that makes use of Deut 7, along with other texts, to create a new work. This is the direction in which the previous discussion about the messenger has pointed, and we will pursue this possibility here. What is important is not only the similarities that point to literary dependence but also the differences and their diachronic significance.

To facilitate our discussion, I will set out the rest of the text of the epilogue verses 23–33, including a repetition of verse 23, which forms a transition between the two units:

²³When my messenger goes at your head and brings you into an encounter with the Amorites, the Hittites, the Perizzites, the Canaanites, the Hivites, and the Jebusites, then I will obliterate them. ²⁴You are not to bow down to their gods, nor serve them, nor perform their rites. Instead, you must completely overthrow them and smash their sacred pillars. ²⁵You are to serve Yahweh your God and thus I will bless your food and drink and will remove disease from among you. ²⁶There will be no miscarriage or barrenness in your land. I will assure you a complete life span. ²⁷My terrifying presence I will send before you and I will throw into a panic every people against whom you come and so rout all your enemies before you. ²⁸I will send a nest of wasps before you and they will drive out the Hivites, the Canaanites, and the Hittites from before you. ²⁹I will not drive them out from before you in a single year, lest the land should become waste and wild animals overrun it. ³⁰I will only gradually expel them as you expand and inherit the land. ³¹I will set your boundary from the Red Sea to the Sea of the Philistines [the Mediterranean] and from the desert to the Euphrates when I give the inhabitants into your hands and expel them from before you. ³²Do not make a covenant with them or their gods. ³³They are not to dwell in your land lest they lead you to sin against me, for should you serve their gods, it will certainly spring a trap over you.

First, let us consider the list of six nations in Exod 23:23 and the shorter version of three in verse 28. These lists correspond to the list of seven in Deut 7:1, which adds the

Girgashites and also has a different order. There can be no question about the unhistorical character of these lists.¹⁰⁵ The series of names is an ideological construct. The terms “Amorites” and “Hittites” as applied to the region of Palestine depend entirely upon their occurrence in the late Neo-Assyrian royal inscriptions, in which these archaic terms are applied to all the inhabitants of the region of Syria-Palestine. That in itself limits the horizon in which these terms are introduced into Hebrew literature from the time of Sargon to the end of the reign of Assurbanipal, late eighth to seventh century B.C.E. Given the other evidence of Assyrian influence on Deuteronomy and on the DtrH, I see no reason to doubt that the list of aboriginal nations is not also a product of this Deuteronomistic literature.

This is further confirmed by the description of the dimensions of the Promised Land in verse 31. The parallel to this does not lie in Deut 7 but occurs elsewhere in the Dtr tradition: Deut 1:7, 11:24, and Josh 1:4. The dimensions are not those of the Davidic empire as many have proposed but are the dimensions of the Hatti-land in the Assyrian inscriptions, which includes everything west of the upper Euphrates, through the Syrian desert and the Eastern Mountains to the Mediterranean Sea, and south to the borders of Egypt. The reference in Josh 1:4 to this whole region as “all the land of the Hittites” corresponds to the “the wide land of Ammurū [the Amorites] and the Hittite-land in its entirety” in the Assyrian royal inscriptions and confirms this source as the inspiration for these geographic limits.¹⁰⁶ The region from the upper Euphrates to the border of Egypt is still known as the Hittite-land (Hattu) in the Neo-Babylonian Chronicles.¹⁰⁷

There is considerable difference among the biblical sources as to what is to happen to these indigenous peoples. A number of terms are used to describe their fate, and the meanings of these terms are sometimes disputed. Deut 7:2 uses the term *חרם*, “to devote to destruction,” in keeping with its principles of holy war in Deut 20:17 and reflected in the stories of Jericho and Ai in Josh 6–8. This verb and its corresponding noun *חרם* are used predominantly in Deuteronomy and DtrH¹⁰⁸ with the clear meaning of total destruction: “you shall show no pity.” This is an obligation imposed upon the Israelites to be carried out by them. The same notion is expressed in an *inclusio*, or summation, in 7:16a: “You shall destroy completely (*אכלו*) all the peoples that Yahweh your God gives to you; your eye shall not pity.” In 7:17–24, the theme of the nations’ destruction is taken up again, but now primarily as the activity of the deity. Various terms of destruction, such as *שמד* and *אבד*, are used with either the deity or the Israelites aided by the deity (see also Deut 8:20; 9:3; 31:3–4) as agent. Common also in the D tradition is *כרתה*, “to cut off,” used of the deity (Deut 12:29).

None of these terms are used in Exod 23:20–33. The term that describes the activity of the deity toward the nations is *כהה*, “to efface” (v. 23), when the deity says, “I will obliterate them.” The term in this sense is rather rare and is also used of the obliteration of the “house of Jeroboam” (1 Kings 13:34). How this obliteration of the nations will be accomplished is not made clear until the later part of the unit in verses 28–30. The emphasis in verses 28–30 is on the theme of expelling (*גרש*) the nations, a term that is not found in Deuteronomy and has given rise to much discussion about its diachronic relationship to the idea of extermination in the D tradition.¹⁰⁹ The two ideas of expelling and exterminating without pity do not seem to be compatible. Because the Covenant Code is assumed to be earlier than Deuteronomy, the development is seen to

be in the direction of greater severity.¹¹⁰ As with the term *בְּלֹאֲךָ* above, we must examine the full controlling framework of this term and its usage. In Exod 34:11 the deity expels (*גָּרַשׁ*) the six indigenous nations, and in 33:2 it is the *בְּלֹאֲךָ*, as vanguard of the people, who is the means by which the deity expels (*גָּרַשׁ*) the six nations. The same theme occurs in Josh 24:12, applied to the Amorite kings Sihon and Og, and to the Amorites in general in verse 18. These texts are so close in perspective that they all belong to the same source, J. The theme appears in one late Dtr text, Judg 6:9, but is not otherwise characteristic of this source.¹¹¹

When we turn to its use elsewhere in J, we find it in the stories of Adam and Eve (Gen 3:24) where the deity expels the pair from the Garden in lieu of the death penalty out of pity (?). In the story of Cain and Abel, Cain is expelled from the arable land (Gen 4:14), and in the Abraham story, Hagar is expelled from Abraham's household (Gen 21:10). The last instance is especially important because it deals with the motif of land inheritance; the Ishmaelites are not to share in the Promised Land with the offspring of Isaac, a theme that is directly parallel to that of the expulsion of the nations in the Covenant Code and related texts. In the story of the exodus from Egypt, the motif of expulsion plays a somewhat ironic role. Here it is the Pharaoh who is made by the god to expel the Israelites from Egypt so they may escape in order to inherit the land of Canaan (Exod 6:1; 11:1; 12:39, cf. v. 33). There seems to be in J an elaborate play on the whole idea of expulsion, of exile. To be expelled from one's own land could be understood as divine punishment akin to devastation and obliteration, whereas to be expelled from forced captivity was freedom.

There is another term in this discussion that has also been debated. It is the hiphil (causative) form of the verb *יָרַשׁ*, "to inherit," and can mean in the hiphil either "to cause someone to inherit" or "to disinherit." When the god is the subject and Israel the object, then it is the deity who causes Israel to inherit its land, but when the nations are the object, then the deity "disinherits" them. There are two different views about the nature of this disinheritance. Some advocate that it means "expulsion," similar to *גָּרַשׁ*.¹¹² This view is followed in many modern translations. Others, such as Lohfink,¹¹³ take it to mean "destroy." It is best, however, to see the term as ambiguous because the disinheritance can come from either extermination or expulsion. There are instances in Dtr in which *יָרַשׁ* in the hiphil is used closely with verbs of destruction (Deut 7:17–24; 9:3–5; 31:3–4). In other instances, however, it is paired with verbs such as *הָדַף*, "to push aside" (Deut 6:19; 9:4; Josh 23:5). The verb *יָרַשׁ* in the hiphil does not occur in Exod 23:20–33, but it is found in Exod 34:24, the parallel text in J.¹¹⁴ The meaning is not incompatible with that of verse 11, which contains the verb *גָּרַשׁ*. The fact is that the ambiguity of the meaning "to dispossess" could have allowed the movement from the notion of complete military annihilation to that of expulsion and exile. This can be seen from the fact that the Holiness Code uses a direct parallel to *גָּרַשׁ*, namely, *שָׁלַח*, "to send," in Lev 18:24 and 20:23, which speak of the deity "sending out" the nations before the people. J has simply taken over this idea and used more vivid language, although the same parallel between *גָּרַשׁ* and *שָׁלַח* is used throughout the exodus story. The true historical development, therefore, is from the idea of annihilation to that of expulsion and exile.

Connected with the theme of expulsion of the nations is the notion that "hornets" or "wasps" will be used for this purpose (Exod 23:28; Josh 24:12). This motif seems to

be derived from Deut 7:20, but with a difference. The function of the “wasps” in Deuteronomy is not to expel the people but to find the hidden remnant of the foreigners until they are completely destroyed. The wasp motif is part of a larger theme, that of the gradual annihilation of the native population, instead of the complete extermination of the whole population all at once. In this respect, there seems to be a modification, in Deut 7:17–26, of the older level of the tradition in 7:1–5. The wasp motif functions as a divine agency only with respect to finding the few that may be left from the general destruction just to make the whole extermination complete. This has changed in Exod 23:28, where the wasps are now parallel to the divine terror, the messenger, and any other agent of the deity used to expel the nations. The image of the “wasps” has become confused. This is also seen in the application of the wasp motif to the conquest of Sihon and Og in Josh 24:12, which makes for a forced metaphor because the original account of the conquest of Sihon and Og reflected annihilation of these peoples, not expulsion. The motif in Deut 7:20 clearly seems to be the original one.

The gradual acquisition of the land, as reflected in Exod 23:29–30, with reasons for why it is necessary, is also a late theme that has many variations. I would agree with Blum¹¹⁵ that there is a development in this idea of gradual occupation of the land, from the complete conquest by Joshua, to the tribes’ future gradual conquest of the land beyond Palestine in Greater Syria not yet conquered, to the conquest or subjugation of nations that still remained within the homeland itself. Thus, Deut 7:22–24, which is similar to Exod 23:29–30, is a modification of the annihilation theme in Deut 7:1–5. The same theme is picked up by DtrH in Josh 23:1–5, in which the nations that remain, in addition to the land that was conquered by Joshua (cf. 11:16–18), are said by Joshua to have been allotted to the tribes in anticipation of Yahweh’s actions: “Yahweh your God will push them back out of your sight, and he will dispossess them (שׁררִי hiphil) from before you” (v. 5). This has in mind the idealized territory between the Euphrates and the borders of Egypt. This theme is likewise expressed in a P version in Josh 13:1–6 that builds directly upon the Josh 23:1–5 text. After a detailed geographic delineation of the land that remained, Yahweh states to the elderly Joshua: “I myself will dispossess (שׁררִי hiphil) them from before the people of Israel. Only allot the land to Israel for an inheritance, as I have commanded you” (13:6b).¹¹⁶ A later, negative construction is put on the theme of the remnant of the nations in Judg 2:20–3:4, and it is this construction that is also followed in Judg 2:1–5. Exod 23:29–31, with its positive emphasis on the divine expulsion of nations from this “Greater Syria,” belongs close to the DtrH development of this theme and not with the negative slant given to Israel’s failure to dispossess all the peoples within the land, as in Judg 2:1–5. This is another reason that this text should not be taken together with Exod 23:20–33.

There are a number of additional parallel themes in the two units of Exod 23:23–33 and Deut 7 that also share some distinctive vocabulary. These have to do with warnings against serving the gods of the nations, not entering into any covenants with them, eliminating their objects of worship, and the blessings that attend upon service of Israel’s god. Here it would be helpful to look first at the account in Deut 7. The whole chapter has a clear logic and progression of thought. It begins with the theme of the complete destruction of the indigenous inhabitants, verses 1–2. Failure to do this and to spare some would lead to mixing and intermarriage, which in turn would result in apostasy by the sons who served other gods, thus invoking the wrath of Israel’s god followed by

the people's destruction. So they are to destroy their altars, pillars, asherim (אֲשֵׁרִים = cult poles?), and carved images (vv. 3–5). The reason for this intolerant action is because the people are a chosen and dedicated people of the god, Yahweh, who has absolute claim on them, and they are under covenant obligation to him and bound to keep all his statutes and ordinances (vv. 6–11). Strict obedience to this covenantal arrangement and its demands will mean blessings and prosperity, abundant crops, and no barrenness or disease (vv. 12–15). A summary statement repeats the obligation to destroy the peoples so as not to serve their gods, which would be a “trap” (מִיָּקֶשׁ) to them (v. 16).¹¹⁷

A second unit takes up the theme of destroying the nations by encouraging the people not to despair of the task against those who are greater and stronger than they are because Yahweh will aid them, causing their enemies' destruction as he did in Egypt, so that in time all will be destroyed (vv. 17–24). The unit concludes with a special warning against claiming the gods as objects of booty, even those covered with silver and gold, because the Israelites can easily become “entrapped” by them; rather, the people are to completely destroy them (vv. 25–26). The logical progression of thought in the chapter is clear, and even if the second unit is later, it builds upon and amplifies the earlier part in verses 1–5.

When we come to Exod 23:23–33, however, the logic and progression of thought become difficult to follow, which leads many to propose a redactional solution. Yet this is a doubtful strategy. Let us look at the unit. The opening statement about Yahweh or the messenger obliterating the nations while Israel presumably does nothing does not lead into the statement about not worshiping their gods and destroying their objects of worship but mentions only the מַצְבּוֹת, “pillars.” This looks like a rather cryptic summary of both Deut 7:5 and 25–26. Nothing is said about the dangers of intermarriage here. The whole discussion in Deut 7:6–11 about the demand for absolute loyalty to Yahweh is summarized in the brief statement “You shall serve Yahweh your God,” using the title for the deity in the third person as in Deuteronomy even when it does not fit the first-person style of the rest of the narrative.¹¹⁸ Nothing is said about obedience to the commandments. Yet the logic of Deuteronomy is used here with the enumeration of the blessings, again in abbreviated style (vv. 25b–26). The subject in verses 27–31 returns again to that in verse 23 as an elaboration, just as in Deut 7:17–24, with some of the same motifs, but the reason for the emphasis on divine activity, to encourage the people who may be fearful of the coming encounter, is completely lacking in the Covenant Code. So the transition from verses 26 to 27 is awkward. This unit in verses 27–31 leads into a discussion about not serving the foreign gods, as in Deut 7:25–26, but instead of speaking about the gods as war booty, the Covenant Code in verses 32–33 returns to the themes of Deut 7:2–5 and 16b. Here the author simply selects phrases out of context: “Do not make a covenant with them” (v. 32a, Deut 7:2) “or with their gods,” “for should you serve their gods, it will certainly spring a trap over you” (v. 33b, Deut 16b). The statement “they are not to dwell in your land, lest they lead you to sin against me” (v. 33a) is a summary of the long discussion about coexistence and intermarriage in Deut 7:3–4. However, it has been modified to emphasize expulsion of the peoples (v. 31) instead of annihilation as in Deut 7:2.

What seems to me perfectly clear from this comparison is that Deut 7 is the older, basic text and Exod 23:23–33 has been composed as a much shorter version, following

the same basic outline of topics but with much less logical clarity.¹¹⁹ A few motifs, such as the “messenger,” have been introduced from the author’s broader framework, and the dimensions of the land in v. 31 have been taken from elsewhere in DtrH. Another version of J’s composition appears in Exod 34:11–16, which rests more heavily upon Deut 7:1–5 but with some of the same modification to emphasize the expulsion of the inhabitants. Here more of the cult objects to be destroyed are mentioned, as well as the dangers of intermarriage. In addition, language that is typical of other parts of Deuteronomy is employed. The same themes are picked up again in Josh 24. I will mention only one point of similarity between this text and Exod 23:23–33 in contrast to Deut 7. I noted above that in place of the emphasis in Deut 7:11–12 on obedience to commandments such as those contained in Deuteronomy, Exod 23:25 speaks only of serving Yahweh as the source of blessing. Similarly, Josh 24:14–28 stresses serving Yahweh only and not serving other gods as the primary obligation of the people. All other duties are summed up in that one concept. Both texts belong to the same horizon and perspective, and in my view both were composed by J.

Conclusion

The epilogue was composed, not as a conclusion to an independent code, but as a transition back to the larger setting of the Yahwist’s literary opus. It looks forward to the rest of the wilderness journey from Sinai to the Promised Land under the divine guidance of the “messenger”—the pillar of cloud and fire—which is the vanguard presence of the deity. There is nothing “redactional” about this *גִּלְגָּל*/pillar of cloud theme because it is introduced into every stage of the Moses story, from the call (Exod 3) to the guidance out of Egypt and the victory at the sea (Exod 13–14), the Sinai pericope (Exod 19–24, 32–34), and the desert journey (Num 10, 14). It is quite distinct from Deuteronomy’s presentation of the wilderness journey, which, except in a few late additions, does not treat the vanguard theme. The theme, however, comes to the fore in Second Isaiah, which speaks specifically of the vanguard and rearguard of Yahweh in the second exodus from Babylon (Isa 52:11–12).¹²⁰ The whole theme of the desert journey from Babylon to Judah is dominated by the motif of the divine vanguard who guides and provides for his people and prepares the way (Isa 35:1–10; 40:3–5, 9–11; 41:17–20; 42:14–16; 43:19–21; 48:20–21; 49:8–13; 55:12–13).

The author of the epilogue (J) has imitated his primary source in Deut 7 in a shortened version to present his homily on the future hope of the Promised Land. This not only serves as the narrative connection between the giving of the law at Sinai and the next phase of the wilderness journey but also reflects the concern of the exile in Babylon for the return, as so clearly attested in Second Isaiah. Yet there is a shift in perspective from conformity to the Deuteronomic laws as laid down in the code as the basis of blessing to service of Yahweh alone as the sole basis of blessing and prosperity, a concern that also matches that of Josh 24.

The Civil Laws, or Mishpatim

After the introductory laws in Exod 20:22–26, which constitute part of the framework of the law code as we have seen above, the deity proceeds to set forth the law code proper with the statement: “These are the laws (בְּפִטִּים, *mišpātīm*) that you [Moses] are to set before them [the people].” The term “mishpatim” is understood by most of the scholars reviewed in the previous chapters to refer to the body of civil laws that make up the first half of the code. It is these laws that bear the closest resemblance to the laws of the other Near Eastern codes, although it is important to note that there are exceptions both in form and in content in which the particular law or part of it departs from the Near Eastern type and has its connection with a type of law in the Hebrew legal tradition that is very different and is represented by Deuteronomy and the Holiness Code. This curious mixture of laws in this section of the code will need to be addressed. Nevertheless, I will use the Hebrew rubric *mishpatim* to refer to all the laws in this part of the code.

The Law of the Hebrew Slave

One of the most frequently discussed laws of the Covenant Code is the law having to do with the Hebrew slave in Exod 21:2–11.¹ It is the subject of a dissertation by G. C. Chirichigno, revised for publication as a monograph, *Debt-Slavery in Israel and the Ancient Near East*.² This work, as well as its predecessors, follows the almost universal assumption that the version of the Hebrew slave law in the Covenant Code is the oldest version of this law and therefore antecedent to the parallel versions in Deuteronomy and the Holiness Code.³ The law has received prominent treatment in a series of monographs on the Covenant Code, all of which follow the rule of the priority of the Covenant Code over Deuteronomy and the Holiness Code.⁴

The conviction that the law of the Hebrew slave in the Covenant Code is the oldest version of this law has prejudiced the discussion of the law in two major respects. First, the subsequent versions in Deuteronomy and the Holiness Code are interpreted as based upon, and modifying, the law of the Covenant Code, and this invariably has a way of making the Covenant Code version conform to the later laws. Second, the parallel material from Mesopotamia is used to interpret the Covenant Code law in such a way that, as

the earliest phase of Israelite law and social ethics, it reflects its origins in general Near Eastern law. As I will show below, the comparison with Mesopotamian law, especially the Laws of Hammurabi (LH), has led to a misunderstanding of the law in the Covenant Code. In attempting to understand the history of the Hebrew slave law, it makes a great difference where one begins. I will begin with the laws in Deuteronomy and the Holiness Code to show how different and more comprehensible the understanding of the law in the Covenant Code becomes when viewed from this new perspective.

The Debt-Slave in Deuteronomy and the Holiness Code

The law in Deut 15:12–18 is the most straightforward and easiest of the three versions to treat.⁵ Yet it has some curiosities. While it has a certain superficial resemblance to the form of casuistic law with its successive ו clauses, it belongs to the larger social legislation of 15:1–18 and is hardly subject to prosecution in this form, as the reference to it in Jer 34:8–14 makes clear. There are no penalties suggested, only a set of moral arguments. It does not even state that the slave has the right to leave after six years of service, only that his owner should be willing to let him go (שלח), and that he should not go “empty-handed,” presumably to avoid a repeat of the very situation that caused the enslavement in the first place.

The parallel legal and social situation is attested in Hammurabi’s law code (LH §117) with some differences. The Babylonian law suggests that in a case of financial crisis over default of a loan, a head of household could sell his wife or children (son or daughter) into a limited servitude of three years to cover his debt. Nothing is said about himself and there is no suggestion that the servitude could be made permanent.⁶ As Chirichigno points out,⁷ there is reason to believe that the three-year limit in the law was a reform to curb the abuse in which such servitude tended to become permanent.⁸

Deut 15:12–18 envisages a similar circumstance in which a male or female Hebrew is in dire financial straits and seeks to find relief from debt by temporary servitude to cover the debt. Such persons are not slaves prior to the transaction. As Babylonian law makes quite clear, there is no reason to distinguish between male and female, because the law has in mind temporary service as the rule. In the Hammurabi Code a man may sell either his son or his daughter into temporary servitude. The Deuteronomic law speaks of the man himself entering limited servitude, and whether, therefore, such a person enters service along with his family or not has nothing to do with the principle of limited servitude, so that the matter of single or married does not enter into the discussion of the law.

The procedure by which the Hebrew slave becomes permanently dependent by means of a slave-mark appears to be a private matter within the slaveholding family.⁹ Yet if that is the case, then it is hard to see how the application of the slave-mark could not have been very much abused. The fact that the practice was abused is reflected in Jer 34:8–16. The account clearly indicates that there had not been a release of male and female Hebrew slaves after six years of service, so a general release was declared.¹⁰ But the slaves were released only temporarily, and the owners were able to reclaim them again, against the prophet’s condemnation. It is obvious that the account of this episode has in view the Deuteronomic version of the law. It also adds a new feature that the promise of release was made under oath (a covenant) in the sanctuary, which becomes the basis for the prophet’s subsequent condemnation of the owners.

The parallel law in Lev 25:39-46 is clearly dependent upon Deuteronomy.¹¹ The understanding of “your brother” as embracing not just a kinsman but any fellow Israelite/Hebrew is derived from Deuteronomy.¹² Likewise in agreement with Deuteronomy, the Holiness Code reckons with the situation in which the indentured service is for debt: “If your brother living among you becomes poor and sells himself to you, you will not treat him as a slave. He is to remain with you as a hired hand and as a stranger” (vv. 39-40a). The motivation for this treatment of the debt-slave is given in verses 42-43: “for they are my slaves whom I brought out of the land of Egypt,” and “you shall not treat them harshly, but you shall fear your God.” The fellow Hebrews are under the protection of the god, their deliverer.¹³ The basic point of the Holiness Code law seems to be to emphasize the humanitarian concern that fellow Hebrews are not to be treated as slaves. For this reason also they may not be sold (v. 43b).

Furthermore, Deuteronomy, in Deut 15:1-11, had proposed a national seventh year of release of debts to relieve the needy. The older law of the Hebrew slave was associated with this law because of the seven-year scheme, but the debt-slave’s release in his seventh year could not have been part of a general release or it would not have worked. If, as it seems to me, the jubilee release in the Holiness Code law is secondary, then the Holiness Code may have assumed a general seventh-year release for slaves, as in the current law in Deuteronomy, or just an indefinite periodic release or the possibility of redemption, as with the Hebrew slave owned by a resident alien (גֵר). The same basic rule applies to the resident alien living in the community to whom an Israelite brother sells himself (vv. 47-55). He may be redeemed by his family, but his treatment by the resident alien is to be the same as he would receive under his Israelite brother.¹⁴ The Holiness Code uses the same kind of moral persuasion but directs it entirely at the way indentured Hebrews are to be treated as laborers or serfs. This also means that they cannot be sold as slaves (presumably to foreigners, who would treat them as slaves). There is also no need to provide charitable donations to the indentured Hebrews, as in Deuteronomy, because as hired hands they can now earn their release and have enough for a fresh start. This was actually an improvement on mere exhortations to charity that could never have the status of law.

Furthermore, the Holiness Code (Lev. 25:44-46) goes on to make a distinction between indentured Hebrews and foreign slaves, who are to be regarded in quite a different fashion. They may be considered as property and treated as slaves, that is, “harshly.” They and their offspring are permanent possessions and may be inherited as property in perpetuity. The concern of the debt-slave law in both Deuteronomy and the Holiness Code is humanitarian and directed toward conditions of poverty among fellow Hebrews and not general regulations regarding slavery. The fact that the “laws” are primarily injunctions with rhetorical persuasion, using motivation clauses and direct personal address, makes them similar in form to the humanitarian laws in the Covenant Code (Exod 22:20-26 [21-27]), which will be considered below.

The Hebrew Slave in Exodus 21:2-6

The situations envisaged in Exod 21:2-6 and 7-11 are actually quite different from that of Deuteronomy and the Holiness Code, and it is a mistake to try to interpret them as if they were the same. The first law, in 21:2-6, may be set out in parallel form with Deut 15:12-18:

Exod 21:2-6

²Whenever you purchase a Hebrew slave, he is to serve six years, but in the seventh he may leave as a free man, without payment.

³If he entered (service) single, he will leave single; if he is married, his wife may leave with him. ⁴If his master gives to him a wife and she bears sons or daughters, the wife and her children will belong to his master, and he alone may leave.

⁵But if the slave declares, "I love my master, my wife, and my children. I will not go free." ⁶His master will bring him to the deity. He will bring him to the door or the doorpost and will pierce his ear with an awl. He will then serve him permanently.

Deut 15:12-18

¹²Whenever your brother, a Hebrew man or a Hebrew woman, sells himself to you, he is to serve you for six years, but in the seventh year you are to release him from you as a free man. ¹³And when you release him as a free man from you, you are not to send him off empty-handed. ¹⁴You are to furnish him generously from your flocks, your threshing floor, and your winepress. Just as Yahweh your God has blessed you, you are to give to him. ¹⁵You must remember that you were once a slave in the land of Egypt and Yahweh your God redeemed you. For this reason I am commanding you now (to carry out) this injunction.

¹⁶If it should happen that he says to you, "I will not leave you," because he loves you and your household, since you have been good to him, ¹⁷then you are to take an awl and run it through his ear into the door, and he will thus become a permanent slave. You are to do the same for your female slave. ¹⁸You should not view it as burdensome when you release him as a free man, because at half the cost of a hired hand he has served you for six years and Yahweh your god has blessed you in all your affairs.

The first thing to be observed in this comparison of the two versions of the law is the size disparity in treatment of the same element in Exod 21:2 and Deut 15:12-15, 18. Is the law in Deuteronomy, which is part of the longer discussion of humanitarian concern for one's fellow Hebrew, an elaboration of Exod 21:2, or is the latter merely a brief summary of the former Deuteronomic law? What makes the disparity even more remarkable is that Exod 21:3-4 contain an important qualification of the law in verse 2 that is not reflected in Deuteronomy at all. This qualification immediately affects the way in which the slave's retention in service should be understood in Exod 21:5-6, which differs from Deut 15:16-17a. While Deut 15:17b has the statement that the female slave is to be treated in the same fashion as the male slave, Exod 21:7-11 has a long qualification of this phrase that suggests that they cannot be treated the same. (This

issue will be taken up in detail below.) How are we to judge the direction of the dependence of these laws?

In his recent treatment of this law, E. Otto claims that the qualifications in Exod 21:3–4 and 7–11 were not accepted by Deuteronomy or that these laws did not need to be reformulated by Deuteronomy and were simply left as they were.¹⁵ Yet it is hard to see how either of these possibilities could be the case. It is one thing to see the Deuteronomic law as a general principle dealing with male and female debt-slaves, but once an exception to the rule is made, it cannot be ignored. What happens when a male debt-slave with four years of service is allowed to marry a female debt-slave with two years of service, or even a regular chattel-slave? Why should Deuteronomy, which gives such verbose treatment of one clause, choose to completely ignore an obvious qualification of the general principle? Or how can Deuteronomy state that the female slave must be treated the same way as the male slave without qualification and ignore any comment on Exod 21:7–11, in which the female slave becomes the wife of her master and is not expected to leave in six years' time? The most reasonable way of understanding the relationship of these laws is to see Deuteronomy as the statement of a general principle within the larger context in Deut 15:1–18 of debt distress, a completely internal Deuteronomic legal development. In form, it has little in common with casuistic laws; it is based entirely upon moral obligation and does not presuppose any legal collection. The Covenant Code law, on the other hand, modifies the law with important qualifications. It merely summarizes the initial situation in very brief fashion and then adds new aspects to the law not envisaged in the earlier version. As we shall see repeatedly, that is the standard way in which the author of the Covenant Code develops his set of laws.

In addition to the general profile of these laws set out above, there are a number of details that deserve comment. In the Exodus version of the law, with the exception of the initial second-person verbal form, the law is cast in the casuistic style.¹⁶ This has encouraged scholars to view the initial second-person singular form as a redactional change made by an editor who wanted to provide a transition between an older legal corpus and the new context of the present text. It is usual therefore to propose an original version corresponding to the verb found in Deut 15:12 (כִּי יִמְכַר לְךָ אֲחִיךָ), "If your brother sells himself to you") but in the third person (כִּי יִמְכַר אִישׁ "If a person sells himself").¹⁷ The proposal seems unlikely for the following reasons:

1. It is unclear why a later redactor would change the verb מִכַּר to the verb קָנָה, thereby giving to the law an entirely different meaning. Since the verb מִכַּר is used in verse 7, there must be a reason for the deliberate choice of the verb קָנָה in verse 2.

2. The proposed third-person singular niph'al (reflexive) creates a problem for the phrase "Hebrew slave," which must be understood as proleptic, since a slave cannot sell himself.¹⁸ This is very unlikely, and the present text, therefore, should be retained if it can be shown to make good sense as it is.

Sara Japhet, who accepts קָנָה as original, has argued that the difference between the use of קָנָה in Exod 21:2 and מִכַּר in Deuteronomy and the Holiness Code points instead to the dependence of Deuteronomy on the Holiness Code.¹⁹ Her argument is that Deuteronomy, which is otherwise heavily dependent upon the Covenant Code, would not have changed the verb קָנָה if it had not been influenced by the use of מִכַּר in the Holiness Code, with its special concern for the impoverished Hebrew. Yet if the ver-

sion of the law in the Covenant Code is later than Deuteronomy, this argument for the priority of the Holiness Code over Deuteronomy fails, and because there are so many other reasons for considering the Holiness Code as dependent upon Deuteronomy,²⁰ the use of קנה by the Covenant Code actually argues for the later date of the Covenant Code. The law of Deuteronomy cannot be derived from the law in the Covenant Code as it stands in its current form.

The problem of how to understand “Hebrew” (עברי), whether as a social term or as a gentile, has been much discussed.²¹ The reason that this question arises at all is the attempt to associate the gentile “Hebrew” (עברי) with the *habiru* as a way of explaining Hebrew origins. The *habiru* represented a widespread social class throughout the second millennium B.C.E. in the Near East. They may have been social outcasts or immigrants who served as mercenaries or as indentured laborers just above the class of slaves. The possibility that עברי reflects just such a social designation as a particular type of slave depends entirely upon a demonstration that the law is much older than the Deuteronomic parallel, where עברי clearly has the gentile meaning of “Hebrew.” Only a Near Eastern example of a *habiru* enslavement agreement that completely parallels Exod 21:2–6 would support such an argument for priority. But no such document has been discovered, and such Nuzi parallels that have been produced have encouraged a forced interpretation of the biblical law.²²

If we simply consider the phrase “Hebrew slave” (עבר עברי) within the context of the larger Pentateuchal source J, there is no reason to regard עברי as anything other than the gentile adjective “Hebrew.” In Gen 39:17, the same phrase occurs in the definite form, used to refer to Joseph and clearly meaning “the Hebrew slave.” The gentile “Hebrew” is used elsewhere in the Joseph story²³ and frequently in the exodus story.²⁴ Compelling reasons must be offered by anyone who proposes to depart from the clear and frequent usage within the same source.²⁵

The first thing to note about the Hebrew-slave law in the Covenant Code is that, unlike Deuteronomy, it does *not* parallel the Babylonian law (LH §117), because this is not a case of someone selling himself or a member of his family into slavery for debt.²⁶ Exod 21:2a begins with the statement: “Whenever you purchase a Hebrew slave. . . .” The most obvious and direct meaning of this statement is that the person is already a slave for whatever reason and has been purchased from another owner.²⁷ The terms of the law, however, are such that the seller could not belong to the Israelite community, because that would be contradictory and make void the law if an Israelite could sell his fellow Hebrew within the six-year period. The seller, therefore, must be a foreigner.²⁸ In these circumstances, the law wishes to distinguish between male and female slaves and the conditions under which the male Hebrew slave enters servitude, whether single or married. If he is single and given a permanent female slave as a wife, then the whole reason for choosing permanent servitude changes from that of Deuteronomy, because he can then be parted from his family. Deuteronomic law deals only with the general principles of debt-slavery and does not consider this possibility (nor is such a situation envisaged in LH §117). The Holiness Code stands midway between Deuteronomy and the Covenant Code because the Holiness Code not only deals with the Hebrew indentured for debt (as in Deuteronomy) but also refers to the purchase of foreign slaves as permanent possessions. However, the Holiness Code does not allow for the purchase of Hebrew slaves from foreigners or resident aliens, nor does it allow for the marriage

of a male Hebrew debt-slave to a foreign chattel-slave. They belong to two different classes of society.

In the Covenant Code, the law of the Hebrew slave is applied to a new social context and to a situation for which it was never intended by Deuteronomy. The Covenant Code takes up the six/seven-year scheme of Deuteronomy and applies it to all Hebrew slaves, whether debt-slaves or chattel-slaves, within the community of "Israel." This must be the reason for the change of wording to "Whenever you purchase a Hebrew slave," to include those who are already slaves. This is in no way contradicted by the discussion about "entering" single or married, because slaves could be bought as individuals or as family units.²⁹ The question that must be considered, however, is what sort of person a single Hebrew male slave would marry. Could he not marry a Hebrew female slave? This issue is complicated by the question of whether or not the Hebrew slave (עבד עברי) could also include females. Carolyn Pressler discusses this question but her view is influenced by three considerations that are not legitimate in my view: (1) that the Covenant Code law can include debt-slavery, (2) that Deuteronomy is a revision of the Covenant Code to specifically include women, and (3) that all the slaves involved are Hebrews.³⁰ If one must assume that the slaves are being purchased from foreigners for reasons given above, then some of the female slaves may be Hebrew and some non-Hebrew. If the Covenant Code is later than Deuteronomy and the Holiness Code, then the female Hebrew slaves may be assumed to be subject to the same principle as the male Hebrew slaves, whereas according to the Holiness Code the foreign female slaves are permanent. The law, however, is not explicit in its distinction between Hebrew and non-Hebrew female slaves, so one cannot be certain about these matters. The purchase of Hebrew female slaves for the purpose of marriage is a special situation that will be taken up below.

Nevertheless, it is likely that the author of the Covenant Code has in mind the possibility of a master owning permanent foreign slaves, as in the Holiness Code, and it is one of those female slaves that he can give to a single Hebrew slave as a wife.³¹ Yet according to the Holiness Code, such a female slave and her offspring are the permanent possession of the master. The Covenant Code has thereby changed the whole character of the original law. So while the Covenant Code has carried over the motive of the love of the slave for his master from Deuteronomy, it has added the motive of the Hebrew slave's not being separated from his family as the primary reason for choosing permanent servitude.

Furthermore, there is an interesting change in the terms of emancipation between Deuteronomy and the Covenant Code. In Deut 15:12–18, the emphasis is upon the master's letting the slave go free (שליח חפשי) and not letting him go "empty-handed" (ריקים). The Covenant Code has changed this to suggest that in the seventh year the Hebrew slave has the right "to go out free" (יצא חפשי), and that he can do so "without payment" (חנם). The implication is that the six years of labor have made up for the purchase price. This new wording has given a more juridical cast to the whole law. The use of the term חנם, "without payment," does, perhaps, imply the possibility of redemption prior to the seventh year.³² In the Holiness Code, just such a possibility of redemption is discussed in connection with Hebrew slaves owned by "strangers." This close association of release "without payment" and redemption is also found in Isa 52:3, which describes the end of enforced exile thus: "For thus says Yahweh: 'You were sold for nothing (חנם) and

without money will you be redeemed.” It would appear that the prophetic author has in mind the laws of the Hebrew slave, especially the Holiness Code and the Covenant Code.

The ceremony of permanent enslavement in Exod 21:6 has its parallel version in Deut 15:17, but the former version contains a significant addition. For convenience, I will repeat the parallel laws here:

Exod 21:6

⁶But if the slave declares, “I love my master, my wife, and my children; I will not go free,” his master will bring him to the deity. He will bring him to the door or the doorpost and will pierce his ear with an awl. He will then serve him permanently.

Deut 15:16–17a

¹⁶If it should happen that he says to you, “I will not leave you,” because he loves you and your household, since you have been good to him, ¹⁷then you are to take an awl and run it through his ear into the door, and he will thus become a permanent slave.

The question is whether Deuteronomy is a shortened version of the Covenant Code or the Covenant Code has expanded Deuteronomy. Åke Viberg has made a detailed study of this legal practice of piercing the ear of the slave.³³ His basic assumption is that Exod 21:6 is the oldest version of the law, and this governs all his comparisons. The first task for Viberg is to understand that part of the law in verse 6a that is not found in the Deuteronomic parallel. The text states: “His master will bring him to the deity. He will bring him to the door or the doorpost.” The first problem is the meaning of the phrase “to the deity.” Two possibilities are advocated, it refers to either the slave owner’s household gods or the national god Yahweh at the local sanctuary. The first alternative is to view the law as reflecting an older Canaanite legal custom of piercing the ear in the presence of the household gods, but this is just speculation without evidence. If “Hebrew” in verse 2 means an Israelite, as argued above, then there is little basis for such a reconstruction.

The assumption behind the second suggestion, favored by Viberg, is that it refers to a ceremony at a local sanctuary and that this law therefore reflects the pre-Deuteronomic period of numerous local sanctuaries, but such an assumption is not shared by this study. The meaning of the phrase “to bring him to the deity” depends very much on the interpretation of the subsequent clause, “he will bring him to the door or the doorpost.” Viberg argues that this phrase is meant to be explicative, to clarify the former phrase. The two are certainly to be understood as equivalent, but which explains which? The second phrase by itself could refer merely to the entrance of the master’s house, so it is the first phrase that defines the meaning of the second. But this still leaves unanswered what this exactly means, because it seems a very odd way of saying, “he will bring him to the house of the deity,” if that is what it means. Why did the author choose this particular construction?

This brings us to a consideration of the parallel in Deut 15:17. Viberg holds that Deuteronomy has shortened the Covenant Code version because he interprets the phrase “into the door” as a deliberate revision of the reference to a local sanctuary in Exod 21:6a, as he understands it. But the Deuteronomic phrase “into the door” hardly looks like such a revision. One would expect either a centralization of the local custom, such as “bring him to the place that Yahweh will choose . . .,” or an unequivocal statement

about bringing the slave to the door of his own house. As it stands, if the Deuteronomic law alludes to the Covenant Code law, then it does not revise anything. It is, to my mind, preferable to see the phrase “into the door” as merely part of the description of how the slave-mark is to be made. This means that it is Exod 21:6b that has shortened the Deuteronomic version of this operation. However, J has taken this remark about the door and has expanded it into quite a different meaning. First, he adds “the doorpost” alongside “the door.” This is highly suggestive because elsewhere in Deut 6:9 the doorpost is the place where the divine law is written.³⁴ Thus, in any post-D understanding of this action, to conduct this ceremony at the doorpost may very well be the equivalent of performing this solemn action “before God.” This means that J has made use of two different texts to formulate his understanding of this action.

This also explains the awkward construction in Exod 21:6a, because it is intended as an explanation of the reference to the door in Deuteronomy. I had previously argued that Exod 21:6a was an addition to the law in Deuteronomy in order to change the private domestic ceremony to one that is now public and related to the sanctuary.³⁵ I suggested that the reason for this change was to avoid the abuse of private permanent enslavement against the Hebrew slave’s will. However, if this is the case, then it is hard to see why the Covenant Code’s text would not simply state: “his master will bring him to the door of the house of the deity.” It now seems to me more likely that the domestic ceremony has simply been solemnized to make it an act in the divine presence.

The “Purchase” Marriage: Exodus 21:7–11

The lack of any direct connection in the Covenant Code law of the Hebrew slave with debt-slavery applies equally to the second part of the law in Exod 21:7–11, which states:

When a man sells his daughter as a female slave, she shall not go free as the male slaves do. If she no longer pleases her master who has designated her for himself, he must let her be redeemed and is not to sell her to foreigners because he has acted in bad faith toward her. If he designated her for his son, he is to treat her as a daughter. If he takes a second wife, he is not to deprive her of food, clothing, or conjugal rights. If he does not do these three, she may go free without paying any money.

It seems to me that if one considers this part of the law without the prejudice of the Covenant Code’s priority, then it seems so obviously to be a qualification of the statement in Deut 15:17b: “You are to do the same for your female slave.” It is senseless to suggest that Deuteronomy is attempting to modify this law by stating that the female slave who is sold into marriage should go free after six years. This law suggests that the primary reason for enslavement of Hebrew women (although certainly not the only reason) is that daughters are sold by their Hebrew fathers as wives either for the ones who purchase them or for their sons.³⁶ Unlike the situation in the first half of the law, it is not a foreigner who sells the woman but a Hebrew man who sells his own daughter. In such circumstances, of course, there could be no question of release after six years unless the rights of the woman so married were not fulfilled. In any case, such a Hebrew woman was not a slave purchased from a foreigner, as in the case of the male slave above, and could never be resold to a foreigner.³⁷

What is the social situation envisaged by such a law? While it is not reflected in any Babylonian law code, S. Paul has drawn attention to similarities between Exod 21:7–11 and a type of Nuzi marriage contract, the *tuppi mārūtī u kallūtī/kallatūtī*, “document of daughtership and daughter-in-lawship.”³⁸ Both cases pertain to the sale of a young girl by her father for the purpose of marriage, but there are also some important differences that mitigate against seeing any close relationship between the legal practices. In particular, the Nuzi texts reflect a type of adoption-marriage that was a widespread legal practice in the Near East, whereas Exodus says nothing about “adoption” as part of the transaction here.³⁹

Nevertheless, there are some interesting Mesopotamian marriage contracts, much closer in time to the biblical case, that take the form of a slave sale. A Neo-Assyrian text of the late seventh century B.C.E. states:

Mullissu-hasina, the daughter of Nabu-rihtu-usur–Nihtiesarau contracted and bought her for 18 shekels of silver for Siha, her son, for marriage. She is the wife of Siha. The money is paid completely.⁴⁰

In this case, it would appear that the father did not have the means to provide a dowry in exchange for a marriage “gift.” So he sold his daughter to a woman as a wife for her son. The transaction is not like a regular marriage contract but has the same form as that of the sale of a slave.⁴¹

The same situation seems to be reflected in the remarks of Jacob’s wives in the Jacob-Laban story, which states (Gen 31:14–16):

Then Rachel and Leah answered him [Jacob]: “Is there any portion or inheritance left to us in our father’s house? Are we not regarded by him as foreigners? For he has sold us, and he has had continuous use of what was paid for us. All the property which God has taken away from our father belongs to us and to our children. Now then, whatever God has said to you, do.”

The sale of Laban’s daughters was in the form of the 14 years of service by Jacob, but the wives complain that they did not receive an adequate portion as part of their inheritance or dowry. Their father has treated them like foreign women (נכריות) who could be bought and sold.⁴²

On the basis of this evidence, I must reject Pressler’s interpretation of Exod 21:7–11. She imagines, without offering any evidence from legal documents, that the woman is a minor and is purchased for future sexual purposes and that fathers of young girls could sell their daughters at will to serve as concubines.⁴³ The term פילגש, “concubine,” is not used, and it is entirely prejudicial to the understanding of the law to construe it in this way. The cuneiform text quoted above assumes that as soon as the purchase is completed, the woman becomes the wife of the man for whom she is intended. Contrary to Pressler’s contention that the master could dispose of the “girl” by marrying her to a slave or to another man, the contract implied in Exod 21:7 is precisely what we have in the extant cuneiform document cited above. Within J’s social context, “purchase for marriage” was sufficiently common to introduce a qualification regarding the release of Hebrew slaves, male and female, that prohibited the release of Hebrew women who entered the household in this way. But it still maintained the strict principle that Hebrew women under no circumstances should be sold in marriage to foreigners and

thereby become alienated from the religious and ethnic community. This may be compared with the general statement in the Holiness Code (Lev 25:42b) that the Hebrew debt-slave was not to be sold as a slave, which in the context means selling to foreigners.

A position similar to Pressler's is advocated by R. Westbrook. He asserts that "there is nothing in the terminology to suggest that marriage is meant," and "when ancient Near Eastern sources wished to indicate that a female slave was a wife, they did so explicitly, both in the language of formation and dissolution."⁴⁴ Westbrook has not considered the parallels cited here. Nevertheless, those that he does cite do not seem to support his position. He notes that two marriage contracts of the Old Assyrian period refer to the woman as "slave" (*amtum*) or to taking a woman "for female slavery" (*ana amtūtim*), and in both cases the terminology refers to marriage.⁴⁵ This terminology is just as we have it in Exod 21:7, "for female slavery" (אִמָּתוּלָה). This special language of "formation" is used because of the special nature of the "slave-sale" marriage. That is also the case with the language of dissolution, as we will see below from the parallel example in Deut 21:11-14. The text in Exod 21:10 further refers to the situation when the master "takes another," which is usually understood as "another wife," but Westbrook interprets this as a second concubine. Yet in the Old Assyrian text mentioned earlier, we have the identical reference to a person "not taking another (wife)." The whole attempt to create a form of slavery concubinage out of Exod 21:7-11 must be rejected.

Not included in the Akkadian example of the purchase-marriage contract cited above are the specific conditions and obligations implied by the law in Exod 21:8-11. These may have been present in some of the Hebrew contracts that governed such marriages, but it is also possible, if not more probable, that the jurist is here suggesting conditions that should apply in such cases. Perhaps he wishes to safeguard the rights of young women which might be open to abuse. Does he have some other precedent in law that can be used to support such an elaboration?

At this point, some comparison can be made with the regulation in Deut 21:10-14 having to do with foreign female slaves who are captives of war and who become the wives of their Hebrew captors. The general circumstances are quite different from those of the Covenant Code law, in which it is a Hebrew woman who is sold into slavery for the purpose of marriage. It cannot, therefore, be a case of one law code intentionally modifying a law in the other code. Yet there is a striking similarity between the final provision of the Deuteronomic law (v. 14) and those clauses in the Covenant Code which have to do with the treatment of such a "bought" wife. The laws may be compared:

Exod 21:8:

If she no longer pleases her master who has designated her for himself, he must let her be ransomed. He is not to sell her to foreigners, because he has treated her badly.

Deut 21:14

But if you no longer find her pleasing, let her go free. You must not sell her or treat her harshly, since you have had your way with her. (REB)

Here we have a corresponding series of elements in the same order even though the language used is quite different and the various elements are made to fit the different situations. In the case of Deuteronomy, the captor of the foreign woman has paid nothing for her, so he must let her go free. In the case of the Covenant Code, the master has purchased the woman and so is entitled to some remuneration. The nature of the ran-

som is not clear, since her father is not likely to be in a position to pay. On the basis of Lev 19:20 (a late addition by P), however, a free man may ransom a slave woman through marriage by means of the bride-price (מֹדֶר), and this is probably what is in view here. The text means that the husband who rejects her is to permit her to remarry someone who does care for her. Deuteronomy further specifies that the husband must not sell her, presumably to another Hebrew since she is a foreign captive. The Covenant Code, however, must add the phrase, “to foreigners,” since the woman is a Hebrew. Deuteronomy gives as the reason for her release the fact that the Hebrew captor has had sexual intercourse with the woman and thereby liberated her from her slave status. The Covenant Code uses the term בַּגְד, implying deceit or treachery, because both parties, the father of the woman and the husband, entered into the agreement that the woman would be the man’s wife, and she was not being treated as such.

Deuteronomy, however, has the additional prohibition of not treating the woman “harshly” (עִמָּר hithpa’el; see also Deut 24:7), which has the same meaning as בַּפֶּרֶךְ, “with severity,” in the Holiness Code, which, as we have seen above, means being treated as a slave. This element is not found in the sequence in Exod 21:8. Nevertheless, the rest of the law in Exod 21:9–11 has to do, in a positive way, with how the woman is to be treated. It states that she must be treated like a daughter if given to his son (v. 9), or if the one who buys her takes a second wife, then she must continue to have the rights of a full wife (v. 10). Denial of these rights means that she may go free, without payment, the same as the captor’s rejected slave-wife. This looks like the general prohibition against “harsh” treatment in Deuteronomy has been spelled out in detail in the Covenant Code in the case of a quite different kind of slave-wife. The similarity of the two statements in Deut 21:14 and Exod 21:8 strongly suggests literary dependency or imitation, but the way in which the Covenant Code has adapted and expanded it argues for the Covenant Code’s dependence upon Deuteronomy in the development of the law. The law is a literary construction, based upon a social custom of purchase marriage but amplified by imitation of a clause in a quite different slave-marriage law.

The Law of the Hebrew Slave and Nehemiah 5:1–13

A new perspective on these laws can be gained by looking at the social situation reflected in Neh 5:1–13.⁴⁶ The crisis situation is set out in verses 1–5, in which it is reported to Nehemiah that many of the people have become impoverished because they are heavily in debt and have even sold their sons and daughters into debt-slavery. Nehemiah then meets with the nobles and officials who have allowed this situation. The first charge is that they have taken interest from their “brothers,” a clear violation of Deuteronomy and the Holiness Code. However, the further remarks that he makes to the assembly are of significance here. He states (v. 8): “As far as we have been able, we have bought back our Jewish countrymen who have been sold to the nations; but you are now even selling your own countrymen so that they may be sold to us.” This practice of buying Hebrews from foreigners so that they could be restored to the Judean community is not reflected in either Deuteronomy or the Holiness Code but is precisely the concern of the Covenant Code.⁴⁷ What Nehemiah is complaining about is that while some were engaged in this form of restoration as much as they could afford, the whole

process was being undermined by those within the Judean community who were selling their countrymen to foreigners, in violation of the law.

The Hebrew Slave and the Seven-Year Cycle

In a major study on the Habiru-Hebrews problem, O. Loretz contends that the law in Exod 21:2–11 in its present form is later than Deut 15 and therefore exilic.⁴⁸ One of his major arguments is the fact that the seven-year cycle of the Hebrew slave takes for granted the notion of the Sabbath, and this institution only comes into vogue in the exilic period. Niels P. Lemche responded to this by pointing out that in Deut 15:12–18, the seventh year for any particular slave could not be understood as a general Sabbath year for everyone, and the same was also the case for Exod 21:2–6.⁴⁹ Therefore, one cannot be sure that Sabbath observance had any bearing on the formulation of this law.

This criticism is valid as far as comparison with the two specific laws of Deut 15:12–18 and Exod 21:2–6 are concerned, but it does not take into consideration the fallow-year law and the Sabbath law of Exod 23:10–12 nor the Sabbath year of Lev 25:1–7 and its relationship to the Hebrew slave law.⁵⁰ Lemche's own treatment of these relationships is debatable.⁵¹ He begins by assuming an early date for the Covenant Code and its priority over the other two codes. Thus, he believes that Exod 21:2–11 and 23:10–11 were originally separate blocks of material that "were brought together already in the time of the Judges."⁵² He also assumes the dependence of both Deut 15:1–6 and Lev 25 on Exod 23:10–11. If, however, we follow the lead of our discussion of the Hebrew-slave law, then the order of development would be from the seventh-year grant of debt-release (שמטה) of Deut 15:1–6 to the sabbatical year of Lev 25:1–7, and finally to the fallow year of Exod 23:10–11, which includes both a release (שמש) for the land and a seventh-year fallow for the sake of the poor. Nevertheless, the arguments for an exilic dating for the Hebrew-slave law are not dependent upon any connection between the seven-year cycle and its similarity to the Sabbath cycle. We will return to this issue below.

Some scholars have pointed to the apparent balance between the law of the Hebrew slave, with its 6/7 pattern at the beginning of the mishpatim, and the law regarding fallow land, with the same 6/7 pattern at the end of these laws or the beginning of the ritual laws. This is regarded as deliberate compositional balance. That may perhaps be the case, but what is not given due consideration is the fact that in Deuteronomy the law of the Hebrew slave (Deut 15:12–18) follows the discussion of the seven-year release (15:1–11), both of which seem to address the common problem of impoverishment through debt. In the Holiness Code, the laws of the Hebrew slave (Lev 25:39–46) likewise follow the law of the seventh-year Sabbath of the land (25:1–7, 18–24) and some humanitarian injunctions in 25:35–38,⁵³ in which there is a shared theme of the impoverished Hebrew "brother." My analysis suggests that the Covenant Code actually split apart two themes that were previously closely associated. The code retains the humanitarian motive in the fallow-land law but no longer includes it in the law of the Hebrew slave, because the conditions of enslavement have changed from the time of Deuteronomy and the Holiness Code. The Hebrew slave law that originated in the social humanitarian "brotherly" ethic of Deuteronomy has been modified to bring it more

closely into the orbit of casuistic laws in the Covenant Code, even though its origins in the humanitarian laws is still evident at many points in the law.

Conclusion

In the past, the law of the Hebrew slave has been used to reflect conditions in early Israelite society and religion. If, as I have tried to show, the Covenant Code is actually later than Deuteronomy and the Holiness Code, then the law must be understood as a window on the exilic and postexilic conditions of Hebrew enslavement. The author of the Covenant Code tried to extend the Deuteronomic law of debt-slavery for Hebrews to include the commercial traffic in Hebrew slaves between Jews and foreigners. What was previously dealt with as a humanitarian concern for assistance to the poor among fellow Hebrews in Deuteronomy and the Holiness Code has been given a more casuistic form by the Covenant Code under the influence of Babylonian law and has been included within the *mishpatim*. Even though it still retains traits of the older source in the initial opening second-person singular address and in its lack of a penalty clause in the first law (in vv. 2-6), the second law (in vv. 7-11) does have clauses that are closer to the usual form.

The notion that Deuteronomy was using the Covenant Code as its base and simplified it by dismissing any distinction between male and female slaves has so many obvious difficulties that it must be judged as untenable. It is the Covenant Code that has extended the laws of Deuteronomy and the Holiness Code to new situations and not the reverse as has so often been stated. These new situations have to do with life in the Babylonian diaspora, where large numbers of Hebrews were enslaved to foreigners living in the same region, not to their Hebrew “brothers” and not merely for debt. The “sale” of daughters into marriage, which was a foreign, Mesopotamian practice, appears to have been adopted by the Hebrew population in cases of financial necessity in this same exilic setting and clearly had to be made an exception to the Deuteronomic law that required the woman’s release after six years. While there was nothing in Babylonian law that addressed these issues, the Hebrew legal tradition of Deuteronomy and the Holiness Code was used and modified to resemble the casuistic style of Babylonian law and included within the *mishpatim*. This sets a pattern of blending elements from the two different legal traditions, the Babylonian and the Hebrew, that pervades the casuistic laws.⁵⁴

The Casuistic Laws and the Babylonian Law Codes

As I have tried to show in the introduction, one of the major pillars for the antiquity of the Covenant Code and for its priority over the other biblical codes is the presence of the large block of casuistic laws and their similarity with the Babylonian legal tradition. These casuistic laws are found in Exod 21:18-22:16 [17], between the two sets of participial prohibitions in 21:12-17 and 22:17-19 [18-20]. The relationship of these two types of laws to each other is a matter of debate and will be taken up below. The casuistic laws follow the standard form of Near Eastern law codes, namely, a third-person

style with the general situation set forth by a “when” (כִּי) clause, followed by the consequences in the main clause. This may be further qualified by one or more “if” (אִם) clauses, setting forth additional conditions that may apply within the general situation. The penalties or judgments are then set forth in the main clause. Typical examples occur in Exod 21:18–21. At a few points, the style is modified by the second person, and this is usually taken to be a sign of later editorial modification. The matter, however, requires closer consideration and will be taken up below. It is not my intention to examine all of these laws and deal with the problems of their legal and philological interpretation. The object of this study is to examine the relationship of the Covenant Code to the other two biblical codes, and in this regard, only a few of the laws in this part of the code come under consideration. Nevertheless, the scope for comparison is greater than scholars have usually allowed.

The Compositional Structure of the Casuistic Laws

As we have already seen in the scholarly survey in chapter 1, much has been written about the compositional structure of the mishpatim in Exod 21:12–22:19 [20], and there is no need to repeat here our previous discussion, except to observe that there are two countervailing tendencies. The one is to regard all the changes in form and style or deviations from the predominant casuistic form, or changes in subject within the casuistic laws themselves, as reflecting the gradual combination of many smaller units that resulted from successive redactional expansion and rearrangement. At one extreme is E. Otto, who divides this group of laws into three prior collections consisting of capital crimes in 21:12–17 and 22:17–19 [18–20], which framed a collection of the bodily injuries in 21:18–32 and the family law of 22:15–16 [16–17] and the separate collection of compensation laws in 21:33–22:14 [15].⁵⁵ Within some of these collections, there were originally smaller separate collections that were edited and combined in a long history of redactional development. Evidence of interconnection between these blocks is merely attributed to redactional activity. For Otto, there are no authors of law codes; they are entirely the work of multiple editors (redactors).

The other tendency in the study of the laws is to stress the compositional interconnections and argue for a greater unity of the whole and to dispute that it is possible to recover such a complex redactional history as proposed by Otto.⁵⁶ Diversity of style and composition, however, still leads these scholars to speak of redactional composition and to posit older materials from which these laws are constructed. Therefore, before dealing with particular laws, I will outline the structure of this part of the Covenant Code and propose a quite different understanding of its compositional form. I will then test this proposal by examining a select group of laws as they bear on the question of their relationship to both the Mesopotamian codes and to the other biblical codes.

Because the casuistic form of law is the one that predominates in this part of the Covenant Code and because it is characteristic of the older cuneiform legal traditions, it is made the basis of the structure. This means that we should look at the corresponding structure of Babylonian codes, especially that of the Hammurabi Code. First, let us set out in parallel columns the casuistic laws of the Covenant Code (Exod 21:12–22:19 [20])⁵⁷ and the Hammurabi Code.

For comparison, I will list only the categories of laws in the Hammurabi Code and their arrangement that are relevant for comparison with the Covenant Code:

Exod 21:12-22:19 [20]	Hammurabi Code
21:12-17 capital crimes (participle + מוֹת יוֹמֵהּ)	§195 A son who strikes his father
13-14 unintentional manslaughter	
21:18-27 bodily injury (person against person)	§§196-214 bodily injury (intentional or accidental)
18-19 injuries received during a fight	§§206-8 injuries received in a fight
22-23 injury to a pregnant woman	§§209-12 injuries to a pregnant woman
24-25 <i>lex talionis</i> series	§§196-97, 200 injuries to eye, bone and tooth of <i>awilu</i> (<i>lex talionis</i>)
20-21, 26-27 injuries to slaves	§199 injuries to slaves
21:28-36 negligence causing bodily harm	§§215-56 negligence causing damage or bodily harm
28-32 injuries to persons from a goring ox	§§250-52 The goring ox
33-34 injuries from negligence	
35-36 injuries to animals from a goring ox	[LE §53 ox gores another ox]
21:37-22:14 [22:1-15] property laws	§§6-25, 53-116 property laws
22:15-16 [16-17] violation of an unmarried virgin	§§127-61 marriage laws
22:17-19 [18-20] additional capital crimes	§§1-4 some capital offences, including sorcery §2

When we place these laws side by side, some interesting observations on their arrangement become apparent. There is nothing in the Hammurabi Code (LH) that corresponds with the series on capital crimes in the Covenant Code (Exod 21:12, 15-17; 22:17-19 [18-20]), except perhaps the law against sorcery in LH §2. Yet there is one parallel: LH §195 on a son who strikes his father and the law regarding the striking of father and mother in Exod 21:15. In the Hammurabi Code, it is not a capital offense but is punishable by amputation of the hand. The forms of the laws are also different, with the Covenant Code using the participial construction for the offender with מוֹת יוֹמֵהּ, whereas the Hammurabi Code uses the casuistic form of law. Two other capital offenses (vv. 16-17) are added, and these will be discussed below.

The Covenant Code then moves to injuries received during a fight (vv. 18-19). This is linked to the prior treatment of homicide in verses 12-14 by the statement “and he does not die” in verse 18. The law in verses 18-19 parallels LH §206 rather closely except that the consequences of the victim dying as a result of the fight are dealt with in the following law, LH §207, which emphasizes the possibility that the fatal injury was not intentional and which therefore is the equivalent of Exod 21:13-14. At this point, the Covenant Code draws on Hebrew custom, which is different from the Babylonian practice and leads to a modification of the laws. In laws dealing with bodily injury, the Hammurabi Code regularly follows the pattern of first treating injuries done to the full citizen (*awilu*), then to the commoner (*muškēnu*), and finally to the slave.⁵⁸ Apart from

the fact that the Covenant Code does not recognize the “commoner” class, it also follows this pattern of alternating injuries to free persons and injuries to slaves. However, it makes an important change in perspective for the latter laws. It is not a case of injuries inflicted on another person’s slaves, which are considered as property damage, but injuries inflicted on one’s own slaves, as in Exod 21:20–21, 26–27, which cannot be done with impunity. This humanitarian concern is already evident in the slave laws of 21:2–11 and is consistent throughout the Covenant Code, as we shall see.

The Covenant Code then proceeds to deal with the very special case of injury to a pregnant woman that results in death, Exod 21:22–23, and this follows exactly the arrangement in LH §§209–210. The judgment in the case of the death of the woman is dealt with in strictly talionic fashion with the death of the perpetrator’s daughter. The equivalent is expressed in Exod 21:23, “life for life,” without saying what that precisely means. This will be discussed below. To this is added a talionic series (vv. 24–25) that is puzzling because it does not seem to apply to the immediately preceding case. Yet comparison with the Hammurabi Code, in which the same series, eye for eye, tooth for tooth, and broken bone for broken bone is made the basis of a set of laws in LH §§196–201, shows that the talionic series in Exod 21:24–25 is intended to be a summary of just such cases. The Hammurabi Code also includes similar injuries to slaves (§199) and these are paralleled in Exod 21:26–27 with a clear connection to the preceding talionic series.

The laws concerning injuries inflicted intentionally or accidentally are followed in both the Covenant Code and the Hammurabi Code by laws dealing with negligence. Out of the many instances of such cases in Babylonian law, the Covenant Code focuses primarily upon the case of the goring ox (Exod 21:28–32, 35–36). I will treat this celebrated case in more detail below. What is significant, however, is the fact that both the arrangement of the legal sequence in the Covenant Code and the content of specific laws parallel Babylonian law so closely. Wherever the arrangement deviates from the Babylonian legal tradition, there is a reason for it within the Hebrew legal tradition, and we will investigate this below.

The laws that follow in Exod 21:37–22:14 [22:1–15] deal with damages to property through negligence, theft, and deposit. These are treated in the first half of the Hammurabi Code, so there is a major displacement of these in the Covenant Code. Yet the transition from bodily injury through negligence to the destruction of property through negligence is made in a smooth and logical way in Exod 21:33–36. The theme of the goring ox in verses 35–36 belongs to what comes both before and after. Marriage and family laws are the next major block in the middle of the Hammurabi Code (§§127–194), and these also follow the property laws in the Covenant Code (Exod 22:15–16 [16–17]). However, the Covenant Code contains only one law, in two parts, while a much larger series in casuistic style is to be found in Deut 22:13–29, with a close connection between the two. This will need to be investigated below. Yet this one marriage law also has to do with property rights and so is not inappropriate to the sequence in which it stands.

The arrangement of the laws in Exod 21:12–22:16 [17] reveals a unified corpus that depends heavily upon the Hammurabi Code or its literary descendant. It is not just the continuity of certain legal traditions concerning matters of homicide and bodily injury and of property and marriage, transmitted by some vague process of cultural diffusion, that is attested here. It is the way that they are put together and related to each other that points to direct literary dependence upon the Babylonian legal tradition. Where

the arrangement differs, one can account for it by seeing in the Covenant Code the influence of other parts of the Hebrew legal tradition. This is not just a matter of inserting into a fixed corpus an alien block of material but a skillful fitting together of legal materials to create a compositional whole. The law of the Hebrew slave (21:2–11) stands first and outside the rest of the casuistic corpus because it owes nothing directly to the Hammurabi Code. It does not derive from a tradition of casuistic law but is entirely dependent upon Deuteronomy and the Holiness Code, as I have argued above. It still retains the introductory second-person singular of the “if-you” style, and its concluding clauses are more in the nature of moral admonitions than penalty clauses. Yet its construction imitates a casuistic style that has made it into one of the *mishpatim*. From this structural overview we may now turn to examine and test individual units.

Participial Prohibitions

The participial prohibitions begin with an initial participle, rendered in translation as “the one who” plus verb, and conclude with a penalty clause using the formula *ימות ימות*, “he shall be put to death.” They are present in this form in a series in Exod 21:12, 15–17, and a second series may be found in Exod 22:17–19 [18–20]. The latter shows greater variation in form, in which the death penalty is variously expressed.⁵⁹ They bracket the main body of casuistic laws, which has led to much discussion about their relationship to these laws. Albrecht Alt was the one primarily responsible for advocating the view that such “apodictic” laws formed an originally independent series of laws distinct from the casuistic laws and with a quite different *Sitz im Leben* in the early history of Israelite law. These apodictic laws were derived from Israel’s nomadic past and preserved as religious sanctions in the cult and were only secondarily combined with the Canaanite casuistic laws. This viewpoint has been variously modified to suggest different social settings and different histories of development of the series.⁶⁰

Two recent studies on the Covenant Code, one by Schwienhorst-Schönberger and the other by Osumi, have called into question the idea that an independent series of participial prohibitions has been combined with the casuistic legal tradition to form the present arrangement in the Covenant Code.⁶¹ Their arguments are based primarily on the structure of the present text of the laws and the relationship of the prohibitions within that structure. This is evident in the initial text of the series (21:12): “The one who strikes a man and he dies will be put to death.” This theme of someone striking (*נכה*) another and the person does or does not die (*ימות*) followed by the consequences is the constant preoccupation of the following casuistic laws (vv. 18–25). Furthermore, the law in verse 18 contains the specific qualification “and he does not die” and the further qualification in verse 19 that if the person recovers from the blow, “then he who struck him” (*המכה*, participle) has no liability. Both qualifications strongly imply the existence of a previous statement in which the person does die and the “one who strikes” (*מכה*) has liability, as we have it in verse 12. So closely are these statements of verse 12 and verses 18–21 integrated with each other that they all belong to the same compositional layer and the work of the same author.

Once it is admitted that verse 12 belongs with verses 18–21, in spite of its difference in form, the question arises as to the relationship of the prohibitions in verses 15–17 to these texts. Here there is a difference of opinion between Schwienhorst-Schönberger

and Osumi. The former wants to exclude all of the material in verses 13–17 as the work of a single redactor. Osumi, however, considers only verses 13–14 as redactional and emphasizes the similarity of theme and language between verse 12 and verse 15 and within the larger series. If the prohibition of verse 15 belongs, then verse 17 may be included as a closely related topic also dealing with parents. This would leave only verse 16 as another case of a capital crime, structured in the same way as the others. Once it is admitted that the author of verses 12 and 18–21 could make use of different types of laws, then there is little justification to postulate a redactor to account for those in verses 13–17.

Furthermore, we noted above that within the Hammurabi Code LH §195 contains a law dealing with the case of a son who strikes his father and the subsequent penalty, which is amputation of the hand. This precedes the series of regular bodily injury laws that parallel those in Exod 21:18–21. One can easily account for the difference in form in the biblical code by the fact that the penalty is the death sentence, which is otherwise expressed with the *מוֹת יוֹמֵת* formula. The fact that this particular law appears in the same order in both the Babylonian code and the Covenant Code cannot be fortuitous and strongly argues for deriving the two types of law from the same author/jurist.

What is still missing from these recent studies on the Covenant Code, however, is a comparison of these participial prohibitions with those of the same form or subject matter in the other codes to adequately account for this mixture of laws in the Covenant Code. Within the other law codes, laws in this participial form and containing the *מוֹת יוֹמֵת* formula have their parallels only in the Holiness Code⁶² (and P); they are not found in Deuteronomy, even when it deals with the subject of capital offenses. It is interesting to see that apart from the Holiness Code *מוֹת יוֹמֵת* is used previously by J in Gen 26:11 (within a participial prohibition) and outside the Pentateuch, only in Judg 21:5 and Ezek 18:13.⁶³ Far from reflecting a tradition of early nomadic law (Alt) or even an archaic form of sentencing by a judge in the local court, the formula seems to be exilic in date.

The matter of this exilic context, as reflected in Ezek 18 and Lev 20:24, needs some closer attention. Ezek 18, in the form of a disputation speech, develops an elaborate argument in which the prophet discusses how God judges the righteous and the sinner quite apart from whether their fathers were either righteous or sinners as well. Thus, the one that does what is right and avoids a list of serious offenses is declared by God to be righteous and “he will certainly live” (*חיה יחיה*). By contrast, the son of this righteous one who does all the evil things that the other avoids will “certainly die” (*מוֹת יוֹמֵת*). What is perhaps surprising about the list of evils for which the death sentence is pronounced is that it does not include any of those that are in Exod 21:12, 15–17, even though they all use the formula *מוֹת יוֹמֵת*.

The connections of Ezek 18 are much closer to Lev 20 and 24, as Zimmerli points out.⁶⁴ Even though the subject matter is not particularly close, the form does seem to be closer in two respects. First, Ezekiel uses the phrase “if a man” (*אִישׁ כִּי*) plus imperfect of the verb (v. 5),⁶⁵ and this construction is also used in Lev 24:17, which begins with *אִישׁ כִּי* and ends with *מוֹת יוֹמֵת*, while the form used frequently in Lev 20 is *אִישׁ אֲשֶׁר*, ending in *מוֹת יוֹמֵת*.⁶⁶ Second, Ezekiel also uses the phrase “his blood will be upon himself” (18:13), which is also used in Lev 20:9, 11, 12, 13, 16, 27, in conjunction with *מוֹת יוֹמֵת* or *יוֹמֵתוֹ*. Whatever the relationship between Ezekiel and the Holiness Code, it seems clear that this terminology belongs to a Priestly torah tradition in which the pronounce-

ment of the sentence of death is given by the deity. For the most part, the subject matter in Ezek 18 and Lev 20 is not a matter for the courts.

In Lev 24:17, however, the matter is quite different, for here the formula is applied to the judicial sphere in the case of homicide:

ואיש כי יכה קל-נפש אדם מות יומת

If anyone mortally strikes a person, he must be put to death.

This statement is set alongside the statement in verse 18:

ומכה נפש-בהמה ישלמה נפש תתת נפש

The one who mortally strikes an animal must pay compensation for it, life for life.

Verses 19–20 deal with the issue of bodily injuries, also a matter for the courts. Then verse 21 summarizes the previous laws again with the short form: “The one who strikes (מכה) an animal will pay compensation for it; the one who strikes (מכה) a human will be put to death.” What we seem to have in the case of this particular law is the development of a variant, shorter form that uses the participle of the verb in place of the formula *כִּי אִישׁ* (or *אִישׁ אֲשֶׁר*) plus imperfect verb. Furthermore, the general principle regarding the killing of animals, expressed in the participial form in Lev 24:18, 21 with the penalty requiring compensation (שלם), is reflected in the law codes as a series of casuistic laws (see Exod 21:33–37).

When we now turn back to Exod 21:12, it is this shorter form that states a general principle that becomes standard:

מכה איש ומת מות יומת

The one who strikes a person so that he dies is to be put to death.

It would appear from this survey that the form of the law in the Covenant Code is the latest development of this formula with *מוֹת יוֹמַת* when compared with Ezekiel and the Holiness Code and that it is directly dependent upon Lev 24:17, 21. Moreover, in the Covenant Code, the manslaughter law in Exod 21:12–14 is likewise followed in 21:18–36 by a series of laws that deal with bodily injury and that include the *lex talionis*, parallel to the arrangement in Lev 24:19–20. Furthermore, the reason for the preference of the participial form in Exod 21:12 is not hard to find. The use of the form with *כִּי אִישׁ* in Lev 24:17 and 19 may have been avoided by the Covenant Code to prevent confusion with the standard casuistic form that begins with *כִּי* and that is used for the bodily injury laws in verses 18–21. To these we will return below.

This analysis confirms the view that the series of capital crimes in verses 15–17 is not part of an old fixed series but is derived from a number of different sources and has merely been placed here by association with the series on manslaughter. This principle of combining laws with similar features is now a well-recognized feature of biblical and Near Eastern law. The prohibition in verse 17, “The one who curses his father or his mother must be put to death,” is derived from Lev 20:9 in shortened form with the initial *יקלל אשר* reduced to a participle of the verb *קלל*. The construction is the same as that of verse 12 and clearly by the same hand. The other two prohibitions are from quite different sources and suggest quite a different compositional process.

The law in Exod 21:15 does not have an exact parallel in the Old Testament’s other codes. The Hammurabi Code (LH §195) does have such a law about striking a parent,

in casuistic style, for which the penalty is maiming. The Covenant Code law (v. 15) is made to conform to the law on cursing one's parents (v. 17) by prescribing the same penalty. Moreover, Deut 21:18–21 contains the law about the stubborn and rebellious son and the court procedure for dealing with him. This is a capital offense for which the penalty is death by stoning. Nothing is said about striking, and the *מורה יומרה* formula is not used. Nevertheless, to strike one's parents, even though it is not fatal, is a form of dishonor that merits capital punishment and so finds its place in this list. As in the Hammurabi Code, it closely precedes the laws on bodily injury.

The law on kidnapping in Exod 21:16 has its parallel in Deut 24:7. They may be compared side by side:

Exod 21:16

Whoever kidnaps a person, whether he sells him or he (the victim) is found in his possession, he is to be put to death.

Deut 24:7

When someone is found to have kidnapped a person from his brothers, his fellow Israelites, and treated him harshly and sold him, that kidnapper is to die, and so you will rid the evil from your midst.

The Covenant Code version is much shorter, yet it contains all of the essentials in Deuteronomy. But the Covenant Code also contains an additional element that is not in the Deuteronomical law. This has to do with the situation in which the victim is still found in the kidnapper's possession. This additional provision is modeled on the theft of an animal in Exod 22:3, where a similar qualification occurs using the same terminology: "If it [the animal] is found in his possession."

On the basis of his comparison of the two laws G. Brin argues that the Deuteronomical law is the older version.⁶⁷ It is presented in Deuteronomical idiom and must be original. This leaves Brin with the difficult task: "How is it that the more ancient codex of the two—the Book of the Covenant—reflects a 'modern' stage of the kidnapping law, whereas the later parallels in the Book of Deuteronomy do not?"⁶⁸ His answer is that the two codes have different and separate routes of development. But this is very unlikely, and most scholars argue for a direct dependence of one law code on the other.⁶⁹ The obvious solution is that the Covenant Code is later than Deuteronomy, as we have seen throughout the discussion.⁷⁰

The parallel between Exod 21:16 and Deut 24:7 also raises the question of form because the later participial form of the Covenant Code law would appear to be replacing the casuistic form of the Deuteronomical law. This is also supported by the parallel law concerning the theft of animals in Exod 21:37; 22:3 [22:1, 4], which is in the casuistic form. One may conclude from this that the participial form is an exilic variant of the casuistic form, as may be seen by its use in the Holiness Code. Furthermore, if we look at the Neo-Babylonian Law Code, it prefers to make the opening statement, not with a conditional (*šumma awilum*), as in the Hammurabi Code, but with the direct statement, "a man who . . ." (*amēlu ša*), which corresponds to Hebrew *איש אשר* or *איש כי*, as in Ezekiel and the Holiness Code, which in turn alternates with the participial form. It should also be noted that within the Neo-Babylonian Laws, secondary conditional clauses may be added, just as we have it in Exod 21:13–14, so that on the basis of form, there is no reason to consider them as later additions.

It is, likewise, important to observe that in Ezek 18 the statements of judgment as to who will live and who will die are made by the deity as judge. The divine voice is maintained throughout. In Lev 20 and 24:17–22, the divine voice also stands behind the laws, so that it is safe to say that the form of the law is associated with divine authority. The laws in Exod 21:12 and 15–17 do not make such a divine voice apparent, but it is entirely compatible with the larger context in 20:22–21:1 and especially in the expansion of the first prohibition in verses 13–14. It would explain why the author of verses 13–14 could assume the divine voice for the whole unit.

There is a further series of three participial laws in Exod 22:17–19 [18–20]. These manifest greater form-critical variety since only one of them, verse 18 [19], contains the formula *מִתּוֹת יִמַּתּוּת*. Nevertheless, as we shall see, this series bears the same relationship to its sources that we saw in the previous one. The primary preoccupation of recent studies on the Covenant Code has been the question of the relationship of these laws to those of a different type in the immediate context. This question is addressed from the perspective of the particular scholar's compositional theory. Thus, Otto, who sees multiple redactional levels in the Covenant Code which are reflected in framing structures producing a chiasmic structure, understands this series of three laws (itself edited on an A-B-A pattern of two cultic prohibitions framing a sexual prohibition) as the counterpart to those in 21:12–17 at the beginning of the casuistic series and belonging to this same pre-Deuteronomy law code.⁷¹ For Schwienhorst-Schönberger, the unit in 22:17–19a is merely one of a number of proto-Deuteronomomic additions to the earlier basic Covenant Code.⁷² This view, however, bears no relationship to his subsequent comments on the individual prohibitions.⁷³ Osumi follows Otto in seeing the series as part of the framing structure of religious laws around the casuistic laws to form the conclusion to the earliest code of the Jerusalem court.⁷⁴ Osumi gives little attention to the form, content, and parallels in arriving at such a decision. Before any evaluation of these laws can be made, therefore, it is necessary to consider them individually.

The first prohibition is against sorcery:

מִכְשַׁפּוֹת לֹא תַחֲיֶה

The one practicing sorcery you must not allow to live.

There are no close parallels to this law in Deuteronomy or the Holiness Code. The closest discussion of this issue in the other codes is in Deut 18:10, in which the “sorcerer” is listed as one of a number of abominable practices and practitioners, but no penalty for such activity is given. It is even likely that the last item in verse 10, “sorcerer,” is an addition to the list to make it more complete. The Holiness Code also has general prohibitions against augury, witchcraft, mediums, and the like (Lev 19:26b, 31; 20:6), but it does not include this particular term.

All the references to the practice of sorcery are rather late and suggest foreign influence, particularly from Mesopotamia.⁷⁵ Its legal tradition also treats sorcery (using the same cognate verb *כִּשְׁף*) as a capital offense. Laws against it occur in both the Hammurabi Code (LH §2) and the Middle Assyrian Laws (MAL A§47), with a similar law against magic in the Neo-Babylonian Laws (NBL §7). If the Covenant Code is otherwise heavily dependent upon this legal tradition, it would not be surprising to have such an interdict for just this particular practice and not for those others that are enumerated in the other two biblical codes. In contrast to the form in Deut 18:10, which is masculine, the

feminine form in Exod 22:17 [18] has given rise to some speculation that a second meaning is involved here that has to do with adultery and prostitution.⁷⁶ This is based on the fact that in reference to Jezebel (2 Kings 9:22) and in the feminine personifications of Babylon (Isa 47:9, 12) and Nineveh (Nah 3:4), the idea of sorcery is in parallelism with the term זנוניות, “harlotry.” However, it is the term זנוניות that has developed the special metaphorical sense in DtrH of worshipping foreign gods, and this is the meaning in 2 Kings 9:22, where REB renders the term correctly as “obscene idol-worship.”⁷⁷ It is this same metaphorical usage that is explicitly used in the personification of Nineveh and, perhaps implicitly, in the case of Babylon. Yet it is precisely these feminine examples that may explain why J has used the feminine form here.

The statement of judgment, “You shall not permit (her) to live,” is exceptional and has also stimulated discussion. The personal form of address belongs to the same divine voice that we have seen previously in the laws and will find in the humanitarian injunctions that follow. The question, however, is whether this sentence of judgment is equivalent to that of מות יומת. Childs suggests a distinction between the two forms of judgment.⁷⁸ In Deut 20:16, it is used to reflect the ban and is parallel to the verb חרם. This latter verb is also found in Exod 22:19 [20], the third in the series. However, the matter can be seen in a new light by considering the use of מות יומת and its parallels in Ezek 18. There one finds an interplay between the verb חיה and מות יומת such that the one is construed as the opposite of the other in the sentencing formulae. In verse 13, it specifically states that the one who does abominations “will not live” (לא יחיה), and this is taken as the direct equivalent of מות יומת in the same text. On this basis, there can be no doubt that they are equivalent, as used by Ezekiel, and are so understood by J in the Covenant Code.

The law in Exod 22:18 [19] deals with bestiality. It states

כל־שכב עם־בהמה מות יומת

Everyone who lies with an animal is to be put to death.

It is in the participial form with the penalty expressed by מות יומת. The parallel laws are Lev 18:23 and 20:15–16 in the Holiness Code, both within a series of sex laws, and Deut 27:21 in the series of curses. The one closest in form to that of Exod 22:18 is Lev 20:15–16 because it contains the מות יומת formula: “The man who copulates with an animal is to be put to death (מות יומת) and you are to kill the animal. The woman who approaches an animal to copulate with it, you are to kill the woman and the animal. They must be put to death (מות יומתו). Their blood is on their own heads.” What is different from the Covenant Code law is that the Holiness Code contains a double law to cover the offences of both male and female. This is also the case with Lev 18:23, whereas the law in Deut 27:21 uses only the masculine participle שכב similar to the Covenant Code. What is curious about the form of the law in Exod 22:18 is that it uses כל, “all/everyone who,” which would seem to be redundant. Yet the fact that the laws in the Holiness Code specify both male and female offenders may be the reason why, in this shorter version in the Covenant Code, כל is used to stand for both sexes. It is also noteworthy that in two of the other versions of the law (Lev 18:23 and Deut 27:21), כל, “any,” is used with the object “animal.” That is clearly the older form of the law, and in this latest version, the כל has been shifted to the subject.⁷⁹ Schwienhorst-Schönberger, after giving many of these same reasons for considering Exod 22:18 [19]

as dependent upon Lev 20:15–16 and Deut 27:21, concludes by saying: “Der Vers kann durchaus alt sein.”⁸⁰ That simply betrays his overwhelming prejudice for the earlier date.

The law in Exod 22:19 [20] seems to have been corrupted in transmission and may best be reconstructed from the Samaritan Pentateuch as

וְכַבֵּשׁ לְאֱלֹהִים אֲחֵרִים יָחַרְחַר

The one who sacrifices to other gods is to be put to death under the ban.⁸¹

The interpretation of this text in the past has been largely governed by the assumption of its pre-Deuteronomistic dating. Lohfink attempts to reconstruct a pre-D development for the concept of the חָרַם in the Old Testament,⁸² but there are no texts that are indisputably pre-D apart from this text. This one is also exceptional in making the חָרַם a punitive term for individuals. Schäfer-Lichtenberger wants to draw a distinction between the use of חָרַם in this law and the previous law, which calls for capital punishment. She suggests that in this case the verb חָרַם does not mean “to exterminate” but merely to exclude from the religious community of Yahweh worshipers.⁸³ There is no supporting evidence for such a view, and its place within this series of capital offences militates against this explanation.

The most obvious and straightforward way to understand this text is within the context of the Deuteronomistic theology. In Deut 7 and 20:15–18, the חָרַם is called for because of the danger that the “foreign,” non-Yahwistic population will lead the Israelites astray in the worship of other gods. In the DtrH, this principle is always applied to large population groups in the context of holy war. In the laws on apostasy in Deut 13 and 17:2–5, the חָרַם is not mentioned in connection with individuals, who are usually executed by stoning, but only in the case of a whole town or community committing apostasy, in which case the inhabitants and everything in the town are devoted to the ban. The law in Exod 22:19 [20] has retained this special Dtr association of apostasy with the חָרַם but has now made it an individual, rather than a collective, sentence.⁸⁴ It is scarcely possible that such a law could have existed during the monarchy before the Deuteronomistic reform when the recognition of other gods was common. Thus, Schäfer-Lichtenberger’s effort to give the verb חָרַם the special meaning of exclusion from Yahweh worship is a rather forced effort to deal with this problem. The explanation of the shift from corporate ban to individuals, however, lies in seeing in this law an exilic development toward individual responsibility. With the verb in the rather rare form of the passive, hophal,⁸⁵ it is not even certain who the instrumentality of this חָרַם is to be. It could be that the deity himself is intended, which is a late and derived usage. If this is the case, then the law fits very well with the post-Deuteronomistic text of Josh 24:19–24, which also emphasizes this exilic development of individual responsibility.⁸⁶

To sum up our observations on the participial prohibitions, all of these laws belong to the same historical horizon and are drawn from the same sources in Deuteronomy, the Holiness Code, and Ezekiel. The participial form, especially with the formula מוֹת יוֹמָת, can only be explained from the sources of this period and not as an archaic form of law, as so many from Alt onward have tried to do. The form is a late variant of the casuistic style and has direct parallels in some cases with laws formulated in the casuistic style. Even those forms that deviate from the basic pattern do so as particular developments of Deuteronomy and the Holiness Code. The division of the deviations into

two groups has much to do with their association with the laws that follow them and with the parallel laws in the sources from which they are drawn. There is no good reason to suppose that the laws in the participle form were compiled and included within the code by a jurist different from the one responsible for the casuistic laws.

The Law of Asylum: Exodus 21:13–14

I have already indicated above that the prohibition series in 21:12 and 15–17 is closely integrated with the series of casuistic laws that follows it. However, within the participle series itself, the initial manslaughter law in verse 12 is qualified by the distinction in verses 13–14 between unintentional and intentional killing, although not strictly in the classical casuistic style. In the case of unintentional killing, asylum is provided, while in the case of intentional killing, it is denied. This resembles the adjudication of innocence and guilt as in case law, but the style here is divine speech in the first person directed to Israel in the second person. This, together with the reference to “my altar,” makes it clear that we are dealing with the same author and compositional stage as those of Exod 20:22–26.

The subject of asylum calls for comparison with Deut 19:1–13.⁸⁷ It is only here (and in the later P parallels in Num 35 and Josh 20) that the institution of blood revenge and asylum is fully presented. The law is set forth within the framework of the general Deuteronomic fiction of wilderness legislation: “When Yahweh your God cuts off the nations whose land Yahweh will give to you and you dwell in their cities and their houses, three cities you will set apart. . . .” The law that follows suggests two major reforms. First, it makes a distinction between unintentional and intentional manslaughter by giving examples of accidental death (vv. 4–5) and premeditated murder (v. 11). Asylum will only apply to unintentional manslaughter, and a judicial authority will be responsible for making that judgment. This is probably the official mentioned in Deut 17:8–13, the judge at the place that Yahweh will choose, who has the task of judging between accidental and premeditated homicide. But the sentence will still be carried out by the “avenger of blood” (נֹאֵל הַדָּם).

Second, whatever asylum local sanctuaries may have provided in the past, with centralization of worship in one place there will now be three cities of refuge that can provide such a protection.⁸⁸ This is usually described as a secularization of the asylum process similar to the secularization of the local slaughter of animals. Nevertheless, as A. Rofé points out, the reason for the appointment of three cities in verses 6–7, namely, that without them the distance for the flight of the manslayer may be too far to avoid the avenger of blood, implies that the one central sanctuary continues to serve as the primary asylum.⁸⁹ In the case of Jerusalem, however, asylum could not be secularized, and the Temple and its environment continued to be the most important sanctuary and asylum in Judah for a long time to come.⁹⁰

The question then becomes: Does Exod 21:13–14 reflect the institution of asylum before the Deuteronomic reform?⁹¹ The answer is certainly no! First, the sentence decreed for the murderer in verse 12, “he must die” (מוֹת יָמוּת), is used in Ezek 18 and the Holiness Code, as we have seen, without any reference to an avenger (נֹאֵל) from among the victim’s kinsmen, and the sentence “you are to take him to die” in verse 14 refers back to verse 12. In Gen 26:11, מוֹת יָמוּת suggests a sentence to be carried out by the

state. As in the Holiness Code, this is a development later than Deuteronomy. Furthermore, the law in the Covenant Code clearly recognizes the responsibility of a legal authority to make the distinction between intentional and unintentional manslaughter.⁹² The language suggests a legal process of determining guilt or innocence such as is spelled out in Deuteronomy.

Second, it is the deity that designates the specific place of asylum: "I will set for you a place to which he may flee." This cannot be taken to mean all local sanctuaries.⁹³ This is not a law that has in mind a number of existing sanctuaries; rather, it assumes the Deuteronomic fiction of wilderness legislation before the land is settled. It has in mind the Deuteronomic scheme of designating the place of asylum prior to the conquest, but it restricts the choice now to only one place, the place that the God himself chooses. The usual Deuteronomic formula "The place that Yahweh chooses to set his name there" becomes "I will set for you a place." This place can only be Jerusalem.⁹⁴ God's choice of a "place" for his sanctuary in Deuteronomy becomes also the choice of the place of asylum. There has been some discussion about whether or not there is a distinction between the reference to a "place" (מָקוֹם), suggesting a larger location, and the altar, a sanctuary within the place. But Deuteronomy also combines Yahweh's choice of a "place" within the tribes with a place of sacrifice, the one altar. The reference to "my altar" is the same altar as in 20:24–26,⁹⁵ which confirms the fact that the altar in the earlier law is not a plurality of altars but a single altar chosen by God. In the limited circumstances of the exilic period, this probably now means Jerusalem.⁹⁶ Furthermore, Rofé has collected considerable evidence to show that from the late monarchy to exilic, Persian, and Hellenistic times, Jerusalem continued to serve as a primary place of asylum.⁹⁷ The law envisages only one place of asylum instead of a plurality in Deuteronomy because the community in the homeland has been reduced to a rather small area.

Third, the form of the law follows the source from which it is drawn. The law is casuistic in form but does not use the usual format of the other casuistic laws in the closely related bodily injury laws of 21:18–20 with כִּי and אִם clauses. Instead, we find וְאִשֶּׁר to introduce the first instance (v. 13), followed by כִּי in verse 14, just as we have אִשֶּׁר and וְאִשֶּׁר in Deut 19:4 and 5, followed by כִּי in Deut 19:11.⁹⁸ Furthermore, the law reverts to the divine voice in the first person to convey the deity's instructions to the people, who are referred to in the second person, just as elsewhere in the Covenant Code. This is totally out of character for Near Eastern casuistic law, but it is the usual modification of laws taken from Deuteronomy, in which Moses, in the name of the deity in the third person, addresses the people in the second person.

Fourth, the distinction between intentional and unintentional homicide in Exod 21:13a and 14a looks like a summary statement of the description in Deuteronomy. Intentional homicide is described in the Covenant Code as "one who lies in wait" (v. 13) and "one who is seething (יָדָה) against his fellow to kill him treacherously" (v. 14). These are brief allusions to the description in Deut 19:4: "If someone hates his fellow and lies in wait for him and then confronts him and mortally attacks him and he dies. . . ." Likewise, the summary statement for accidental death in Exod 21:13 ("the deity allows the victim to fall by his hand") may presuppose the description of such an accident in Deut 19:4–5, but it is more likely that it is intended to cover the case of unintentional homicide in a fight, as reflected in Exod 21:18, to be considered below.

It is now possible to explain why the closely related subjects of intentional and unintentional homicide and asylum are contained in quite different types of laws. The fact is that Near Eastern law codes deal with unintentional homicide in the context of bodily injury laws in the casuistic form but say nothing about asylum and leave intentional homicide to the institution of the blood feud.⁹⁹ Unintentional manslaughter is addressed in the Hammurabi Code (LH §§206–7) within the context of a fight (*ina risbatim*) in which intention to harm is present but not premeditated murder. In this case, it couples bodily injury and unintentional manslaughter together. The law states:¹⁰⁰

If an *awilu* (a free citizen) should strike another *awilu* during a fight (*ina risbatim*) and inflict upon him a wound, that *awilu* shall swear, “I did not strike intentionally,” and he shall satisfy the physician (i.e., pay his fees). (LH §206)

If he should die from his beating, he shall also swear (“I did not strike him intentionally”); if he (the victim) is a member of the *awilu*-class, he shall weigh out and deliver 30 shekels of silver. (LH §207)

The law envisages a situation in which two persons are in a fight,¹⁰¹ each intending to injure but not severely or fatally, so that in the event of a death, the most that can be assessed is a stiff fine. This may be a case of attempting to limit the blood feud. The matter of unintentionality is settled by an oath.

The Covenant Code constructs the law somewhat differently. It first states the law on homicide, using the participial form for capital crimes found in the Holiness Code. It then modifies this by a casuistic qualification that explains the unintentional manslaughter. It was a situation, not of premeditation (i.e., lying in wait for him), but of an accident that looks very much like the situation reflected in the Hammurabi Code above. The remedy is not an oath and a fine as in cuneiform law but the institution of asylum from the Hebrew tradition, in the second-person singular. It is this same casuistic third-person form, modified by second-person injunction, that occurs in the asylum law in Deuteronomy, a form that is particularly characteristic of Deuteronomistic legislation. *The mixture of forms in the Covenant Code simply follows the sources from which the author drew his material. It is not the result of redactional layers in the text.*

Laws on Bodily Injury: Exodus 21:18–27

Following the laws having to do with homicide and unintentional manslaughter in the Covenant Code is a series of laws dealing with bodily injury in Exod 21:18–27. The arrangement of these laws may be compared with those in the Hammurabi Code and the Holiness Code. The laws in the Hammurabi Code that deal with bodily injury (§§196–206) come before those dealing with cases of homicide (§§207–214). Bodily injury laws between free persons of equal rank may be expressed in terms of *lex talionis*: §196 (an eye for an eye), §197 (a broken bone for a broken bone), §200 (a tooth for a tooth). Injuries to those of lower social rank are dealt with differently, by fines. The Holiness Code treats homicide in Lev 24:17 [18] first, followed in verses 19–20 by a general law on personal injury in the same form as the homicide law, with the penalty clause expressed in terms of the *lex talionis* series (fracture for fracture, eye for eye, tooth for tooth), which is meant to cover all cases of bodily injury by a general principle of equivalence. This series could be understood as a summary of the three cases in the Hammurabi Code.

The situation in the Covenant Code is more complex. Like the Holiness Code, it has placed the homicide law first but expanded it to include unintentional homicide as in the Hammurabi Code (Exod 21:12-14). This is followed, in verses 18-19, by a bodily injury law that does not include the talionic principle but is the direct parallel to that of Hammurabi Code §206, cited above. The law in Exod 21:18-19 states:

In the case of men quarrelling, one man strikes his fellow with a stone or his fist, and he does not die but becomes bedridden; then if he rises and walks outside with his cane, the one who struck him will be cleared [of a serious charge], but he will pay for his period of rest and all his medical expenses.

The law resembles LH §206 in three important respects: (1) the similar setting of an injury incurred in a quarrel or fight, (2) the close connection to the law on homicide, and (3) the provision for compensation to cover medical expenses. Given the great variety of possible bodily injury laws, this resemblance points strongly toward direct literary dependence. This is not just a case of scribal drafting in casuistic style but of the substance of the law. The Hammurabi Code presents this law as a case of a severe injury that was unintentional and so requires only restitution for damages. *Lex talionis*, which is punitive, does not apply, and so also in the Covenant Code. In Exod 21:20-21, the Covenant Code deals with the case of the homicide of slaves, presumably the owner's own slaves, and this situation is not covered by the Hammurabi Code, although it does deal with the homicide of a commoner (*muškēnu*) in LH §208. This is followed in LH §§209-14 by a series of laws having to do with the injury and possible deaths of pregnant women, and the same arrangement is also found in the Covenant Code.

*The Injury to a Pregnant Woman and the Lex Talionis
in Exodus 21:22-25*

The law about injury to a pregnant woman, whose limits are usually regarded as Exod 21:22-25, has given scholars a lot of trouble because of its place within the compositional structure of the bodily injury laws in Exod 21:18-27. There is a law about injury to slaves in verses 20-21 and again in verses 26-27 so that the law in verses 22-25 has the appearance either of breaking this continuity (and for this reason is sometimes regarded as a secondary "redactional" addition) or of paralleling the law in verses 18-19, which also deals with a situation of free persons fighting with each other. The alternation between laws dealing with free persons and those dealing with slaves produces a symmetric A/B A/B pattern.¹⁰² This is a regular pattern in the Hammurabi Code and as such would argue for the compositional unity of the whole.

Nevertheless, this law has a number of features that identify it as rather curious and exceptional within its present context:

1. It stands within the series of bodily injury laws that are characterized by the verb "to strike" (נכה), but that verb does not appear within this law, even though the situation reflected in the law seems to be similar to that of verses 18-19.

2. The law itself has the appearance of casuistic style, and yet it reverts at the end to second-person style in which the personal referent "you" is not at all clear.

3. The penalty for the “calamity” (לַחֲסָדָה) in verse 23 is stated in terms of the *lex talionis*, “life for life,” which almost certainly refers to the death of the mother. The rest of the clauses in the *lex talionis* series in verses 24–25, however, appear to be quite inappropriate to this particular legal situation.

4. The Mesopotamian legal tradition, which regularly includes laws on bodily injury to a pregnant woman and her fetus, deals with this situation in a much clearer, straightforward fashion. It simply indicates that if a person strikes a woman and causes miscarriage, he pays a fine, and if the woman dies, the man will be killed (or in LH §210 his daughter will be killed). Why, in the case of the biblical law, is the whole matter made so confusing?¹⁰³

All of these features taken together point away from understanding this law as a development merely within the tradition of Near Eastern jurisprudence as reflected by the larger corpus of casuistic laws. Instead, they point in the direction of viewing the law as a literary hybrid, a conflation of very different legal materials found in Deuteronomy and the Holiness Code. It is not possible in this study to review and critique the extensive literature on the subject of the *lex talionis* in general or this law in particular.¹⁰⁴ I will instead take as a point of departure a recent contribution to the discussion by E. Otto in which he uses the law about an injury to a pregnant woman in Exod 21:22–23 as an important test case for articulating the nature of Israelite casuistic law and its relationship to cuneiform law dealing with the same subject.¹⁰⁵ Otto poses at the outset an interesting comparative problem. Within the cuneiform corpus of laws, a number deal with injury to a pregnant woman. Yet this frequent reference does not seem to correlate with legal records of court cases, where the issue never seems to arise. Otto states: “The miscarriage by bodily injury of a pregnant woman was so rare an occurrence, with no treatment in legal records elsewhere . . . , that the only explanation of the fact that we find this law in nearly all the ancient Oriental law codes must be the assumption that this case is a literary phenomenon rather than a legal one, chosen for illustrative purposes in a school tradition.”¹⁰⁶ I completely agree with this assessment.

The question then arises as to whether or not the example of this law in Exod 21:22–23 also belongs to this same school tradition and therefore whether “the town institutions of scribal education were the places for transmission of cuneiform law into Israelite law.”¹⁰⁷ Otto rejects this possibility and his reasons are twofold. First, he argues that Exod 21:22–23 is of “indigenous origin” in Israelite law because it manifests significant differences from its cuneiform counterparts. It shares with the cuneiform tradition the fact that the death of the fetus is to be paid for by compensation payment, whereas the death of the mother is to be treated as a capital delict. Contrary to the cuneiform tradition, however, the biblical law appears to demand the death penalty for “unintentional” injury with fatal consequences. For Otto, this law in its particulars “mirrors the legal practice of local courts in Israel.”¹⁰⁸ Second, Otto has great difficulty in seeing how the legal tradition of Mesopotamia could be transplanted into the Israelite countryside where this law was practiced.¹⁰⁹ For Otto, the Israelite casuistic laws, like their cuneiform counterparts, “were derived from trial-protocols and legal narratives; that is, they had their origin in Israelite legal practice.” It is only in the later redaction of the law codes that “Israelite drafting techniques were dependent on those of cuneiform law.”¹¹⁰

There are a number of issues to be raised with respect to this position. First, Otto seems to dismiss too easily the similarities with cuneiform law. Not only do they deal with the death of the fetus, for which compensation is paid, and the possible death of the mother, for which the death penalty is invoked, but they also seem to associate the principle of *lex talionis* with this particular case. (On this, see below.) This similarity is all the more problematic for Otto since he regards the *lex talionis* principle in Exod 21:24–25 not as part of the original law but as a later redactional addition. The resulting resemblance to cuneiform law is for him just a curious coincidence. Second, I can agree with Otto that it is too difficult to envisage the Mesopotamian legal tradition as existing throughout the early rural Judean and Ephraimite countryside. This, for Otto, is the social context in which the casuistic laws of the Covenant Code arose. However, I have just as much difficulty in seeing how the Jerusalem schools of the eighth century would be familiar with cuneiform “drafting techniques,” which according to Otto were used by the redactors of the Covenant Code in the construction of the mishpatim of Exod 21:18–32. The problem may be that Otto has understood the issue in terms of a quite false alternative. If one does not assume a great antiquity for the casuistic laws of the Covenant Code but places their composition in the Babylonian exile, then the difficulties with similarities to the Mesopotamian legal tradition disappear.¹¹¹ Third, Otto seems to accept that the law of the injury to a pregnant woman is a literary construct in the cuneiform tradition and that it does not arise out of various court-protocols because of the rarity of the event. All of the variations between the cuneiform codes are explained on the basis of the particular literary features and redactional methods of each code. Yet he rejects the same explanation for the biblical example of the law and insists that this particular law in Exod 21:22–23 is derived from particular court cases. He does not consider the possibility that it too is a literary construct, but that in my view is precisely how it must be explained and why it differs in certain ways from its cuneiform counterparts.¹¹²

This matter of whether or not casuistic laws are derived from actual court cases is of fundamental importance in understanding the composition and interpretation of the Covenant Code, and Otto’s proposal regarding this particular law is a good test case. In order to fit Otto’s suggestion, one would need to construct a scenario for its history somewhat as follows. In a small town in Ephraim or Judah, there would need to be two highly unusual cases in which first a pregnant woman, as a bystander during a street brawl (this is Otto’s understanding of the text), was accidentally struck and the injury resulted in the abortion of the fetus but without further injury to her. The local court entered a verdict against a particular assailant in the brawl, and he had to compensate the husband for the death of the fetus. But the woman did not experience any further harm. A diligent town scribe recorded the case. Then a short time later in the same place, another such brawl took place with another injury to a pregnant woman, but this time not only is the fetus lost but the woman dies as well. The verdict is capital punishment—life for life. The case is again recorded by our faithful scribe. At some later point, the scribe’s collection of cases ends up as the property of a group of jurists composing or editing a code in Jerusalem, and they fit this remarkable set of cases into their code.

Such a scenario is, of course, absurd. The legal process in Israelite and Judean towns was very likely oral. If any written document was made to record the verdict and financial settlement, then it became the property of the parties involved. There was no judicial archive of such verdicts. There was no reason for a scribe to make any such inde-

pendent collection or for judges to keep records of their cases, much less to send them to Jerusalem. The creation of lawbooks containing the narrative accounts of specific cases that could serve as precedents for future cases is a modern phenomenon.¹¹³ Any attempt, therefore, to construct such a scenario with so many coincidences and improbabilities clearly demonstrates that this is not how this law came into being. *And if this law with its distinctive features did not come into being through particular court cases, then none of the laws in the Covenant Code did.*

Furthermore, Otto's understanding of the development of casuistic law in Israel gives rise to an equally unlikely complex tradition history for Exod 21:12–32 and for the place of this law and talion within this corpus. First, it would appear, according to Otto's scheme, that there was the "archaic apodictic law" of Exod 21:12 and 15–17 that was modified by the casuistic law in verses 18–19 (the dependence of v. 18 on v. 12 is clear). Then the further exceptional case of verses 22–23 was added to deal with the death of women—the penalty, however, expressed in the form of talion with second person in verse 23b. Why this change in person should occur here is never clarified by Otto.¹¹⁴ This talionic principle of "life for life" is then extended by further clauses having to do with bodily injuries (but why were they added?), and then these in turn were modified by a series of laws having to do especially with slaves, verses 20–21, 26–32. The dependence of verses 26–27 on verse 24 is obvious, as we have seen. Finally, as a modification of the strict principle of capital punishment for a death, the qualification of verses 13–14 that allows for an exception for unintentional homicide was added. This addition has the appearance of casuistic law but reverts to second-person speech in verse 14. Yet the style of casuistic narrative in third person that ends with a second-person command is the same in verses 13–14 that we have also in verses 22–23 and suggest a common source. They should not be ascribed to separate redactional layers. As we have seen above, the close correspondence between the arrangement of laws in the Hammurabi Code and in Exod 21:12–32 completely contradicts the complex redactional development proposed by Otto.

Other scholars have likewise regarded the oddities in Exod 21:22–25 as evidence of a hybrid of legal traditions. Thus, F. Crüsemann and Y. Osumi argue for seeing the lawmaker as one who reformed the casuistic system of damages by imposing on it the *lex talionis* from a different legal tradition with its more equitable principle of equivalence.¹¹⁵ The assumption is that both traditions, the casuistic and the *lex talionis* traditions, are very old and from very different origins and have been brought together in some kind of compromise document. Yet the principles of *lex talionis* are, in fact, quite at home in cuneiform law, so that they cannot be viewed as reflecting conflicting legal systems.¹¹⁶

It seems to me that there is something fundamentally wrong with the highly complex redactional scheme of Otto and with the more modest proposal of Crüsemann and Osumi, that of the combination of traditions. The problem is that there is a whole series of interconnections between different types of laws and Otto's method is to explain these interconnections by means of redactional layers. But they could also be the work of a single lawmaker who is putting together his law as a literary construct on the basis of a diverse body of legal material from different traditions that he has at his disposal. In the case of the law in Exod 21:22–25, I will try to show that this law represents a late prescriptive construction composed by conflating very different legal materials found in the other law codes: Deuteronomy and the Holiness Code. Furthermore,

the sources and the direction of borrowing can be determined with a fair degree of certainty. Let us consider these parallels.

The situation presented in Exod 21:22, in which men are involved in a fight and which includes a pregnant woman, is very confusing. The law states:

When men fight together (יָצָוּ) and they injure a pregnant woman and her fetus aborts, but there is no fatality, he shall be fined whatever the husband imposes upon him and shall pay according to (the decision of) the judges.

Is this woman to be viewed as an innocent bystander witnessing a brawl who is then accidentally injured in the melee? The probability of this happening is extremely low. It is hard to see why a special law would have been formulated for just this very unusual circumstance. If, however, we look at a parallel law in Deut 25:11–12, the whole matter becomes quite clear:

When men fight together (יָצָוּ), a man with his fellow, and the wife of the one approaches to help her husband escape from the hand of the one who is beating him and she reaches out her hand and seizes him by his genitals, then you shall cut off her hand; your eye shall have no pity.

First, this law begins with identical language, “When men fight together,” but then states explicitly, “a man with his brother (fellow Israelite),” which means that the situation is not a general brawl but a fight between two men. The shorter version of this situation in Exod 21:22 loses this clarity. The earlier law in 21:18 begins in the same way: “When men quarrel. . . .” It is also just a case of two persons in a fight.

Second, Deut 25:11 clearly indicates that the wife of one of the combatants becomes involved in the struggle, and if one assumes that it is precisely this situation that is also envisaged in Exod 21:22–23, then the case makes much better sense because a woman assisting her husband can also be harmed as well as causing harm. The woman becomes the injured party instead of, as in Deuteronomy, the offending party. And it is precisely a pregnant woman who is most vulnerable to injury in such a case. In addition, the injury is regarded as a capital offense whether intentional or not.

Third, in Deut 25:12, the execution of the punishment is expressed in the second-person singular: “you shall cut off her hand; your eye shall have no pity.” The context of the other laws shows quite clearly that it is the community of Israel that is being addressed by this second-person command. In Exod 21:23, the referent of this second singular verbal form has become quite ambiguous because the context of the other laws does not contain such direct forms of address. Only in 21:14 do we have a similar reversion to second-person singular with a similar referent, the Israelite community. All of these indicators suggest that this law was formulated on the model of Deut 25:11–12. The development could hardly have been in the other direction.¹¹⁷

There is another important aspect in which this law of the Covenant Code and its parallel in Deuteronomy should be compared, and that is in their relationship to their cuneiform sources. The law in Deut 25:11–12, with its initial casuistic style, belongs to the cuneiform legal tradition, as attested by MAL A§8:

If a woman should crush a man’s testicle during a quarrel, they shall cut off one of her fingers . . . , or if she should crush the second testicle during the quarrel—they shall gouge out both her [. . .].

This brief description in the Assyrian Laws, which describes the circumstance in which the woman inflicts her injury by the very brief phrase “during a quarrel,” is expanded and given clarity by Deuteronomy with a narrative of events in which the woman comes to the defense of her husband. In spite of this expanded treatment, Otto uses this example to argue for direct dependence of Deuteronomy upon the Assyrian legal tradition in the Neo-Assyrian period.¹¹⁸ In like fashion, the author of the Covenant Code may be interpreting the act of striking the woman, reflected in LH §209, as resulting from a situation similar to the one suggested by the larger legal context of §§206–8, all of which have to do with injuries or deaths resulting from a fight, and the parallel narrative in Deuteronomy about men fighting in which the woman interferes. In the case of the Covenant Code, however, Otto denies that there is any connection between the cuneiform laws and the biblical law because of this narrative context. Thus, Otto’s comparative method leads to a fundamental inconsistency and contradiction within the larger compass of his work. Otto argues in several publications that the casuistic family laws of Deut 22:22–29, along with others in Deut 21:15–21, 24:1–4, and 25:5–12, are directly dependent upon the Middle Assyrian Laws, tablet A, such that these biblical laws can be dated to the Neo-Assyrian period in the seventh century, when he believes that the Judean scribes would have had direct access to these texts.¹¹⁹ For him, there is an interplay between the cuneiform source and the Judean family ethic, in which the Assyrian laws that are adopted are nevertheless modified by Judah’s own tradition.¹²⁰ Yet Otto denies that the law regarding the injury to a pregnant woman in the Covenant Code that has been modified with a narrative context very similar to Deuteronomy could be dependent upon the Babylonian laws, even when, as we have seen, the similarities between the Babylonian laws and the Covenant Code are far closer in form, arrangement, and specific content than those noted by Otto between Deuteronomy and the Middle Assyrian Laws. If one applied the comparative method of accounting for similarity to cuneiform laws consistently, then one would be forced to conclude that the casuistic laws of the Covenant Code are directly dependent upon the Babylonian laws and their dating is controlled by the most appropriate historical setting, that of the period of the Babylonian exile.

Nevertheless, this parallel in Deuteronomy does not account for the use of the *lex talionis* in the punishment clause of the Covenant Code law, even though both demand a physical form of punishment. The use of this *lex talionis* series raises serious problems for Exod 21:22–25. It is easy to see how an injury to a pregnant woman that results in miscarriage can lead to a woman’s death, in which case the “life for life” would apply. The list of other bodily injuries, however, does not seem to be appropriate. Since the principle “life for life” could be used alone as elsewhere in the Old Testament, it is not clear why the others were included in this law. Some scholars invoke a Deuteronomistic redactor for the list in verses 24–25, but the series in verse 25 is not found in Deuteronomy and it still does not explain why a redactor would make such an addition. Consequently, we may ask: How can we account for the connection of this *lex talionis* series with this particular case?

There are two recent attempts to solve this problem. The solution by Schwienhorst-Schönberger is to render the term לִחַיִּים as injury or accident that may or may not be fatal, in which case both verses 23b and 24 would apply.¹²¹ However, all of the other references to לִחַיִּים in Gen 42:4, 38, and 44:29 suggest only a fatality. Furthermore, the

many cuneiform examples of this law all deal with two possibilities: the loss of the fetus and the death of the woman. The many attempts to solve the problem by a specialized rendering of תָּוֹסֵס do not seem to win many adherents.¹²²

Y. Osumi has likewise addressed this problem. He rejects the solution of Schwienhorst-Schönberger and his interpretation of תָּוֹסֵס and instead associates verses 24–25, not with the law in verses 22–23, but with the legal situation in verses 26–27.¹²³ He argues first that the injuries mentioned in verse 25 are particularly appropriate for slavery and the possible injuries to which slaves were prone at the hands of their masters. And second, the references to an injury to the eye and the tooth in verses 26–27 relate directly back to the series in verse 24 and apply the talion principle to slaves. In their case, the principle of equivalence is to give them their freedom. Osumi also suggests that the other injuries in verse 25 would result in the slave's freedom as well.

The close connection between the talion series in verses 24–25 and the law that follows cannot be denied and suggests that the talion series was not just an addition to a series of casuistic laws but part of a purposeful composition, as Osumi argues. Nevertheless, the talion principle does not actually apply to slaves. Instead, they receive a form of compensation, their freedom. And it still does not explain why the lawmaker at this particular point made use of the second-person address and a talionic series in place of the more usual language of casuistic law.

Here it is important to compare the Covenant Code with LH §§209–10, which also deal with injury to a pregnant woman:¹²⁴

If an *awilu* strikes a woman of the *awilu*-class and thereby causes her to miscarry her fetus, he shall weigh and deliver 10 shekels of silver for her fetus.

If that woman should die, they shall kill his daughter.

The law is stated in a very straightforward, unambiguous way. When a man strikes a pregnant woman, if there is simple miscarriage with no further injury, then there is a compensation payment. However, if the woman dies, then the daughter of the offender is killed. This is the talionic principle of life for life, since the “woman of the *awilu*-class” is literally the “daughter of a free citizen” (*marat awilim*). This law is only one of a number of cases of injury in which the talion principle is applied. But the principle applies only to the *awilu*, the full citizen, not to the *muškēnu* (commoner) or slave, for whom compensation is paid.

Furthermore, unlike both Deuteronomy and the Holiness Code, which do not have a set of laws for damages or general laws covering the treatment of slaves, the Covenant Code includes the discussion of injury to slaves (Exod 21:26–27), as does the Hammurabi Code, with the same kind of distinction between free persons and slaves in the application of the talion principle.¹²⁵ This means that the extension of the *lex talionis* in verses 24–25 is deliberate. It is intended to serve as a summary of all those laws in the Hammurabi Code (LH §§196, 197, 200) in which the talion principle is applied to free citizens, and the slave laws in which a different form of punishment applies follow from this. It also explains why the laws in verses 20–21 which deal with the homicide of slaves follow those that deal with free persons in verses 12–14, 18–19. The whole corpus is in fact a well-designed unity.

In the Middle Assyrian Laws, the talionic principle is repeatedly referred to in connection with the blow that causes abortion or the death of a pregnant woman. Thus, in

MAL A§50, the penalty is “they shall treat him as he treated her,” in addition to compensation for the fetus. If the woman dies, then they are to kill the assailant. Even in the case of a prostitute (MAL A§52), “they shall assess him blow for blow,” in addition to compensation for the fetus. (See also MAL A§21.) It is clear that in the cuneiform tradition the principle of *lex talionis* is closely associated with the laws of injury to a pregnant woman, with respect both to capital punishment in the case of her death but also to the administration of physical forms of punishment by the authorities. It is also clear that compensation and physical forms of punishment as reflected in the *lex talionis* are not mutually exclusive, as is so often suggested.

The law in Exod 21:22–25 likewise contains both the penalty of compensation for the fetus and the *lex talionis* of life for life to cover the possible death of the woman. Yet the form of the law, with the use of the verb נתן in second person, “you shall give,” in Exod 21:23 and the simple listing of the talion series, does not correspond with the Mesopotamian legal tradition. Furthermore, the use of נתן is also confusing in this legal context. In some of the surrounding laws, נתן has the sense of “to pay” when used in conjunction with punishment. But “you” refers to the community of Israel, and it does not make sense to ask it to pay for crimes by members within it.¹²⁶ We have already seen the penalty expressed in a similar fashion in Deut 25:12, “you shall cut off her hand; your eye shall have no pity,” as a reference to the community of Israel with a corporal penalty that is similar to that of *lex talionis*.

There are, however, two other relevant biblical texts that have a bearing on the form of Exod 21:22–25, both of which contain the talion formula. The first is the law in Deut 19:16–21 that deals with the case of a malicious witness, a rather common theme in Mesopotamian law. The law states that if, after examination by the judges, an accuser proves to be a false witness, then the penalty will be meted out in accordance with the severity of the accusation (vv. 19a, 21):

And you will treat him as he intended to treat his brother. . . . Your eye shall have no pity, life for life, eye for eye, tooth for tooth, hand for hand, foot for foot.

This is very similar to the penalties in Mesopotamian law, where, in the case of a capital offense, the false witness will himself receive the death sentence. In cases where equivalence is not possible, often a form of corporal punishment is imposed. In Deuteronomy, all of the many possibilities that are cited in the Mesopotamian legal tradition are merely summarized (“you will treat him as he intended to treat his brother”),¹²⁷ and the penalties are dealt with by use of the talion series, even though some of these hardly apply in the case of perjury in court. The shift from third-person address, however, to direct second-person “you,” as well as the reference to a fellow Israelite as “brother,” is characteristic of the Deuteronomistic Code. It is this second-person “you” and the talion series that have been taken over by the lawmaker of the Covenant Code, although Deuteronomy uses the verb עשה and not נתן in this instance.

The parallel text in the Holiness Code that deals with the *lex talionis* (Lev 24:17–20) likewise deserves a closer look:

¹⁷If anyone mortally injures a person, he shall be put to death. ¹⁸The one who mortally injures an animal will pay compensation, life for life. ¹⁹The one who gives an injury to his neighbor, as he has done so will be done to him; ²⁰fracture for fracture, eye for an eye, tooth for a tooth. Just as he has given an injury to another person, thus will be given to him.

In this law it is clear that the statement of inflicting punishment, “as he has done (עשה) so will be done (עשה) to him”(v. 19), just as we have it in Deuteronomy, is the equivalent of the statement “As he gave (נתן) an injury to another person (אדם), thus will be given (נתן) to him” (v. 20), so that the verb נתן as used in verse 20b has the meaning of inflicting punishment. This strongly suggests that נתן in Exod 21:23 also means to inflict punishment. Furthermore, it raises the question of the relationship between these two versions in the Covenant Code and the Holiness Code, which calls for a closer look at the whole text of the Holiness Code law in Lev 24:17–20.

The set of laws above deals with three issues: (1) homicide with capital punishment (v. 17), (2) the killing of an animal with compensation (v. 18), and (3) bodily injury to a free person with *lex talionis*. The point of the contrast between “human life” (נפש אדם) in verse 17 and “animal life” (נפש בהמה) in verse 18 is that one cannot pay compensation for homicide. It remains a capital offense. What is not stated but clearly implied is that “life for life” in the case of humans means capital punishment. In this respect, it is in agreement with Deut 19:21. The Holiness Code then spells out the rest of the talionic principle regarding bodily injuries, but with the phrase “fracture for fracture” as a shorter version of “hand for hand, foot for foot.”¹²⁸

The Covenant Code takes up these same three subjects, except in a different order, and expands them into a whole set of laws on homicide, bodily injury, and property damage. The one on homicide in Lev 24:17 (cf. v. 21) is repeated in Exod 21:12 with the same מות ימות formula, but in place of the נפש אדם (“human life”) in the phrase “the one who strikes any human life,” the Covenant Code uses the verbal phrase “and he dies” (ומת). The contrast between human and animal death is thus broken. The general principle of capital punishment for homicide is then further modified by reference to the law of asylum in verses 13–14, which is taken over from Deut 19:1–13 (as discussed above), to deal with unintentional homicide. Other capital offenses that closely relate to homicide are included in verses 15–17. The subject of homicide is further expanded by laws relating to bodily injury that could lead to homicide, both to another free person and to a slave (Exod 21:18–21). The connection is made between these laws by the phrase “and he does not die” (ולא ימות) in verse 18, which relates back to the phrase “and he dies” (ומת) in verse 12, both by the same author.

It is in this context that the lawmaker deals with bodily injury and homicide of a woman in verses 22–23, but only by means of a very specialized example of injury to a pregnant woman and her fetus. This is precisely the arrangement that we find in the cuneiform legal tradition. It is the problem of the fetus, so celebrated in cuneiform law, about which the lawmaker creates his legal narrative, using a similar legal narrative from Deut 25:11–12, to deal with this gray area of human life. In the case of miscarriage in verse 22, the injury to the fetus is treated as a matter for compensation similar to the previous laws in verses 18–21. From this situation, the law moves to the general principle of *lex talionis* in verses 23–25, drawn from Lev. 24:19–20. The reference to “harm” (אסון) in Exod 21:23 means a fatality to which the talion principle is applied.

Yet how are we to understand the phrase “life for life”? Taking his clue from LH §210, which explicitly demands that the daughter of the offender be put to death, Houtman suggests that the author of the biblical law intends that the offender’s wife be put to death in place of the other man’s wife. And the same applies to the other elements in the *lex talionis* series.¹²⁹ They are inflicted on the wife of the offender and not

on the man himself. I consider this solution very unlikely. In other cases in cuneiform law, injuries done to a pregnant woman are exacted blow for blow on the offender himself. I think that the explanation of the phrase “life for life” lies in another direction. The blow to the pregnant woman is not simply a case of premeditated murder, for which the term used for the penalty is *נִמְתָּ יָמֶיךָ* (v. 12), nor is it accidental death (vv. 13–14).¹³⁰ It is an example of a special case. Schenker refers to Exod 21:22–23 as a case of partial, indirect, and oblique intention.¹³¹ In Exod 21:23, “life for life” refers to the death sentence in a special case, as it does in Deut 19:21. In Deuteronomy, “life for life” is not used in the regular instance of manslaughter, but only in a rather special case in which blood is not actually shed and therefore the blood feud does not come into play. Instead, it is used to suggest the death penalty for the offense of false witness in a capital case. Furthermore, one could interpret LH §§209–10 in the context of a fight or quarrel, as reflected in §§206–8. This would make the general circumstances and the degree of intentionality in the Hammurabi Code much closer to the Covenant Code than Otto has suggested.

To the phrase “life for life,” the lawmaker in Exod 21:24 then adds the rest of the *lex talionis* that deals with bodily injury in the form that he finds it in Deut 19:21. This means that he must assume the remark about bodily injury inflicted by someone against a free person as we have it in Lev 24:19: “One who gives an injury to his fellow, as he has done the same will be done to him.” To the original form of this talionic principle as stated in Deut 19:21 and here in verses 23b–24, the lawmaker of the Covenant Code has also added his own distinctive phrases: “branding for branding, bruise for bruise, blow for blow,” in verse 25. The reasons for these additions seem to me to be twofold. First, one finds in the Hammurabi Code within the series dealing with bodily injuries (§§196–206) specific laws regarding injuries to eye (§196), bone (§197), and tooth (§200), with penalties using the talionic principle. Likewise, in discussions about injury to pregnant women, there are references to the talionic principle of “blow for blow” as part of the punishment clauses, which may have influenced their inclusion here. The series is just a summary way of expressing such a series of laws. Second, as Osumi has argued,¹³² the series seems to anticipate the discussion of the treatment of slaves that follows.

Laws on Slavery

Within the casuistic laws of the Covenant Code, there are a number of laws that deal with slavery and make the distinction between slave and free. In addition to the special law concerning the purchase of male and female Hebrew slaves in Exod 21:2–11, there are those that distinguish between manslaughter and injury to free persons and to slaves (21:20–21, 26–27, 32). The same kind of class distinction is a feature of some Babylonian laws, such as the Hammurabi Code, as we have seen above, but not of others, such as the Middle Assyrian Laws.

It is noteworthy that Deuteronomy and the Holiness Code make no such distinctions or allowances in their laws for the treatment of slaves. In Deuteronomy, apart from the Hebrew debt-slave (both male and female), the possibility of slaves only arises as a consequence of military activity, in which case it is assumed that there will be no male captives. The female captives and their dependents may be taken as spoil (Deut 20:14), but little is said about their treatment. Only in the case of a female captive be-

coming the wife of her captor does it dictate certain terms, including the stipulation that if she is divorced because she no longer pleases “you” (the Israelite male), then she may not be sold or treated as a slave (Deut 21:10–14).

In the Holiness Code, the remarks about non-Israelite slaves arise primarily out of a comparison made between them and the Israelite who has become enslaved for debt (Lev 25:42–46). There are no further regulations that pertain to such persons, only the assumptions that the non-Israelite slaves may be treated harshly—that is, as slaves (vv. 43, 46)—whereas the Israelites may not be treated as slaves but only as hired hands. It is also assumed that non-Israelites are permanent property that can be transferred to offspring as inheritance, as any other property. The Holiness Code virtually forbids the class distinction between slave and free for all Hebrews (25:39–42, 55), and non-Hebrews are beyond the law’s concern.¹³³

The Covenant Code laws on slaves may be viewed as filling a gap in the older codes by qualifying the treatment of slaves by their owners. As in the case of the law of Hebrew slaves, this is a supplementation. It is also strongly influenced by the Babylonian tradition of jurisprudence, which contained such distinctions between slaves and free persons. As we saw above, LH §§196, 197, and 200 are laws dealing with bodily injury to free citizens, to which the talionic principle applies. In LH §199, the law states:

If he (an *awilu*) should blind the eye of an *awilu*’s slave or break the bone of an *awilu*’s slave, he shall weigh and deliver one-half of his value (in silver).

In similar fashion, the Covenant Code follows the talionic series in Exod 21:24–25 with laws in verses 26–27 that deal with similar injuries to slaves, injuries to eye and tooth. In this case, however, the penalty is not retaliation but compensation in the form of the slave’s freedom. The difference between the Hammurabi Code and the Covenant Code is based upon the fact that the former is concerned only with the slave as property and injury as damage to one’s property, whereas the Covenant Code refers to the treatment of the owner toward his own slaves and not damage to another person’s property. In this way, the biblical law actually fills a gap in slave laws by expressing some humanitarian concern for the treatment of slaves.

Nevertheless, in the case of two laws having to do with slaves, the notion of the slave as property is still present. In the case of homicide of a slave by his owner (Exod 21:20–21), a matter not found in the Hammurabi Code, the owner is held responsible, although the penalty is not explicitly stated. But if the homicide is unintentional, as attested by his survival for a day or two, then there is no punishment in addition to the owner’s loss of his slave’s services; that is, “he is his money.” In a law concerning the goring ox (Exod 21:28–32), if an ox gores (and kills) a slave, male or female, then the owner of the slave is to be reimbursed thirty shekels for the loss.

The Compensation Laws: The Goring Ox, Exodus 21:28–36

The laws that are concerned with the goring ox are among the most celebrated in the study of the Covenant Code and raise in a particular way the issue of the relationship of the Covenant Code to the Mesopotamian legal tradition. Unlike the matter of homicide and bodily injury, in which one must decide on intentionality, these laws address the issue of culpability for possible negligence. The close relationship of the Covenant

Code to the Hammurabi Code may be observed by simply comparing the laws in Exod 21:28–32 with those in LH §§250–52.¹³⁴

Exod 21:28–32

²⁸Whenever an ox gores to death a man or woman, the ox shall be stoned, and its flesh shall not be eaten; but the owner of the ox shall be cleared.

²⁹But if the ox has been accustomed to gore previously, and its owner had been warned and had not restrained it, and it kills a man or woman, the ox shall be stoned and its owner likewise put to death.

³²If the ox gores a male or female slave, the owner shall pay their master 30 shekels of silver, and the ox shall be stoned.

LH §§250–52

§250 If an ox gores to death a man while it is passing through the streets, that case has no basis for a claim.

§251 If a man's ox is a known gorer, and the authorities of the city quarter notify him that it is a known gorer, but he does not blunt(?) its horns or control his ox, and that ox gores to death a member of the *awilu*-class, he (the owner) shall give 30 shekels of silver.

§252 If it is a man's slave (who is fatally gored), he shall give 20 shekels of silver.

The law in Exod 21:28 is virtually parallel with LH §250, except for the disposal of the ox. In Exod 21:29 the negligence that results in death is treated as a capital offense, whereas it is only a penalty of 30 shekels in the Hammurabi Code. The goring of a slave, male or female, is treated in the same way in both the Covenant Code and in the Hammurabi Code, except for the degree of compensation. There is nothing in the Hammurabi Code that corresponds to the possibility of redemption, as in verse 30, or the application of the law to the goring of son or daughter in verse 31.

It is not hard to see that the Hammurabi Code is the model upon which these laws have been formulated, with some particular expansions. The most distinctive expansion is the concern for the disposal of the goring ox by stoning and not eating its flesh. There is a special religious concern here that is not present in the Hammurabi Code. Elsewhere, the Covenant Code, in Exod 22:31 [32], expresses a similar taboo about eating such animals.¹³⁵

The law in Exod 21:33–34 deals with an act of negligence that is similar to many such laws in the cuneiform codes. The issue of the goring ox returns, however, in Exod 21:35–36, and here it is a case of one ox goring another ox. Here the principle of *lex talionis* is applied to animals and deserves special attention. Lev 24:18 deals with the killing of a neighbor's animal by a very simple principle, "life for life," which is understood as payment of compensation, using the verb שָׁלַם. The Covenant Code clearly accepts this principle but then fills in a "legal gap"¹³⁶ by creating a whole series of laws that deal with compensation for the death of animals, as well as for other property damages. In particular, the extended legal narrative in Exod 21:33–36 specifies that when a person does not actually strike a neighbor's animal to cause its death but through negligence (the uncovered cistern or the vicious ox) is nevertheless responsible for its death, he must compensate on the talionic principle of "ox for ox." It is hard to see how the lawgiver of Lev 24:18, who speaks of someone killing another's animal, could sum

up in this simple statement the whole body of compensation law in the Covenant Code.¹³⁷ The development must certainly be in the other direction.

The application of the talionic principle to mean compensation in the case of animals may be found in a special law in Exod 21:35–36. This law is not in the series in the Hammurabi Code, but the first half of this law is closely paralleled in the Laws of Eshnunna, LE §53.

Exod 21:35–36

³⁵When someone's ox injures his neighbor's ox so that it dies, they shall sell the live ox and divide the money received, and also divide (the carcass of) the dead animal.

³⁶However, if it was known that the ox had previously gored, and its owner had not restrained him, he will completely compensate ox for ox and the dead animal will also be his.

LE §53

If an ox gores another ox and causes its death, the two ox-owners shall divide the value of the living ox and the carcass of the dead ox.

The parallel between LE §53 and verse 35 is so close that a direct literary relationship seems to be the only way to account for it. In his study of the laws of Eshnunna, R. Yaron states: "Anyone looking at the two texts [Exod 21:35 and LE §53] without preconceived notions will see at once how closely similar they are, not only in the actual solution proposed but even in the mode of formulation. The identity of the very peculiar ruling laid down in both sources makes it virtually certain that they are connected with each other, probably since both borrowed from a common font, Oriental legal practice."¹³⁸ This opinion is supported by J. J. Finkelstein, who asserts: "Moreover, the form which the goring-ox laws take in the Covenant Code is so close to its cuneiform analogues that it bespeaks the presence in Palestine of an almost canonical knowledge of the precise phraseology of the earlier Akkadian formulation. There is, in short, no certain way at present of explaining the verbal identity between sources that are perhaps five hundred years and many miles apart. But the fact of this identity is incontrovertible and compels us to postulate an organic linkage between them even if this linkage cannot be reconstructed."¹³⁹ The case is set forth with even more vigor and logic by M. Malul, who sets out in detail all of the similarities and differences between the Mesopotamian laws on the goring ox and those in the Covenant Code. He comes to the conclusion that the relationship between a descendant of the Hammurabi Code and the Laws of Eshnunna texts and the Covenant Code must be a literary one.¹⁴⁰ He speaks of the author of the Covenant Code as having the Mesopotamian legal texts in front of him.

The decisive arguments for literary dependence in the case of the laws regarding the goring ox are twofold. First, the language and wording of the laws are so close as to preclude coincidence. A notable example is the use of the verb *ggn* in Exod 21:35 in the sense of "to gore," which is parallel to *gnn* in the other texts. This is not the usual meaning of *ggn* in Hebrew, but in the cuneiform laws both verbs are used interchangeably in the sense of "to gore," so that this special sense of *ggn* must have been taken over from the Mesopotamian model text. Other examples of close wording could also be cited.¹⁴¹

Second, the law does not seem to arise out of a particular social situation, because references to such cases of injury and damages by oxen are extremely rare in legal documents, so that it is best explained as a literary topos within a legal scholastic tradition.¹⁴² The differences are no more than what one would expect in the case of laws being taken over by a new legal and social setting and made to fit its general ideological outlook and *Weltanschauung*.¹⁴³ There are corresponding differences among the Mesopotamian laws, and one would expect even greater differences to be evident between the laws of that region and time and those of the Hebrew codes. It is the degree of similarity that is remarkable and must be accounted for.

Yet all these scholars, and those like Otto who argue against their position, come to this question with the preconception of an early date for the Covenant Code, from pre-state times to the eighth century B.C.E., which does not suggest an appropriate historical setting in which such a direct borrowing could have taken place. The only reasonable possibility is that the author of the Covenant Code was a resident of Babylonia during the exile and was familiar with Mesopotamian legal texts as well as those of his own tradition, Deuteronomy and the Holiness Code. He often makes new laws based upon the models in the older codes or combines them in creative ways. Thus, he adds the second clause in verse 36 that seems to be a direct qualification of the first clause in verse 35, based upon the law of the habitually goring ox (v. 29). The qualification as applied to the ox goring another ox is not represented in the extant Mesopotamian legal tradition, so it is probably an innovation of this jurist. At the same time, he makes use of the talionic principle of “ox for ox” as the basis of compensation, as set forth in Lev 24:18.

*The Violation of an Unmarried Virgin: Exodus 22:15–16 [16–17]
and Deuteronomy 22:28–29*

Let me begin by making a brief observation that was made by R. H. Pfeiffer many years ago but has subsequently been ignored or forgotten.¹⁴⁴ Pfeiffer noted that Deut 22:13–29 contains a set of laws in casuistic style (with slight D editing) that have to do with sexual relations. These include relations between a man and a betrothed (vv. 23–27) or unbetrothed virgin (vv. 28–29). It is only the last law, about the violation of an unbetrothed virgin, that is paralleled in the Covenant Code:

Deut 22:28–29

²⁸If a man happens to meet a virgin who is not betrothed, seizes her, and lies with her and they are discovered,

²⁹the one who lay with her shall pay to the father of the virgin fifty shekels of silver and she shall be his wife because he violated her. He will not be able to divorce her during his lifetime.

Exod 22:15–16 [16–17]

¹⁵If a man seduces a virgin who is not betrothed and lies with her, he shall pay the bride-price for her and she shall become his wife.

¹⁶If her father completely refuses to give her to him, he will weigh out the equivalent of the bride-price for virgins.

As Pfeiffer previously noted, the Deuteronomic laws on marriage and sexual relations cannot be derived from the Covenant Code, because the latter does not contain parallels to any of the laws in Deut 22:13–27. The Covenant Code contains only the last law

about the unbetrothed virgin in abbreviated form (Exod 22:15 [16]). However, the Covenant Code adds a situation (v. 16 [17]) that is not covered in Deuteronomy, namely, if the father refuses to give his daughter to the man who has violated her, then the latter must hand over the bride-price for virgins. So obvious was this as an example of the Covenant Code's dependence upon Deuteronomy that Pfeiffer developed a special theory to account for it. He suggested that the Covenant Code was added to Exodus in the exilic period by a redactor who had access to an old Canaanite law code, the same one that was used by Deuteronomy, and that he added to the Covenant Code the law that was missing from Deuteronomy's treatment of marriage laws. This expedient by Pfeiffer was necessary because he was still committed to an early date for most of the Covenant Code. However, such a redactor is unnecessary if the author of the Covenant Code, and not just a redactor, was using Deuteronomy.¹⁴⁵ And there is no support for an old Canaanite law code as Alt and others supposed.

Nevertheless, the idea of a Mesopotamian legal tradition behind the casuistic laws of Deuteronomy and the Covenant Code has much to commend it. While the Hammurabi Code does not contain any laws about an unbetrothed maiden, the Middle Assyrian Laws do address this issue. The relevant part of MAL A§55 states:

If a man forcibly seizes and rapes a maiden who is residing in her father's house, [. . .] who is not betrothed(?), . . . the father of the maiden shall take the wife of the fornicator and hand her over to be raped. . . . If he (the fornicator) has no wife, the fornicator shall give "triple" the silver as the value of the maiden to her father; her fornicator shall marry her; he shall not reject her. If the father does not desire it so, he shall receive "triple" silver for the maiden, and he shall give his daughter in marriage to whomever he chooses.

The Middle Assyrian Laws clearly reflect the notion of a penalty of triple the usual bride-price, whether the father consents to the marriage or not, and this notion of penalty seems to be reflected in Deuteronomy as well with the stipulation of fifty shekels of silver. The Covenant Code merely aims at restitution in stipulating the usual bride-price in both cases. But Deuteronomy does not have the final clause about the father's lack of consent, and this is added by the Covenant Code to make up for this deficiency.¹⁴⁶ This does not mean that the law in Exod 22:15-16 [16-17] is merely a late, redactional addition to the Covenant Code because it fits awkwardly with the preceding property laws.¹⁴⁷ If a redactor wished to add only a clause to the marriage law that was missing from Deuteronomy, why add it to the Covenant Code rather than to Deuteronomy, where it clearly belongs? Its position in the Covenant Code makes sense only if the Covenant Code is a later composition than Deuteronomy and *all* of its casuistic laws are viewed as supplemental to those of Deuteronomy.

Another solution similar to that proposed by Pfeiffer is to attribute similar or parallel laws in Deuteronomy and the Covenant Code to a common third source. In this vein, A. Rofé identifies several laws in Deut 21-25 as belonging to a homogeneous group of laws that come from "a common source, a single written document," and to this group he also attributes Exod 22:15-16 [16-17] together with its parallel in Deut 22:28-29.¹⁴⁸ The problem of whether or not the law in the Covenant Code can be attributed to a common source with the Deuteronomical material is that not only are they similar, but there appears to be clear overlap in which Exod 22:15 essentially repeats Deut 22:28-29. That would make it difficult to understand both as coming from the

same source. Rofé disputes that they are in fact the same and makes a distinction between “rape” *הפש* in Deuteronomy and “seduce” *פיתה* in the Covenant Code.¹⁴⁹ But it is hard to see what the legal distinction between the two would be. The laws in Deut 22:22–27, which precede the one dealing with the unbetrothed virgin, make the distinction between the consent of the woman and rape with very similar language. It is best, therefore, to explain the difference in language in the Covenant Code as merely a shortened version of the longer text in Deuteronomy. This would mean that the author of the Covenant Code has the Deuteronomic law before him and extends it to include a new situation under the influence of the Mesopotamian legal tradition. This is quite different from the proposal to reconstruct an older Hebrew code, parts of which show up in the Covenant Code and parts in Deuteronomy.

Another law, in Lev 19:20–22, has to do with betrothal to a female slave and the possibility of adultery. It has some similarity to Exod 21:7–11, except that instead of a young woman being sold into marriage as a slave, here the marriage would result in a change in status from slave to free. The interpretation of the law, however, is very controversial.¹⁵⁰ There are some disputed terms which lead to quite different renderings of the first clauses in verse 20, but I will set out the following version for discussion:

If a man has sexual intercourse with a woman, a slave girl, who has been assigned/betrothed (*נזרפה*) to another man but not yet ransomed or given her freedom, a distinction (*בקררה*) shall be made [i.e., between this case and that of a free woman]; they will not be put to death, because she had not yet been freed. He is to bring his reparation offering (*זשח*) to Yahweh to the door of the Tent of Meeting. . . .

A number of issues are involved in the interpretation of this law. First, the law falls under the general prohibitions against adultery with the threat of the death penalty, so there must be two different men involved: the one committing the sexual act and the betrothed. What is not clear is whether there is also a fourth party, the owner of the slave distinct from the first male. If that were the case, however, one would surely expect some statement of damages to the owner of the slave, so it is more likely that the one who violates the betrothed slave girl is the owner.

Another issue that arises is whether the slave girl is Hebrew or foreign and whether or not she is merely a temporary debt-slave. That she is both a Hebrew woman and a debt-slave is the position of Westbrook,¹⁵¹ and this dictates how he understands the Hebrew terminology and the legal interpretation of the text. This is probably correct since only Hebrew slaves could be redeemed or given their freedom, on the basis of Deut 15:12–18 and Exod 21:2–11. However, the law in Lev 25:39–46, considered above, constitutes a problem because in it a Hebrew debt-slave is not to be treated as a slave at all. Yet Neh 5:1–13 certainly indicates that female Hebrews could be enslaved. Even though Exod 21:2–11 does not deal with debt-slavery (contra Westbrook), it suggests that all Hebrew slaves could be redeemed or gain their freedom through time. So we are not dealing here with foreign chattel-slaves. What complicates the discussion, however, is the fact that this law uses the terminology of the Priestly Code and must be understood within the context of that code. It may perhaps be based upon an older casuistic law, but it is concerned now with the priestly *זשח* offering in this particular case. Thus, it is not a typical example of casuistic law and may be defective in some of its clauses. It is also clearly later than any of the laws in the other codes.

Concerning the disputed terms נהרפת and בקרת, the first should be rendered as equivalent to נוארשה, “betrothed,” of the other marriage laws in Deut 22:23–29 and Exod 22:15–16 [16–17]. The unusual term is perhaps used to distinguish the quite different betrothal arrangements. The word בקרת is best understood in terms of the P use of the verb בקר in Lev 13:36 and 27:33, as B. J. Schwartz suggests.¹⁵² He renders the verb in the sense of making a distinction, and this seems to work well in all cases.

The law therefore envisages the situation in which a slave owner has agreed to assign a slave girl to a free male for marriage on payment of her ransom and freedom, but before the transaction has taken place, he himself has sexual intercourse with her. However, the fact that she was not yet free distinguishes this case from those in which the law of adultery of free persons applies, and therefore, they are not to be put to death. There are no other damages, not even to the betrothed man,¹⁵³ since it is a slave girl that is involved, but the owner is nevertheless not without some approbation and must offer a guilt offering for his actions.

This law may be viewed as a supplement to the Deuteronomic laws on marriage and adultery in Deut 22:13–29, which say nothing about the treatment of slaves. The slave girl law of Leviticus does not fit well with the laws of the Holiness Code in Lev 25:39–46 but seems to presuppose the distinction between free and slave that we have in Exod 21:2–11. This agrees very well with the designation of the Leviticus verses as an addition of the Priestly Code.

Conclusion

The old scheme advocated by Alt and still maintained by many scholars in modified form, that the *lex talionis* in Exod 21:23b–25, along with the participial prohibitions in 21:12, 15–17, belong to an archaic Israelite body of law that was combined at an early stage with an originally foreign “Canaanite” body of casuistic law to form the first biblical law code, the Covenant Code, must be given up. The principle of *lex talionis* is very much at home in the legal tradition of Mesopotamia, and its application is found in the same areas of bodily injury that we have in the Covenant Code. Likewise, the participial prohibitions reflect a form of legal expression that arises in the exilic period, usually to express general principles of law, and those used in the Covenant Code are closely integrated with the other casuistic laws. The mishpatim of Exod 21:12–22:19 [20] were composed as a series of legal narratives in casuistic style that were intended to fill in “gaps” in the legal tradition of Deuteronomy and the Holiness Code, especially as these had to do with tort law, including bodily injury and property law. To do so, the lawmaker borrowed heavily from the cuneiform legal tradition, with which the exilic author of the Covenant Code seems to have been directly familiar.

With respect to the arrangement of the mishpatim, there can be no doubt that he was strongly influenced by the Hammurabi Code for the ordering of the laws in Exod 21:12–36. These follow the same order and subject matter as LH §§195–252 and often contain very similar laws. At times, however, the author is inclined to draw upon the Hebrew legal tradition of Deuteronomy and the Holiness Code, as well as Hebrew custom law, to modify the laws that are taken over from the Babylonian legal tradition. The Covenant Code is a very small sample of possible laws, but even the Hammurabi Code, which is very much larger, hardly covers a large area of those legal situations that are

actually dealt with in the courts. Thus, the high degree of correspondence between the laws in the Covenant Code and those found in the Babylonian codes is quite remarkable and argues strongly for direct literary dependence upon the latter.

As we saw above, the participial prohibitions, especially in the formula *במה יימת*, are not an archaic form of law, as Alt argued, but can best be compared with similar laws in Ezekiel and the Holiness Code in the exilic period. The form is a late variant of the casuistic style and has direct parallels in some cases with laws formulated in the casuistic style. Even those forms that deviate from the basic pattern do so as particular developments of Deuteronomy and the Holiness Code. The first group, in Exod 21:12–17, is closely integrated with the casuistic laws that follow. The first prohibition within the series, dealing with homicide (v. 12), is qualified by conditional clauses in a quasi-casuistic style that has its equivalent in the Hammurabi Code (LH §207) law that deals with unintentional manslaughter, but the prohibition is formulated very differently, drawing upon the Deuteronomic law of asylum (Deut 19:1–13). The reversion to the second-person style and the first-person reference in “my altar” link it with the prior law of the altar in 20:24–26 and the divine voice of the larger narrative setting. The mixture of forms and styles in the Covenant Code simply follows the sources from which the author drew his material. It is not the result of redactional layers in the text. The single divinely chosen altar likewise reflects the small community of Judah in the exilic and early restoration period.

The laws on bodily injuries revert to the Babylonian model very closely in the case of the first one, in 21:18–19 (see LH §206), and in the practice of alternating corresponding clauses dealing with injuries to slaves (21:20–21, 26–27), although the biblical author is more concerned with how an owner treats his own slaves than injury to another owner’s slaves, as in the Hammurabi Code. The law regarding injury to a pregnant woman in 21:22–25 follows the Babylonian order, but in this specific case, the author has modeled it on the legal narrative of Deut 25:11–12 as a special situation and combined it with the general principles of *lex talionis*, based upon Deut 19:19–21 and Lev 24:17–20. The legal tradition of casuistic tort law from Mesopotamia, with its extensive treatment of injury to the pregnant woman, was the basis for the choice of this particular subject and not the report of a particular case, as some have suggested. The direction of borrowing could not be clearer, because the only way that one can understand the two parts of the Covenant Code law that are quite different in form and style from Mesopotamian law is by reference to the parallel laws in Deuteronomy and Leviticus. This is the same mixing of sources as was the case with the previous laws on homicide and unintentional manslaughter, with the provision of asylum and the same use of the second-person singular in the final penalty clause.

Our study of the *lex talionis* series (21:24–25) reveals that its position here is intended to replace the individual talionic laws of the Babylonian source with a summary drawn from Deuteronomy and the Holiness Code. While the Covenant Code and the Holiness Code use the talionic series to summarize the cases of bodily injury, the Deuteronomic use (Deut 19:16–21) is related to the giving of false testimony in a court of law, which is especially concerned with homicide cases as in the Hammurabi Code (LH §§1–4). The application of the series of injuries to slaves in the Covenant Code (21:26–27) again follows the pattern of class distinction in the Babylonian code, but it applies the law in a humanitarian fashion to the treatment of one’s own slaves. What

becomes clear from this comparative study is that the principle of *lex talionis* is not an ancient “nomadic” form of law derived from the time of Israel’s origins but a common Mesopotamian legal practice and is reflected most strongly in the texts of the exilic period when contact with Babylonian law was most direct.

The laws regarding the goring ox in the Covenant Code (Exod 21:28–32, 35–36) demonstrate most clearly the direct literary dependence upon the Babylonian legal tradition. As in the case of the law relating to the injury to a pregnant woman, they demonstrate that the Covenant Code is a literary creation, imitating laws from other collections and not drawn from actual legal verdicts in a court of law. The virtual nonexistence of such cases among the many thousands of extant legal documents reflecting actual cases effectively excludes any other possibility. The casuistic corpus is a single literary composition and not the process of successive redactions of small collections of urban and rural laws. The final laws in this group, regarding the seduction of an unbetrothed virgin (22:15–16 [16–17]), are to be understood as an expansion of the series of family laws in Deut 22:13–29, and as Pfeiffer clearly saw, this means that the whole series of casuistic laws must have been added to the Hebrew legal tradition later than those of Deuteronomy. Our examination of the corpus of casuistic laws as a whole confirms this verdict. Next, we will compare the laws of the second half of the Covenant Code with the other biblical laws.

Ethical Demands and Religious Obligations

Contrary to much of the discussion on the Covenant Code, there is no clear break or division between the civil laws of the first half of the code and the ethical and religious laws of the second half. Thus, the three religious laws in Exod 22:17–19 [18–20] that come after the casuistic laws are similar in form and content to those in the earlier part of the laws in Exod 21:12–17, and that is where I have treated them. And there are many other interconnections between the two bodies of law that make it very doubtful that the two halves ever existed independently from each other. Nevertheless, it is true that there are no civil laws of the casuistic type in this part of the code and therefore no parallels with the cuneiform legal traditions. Ethical and religious concerns predominate, and the motivation of divine sanction or approval replaces social penalty. Within this block of laws, there are groups or series of laws that may be considered together, but this in no way implies that they were ever independent, self-contained series, combined by editors, as so many earlier scholars have argued. They all contain the same relationship to the earlier codes of Deuteronomy and the Holiness Code that we have seen to be the case in the previous block of laws. To demonstrate that this is indeed so will be the task of the discussion that follows.

Social and Humanitarian Commandments

There are two sets of social and humanitarian commandments in the Covenant Code: Exod 22:20–26 [21–27] and 23:1–9.¹ Both sets have an important bearing on the question of the Covenant Code's relationship to Deuteronomy and the Holiness Code. An important study of these laws was undertaken by J. Morgenstern that was part of an extensive treatment of the Covenant Code carried out in the 1920s and 1930s, in which he followed certain basic methodological principles that came out of that period but that still have much in common with current studies in biblical law and these laws in particular.² Morgenstern engages in extensive comparison between the Covenant Code and the other biblical codes, as well as other relevant Old Testament texts. He believes that the Covenant Code in general was made up of a number of short, primitive series

that had been combined and expanded over the course of more than five hundred years. This leads him to introduce a myriad of editorial hands and levels into the development of the code over this long period of time, and these editorial levels frequently overlapped the compositional development of Deuteronomy and the Holiness Code. Nevertheless, for Morgenstern, all explanations of the parallels in these laws move from the Covenant Code to Deuteronomy and the Holiness Code, or else the similarities go back to older sources. Such a scheme means that it is scarcely possible to bring against it any argument for the priority of Deuteronomy or the Holiness Code over the Covenant Code.

Today there is less of a tendency to try to reconstruct the primitive series of short laws, such as those in Exod 22:20–26 [21–27] and 23:1–9. Nevertheless, the hortatory and motivational clauses within these ethical laws are still often viewed as redactional additions.³ That opinion, however, seriously prejudices any comparison between these laws and those of other biblical codes. Thus, the question of the form of these prescriptions and prohibitions, as first set out by Morgenstern, needs to be addressed. Morgenstern identifies these ethical commandments with the Hebrew term *מצוה* and views the collections in 22:20–26 [21–27] and 23:1–9 as based upon two originally separate *מצוה* series, which he reconstructs by removing all the hortatory or motive clauses as secondary redactional additions.⁴ A number of studies that have addressed various form-critical aspects of these laws will be helpful for such a consideration.⁵ Morgenstern himself has pointed to the fact that these commandments are quite different from the previous laws in that they are addressed primarily to individuals and deal with sins rather than crimes, social ethics rather than matters that the state can regulate.⁶ They are therefore lacking in any penalties and depend entirely upon the direct personal address in the second person and on the hortatory and motivational clauses for their intensity and seriousness. The problem with the form-critical approach in the past has been to identify a primitive *Sitz im Leben* that would support a primitive series of apodictic prohibitions and then to use this as a basis for the form-critical discussion of these laws.⁷ The form-critical reconstructions depend on a circularity of argumentation with little control from comparison with other biblical texts, especially the other codes.

The humanitarian laws of the two series in 22:20–26 [21–27] and 23:1–9 are a mixture of the direct apodictic command form, “you shall/shall not,” and the “if-you” conditional form with *אם* or *אם־כִּי*. The second-person address is also a mixture of singular and plural forms. This same mixture of apodictic and “if-you” forms is likewise evident in the humanitarian laws of Deuteronomy in Deut 15 and 22–24 and the Holiness Code in Lev 19 and 25 (but where the second singular predominates).⁸ In the past, the discussion and development of these forms have always assumed the antiquity of the Covenant Code and used this as a point of departure for such questions. More recently, however, a quite different solution to the problem of form has been suggested. In G. A. Chamberlain’s study of the comparison of the Covenant Code with Deuteronomy, he observed that within those laws of Deut 12–25 that are most characteristic of Deuteronomistic themes, the laws are mostly in the second-person singular, they are primarily of the apodictic and “pseudocasuistic” (“if-you”) types, and the simple forms are augmented with secondary clauses and hortatory additions. These forms are not characteristic of the Near Eastern legal tradition in general but correspond to the style and type of commands that one finds in treaties, especially the Esarhaddon treaties and loyalty oaths.

He states: “The preponderance of evidence really leaves little doubt that Deuteronomy is a covenant text built around treaty forms and concerns. Deuteronomy shows a firm outline, a strong political sense, a free use of treaty forms and language, that we must regard as conclusive.”⁹ In Deuteronomy, it is the parts of the code that emphasize the absolute loyalty to Yahweh and the various requirements that this entails where this direct personal address is primary, and from here it is carried over into the social legislation and related laws.

Likewise, in a recent form-critical study of the second-person imperfect verb forms in the Covenant Code, W. Morrow comes to the conclusion from a comparison of Near Eastern legal forms that the second-person references in the Covenant Code have been influenced by the treaty (covenantal) paradigm, but he is unable to account for how this came about because he assumes the greater antiquity of the Covenant Code.¹⁰ However, if the Deuteronomic Code is the older of the two, then there is no difficulty because the Covenant Code has simply taken it over from Deuteronomy, and especially those parts such as the social and humanitarian legislation where it is most heavily dependent upon Deuteronomy.¹¹

Furthermore, if the Covenant Code follows Deuteronomy in the use of the second-person apodictic commands and in the use of the “if-you” (pseudocasuistic) form of law, then there is no longer any reason to view the motive clauses as secondary, because this usage also comes from Deuteronomy both in style and in content. The secondary character of the motive clauses is disputed on other grounds as well in the studies of B. Gemser and R. Sonsino.¹² There is no reason therefore, on form-critical grounds, to view the ethical and humanitarian laws in 22:20–26 [21–27] and 23:1–9 as earlier than Deuteronomy. This opens the way for a comparative study of their content.

First Series: Exodus 22:20–26 [21–27]

We begin with the series in Exod 22:20–26 [21–27]¹³ and the initial injunction in verse 20 with its parallel in 23:9:

You must not defraud a stranger nor oppress him, for you were strangers in the land of Egypt. (22:20 [21])

You must not oppress a stranger, for you know the life of a stranger, for you were strangers in the land of Egypt. (23:9)

Morgenstern explains the duplication of these two commands as the result of their belonging to two different sets of מצוות, corresponding to the two series. A different explanation is to see them as forming an *inclusio* for the same series of similar laws, but neither explanation is very convincing. The laws that follow in 23:10–12 also have a strong humanitarian concern and deal with the same social groups of the poor and needy. Furthermore, if one eliminates the motive clauses, the repetition is greatly weakened, but we have seen above in the form-critical discussion that there is no need to consider them as secondary.

The two injunctions have to do with defrauding and oppressing the stranger (גֵר). While Deuteronomy expresses a certain concern for the stranger (גֵר), as well as other marginal groups in society,¹⁴ it does not have a law against their abuse. Within the Pentateuch, the specific parallel to the injunction not to defraud the stranger is Lev 19:33–34, which states:

Whenever the stranger resides in your homeland, you are not to defraud him. Just as the native-born among you, so will the stranger who resides among you be to you. You will love him as yourself, for you were strangers in the land of Egypt. I am Yahweh your God.

The argument in the motive clause that uses the condition of the Israelites in Egypt is familiar from Deuteronomy. In three places (5:15; 15:15; 24:22) it uses the comparison “You are to remember that you were a slave in the land of Egypt” as a motive for showing kindness to the slave or the poor. In one text (10:18–19), however, it expresses God’s concern for securing justice for the fatherless and the widow and, out of love for the stranger, providing him with food and clothing.¹⁵ It then adds the exhortation “So you shall love the stranger, for you were strangers in the land of Egypt.” It is not hard to see that Lev 19:33–34 has developed directly out of these Deuteronomic texts. Yet the concern in the Holiness Code has changed from offering humanitarian aid to the marginal in society to that of treating the alien (גר) as an assimilated member of the community: “You shall love him *as yourself*.” This is the application of the general principle expressed in Lev 19:18 (“You must love your neighbor as yourself”) that refers to all of one’s countrymen.

The source for Exod 22:20 [21] and 23:9 is equally clear; it is taken almost verbatim from Lev 19:33–34, but in abbreviated form.¹⁶ There is one significant addition, the use of the verb “to oppress” (לחץ), which is repeated again in 23:9. This theme comes directly from J’s account of the Egyptian oppression (Exod 3:9), where both verb and cognate noun are used. In addition, 23:9 places considerable weight on the Egyptian sojourn analogy by the additional explanation “You yourself know what it is like to be a stranger,” which is a creative expansion of the analogy argument. There is no justification for allocating some parts of the text to redactors.¹⁷

The concern for the *ger* is closely followed in 22:21 [22] by the command about the widow and orphan: “You must not wrong any widow or orphan.” The earliest prophetic text that speaks out against mistreatment of these three groups and which denounces fraud (הנהג) and violent treatment (חמס)¹⁸ is Jer 22:3 (see also 7:6): “Do not defraud or use violence toward the stranger, the orphan, or the widow.” This same connection of stranger, orphan, and widow is found in Ezek 22:7 (see also v. 29): “The alien among you has been oppressed; the orphan and widow have been defrauded by you.” It is perhaps significant that the plight of the *ger* is not in evidence as a concern in the eighth-century prophets and comes into view only in the late monarchy or early exilic period. It is for this reason that F. Crüsemann wants to associate the rise of this concern with the downfall of the Northern Kingdom.¹⁹ Since these prophetic texts are from the late monarchy and early exilic period, as are the references in Deuteronomy and the Holiness Code, there is no need to tie concern for the *ger* to this particular historical event of the late eighth century. The combined concerns of Exod 22:20–21 [21–22] belong to the same horizon as the exilic prophetic texts and the other two law codes on which it is dependent.

In recent traditio-historical discussions on the combination of these three, the stranger, orphan, and widow, much has been made of the order and arrangement of these groups.²⁰ It has been observed that within the Deuteronomic tradition generally, there is a fairly fixed order of “stranger-orphan-widow” (אֶלְמָנָה-יְתוּם-גֵּר), which is also followed in Jer 7:6; 22:3; Ezek 22:7 (but orphan-widow-stranger in Deut 10:18). The order in the Covenant

Code, however, is different, with the sequence of widow-orphan. N. Lohfink takes from this the view that the Covenant Code does not yet reflect the fixed formula of Deuteronomy,²¹ but in Zech 7:10 and Mal 3:5 the order corresponds to that of the Covenant Code.

The command in Exod 22:21 [22] not to oppress the widow and orphan is followed by a divine warning in verses 22–23 [23–24]:

If you do afflict them and they cry out to me, I will certainly hear their cry and my anger will blaze and I will kill you with the sword so that your wives will become widows and your sons orphans.

A similar kind of appeal to God by the poor against ill-treatment is found in Deut 15:9 and 24:15, using different language: “He appeals against you (עלך) to Yahweh and it will be held against you as a sin.” There is also an implicit threat in the statement in Deut 10:18: “He [Yahweh] executes justice for the orphan and widow.” The language of the Exodus text, however, is very characteristic of other parts of J, both with respect to the cry for help as in the exodus story (Exod 3:7–9; 14:10–14) and in the expression of God’s anger. The threat in which the punishment will be made to fit the crime is reminiscent of prophetic speeches of divine judgment.

The commandment in Exod 22:24–26 [25–27], which has to do with making loans, is in the “if-you” (pseudocasuistic) form. It is in two parts, which must be considered together, and reads:

If you lend money to any of my people, the poor in your community, you are not to act like a creditor to him; you are not to extract interest from him.

If you take in pledge the cloak of your neighbor, by the time the sun has set you are to return it to him, because it is his only covering. It is the cloak for his body; in what else is he to sleep? If he should cry out to me, I will heed, for I am compassionate.

This law has the same horizon of early exilic prophecy and the law codes of Deuteronomy and the Holiness Code as the previous humanitarian laws. It must, however, be understood within the context of the development of the practice of usury and the increasingly stringent laws against it as reflected in the prophetic and legal texts. The abuses associated with loaning at interest and the consequent impoverishment of large numbers of Israelites at the hands of their fellows are well attested in the prophetic literature of the eighth century. Yet there is no indication that loaning at interest was wrong in itself. Within the law codes of the Pentateuch, Morgenstern has argued that Deut 15:2 represents a stage in the development of the institution of lending when the charging of interest was still permitted.²² It states:

This is how the remission of debts is to be made: every creditor (בעל משא) shall remit the debt of his neighbor. He shall not press his neighbor, his fellow countryman, for repayment, for the remission of Yahweh has been proclaimed.

The year of remission, שמיטה, was introduced to address some of the abuses of loaning at interest by giving relief from the burden of debt. It is likely that the law as a regular cycle of release every seven years was unenforceable, and so a further measure of charitable relief was attempted, as in Deut 15:7–11, to assist the poor but still allow loans on pledge. Closely associated with Deut 15:1–3 and 7–11 in language and perspective is Deut 24:10–15, which contains two laws that arise out of the previous text on debts.

The first (vv. 10–11) allows for the making of a loan on interest (נִשָּׂה) but restricts a creditor (נִשְׂהָ) from forcibly entering the house of a borrower to take his pledge for a loan. It further qualifies this law (vv. 12–13) by making special allowances for the poor, who may only be able to pledge their cloaks in which they sleep. It must be returned at sunset. The second law (vv. 14–15) has to do with paying wages to the poor in a timely fashion, at sunset. Both these injunctions regarding the poor are supported by both positive and negative motivations: in the first (v. 13), blessing by the poor person and credit (“righteousness”) from Yahweh for compliance, and in the second (v. 15), an appeal to the deity against the offender, in which the employer will be held accountable (guilty of “sin”). These same two motivations appear in Deut 15:9–10. This practice of loaning at interest is still the case by the end of the monarchy. As Morgenstern points out, in Jeremiah’s complaint “I have not lent at interest (נִשְׂהָ) nor has anyone lent (נִשָּׂה) to me, yet everybody curses me” (Jer 15:10), the institution of loaning at interest is not regarded as improper as such.²³

The matter of loaning on interest, however, becomes a prohibition in Deut 23:20–21 [19–20]:

You are not to charge interest on a loan (נִשָּׂה) to your brother [fellow countryman], whether interest on money, food, or anything on which interest can be charged. To the foreigner you may charge interest, but to your countryman you may charge no interest, in order that Yahweh your God may bless you in all you undertake upon the land that you are entering to occupy.

The law covers all commodities that may be used for interest-loans and makes a distinction between a fellow Israelite and a foreigner, the same distinction that earlier existed between the Israelite and the foreigner in the שְׂמִיטָה (15:2–3). Both the motivation for such behavior in the positive divine blessing and the anticipation of occupying the land are in keeping with the other parenetic portions of Deuteronomy so that the whole formulation is thoroughly Deuteronomistic in character.

The same attitude toward forbidding the charging of interest to “your brother” is expressed in Lev 25:35–37, in somewhat different language:

If your brother becomes poor and cannot support himself in your community, you are to maintain him; just as the alien and sojourner, he is to live in your community. Take no interest from the capital advance (נִשָּׂה) or interest from the repayment (תְּרִבִּית), but fear your God, so that your brother may live in your community. Do not charge interest on the advance (נִשָּׂה) of money nor add interest on credit (תְּרִבִּית) for food supplied.

This law builds upon the prior Deuteronomy law with the regulations about “your brother” in the same way as the law regarding the Hebrew slave. Here the Holiness Code makes this restriction apply particularly to the poor. The remarks about the nature of the loans have also become more precise and fit the language of the Holiness Code. This same prohibition against the taking of both these kinds of interest, נִשָּׂה and תְּרִבִּית, are to be found in Ezek 18:8, 13, 17; 22:12, where the practice is strictly condemned and in the same context of concern for the poor. This gives us the social horizon of the early exilic period for the beginning of this prohibition on interest.²⁴

If we now look again at Exod 22:24 [25], it becomes clear that the law against loaning on interest belongs to the period after Ezekiel and the Holiness Code. It uses both verbs נִשָּׂה and נִשָּׂה, so that it supports the later legislation against loaning on interest

(נשך) while at the same time prohibiting the earlier practice reflected in the use of נשח. Furthermore, the double object, “my people” and “the poor in your community,” reflects the concerns of the two codes. The reference to “my people” is the equivalent of “your brother” in Deuteronomy as an Israelite distinct from the “foreigner,” whereas the “poor in your community” are the “brother” who has been reduced to poverty in Lev 25:35. Even the use of the prepositional phrase עמך, “among you” (here rendered by “in your community”) seems to reflect its frequent use in Lev 25:35–37. Furthermore, the primary concern is with addressing the problems of the poor as in the Holiness Code. The Covenant Code seems to be an abbreviated version of both Deuteronomy and the Holiness Code. The obvious implication of this is that Exod 22:24 [25] must reflect precisely this development of Israelite social ethics and therefore come at the end of this process in the exilic period.

The second part of the law in Exod 22:25–26 [26–27] has to do with the taking of the cloak of the poor person as a pledge on a loan. Its parallel is to be found in Deut 24:12–13, which states:

If he [the debtor] is a poor man, you must not sleep in his pledge. You must return to him his pledge as soon as the sun sets, so that he may sleep in his cloak. He will bless you and it will be a credit to you before Yahweh your God.

As we saw above, this injunction follows from a law that allows for loaning at interest with some controls. In the case of Exod 22:25–26 [26–27], the qualification is attached to the law in which loaning at interest is forbidden, so it must be the later version. The connection between the two parts is much closer and clearer in Deuteronomy than in the Covenant Code. The Deut 24:12–13 law makes immediately clear that it is a poor person who is reduced to using his cloak as a pledge, whereas in Exod 22:25 [26], this fact must be assumed from verse 24 [25] and may only be inferred from the statement in verse 26. On the other hand, it seeks to explain more fully the connection between the cloak and the pledge.

The use of the term “your neighbor” in 22:25 [26] and “the poor” in verse 24 [25] is interesting because it is also paralleled in Deut 24:10, 12 but with the order of the two terms reversed. Deuteronomy begins with the general category of “your neighbor,” the fellow countryman, to whom loans may be made, and then moves to the more specific class of loans to “the poor.” This is entirely consistent with the internal development of this legislation from Deut 15 and within Deuteronomy, as we have seen. The Covenant Code reverses these two terms so that the whole of the legislation on loans now has to do with “my people, the poor,” and “your neighbor” is now a member of this class.

The motivation clause in Exod 22:26b [27b] is expressed quite differently from that of Deut 24:13b. In the latter case, the poor man blesses the compassionate person, and it becomes a credit to him before God. This is very similar to the theme of the righteous man in Ezek 18 who gets credit for his good deeds before God and is attested as “righteous” (צדיק). The situation in Exod 22:26b [27b] implies the opposite situation of abuse of the poor man’s pledge, and so the wicked person receives condemnation, as in Ezek 18. The form of the warning is similar to that of 22:22–23 [23–24], with the appeal of the wronged party to God: “if he cries to me, I will hear, for I am compassionate” (v. 26b [27b]). Instead of the third-person reference to Yahweh in Deuteronomy, the direct first-person divine voice is used.

The phrase “I am compassionate” (חַנוּן אֲנִי) also calls for some comment. It is not typical of the Dtr, who in one late instance in Deut 4:31 uses the epithet “merciful God” (אֵל רַחוּם) to suggest Yahweh’s forgiving nature toward his people. The attribute “compassionate” corresponds to the usage within J itself and is found in Exod 34:6–7 in the epithet אֵל רַחוּם וְחַנוּן, “the merciful and compassionate god,” one of a series attached to the name of Yahweh.²⁵ Most of the epithets emphasize the forgiving nature of Yahweh, but there is also one that includes God’s role as a judge who “does not acquit the guilty” (v. 7). Likewise, the suggestion in Exod 22:26 [27] is that the deity who has compassion on the plight of the poor is at the same time a threat to those who wrong them.

Second Series: Exodus 23:1–9

Within the second series of social laws in Exod 23:1–9, scholars are accustomed to characterize those in verses 1–3 and 6–9 as court procedures.²⁶ But such a description is a little misleading because there is no framework or introduction that points to such a setting and it must be adduced entirely from the content. While the setting for these apodictic admonitions may be a court of law, the intent is to set forth general principles of behavior as in the previous group of humanitarian commands. The first apodictic injunction in 23:1a, “You are not to start a false rumor,” is parallel to a law in the Decalogue (Deut 5:20): “you are not to bear false witness against your neighbor.” This is intended as a general principle and not a court procedure although it is likely derived from the discussion of such procedures in Deut 19:15–19.²⁷

However, the prohibition in 23:1b calls for special comment. It states: “You are not to conspire with an evil person to be a malicious witness (עַד הַמֵּט).” This warning against perjury must be understood in the light of the court procedures of Deut 19:15–19. The Deuteronomic text states that at least two witnesses are needed to sustain a charge against someone, and then tells what to do in the case of a single “malicious witness” (עַד הַמֵּט). Exod 23:1 assumes this longer discussion of Deuteronomy but then includes a situation not covered by Deuteronomy by warning against collaboration with the first as a second “malicious witness (עַד הַמֵּט),” which would actually fulfill the requirement of the two witnesses of Deut 19:15. The procedure in Deuteronomy simply has no way of dealing with *two* malicious witnesses.²⁸ Thus, the warning in Exod 23:1b presupposes the injunction against a single “malicious witness” and goes beyond it. The reverse, that Deuteronomy develops its law out of the Covenant Code, hardly seems likely.²⁹

The text in Exod 23:2 is very difficult and almost certainly corrupt,³⁰ but any conjectures have gained few adherents.³¹ I would propose the following:

לֹא־תִהְיֶה אַחֲרֵי־רַבִּים לְרַעַת וְלֹא־תִעֲנֶה עַל־דָּם לְנֶשֶׁת אַחֲרֵי רַבִּים לְהַטַּת מִשְׁפָּט

You should not follow the majority into evil deeds; nor should you testify in a capital case (עַל־דָּם) by inclining after the majority so as to pervert justice.

This retains verse 2a as it is but reads דָּם for רַב (which is very difficult) and supplies מִשְׁפָּט (with LXX) to complete the final verb.³² To understand the text, one must look at the second half first. It clearly deals with testifying in a court of law if we can take the verb עָנָה together with the final phrase “to pervert justice” as fairly certain. This calls to mind the text in Lev 19:16, which seems to deal with this theme in a similar way. It states:

You must not go about as a slanderer among your people; you must not stand against your neighbor in a capital offense (על־דָם רעד). I am Yahweh.

The second part of this text seems to reflect the remarks about witnesses in Deut 19:15–21 and the seriousness of offering false testimony in a capital offense. I think that this is also the best way to understand Exod 23:2b, and I have rendered them both in the same way. There is a parallel to Lev 19:16a quoted above in an accusation made by Ezekiel in Ezek 22:9: “Slandering men are present in you [Jerusalem] in order to shed blood.” This seems to relate the two ideas of slander and giving testimony in a capital offense.

What seems particularly distinctive about the admonition in Exod 23:2a is the notion that the “many” (רבים) are a group associated with doing evil and must be avoided. I can find no such warning in the other codes. Yet it is noteworthy that the “many” (רבים) are identified in the Servant Song of Isa 52:13–53:12 as those who are transgressors in need of the servant’s restoration. The one righteous servant stands against the many evildoers. It is also significant that the setting for the Servant Song is dominated by the metaphor of the just one suffering injustice at the hands of the many in a court of law.

The admonition in Exod 23:7 again relates more closely to verses 1–2 than to its immediate context and seems to deal with false testimony by witnesses. It states:

Avoid a false charge, and do not cause the death of the innocent (נקי) and guiltless (צדיק); for I will never acquit the guilty.

The rendering of דבר־שקר as “a false charge” is supported by the use of דבר in the sense of a charge brought by a witness in Deut 19:15 and the references to the “false witness” (עד־שקר) in the same context, verse 18. Deut 19:19–21 spells out the consequences of such false testimony, which is to be administered according to the principle of *lex talionis*. The admonition in the Covenant Code above expresses this in the form of the divine threat of punishment: “I will not acquit the guilty.” This is very similar to the statement that the deity makes to Moses in Exod 34:7, “he [Yahweh] will never acquit the guilty,” using the verb נקה instead of צדק, a close synonym as the pair נקי and צדיק in the same verse indicate. This is very similar to the divine threat at the end of Exod 22:26 [27].

There are three “laws” in the form of exhortations to judges that should be considered together, 23:3, 6, and 8. They read:

Verse 3: Do not show favoritism to a poor person in his lawsuit.

Verse 6: Do not deprive your poor of justice in his lawsuit.

Verse 8: Do not take a bribe, for bribery blinds the clear-sighted and perverts the just pronouncements.

As a set of injunctions scattered among others that do not have to do with judges specifically, it is a rather curious collection and not without problems.³³ The first commandment, in Exod 23:3, seems simple enough, but the obvious problem with this statement is that there is a far greater danger in a court of law that the rich and the powerful will be favored over the poor. Yet nothing is said about that. The injunction in verse 6 seems very general by comparison with the specific advice of the other two, and yet it is structured as a counterpart to verse 3. Verse 8 does not fit the pattern of short statements with its expanded explanation.

The obvious parallel to these laws is the exhortation to judges in Deut 16:19, which follows the instructions about the appointment of judges (v. 18) who are to dispense true justice. The advice to judges states:

You must not deprive anyone of justice by showing favor or taking a bribe, for a bribe blinds the eyes of the wise and perverts the just pronouncements.

There are three prohibitions here. The first is general: "Do not deprive (anyone) of justice." The last two are more specific: "Do not show favor" and "Do not take a bribe," which I have construed as particular instances of the general principle. The explanatory clause is added to the final command of the series. Similarly, in 1 Sam 8:3, Samuel's sons, as judges, are charged with taking bribes and perverting justice. This same combination is found in the proverbial literature. Prov 17:23 states:

A wicked person takes out a bribe from his pocket to pervert the path of justice.

And Prov. 18:5 admonishes:

Showing favor to the wicked is not good, thereby depriving the righteous of justice.

All these texts seem to point to the statement about not perverting justice as the general principle, which may be expressed alone,³⁴ and the second two prohibitions as particular examples of the first. The fact that the court setting for the unit in Deut 16:19 is very clear, that the verse is constructed as a literary unity, and that the last half (v. 19b) is quoted almost verbatim in Exod 23:8 make it most likely that the Covenant Code drew upon this text in composing the other texts. This means that the first two injunctions in Deut 16:19a were split apart and made into two separate commandments and their order was reversed.

The theme of not showing favoritism in Exod 23:3, however, is quite different from the wording in Deut 16:19a and is developed in a curious way, as noted above. Some light can be thrown on this by a parallel in Lev 19:15:

You are not to do mischief in passing judgment, by either favoring the weak (לַדָּל) or showing respect (הִדְרָה) for the great (גִּבּוֹר).

This has the same structure as Deut 16:19 with its three prohibitions, the first general and the second and third specific. This law seems to spell out the full implications of what Deuteronomy means by not showing favor, but the weight of such injunctions is always on the threat of perversion of justice by the powerful. The law in the Covenant Code would, therefore, seem to ignore this side of the issue and only refer to partiality for the poor.

The specific wording of the law in the Covenant Code, however, points in quite another direction. It could be understood as a shortened version of the Holiness Code law, in which the subject of the first part, "poor" (לַדָּל), is combined with the verb "to show respect" (הִדְרָה) from the second. The problem with this solution is that the final product does not make sense, for the verb הִדְרָה has to do with honor and respect and is not appropriate for the "poor." I would therefore accept the suggested emendation of לַדָּל to גִּבּוֹר.³⁵ This would yield the sense "Do not show favoritism to a powerful person in his lawsuit." That would mean that the Covenant Code simply chose the wording from the second part of the Holiness Code law as the part that needed the most emphasis. This solution would also provide a balance for verse 6.³⁶

This leaves Exod 23:6, which is directly parallel to the first injunction in Deut 16:19a. This clause is now treated as a separate command and extended to apply specifically to the poor. Houtman raises the interesting question: To whom does the personal pronoun refer in the phrase “your poor” (אֲבִינֶךָ)?³⁷ He answers the query by suggesting that it does not have reference to the poor in general but to a poor person who is directly involved with the subject addressed in the initial verb. He therefore renders the phrase: “ein bedürftiger Mensch, der von dir abhängig ist,” and understands the lawsuit to be between these two persons. I consider this a rather forced and unlikely interpretation. The parallel in verse 3 does not suggest such a narrow limit. The phrase “your poor” seems to refer to the same group as “the poor of your people” (אֲבִי עַמֶּךָ) in verse 11. The fixed pair “poor and needy” (אֲבִינֶךָ וְדָל) are so frequently used for a class of persons and not of anyone in a state of dependence that the same must be the case here.³⁸

Houtman further cites the parallel in Deut 15:11:

For the poor (אֲבִינֶךָ) will not cease from the midst of the land. Therefore, I command you, saying, “Open wide your hand to your countryman, to your needy and your poor (אֲבִינֶךָ) in your land.”

This text, however, does not support Houtman’s position. The whole unit from verses 7–11 deals with the poor in Israel as a class and how the people as a whole are to respond to them. It speaks throughout of “your brother, the poor” (אֲדָמְךָ הָאֲבִינֶיךָ), which means Israel’s poor and not a particular landholder’s dependents. The language in Exod 23:6 very likely derives from this particular terminology as developed in Deut 15:11. Furthermore, in both verse 3 and verse 6, the prohibition ends with the phrase “in his lawsuit” (בְּרִיבֵהוּ), which is also not in the parallel text of Deut 16:19. Yet in Deuteronomy, such a phrase was not necessary because the series of injunctions is introduced as instructions to judges. Such an introduction is missing in the Covenant Code, so the author must add this phrase to make the context of the lawcourt clear.

Lost or Distressed Animals: Exodus 23:4–5

Two sets of parallel laws in the Covenant Code and Deuteronomy deal with lost and found animals and animals in distress. These are Exod 23:4–5 and Deut 22:1–4. The diachronic direction in which one reads the development of these two laws makes a significant difference in their understanding. Almost all scholarly discussion of these texts begins with the assumption that the one in the Covenant Code is the older law, even when it is often argued that parts of Exod 23:4–5 are late or have undergone late modifications.³⁹ We will begin with Deuteronomy. Deut 22:1–3 states in rather colorful fashion:

You are not to see your fellow countryman’s [“brother’s”] ox or sheep wandering loose and make yourself scarce from them. You must return them to your countryman. If the countryman is not close by and is unknown to you, bring the animal into your own quarters and keep it with you until the countryman comes looking for it. Then return it to him. Do the same for his donkey, for his cloak, or anything else that your countryman loses. You may not ignore them.

This law covers the situation of lost and found property, whether it is a wandering animal or a piece of apparel. If the owner is known, it should be restored; if he or she is not

known, it should be held until the owner comes to claim it. This is a civic duty.⁴⁰ The law's form is a mixture of apodictic prohibition (v. 1) and the pseudocasuistic style (vv. 2–3), characteristic of Deuteronomy. Like many laws of Deuteronomy, it is clearly formulated for the sake of those in the Israelite community, expressed as an association of “brothers.”⁴¹

The parallel law in Exod 23:4 states:

Whenever you happen to come upon the ox of your enemy or his donkey wandering, you must return it to him.

The form and language of the first half of the law have changed significantly. In place of the negative prohibition, there is a pseudocasuistic protasis and only one verb, “you encounter,” to describe the situation. Nevertheless, the apodosis still contains the same strong affirmation. The law, while certainly related to the Deuteronomy parallel, has an entirely different intention.⁴² In this version of the law, the wandering animal now belongs to “your enemy” (אֹיֵב). The significance of this designation is either ignored or completely played down in most treatments of the text. Thus, Houtman construes the text to express merely a way of getting along with people in an “obviously small community.”⁴³ Noth considers that “this ‘enemy’ ‘who hates you’ apparently means a man with whom one is having or has had a dispute at law or with whom perhaps a dispute at law is now for the first time imminent, and for this reason these clauses have been inserted in the present context.” However, there is no evidence that the term “enemy” (אֹיֵב) is used in this way. Noth, of course, must admit that this highly particular interpretation of the enemy assumes what is expressly stated in Deut 22:1–4.⁴⁴ There is simply no way to make sense of the law without assuming that the wandering animals of those who are not enemies (i.e., one's fellow countryman) should be treated in this way as well. That is exactly what is stated in Deuteronomy. Consequently, it makes the most sense to consider this law in Exod 23:4 as an expansion of the Deuteronomy law into a quite new concern, namely, animals belonging to the “enemy” and not fellow Israelites.

Recently, Otto has taken up the view of Noth and Houtman that the “enemy” is merely an opponent at law in the local community and that Deuteronomy has given the law a reformulation to make it into a national law so that the term “your brother” (אָחִיךָ) in Deut 22:1–4 is inclusive of all Jews, including the “enemies.”⁴⁵ This is stated in contradiction to every Deuteronomic usage of the term “enemy” (אֹיֵב). Furthermore, Otto regards the reference to lost articles in Deut 22:3 as an extension of the law by Deuteronomy to include the substance of the law in Exod 22:8, which also deals with lost property. Thus, he claims that the combination of Exod 22:8 [9] and 23:4–5 in Deut 22:1–4 falsifies the thesis that Deut 22:1–4 is a source for the Covenant Code. The interjection of Exod 22:8 [9] into the discussion calls for some additional comment. First, it should be observed that this text belongs to a larger context of property laws in Exod 22:6–9 [7–10] in which the opponent at law in dispute over property rights is consistently referred to as “his neighbor” (רֵעִהוּ), which would be the equivalent of “your brother” in Deuteronomy, but it never uses terms like “enemy” or “the one who hates you” as in Exod 23:4–5. Second, the laws in Exod 22:6–9 [7–10] are in casuistic form and not ethical admonition and have to do with matters of theft and contested property claims resulting from both illegal acts or lost property that has been found and not returned. Deuteronomy has nothing to do with such a legal process, and Deut 22:3

could hardly be understood as a summary of such laws. It is quite plain that those in the Covenant Code do not derive from Deuteronomy either but from the Babylonian legal tradition, as seems clear from similar laws in the Hammurabi Code (LH §§9–13).

Otto goes on to suggest that Exod 22:8 [9], with its remark about bringing the contesting claims to “the God” (האלהים) so the deity can decide the guilty party, refers to some cultic decision, such as an ordeal, at the local sanctuary, which is eliminated by the Deuteronomist in the interests of centralization. There is, however, no need to consider the remark in the Covenant Code as having anything to do with local sanctuaries. That is a red herring. The idea of taking oaths before God and of settling disputes by ordeal is common to Babylonian law and is referred to in LH §9, which deals with lost or stolen property. But it is also a feature of the Priestly Code (Num 5), and a similar process is reflected in Deut 17:8–13. However, Deut 22:1–4 does not reflect any legal process, just general admonition, so there is simply no relationship between these laws in either direction.

If the law is understood as dealing with a class or group of persons, “your enemy,” who are not Israelites, then it must mean those who live outside the territory of Israel. This raises the obvious question of the circumstances under which the animals of the enemy would be encountered by Israelites, who are then urged to return them. It cannot be when Israel or Judah are living in their own territorial region, for it would be extremely rare that they would be able to identify a wandering ox as belonging to a particular Moabite, Ammonite, Aramean, etc. The answer must be when the Israelites are living in close proximity or among the “enemy,” and that is precisely the situation of the Babylonian exile. It is significant that Lev 26:34–45 speaks repeatedly of the exile as the “land of your enemies.” In that situation, a stray animal might very well belong to an “enemy.” This is a clear case of the author formulating a law for the diaspora.

Regarding the substance of the law, there are a number of possibilities in interpreting it.⁴⁶ The law could have in mind the damage caused by wandering animals so that it is a duty to prevent any animals of friend or foe from doing so. But nothing is said here about damages and their consequences, and the term “enemy” is inappropriate in laws with that kind of concern. Nor does it have anything to do with avoiding the charge of theft.⁴⁷ On the contrary, this law and especially the parallel law in Deut 22:1–3 seem to urge action and involvement in the recovery of lost property even when such action runs the risk of being construed as theft. In Deuteronomy, the impulse to avoid getting involved goes against one’s civic duty. However, Exod 23:4 does not have merely civic duty in mind as in Deuteronomy. Rather, the focus is now on the welfare of the animal. Any animal, even one belonging to an enemy, therefore, should be returned. Nothing, of course, need be said about an animal whose owner is not known, since that could hardly then be one belonging to an enemy. Nor is there any comment about lost items of clothing, because the law is not about returning lost property as it is in Deuteronomy.

The parallel laws in Deut 22:4 and Exod 23:5 deal with a closely related theme regarding large animals. They may be set down side by side:

Deut 22:4

You are not to see the donkey or ox of your countryman lying down in the road and avoid them. You must help him raise them.

Exod 23:5

Whenever you see the donkey of your foe⁴⁸ lying helpless under its load, and you hold back from freeing it, you must help him free it.

In this case the large animal is not lost but in distress, so that one should assist with the fallen beast. The form and language of the Deuteronomic law follow very closely that of verse 1, with a strong prohibition, “you are not to see . . .” with a second verb governed by the same negative, “and avoid,” followed by an infinitive absolute and imperfect emphasizing the positive action.

The parallel to this law in Exod 23:5 is more controversial. The language of the text is certainly awkward and there have been a number of proposals to deal with its problems and interpretation.⁴⁹ The first problem has to do with the middle clause (והדליה לו (מעוב לו); is it to be taken with the protasis or the apodosis? If it is taken with the protasis (as above), it creates a certain awkwardness of style and is usually rendered by a paraphrase, as in REB: “however unwilling you may be. . .” If it is taken as part of the apodosis, then the two statements appear contradictory: as a command to desist and as a command to do whatever is implied by the verb עוב. This usually results in attributing two different meanings to the same verb in the same context. A common solution is to regard the middle clause as secondary and unnecessary, but this merely postpones the need to explain why the redactional addition was made if it was not needed.

Alan Cooper is one who advocates taking the verb עוב in both middle and final clauses in the same way, with the meaning of “leave, abandon,” to produce a “plain sense” of the text: “Nothing could be plainer than the plain sense of Exodus 23:5, a couple of refractory particles . . . notwithstanding.” He goes on to paraphrase the law in the following way: “If you see your enemy’s loaded ass recumbent, although you might be tempted to interfere with it in one way or another, you must leave it alone.”⁵⁰ This supposed plain sense is hardly clear or meaningful, for the following reasons:

1. The previous law urges action for the benefit of the animal and its owner. It would be very odd to have it coupled with a law that advises nonaction, to the detriment of animal and owner. Such inconsistency is unlikely.
2. The Deuteronomic parallels suggest that both laws are of the same kind and call for helping the owner of the animals. Cooper must argue that Deuteronomy misunderstands the law that it has taken over from the Covenant Code. It is very unlikely, however, that an ancient lawgiver misunderstood the “plain sense” of the law in the other code.
3. Cooper ignores the problem of the “refractory” particle עמו, “with him,” at the end of Exod 23:5, which also appears in a similar place in Deut 22:4 and signifies that the action to be taken is to be done together with the owner. But it hardly makes sense to suggest that the owner of the animal will also “abandon” it together with its load.

If we compare the situation in Deut 22:4 with that in Exod 23:5, we see that the former mentions only that the animal is fallen and must be raised, but a fallen animal is not a problem unless the animal is loaded. That may be assumed from the remark in Deut 22:4 about the beasts of burden being “on the road” and accompanied by the owner. Nevertheless, Exod 23:5 amplifies precisely this aspect of the problem, namely, that it is the animal’s load that prevents it from getting up and must be removed. In such a case, the animal must be “freed” from his load, after which he may be raised and reloaded. All of this is to be done together with the owner (עמו). There is no difficulty in understanding the verb עוב as “free, release” in this context.

The only problem that remains is how to account for the unusual construction of the middle clause as a second protasis. This is explained from the parallel construction

in Deut 22:1 and 4 in which the negative governs both initial verb, “you see,” and the second verb, “you avoid.” Changing the negative clauses to conditional כִּי clauses in Exod 23:4–5 causes no difficulty in the first law in verse 4, but in verse 5 the initial verb, “when you see,” is followed by a second verb, “and you hold back,” that is the equivalent to the second verb of Deut 22:4 with its implied negative. Therefore, the actual meaning of the middle clause in Exod 23:5 is “You are not to hold back from freeing it,” even though the negative is not expressed. The use of the verb “to see” (רָאָה) at the beginning and the particle עַד at the end makes it clear that the construction is derived from Deuteronomy.

The focus of the law, however, has changed from Deuteronomy to the Covenant Code. In the latter, it is a case not just of helping someone raise up a large fallen animal but rather of helping an animal in distress. The presence of the animal’s owner is completely played down.⁵¹ In both of the situations in the Covenant Code involving animals, the principle of humane treatment has been drawn out of a law that had a very different purpose in mind, related to Deuteronomy’s larger scheme of the ideal Israelite community. It is difficult to see how one could go from the law in the Covenant Code to that of the parallel in Deuteronomy, but the concept of extracting new laws from old ones by the author of the Covenant Code seems entirely plausible.⁵²

In this respect one may also compare the Sabbath law in the Decalogue of Deuteronomy and that of the Covenant Code in Exod 23:12. In the Decalogue (Deut 5:12–15), the emphasis is upon the cessation of work as a religious observance for all members of the household, including the slaves, the domestic animals, and the resident alien. It then singles out the slaves for special humanitarian concern with the statement, “that your male and female slave may rest as you do,” supported by the motive statement, “You should remember that you were a slave in the land of Egypt.” In Exod 23:12, this humanitarian concern for the slave is now extended to include the animals and the alien as well: “that your ox and your donkey may rest and your home-born slave and alien may refresh themselves.” This shares the same interest in the humane treatment of animals that is present in the extension of the law in 23:4–5. All of these laws share the same sentiment and perspective and belong to the single author of the Covenant Code.

The Social and Theological Setting of the Humanitarian Laws

The conclusions that may be reasonably drawn from the above analysis of the individual laws in this group contrast sharply with recent study of the Covenant Code. The position of F. Crüsemann in his major work on Hebrew law may serve as a useful comparison.⁵³ Building on the structural analysis of Halbe and Osumi,⁵⁴ Crüsemann regards the block of humanitarian laws as the clue to a major reform of the official civil code reflected in the *mishpatim* whereby those most vulnerable in society, the aliens, orphans and widows, and the poor generally are assured of justice. This reform he sees as a response to the eighth-century prophets, especially Amos, and the fall of the Northern Kingdom, which led to a flood of refugees into the south. All of this is based upon the prior certainty that the Covenant Code is older than the other codes. Against this view, I have argued above that the social laws reflect the historical horizon of the exilic period, exhibiting dependence upon Deuteronomy and the Holiness Code, as well as the prophet Ezekiel. This is evident in the following ways:

1. Form-critically, they manifest their dependence upon the distinctive forms of Deuteronomic laws of the apodictic and pseudocasuistic “if/you” type. In this, they parallel the forms and usage of the introductory laws in Exod 20:22–26. In both, one also finds the same divine voice and the same frequent links with the larger narrative context of J. This form-critical argument is a much more certain criterion for understanding the composition history of these laws than the redactional reconstruction of Crüsemann and others based upon structural analysis.

2. The social laws take up the same humanitarian concerns for the marginal persons in society as reflected in Deuteronomy and the Holiness Code. It is true that these first appear in the works of the eighth-century prophets, but the specific details are similar to those found in Jeremiah and Ezekiel. In particular, the prohibition against usury as a means of dealing with impoverishment for debt is reflected only in the final stages of Deuteronomy, in the Holiness Code, and in Ezekiel, and its validity is assumed and supported by the Covenant Code.

3. The principles of justice in the court of law with respect to the duties of judges and witnesses build upon, and extend, those expressed by Deuteronomy and the Holiness Code. In this respect, the warning about a second malicious witness goes beyond Deuteronomy’s discussion of the false witness.

4. In the area of civic responsibility concerning lost animals or the fallen beast of burden, the Covenant Code also goes beyond Deuteronomy by including non-Hebrew owners and expressing concern for the animals themselves, regardless of who the owner might be. Furthermore, in these laws, there is a clear indication of the social context reflecting life in the exile among one’s “enemies.”

In all of these ways the humanitarian laws portray the same social, ethical, and theological concerns and the same historical horizon that are manifest in the larger corpus of J in the Pentateuch.

Apodictic Prohibitions and Injunctions

There is a short series of apodictic commands in Exod 22:27–30 [28–31] that do not include any penalty clauses and that are a mixture of types, some being prohibitions in the negative and some positive injunction and admonition. In this respect, the series is not unlike the Decalogue in form. The placement of this series is curious because the first prohibition (22:27 [28]) has a close association with the participial laws in 22:17–19 [18–20], both in subject matter and in source. At the same time, the series interrupts the collection of humanitarian laws in 22:20–26 [21–27] and 23:1–9 and has some similarities in structure and content with the cultic laws in 23:10–19. Yet one should resist rearranging the laws into discrete collections and attributing the present arrangement to one or more redactors.

Prohibition against Cursing God and the Community Leader: Exodus 22:27 [28]

The first law, in 22:27 [28], is a prohibition in two equally balanced parts:

You must not treat the deity with contempt (קלל), and a leader (נשיא) among your own people you must not curse (אָרַר).

Judgments on the antiquity of this text have been very divided and are primarily based upon the presence of the term *נָשִׂא* in the second half. Some have argued that the reference to this form of leadership rather than the king places the law in the pre-state period.⁵⁵ Those who regard the law as compiled in the time of the monarchy and who still wish to view this law as original argue that it is a designation for a clan leader and understand “your people” in a more limited way, or they see in the use of *נָשִׂא* an implicit criticism of the monarchy as an institution.⁵⁶ The frequent use of *נָשִׂא* in Ezekiel, the Holiness Code, and P suggests that the reference is to the recognized form of leadership in the exilic period, and this is the reason that many scholars have considered this verse as secondary.⁵⁷ In my view, however, *נָשִׂא* belongs within the same social horizon as the rest of the code—namely, the exilic period—and is therefore quite appropriate.

The first part of the text also raises a problem for its larger context in that it refers to the deity as object of the verb while in the laws that precede and follow the deity speaks in the first person.⁵⁸ The reason for this form and wording of the law is to be found in the parallel in Lev 24:15–16. The present text has been overlaid by P and incorporated into a story to illustrate the law of blasphemy, but the original is not hard to extract from this expanded version. It reads:

Anyone who treats God⁵⁹ with contempt (*קָלַל*) will be held responsible for his sin; the one who curses (*נִקְבָּה*) the name of Yahweh will be put to death (*מוֹת יוֹמָה*).

There are two parts to this law, as in Exod 22:27 [28], but in this case, both parts deal with cursing the deity. The form is also different. Here in the Holiness Code, especially in the second half, it closely resembles the participial prohibitions that are otherwise used in the Covenant Code, and the entire injunction occurs in the immediate context of the laws in Lev 24:17–21 of the same form that we saw above were previously used by the Covenant Code in Exod 21:12–17. There seems little reason, therefore, to doubt that the author of the laws in Exod 21:12–17 is also the author of this text in Exod 22:27 [28]. In imitating Lev 24:15–16, however, he has adopted the same language, using “God” (*אֱלֹהִים*) and the verb *קָלַל*, but he has changed the clause into an apodictic prohibition. Instead of repeating the same theme in a parallel injunction as in Lev 24:16a, J (the author of the Covenant Code) has paired it with an injunction against cursing the *נָשִׂא*.

The fact that J drew this law from Lev 24:15 is quite sufficient to account for the shift from the deity speaking in the laws before and after and the deity as object in this law. It may be noted that in Lev 24:15–16, P was faced with the same problem because in the larger context Yahweh is speaking to Moses. So to introduce the set of laws with the deity referred to in the third person, he adds at the beginning of verse 15 the phrase “Say to the Israelites,” which is entirely artificial since Moses reports the whole speech in verse 23 and not just the older laws. Yet it illustrates very well the process by which authors, J or P, incorporate materials into their work without always making the necessary changes to make the person and number of the subject agree.

A General Cultic Admonition: Exodus 22:28a [29a]

The next unit in the apodictic series is 22:28–29 [29–30]. It is a little curious to find this set of cultic laws at this point in the code and not combined with those in 23:10–19. Such a combination does not occur in the parallel laws in Exod 34:18–26, so there

must be some other reason to explain why the author has opted for this arrangement here. The verbal connections between the two sets of laws in 22:28–29 [29–30] and 23:10–19 are such that there is no need to suppose different sources or strata within the code to account for this.⁶⁰

The first clause in verse 28a [29a] is in the form of a prohibition like the prior law of verse 27 [28], and this form may have been used to provide a connection between the laws. Yet it is not a true prohibition but a negatively stated injunction:

Both your fullness [of grain] and your drippings [of winepresses] you are not to hold back.⁶¹

This is a very strange injunction and it is hard to know what it means as a law. The terms מלאה, “fullness,” and דמע, “tears,” are very imprecise and hardly correspond to legal language. They can only be understood in conjunction with Deut 22:9, which uses the rare word מלאה together with זרע, “seed,” to mean “the fullness of your grain crops.” And while Deuteronomy does not have the term דמע, it does use a parallel phrase, “produce of your vineyard,” which suggests that this is what is meant by the “tears.” The line is poetry, and its impact is entirely rhetorical and not legal. However, this does not solve all the problems. The law in Deut 22:9 suggests that grain is not to be sown in vineyards between the rows because it will result in the total harvest (“fullness of grain”) being “consecrated” (קדש) to the deity.⁶² This law is given as a warning and does not suggest that such a forfeiture is a good thing. Taken at face value, however, Exod 22:28a [29a] would seem to suggest that the total harvest should, in principle, be dedicated to the deity and this should not be regarded as a penalty. In practice, however, this is not what the law means, so that the principle must have in mind some other law or set of injunctions.

The closest parallel to this general principle in Deuteronomy is the law of the tithe in Deut 14:22–26. The law specifies that in the divinely chosen sanctuary the people are to eat the tithe, which is “a tithe of your grain, your wine, and your oil, as well as the firstlings of your cattle and sheep.” A number of observations may be made here: (1) the first three commodities of the tithe here roughly correspond to “your fullness and your drippings” of the Exodus law; (2) the tithe commodities are followed by a general statement about the gift of firstlings, as they are in Exod 22:28b [29b], the next line of the law in the Covenant Code; (3) this is a general statement of principles that is followed later in the law code (Deut 15:19–16:17) by more specific treatment of such gifts, which is also the case in the Covenant Code; (4) immediately preceding the law of the tithe, in Deut 14:21, there is a prohibition against eating anything that has died a natural death, the direct parallel to the law in Exod 22:30 [31], which follows this unit. All of this suggests a close association of these two units. It confirms the view that the general principle, stated in cryptic poetic language in 22:28a [29a], really has to do with the tithe and can only be understood as a summary statement of the tithe as we have it in Deuteronomy. The Covenant Code cannot be taken literally; it presupposes and is completely dependent upon Deuteronomy for its sense and is otherwise meaningless.

Child Sacrifice and Firstborn Animals: Exodus 22:28b–29 [29b–30]

The next law, 22:28b–29 [29b–30], if less ambiguous, is even more controversial.⁶³ It reads:

The firstborn of your sons you are to give to me.

Thus you will do to your oxen (and) your sheep.

Seven days he/it is to be with his/its mother; on the eighth day, you are to give him/it to me.

Fishbane has observed that the clause in verse 29a [30a] (“Thus you will do to your oxen and your sheep”) may be construed as an exegetical expansion.⁶⁴ Its placement in the text creates syntactical and grammatical problems for what follows, principally in the lack of agreement between the third-person singular pronouns (“he/it,” “his/its,” “him/it”) in 29b [30b] and the plural antecedents in verse 29a [30a] (“oxen,” “sheep”). With verse 29a [30a] bracketed, the rest of the law makes good sense as a unit and seems to refer to some form of dedication or sacrifice of firstborn sons.

There are, however, some difficulties with this reconstruction. First, if verse 29b [30b] applies to human firstborn sacrifice, then the law would seem to restrict the practice to eight-day-old children, but all the examples of child sacrifice in the Old Testament suggest older children (e.g., Gen 22).⁶⁵ It hardly seems likely that the practice was that restrictive. Second, if the reference to animals in verse 29a [30a] is excluded, then one must explain how two separate practices, one dealing with firstling animals and the other with newborn children, came together and were generalized under the same law. It is usually assumed that the original law included all firstlings, human and animal, and that the distinction between the two, in which the human firstborn is redeemed, is secondary. Thus, the relationship between the practice of child sacrifice and the offering of firstlings becomes a desideratum for further clarity on this law. Third, the pronouns in verse 29b [30b] do, in fact, have reference to the firstborn of the oxen and sheep and are therefore appropriately in the singular, as we shall see below in the case of the parallel laws.

This raises the question of whether or not the restrictions in verse 29b [30b] apply only to the animals. This seems to be the position taken by G. Brin, in which he relates this text only to the offering of an animal at the local altars “close to its birth.”⁶⁶ He understands the statement in verse 28b [29b] as an act of dedication of the firstborn to the service of the deity, using the Samuel story (1 Sam 1–2) as the model,⁶⁷ but the gift of that child was the fulfillment of a vow and was not a case of compliance with a law. Nevertheless, if the whole of verse 29 [30] refers primarily to animals, then it raises the possibility that the sacrifice/dedication of firstborn sons was combined with a different law having to do with the firstlings of animals. There are many references in which the two practices of child sacrifice and the offering of firstlings are dealt with quite separately, and these need to be explored.

In a recent book, J. Levenson begins with the law as set out in Exod 22:28b–29 [29b–30] as the legal basis for the practice of child sacrifice in ancient Israel.⁶⁸ This he does on the assumption that the Covenant Code, to which the law belongs, is the oldest law code of ancient Israel and therefore precedes those references in the prophets (Jer 7:30–31; 19:5–6; and Ezek 20:25–26) that, in his view, quite unequivocally point to the practice of child sacrifice in the late monarchy period. He therefore rejects the attempt by R. de Vaux to construe this law in any other way than as a reference to child sacrifice.⁶⁹ For Levenson, Jeremiah and Ezekiel seem to make references to a disputed law having to do with the sacrifice or dedication of children to the deity, and it is the law in Exod 22:28b–29 [29b–30] that is regarded by Levenson and others as the law in

question. The weight of Levenson's discussion, however, rests upon the statement in 22:28b alone ("The firstborn among your sons you are to give to me"), and he says nothing about the second part of the law in verse 29 [30] and the various problems of interpretation that are associated with it. Taken in isolation and out of context, the statement in verse 28b [29b] cannot be used as the starting point for the discussion of child sacrifice in ancient Israel.⁷⁰

Let us therefore turn to those texts outside the Pentateuch that are thought by Levenson to bear directly on the practice of child sacrifice.⁷¹ Jer 7:30–31 (cf. 19:5–6) reflects a protest against a practice in the late monarchy that was being performed in Jerusalem and was sanctioned by the religious authorities there:

For the people of Judah have done what is wrong in my eyes, oracle of Yahweh. They have set up their loathsome idols in the house that bears my name to defile it. And they have built high places of Topheth in the valley of Ben-Hinnom in order to burn their sons and daughters with fire, which I did not command (them) and which never even entered my mind.

This seems to be a clear reference to child sacrifice in which the Dtr editor strongly rejects not only the practice but also the notion that it was something commanded by Yahweh. The language used here "to burn with fire" (שָׂרַף בָּאֵשׁ) is the same as that used in the prohibition in Deut 12:31. The alternate expression in the Dtr tradition is "to transfer by means of fire" (בָּאֵשׁ עִבֵּר), as found in Deut 18:10; 2 Kings 16:3; 17:17; 21:6 (cf. Jer 32:35), and these two expressions must mean the same thing.⁷² However, the objects of this "transfer" are stated as being both sons and daughters, although it is nowhere expressly stated that they are all firstborn children. The text also suggests that some authority represented the rite as something commanded by Yahweh to legitimate this practice. It would further appear that the Jerusalem Temple priesthood were the prime targets against whom the protest was directed.⁷³

Ezekiel, in 20:25–26, seems to confirm this practice of child sacrifice, while at the same time contradicting Jeremiah (or the Dtr editor) on the matter of divine law. He states:

I for my part gave them decrees that were not good and laws by which they could not live. I defiled them by their gifts when they handed over every first-birth of the womb in order that I might devastate them, that they may know that I am Yahweh.

The law envisioned here uses the same language for the act of offering (עִבֵּר hiphil) as in the Dtr tradition but without the reference to fire, בָּאֵשׁ (cf. v. 31); in addition, it refers specifically to the first-birth.⁷⁴ This would seem to be inclusive of both males and females, and it could include animals, but that is uncertain. The text also suggests that, contrary to the Dtr tradition, such a law was to be found in a collection of commandments associated with the wilderness law-giving tradition. Given Ezekiel's close association with the priestly tradition of Jerusalem and the prior indications from Jeremiah, it is reasonable to conclude that it was primarily from this priestly tradition that such a religious rite received its legitimation. Ezekiel shows throughout his prophecy that he was heavily indebted to the priestly tradition. At the same time, Ezekiel shares with Dtr the revulsion at such a practice and seeks to reconcile the contradictory situation in which it places him.

The text of Micah 6:6–8 also appears to make reference to child sacrifice:

⁶How shall I approach Yahweh and do homage to God on high? Shall I come to him with burnt offerings, with year-old calves? ⁷Would Yahweh be pleased with thousands of rams, with ten thousand rivers of oil? Shall I give my firstborn for my transgression, the fruit of my body for the sin of my soul? ⁸He has told you, O mortal, what is good, and what Yahweh expects from you; to do what is just, to love faithfulness, and to live in humility with your God.

On two points, Levenson sees some similarity between this prophecy and Exod 22:28b–29 [29b–30] and therefore regards it as relevant to the practice of child sacrifice. The first is the common use of the verb “to give” (נתן) in connection with the offering of the firstborn. The second is the close association of the sacrificing of the firstborn with animal sacrifice, as in the law in Exodus.⁷⁵ It would appear reasonable to conclude from the Micah text that “giving” the firstborn to Yahweh could be understood as sacrifice. It is not so clear, however, that the law of Exod 22:28b–29 [29b–30] stands behind the text quoted above and reflects a practice of the eighth century B.C.E. Against this is the fact that the offerings of animals in the above text can have nothing to do with those referred to in Exod 22:29 [30], which are quite specific eight-day-old firstlings and not year-old calves and mature rams. There are various additional reasons why the Micah text is not germane to the understanding of the law in Exod 22:28b–29 [29b–30]. First, the text quoted above belongs to a pericope in 6:1–8 that is late exilic or postexilic in date. It clearly reflects the combination of DtrH with the J version of the Pentateuch. It also makes heavy use of the kind of historical résumés that one finds in 1 Sam 12:6–15 and Josh 24:1–13, especially the latter, which is post-Dtr in date.⁷⁶ This means that it cannot be used to refer to the time and words of the eighth-century B.C.E. prophet as evidence for child sacrifice as an accepted practice in that period.⁷⁷ Second, the contrast that it sets up between sacrifice as a way of pleasing God, whatever the amount or quality may be, and being just, faithful, and humble before God says nothing about the legitimacy of the sacrificial practices. The implied answer to the questions is negative. The same comparison could be made long after the practice of child sacrifice was abandoned. Third, the statement having to do with child sacrifice in verse 7 is itself problematic. It states: “Shall I give my firstborn for my transgression, the fruit of my body for the sin of my soul?” The implication that sacrifice in general and child sacrifice in particular were for the expiation of sin does not reflect the preexilic religion of Israel. The sacrifice of the firstborn, whether of humans or animals, certainly had a very different significance from that of sin offerings. It is a rather late, postexilic development that tends to make all offerings into sin offerings. The text seems to completely misunderstand the original significance of the “dedication” of the firstborn. So it can hardly help us in clarifying the law in Exod 22:28b–29 [29b–30].

This brings us to a consideration of the parallels within the Pentateuch. The closest example is the P text in Exod 13:2, which states:

Consecrate to me every firstborn, the first-birth of every womb among the Israelites, both human and animal; it belongs to me.

Taken by itself, the statement is unqualified and, as Fishbane rightly points out, “the existence of the unqualified rule . . . would be hard to explain if the qualifications

were original.”⁷⁸ This observation supports the conclusions to be drawn from Jeremiah and Ezekiel that the practice of child sacrifice existed before such qualifications were made, so that all such statements of redemption by animal sacrifice or compensation (Exod 13:13–16; 34:20; Num 3:11–13; 8:16–18; 18:15–16) must be later. Nevertheless, that does not mean that this particular law in Exod 13:2, which is without qualification in the P source, is earlier than those in Exod 13:11–13.⁷⁹ The law in 13:2 is stated as a general rule by P, who has added it as an introduction to the laws that follow. He has already anticipated the regulation of unleavened bread (13:3–10) by the divine command in 12:15–20, so he mentions only the divine command regarding the law of the firstborn here.⁸⁰ It does not matter that the general rule is repeated in 13:12, because Moses is, in substance, repeating what the deity has commanded him to say. It is only important for P that the ultimate source of the law be seen to be from the deity. The fact that P fully accepts the principle of redemption and the connection made by J between the redemption of the firstborn and the sparing of the firstborn Israelites in Egypt may be seen from the references to J’s text in Num 3:13; 8:17; 18:15 (all P). Furthermore, P uses the rather ambiguous verb קדש (piel), “consecrate,” instead of the more precise term עבר (hiphil), “transfer,” as in 13:12.⁸¹ It may include the notion of sacrifice when applied to animals, but it does not usually have this meaning when used of humans. Consequently, it is not in the least likely that Exod 13:12 is derived from Exod 13:2.

It is equally clear, however, that the law in Exod 22:28b [29b] is not the elusive original law reflected in Jeremiah and Ezekiel. If this were the original law, then I cannot explain why we have this particular wording of the law, which is so different from that in Jeremiah and Ezekiel, as well as in the abundant references to the custom in DtrH. The allusion to the law in Ezek 20:25 uses the phrase “when (they) transfer (עבר hiphil) every first-birth of the womb,” and it is this wording that is also found in Exod 13:12a: “You are to transfer (עבר hiphil) every first-birth of the womb to Yahweh.” This Exodus text must be using the same law that is referred to in Ezekiel.

Exod 13:12b–13 then goes on to make a series of qualifications. The first of these is to include animals, which may suggest that the phrase “first-birth of the womb” (פטר־רחם) had reference originally to human offspring. The second qualification is to restrict the offering to “males,” but the text is a little ambiguous as to whether this refers only to the animals or to the humans as well. The third qualification is to make a distinction between clean and unclean animals, such as an ass, and in the latter case, they must be redeemed with a lamb.⁸² The major innovation, however, is the extension of this redemption to humans (v. 13b), and here the terminology changes and the human offspring are designated as “the firstborn of humans (בכור אדם), your sons,” which now makes unambiguous the restriction to males. This is followed by a historical etiology that justifies this redemption of sons (vv. 14–16). In verse 15b “all the male first-birth” (כל־פטר־רחם הזכרים) are now the animals and they are to be “sacrificed,” but the firstborn (בכור) of the sons are to be redeemed. It is unlikely that any of this innovation (vv. 13b–16) belonged to the original form of the law. At the same time, the author of this revision of the law understood the verb עבר (hiphil) to refer to sacrifice.

Deuteronomy has a very different law about firstlings that seems to stem from a very different cultic tradition. It states in Deut 15:19–20:

Every firstling (כל־הבכור) that is born among your cattle and your sheep, the male, you are to consecrate to Yahweh your God. You are not to work the firstborn of your oxen, and you are not to shear the firstborn of your sheep. Before Yahweh, you are to eat them, annually, in the place where Yahweh chooses, you and your household.

It would appear from this text that the act of consecration does not refer primarily to the slaughter of the animals but to the whole process of setting aside the firstlings from common use until they are slaughtered at the time of the annual festival. It is clear that the use of the verb “to consecrate” (קִדַּשׁ) as applied to animals in Exod 13:2 (P) is derived from this text. The law goes on to specify that if the firstling has any blemish, then it is not to be sacrificed but to be treated as profane slaughter and consumed in the local community. The law knows nothing about the requirement to offer or redeem unclean animals and nothing about the dedication of humans in any form. The terminology used for the firstborn (בכור) is also quite different from the form of the law that seems to stand behind Ezekiel and the law in Exod 13:12. The question therefore arises as to whether this is a radical transformation of an earlier practice or whether, as is more likely, it reflects a quite different cultic tradition.

The offering of the firstlings in Deuteronomy as an annual celebration seems very closely related in form and meaning to the other harvest festivals in Deut 16:9–15 (cf. 26:1–4, 10–11), namely, that of offering the first fruits of the land to Yahweh. It is best therefore to see this as the first agricultural festival, associated with the birth of animals in the spring, and as comparable to the other harvest festivals. This would also make it closely associated with Passover in 16:1–8, but how the two are related is not entirely clear.⁸³ This larger association suggests that there are two possible interpretations of the term “firstborn of the herd/flock.” As with the first fruits of the land, it could merely refer to the first animal born within a herd of cattle or flock of sheep during a given year. Since these animals are to be eaten by the household after they are sacrificed, this limited number is quite appropriate for this purpose. The other possibility is to view the firstborn animal as the firstborn male of every newly matured female animal, and that could amount to quite a large number of the new herd or flock. I consider the first of these two options the more likely.

The law in Exod 13:12–13 seems to be a compromise between the two legal traditions. The term פִּטְרָה, “first-birth,” is used primarily for animals, while the term בכור, “firstborn,” is reserved for humans. The version of the law in Exod 34:19–20 follows that of 13:12–13, except that the animals to be dedicated are more closely specified (“an ox or lamb”), as in the firstlings law of Deuteronomy. Furthermore, the restriction of the offerings to males also seems to be derived from Deuteronomy’s firstling law. All the references to the sacrifice of human offspring in DtrH and Jeremiah make no distinction between male and female. In any case, the texts in Exod 13:12–13 and 34:19–20 cannot be understood as proto-Deuteronomic. The very idea of child sacrifice is condemned in Deuteronomy and the Dtr tradition without qualification. The redemption of the male humans makes these Exodus texts exilic at the earliest, and they have their closest connection with P, who uses the same terminology and the same historical etiology.

Turning back to Exod 22:28b [29b], the statement “The firstborn (בכור) of your sons you are to give to me” does not seem to be an early form of either tradition, the “proto-Priestly” of Ezekiel or the Deuteronomic law of the firstlings. It uses the same terminol-

ogy for humans, “the firstborn (בכור) of your sons,” and the restriction to males that is found only in the post-D/Dtr texts of Exod 13:13, 15, and 34:20 and is therefore a late construction. It has made out of the law of firstlings/firstborn a general principle, so that the nature of the “giving” remains unspecified. As with the P injunction in Exod 13:1–2, the way that the gift is made depends entirely on the prior regulation of Exod 13:11–16, especially because it is from the same hand, J.

Given that Ezekiel insists on the existence of a law regarding the first-birth and the close association of Ezekiel with the Holiness Code, it is perhaps surprising that there is no such law on the firstborn in the Holiness Code, only a prohibition against the giving of offspring to “Molek,” which is considered a foreign practice (Lev 18:21; 20:2–5). Nevertheless, the Holiness Code in Lev 22:27 does contain a parallel to the law as it stands in Exod 22:29 [30], and it remains to investigate the relationship between the two.⁸⁴ Lev 22:27 states:

When an ox or lamb or kid is born, it is to remain seven days under its mother. From the eighth day onward, it is acceptable to offer it as a gift offering by fire to Yahweh.

This piece of instruction reads, not as if it were a separate, self-contained law, but as a qualification on some previous law. The most obvious one with which to combine it is Deut 15:19, the law of firstlings:

Every firstling that is born among your cattle and your sheep, the male, you are to consecrate to Yahweh your God. You are not to work the firstborn of your oxen, and you are not to shear the firstborn of your sheep.

Deuteronomy deals with the specific requirement regarding firstlings (that they cannot be worked or sheared) but does not say how soon after birth it is to be consecrated and how old it may be as an offering at the time of the annual sacrifice. The general regulation in Lev 22:27 answers this question.

What we appear to have in Exod 22:29 [30] is a conflation of Deuteronomy and the Holiness Code. This can be seen from the following chart:

Exod 22:29 [30]	Deut 15:19	Lev 22:27
to your ox (and) to your sheep	among your cattle and among your sheep your ox, your sheep	ox or lamb or kid
Seven days it will be with its mother		Seven days it will be under its mother
On the eighth day you are to give it		From the eighth day onward, it is acceptable

The Book of the Covenant has taken over the collectives for the animals from Deuteronomy. At the same time, it has applied the general regulation of the Holiness Code to the specific law of the firstlings but has made it even more restrictive by specifying that the offering is to occur on the eighth day. Such was hardly the intention of the Deuteronomy firstlings law, in which the firstlings were part of an annual festive meal.⁸⁵ The regulation in the Holiness Code is in complete agreement with this by merely speci-

fyng that the animal has to be at least eight days old, but it could be a year old at the time of the annual donation.

The idea of dedicating every firstborn on the eighth day (Exod 22:29 [30]) and an annual festival as in Deuteronomy, however, are no longer compatible, whether it is a local festival or a centralized one. Yet one can account for the change from the law of the Holiness Code by the fact that the Covenant Code corresponds to a temporal pattern that recurs in the later laws. Exod 23:10 has the following pattern: “For six years you may sow your land . . . , but in the seventh. . . .” And in the law of the Sabbath in 23:12: “For six days you may do your work, but on the seventh. . . .” If it is the case that the Holiness Code law was modified by the Covenant Code to accommodate this pattern, then it has little to do with an actual cultic practice and lies entirely within a kind of literary formation of law.

Since the whole law in Exod 22:28b–29 [29b–30] seems to presuppose both Deuteronomy and the Holiness Code of Lev 22:27 and also borrows the wording of Exod 13:11–16 and 34:20, the requirement about giving the firstborn sons to Yahweh is a statement of principle that presupposes the qualifications of the other laws in J. There is a very similar use of the general statement of principle in Neh 10:37, in which the people commit themselves to bring in annually to the house of Yahweh “the firstborn (בכרית) of our sons and our animals as it is written in the Law and the firstlings (בכורֵי) of our herds and flocks.” Judging from the language, this is almost certainly a conflation of the law in Exod 22:28–29 [29–30] and Deut 15:19 (cf. also Deut 12:6, 17; 14:22–29; 18:3–4).⁸⁶ Yet it would be entirely erroneous to deduce from this statement that child sacrifice was still being practiced in Jerusalem at this time. The statement, therefore, presupposes the other regulations about how this giving is to be done. What has clearly changed from the early festival origins of the firstlings law and the sacrifice or dedication of the first-birth of humans and animals is the transformation of these into the means of support for the Temple.

Once we are able to place these laws in the right diachronic relationship with each other and with the related texts of the Old Testament, then the development of the history of child sacrifice or dedication can be considerably clarified.⁸⁷ Deuteronomy seems to have a law about the offering of firstlings that is restricted to clean male animals and that is connected with an annual festival parallel to its harvest festivals but knows nothing about the need to redeem humans or unclean animal firstlings. The prohibition against child sacrifice in Deut 12:31 and 18:10 seems to be entirely separate from these regulations and viewed as a “foreign” practice. From the perspective of this tradition, the condemnation of the practice of child sacrifice in Jeremiah and the Dtr tradition makes good sense. Ezekiel, however, seems quite familiar with another priestly tradition in which such a law regarding the first-birth of humans had a place. It is this law that was still practiced in the late monarchy and early exilic period. A major transformation of this tradition is reflected in Exod 13:11–16 and 34:20 (J) in which the festive consumption of male firstlings of Deuteronomy is combined with the first-birth law of humans and given an entirely new meaning. The festival aspect completely disappears and it becomes a matter of “dedication by fire” to the deity. The first-birth law is restricted to males, like Deuteronomy’s male firstlings, but it now includes all animals. This means that it must redeem the unclean animals with a substitute. The redemption of the unclean animals is then extended to humans, and this is justified by a historical

etiology about how God slew the firstborn in Egypt but spared the firstborn of the Israelites. The story of the final plague of the death of the firstborn of humans and animals and the sparing of the firstborn of the Israelites was invented by J as a way of transforming an unacceptable practice. The redemption of the firstborn thus becomes a positive “sign” and means of remembering the exodus deliverance.

The P writer follows this tradition but gives an additional explanation for the dedication of the firstborn by making the Levites a substitute for the rest of the firstborn males of Israel who are “consecrated” (שָׁדָד) to God (Num 3:11–13; 8:14–18). He also associates the Passover more closely with the final plague by making the sacrifice of the lamb and the blood rite the means by which the Israelite firstborn were spared (Exod 12:1–13). The redemption of the firstborn of the Israelites by means of the lamb is surely significant in the light of J’s etiology in Exod 13:11–16. P’s Passover therefore seems to represent the conflation of the Deuteronomic Passover connected with the exodus (Deut 16:1–7), J’s festival of Unleavened Bread and the sacrifice of the lambs as redemption for the firstborn humans in each family (Exod 13:3–16), and Deuteronomy’s annual consumption of firstlings by families as in Deut 15:19–23. At the same time P greatly expanded the regulations regarding the dedication of the first-birth and firstlings as support for the cult (Num 18:15–18).⁸⁸

Consumption of an Animal Carcass: Exodus 22:30 [31]

The final injunction belongs very closely to those that immediately precede it in Exod 22:28–29 [29–30]. If we take the whole of the previous injunctions together, we have in fact a series of statements that represent general principles, all having to do with “giving” to Yahweh: the giving of crops in general, the dedication of humans, and the giving of animals. These injunctions are followed by another statement of principle (v. 30a [31a]): “As holy persons, you belong to me.” The preceding series of dedications, which can be expressed in Deuteronomy and P by the verb קָדַשׁ, leads to the result that the Israelites are “dedicated persons” (אֲנָשִׁים קְדוֹשִׁים). The shift from second-person singular in the preceding verses to second-person plural in this verse is based entirely on this choice of terminology. It should not be used as the basis for considering the verse as a secondary addition or as a structural marker.⁸⁹ The statement is the direct equivalent of the principle enunciated in Deuteronomy: “For you are a people holy (עַם קָדוֹשׁ) to Yahweh your God,” using second-person singular (see Deut 7:6; 14:2, 21; 26:19; 28:9). The phrase “a people holy to Yahweh” was coined by Deuteronomy to represent the intimate relationship of Israel, Yahweh’s chosen people, to the deity, and therefore to justify the demand of obedience to Yahweh’s laws in Deuteronomy.

The same theme is taken up in the Holiness Code in Lev 19:2 and 20:7, 26, in which the holiness of the Israelites is again linked to obedience to the law. In this case, however, the people are addressed in the second-person plural, and the deity expresses himself in the first-person singular, as in Lev 20:26: “You belong to me as holy ones (קְדוֹשִׁים), for I, Yahweh, am holy.” The statement in the Covenant Code (Exod 22:30a [31a]) is very close to this form and is also given in the direct speech of the deity in agreement with the wider narrative context of 20:22, as in the case of the Holiness Code, instead of the reported speech of Moses in Deuteronomy, and with the same close association of the declaration to the demands on their goods and persons. The signifi-

cance of the shift from a “holy people” in Deuteronomy to “holy ones” in the Holiness Code and “holy persons” in the Covenant Code can only be understood by exploring the connection between the declaration and the prohibition that follows in 22:30b [31b].

The prohibition in 22:30b [31b] seems on the surface to have little connection with what precedes, and commentators regularly treat it as an isolated law. It states:

You are not to eat flesh mauled by animals (טֶרֶף) in the open country; you are to throw it to the dogs.

This law has its parallels in Deuteronomy (Deut 14:21a) and the Holiness Code (Lev 17:15; 22:8) and cannot be understood without them.⁹⁰ It has been a serious mistake to begin the discussion of these laws with the Covenant Code. We will begin with Deut 14:21a, which states:

You are not to eat any animal carcass (נבלה). You may give it to a stranger (גר) who lives in your towns, and he may eat it or sell (it) to a foreigner (נכרי), because you are a people holy to Yahweh your God.

The term נבלה is often rendered as an animal “that dies naturally,” but that is not a usage that arises out of the Dtr tradition. It is most often used of a human “corpse” that has died *unnaturally* and has not received a proper burial. It may simply be a synonym for פֶּתֵר, “corpse.” This law follows a series of prescriptions and prohibitions in 14:3–20 having to do with dietary matters, especially clean and unclean animals. In these laws, the discussion relates to properly slaughtered animals in which the blood is not consumed. The contrast, therefore, is between an animal that has been properly slaughtered and one that has not, even if it is a clean animal, no matter how it has died.⁹¹ Furthermore, the custom of not eating the נבלה is a way of distinguishing the Israelite from the non-Israelite, the resident alien (גר), and the foreigner (נכרי), who are permitted to eat it. The prohibition identifies the holy people, as do the rest of the dietary laws (14:2).

The parallel in Lev 22:8 is of quite a different sort. It belongs to a series of laws addressed to the priests and states:

He [the priest] is not to eat an animal carcass (נבלה) or one mauled by a wild animal (טֶרֶף), thereby becoming unclean through it. I am Yahweh.

This law is curiously out of place and is only loosely connected to the context in which it now stands.⁹² The laws in the larger context deal with the problem of contamination by contact with things that are unclean (vv. 1–7) and with who may or may not eat the holy portions that are the property of the priests (vv. 10–16), with verse 7 as a bridge between the two. The law in verse 8 is placed into this context because it deals with both unclean contact and eating, and in this context the law is addressed to priests and is given its own parenthetic exhortation in verse 9 related to the priests’ special holiness. In Ezek 4:14, the same categories of נבלה and טֶרֶף are mentioned as unclean food that Ezekiel, the priest, has not eaten. The emphasis of the whole unit in Ezek 4:9–17 is on eating what is unclean and not on any other form of contamination. It is quite possible that the special food laws of Deuteronomy originally applied to priests as holy persons and that Deuteronomy has extended this principle to all Israelites, defining the people as a whole as holy and belonging to Yahweh in this way.

The legal tradition as reflected in Lev 22:8 and Ezek 4:14 modified the law in Deuteronomy in that it added the category of the mauled animal (טֶרֶפֶה) to that of the general category of animal carcass because it meant that the clean animal could have been contaminated by injury or death resulting from the attack of an unclean animal. Consuming such a contaminated clean animal would have resulted in defilement. Deuteronomy (in Deut 14) kept both the laws regarding unclean animals and the consumption of an animal carcass together, both as reflective of the people's holiness. However, the Priestly tradition in the Holiness Code split these two requirements and set the law about the animal carcass in a new context that is primarily concerned with the sanctity of the priesthood and the matter of contamination with dead things. It is no longer a matter of eating food, as such. By contrast, contact of the laity with such contamination follows different principles and is expressed in Lev 17:15:

Any person who eats an animal carcass (נבלה) or a mauled animal (טרפה), whether a native or a sojourner (גר), must wash his clothes and bathe in water and remain ritually unclean until the evening; then he will be clean.

This makes a distinction between priesthood and laity in that the laity are permitted to eat this food so long as they deal with the ritual contamination in an appropriate way. It is the priests in the Holiness Code who have a higher level of holiness and who must therefore be more restrictive in their behavior than the lay Israelite. And as K. Sparks points out,⁹³ the sojourner (גר) has now become assimilated into the worshiping community such that he has the same status of holiness as the native-born, different from Deuteronomy. Furthermore, what is noteworthy is that the law in Lev 17:15 follows a series of solemn prohibitions against the consumption of blood, which was the prime concern for the profane slaughter of animals in Deuteronomy (in Deut 12:20–28). In the Holiness Code, however, the law has lost its basis in the concern for improper slaughter and is merely a matter of uncleanness due to contact with dead animals. While it follows the same sequence of laws in Deuteronomy, it directly contradicts the prohibition of Deuteronomy on the eating of the animal carcass, נבלה.

How does the Covenant Code in Exod 22:30b [31b] compare with these laws? It clearly stands closest to that of Deuteronomy (Deut 14:21a) in that it forbids the consumption of some animals that are within the category of the נבלה, but it limits this to the clean animals mauled by wild beasts, the טרפה. The distinction between these two types is probably derived from the tradition as reflected in Lev 22:8 and Ezek 4:14, but the Covenant Code makes no distinction between layperson and priest.⁹⁴ All the people are holy, as in Deuteronomy. The reason that the Covenant Code includes only animals mauled by wild beasts in its prohibition may be found elsewhere in the code. In the casuistic laws in Exod 21:33–36, there are a number of cases in which an animal dies through an accident or an ox dies after being injured by another ox. In these laws, permission is given for the use of the dead animal, which presumably means that in the case of the ox, a clean animal, it could be used for food. Even if it was killed by another ox, this would still fall under the category of the נבלה and not the טרפה. So it would be quite consistent with the prohibition in 22:30b [31b] but not with Deuteronomy.

There is also a difference in the treatment of the dead animals. In Deuteronomy they may be sold to the stranger (גר) and the foreigner (נכרי), but in the Covenant Code, the mauled animal must be given to the dogs, unclean domestic animals, and not sold or

eaten by anyone. This provision cannot be derived from either Deuteronomy or the Holiness Code. However, in J's story of the Flood, J suggests that the primeval Noah observed the distinction between unclean and clean animals (Gen 7:2–3, 8–9; 8:20), so that to be consistent with this viewpoint, not even foreigners are to be encouraged to consume unclean meat.

With Lev 17:15 the matter is quite different. It is not so much a matter of eating something forbidden as it is contamination by contact with a dead animal, and this can be dealt with by the lay population by washing and bathing. That becomes clear with the Priestly elaboration in Lev 11 where mere contact with the *נבלה* is what makes one unclean. This is a major revision of the laws regarding unclean animals in Deut 14:3–21.⁹⁵

Let us now return to the first part of the law in Exod 22:30a [31a], “As holy persons you belong to me,” and its connection with the prohibition that follows. It is clear that this is a summary statement of the much more elaborate statement that occurs in Deut 14:2:

For you are a people holy to Yahweh your God, and Yahweh has chosen you for himself from the peoples that are on the face of the earth to become his private possession.

This becomes the basis for the dietary laws regarding clean and unclean animals. It is the same statement in shorter form that is made at the end of the dietary laws in verse 21a: “For you are a holy people to Yahweh your God.” By taking over this theme in summary form and putting it *before* the parallel prohibition on not eating certain dead animals, the Covenant Code has accomplished three things. First, it assumes and affirms the general dietary laws in Deuteronomy with which the statement about being holy is so closely associated. It merely adds a modification on the treatment of the carcass at the end. Second, the affirmation of the people's holiness also sums up what has gone before and binds the two parts together. All those dedicated to the deity are “holy things” (cf. Deut 12:26) and belong to Yahweh. Third, the use of the phrase “persons of holiness” in place of the Deuteronomic “holy people” is deliberate, because the holy persons in Israelite society would ordinarily be the priests, and in the Holiness Code and the subsequent P tradition, the regulations about eating carcasses distinguish priest from lay. It seems therefore that the Covenant Code rebukes the Priestly tradition in the Holiness Code by making clear that “holy persons” are not just the priests but the people as a whole. There is no place in J for a separate and distinct priesthood.

The statement about those addressed in the law being holy persons who belong to Yahweh fits well with the broader theme of J in the larger narrative setting. It is in keeping with the prior statement in Exod 19:5–6:

Now, if you truly heed my voice and keep my covenant, you will become my private possession from among all the peoples, for all the earth is mine. You will belong to me as a kingdom of priests and a holy nation.

The similarity with the language of Deuteronomy has long been established, so its dependence needs hardly to be argued.⁹⁶ The affirmation in Exod 22:30a [31a] makes the connection back to this theme in the larger context of the law. What it means to be a “kingdom of priests” and a “holy nation” is, among other things, to abstain from unclean foods as represented by the *טריפה*. For J and the Covenant Code, there is no distinction between layperson and priest. P, however, has reintroduced the distinction by

allowing for such contact with unclean food by the laity. The whole P Code has been developed to make clear the degrees of holiness within Israel and how they are to be observed.

The Cultic Laws of Exodus 23:10–19

The Fallow Year (Exodus 23:10–11) and the Sabbath Year (Leviticus 25:3–7)

The instructions for a seven-year cycle of letting the land lie fallow in Exod 23:10–11 and in its parallel in the sabbatical year law of Lev 25:3–7 raise important issues about the relationships of these bodies of laws. The discussion of these laws, in most cases, is entirely prejudiced by the assumption of the antiquity of the Covenant Code law, so that one can make little progress in the comparative study of the texts by a review of their proposals.⁹⁷ Fishbane, however, at least offers a set of arguments to support his views of the priority of Exod 23:10–11 over that of Lev 25:3–7, from which he extrapolates certain principles of legal exegesis, so it will be useful to begin with a consideration of his views.⁹⁸

A side-by-side comparison will be helpful:

Exod 23:10–11

For six years you may sow your land and gather its produce; but in the seventh you must let it lie fallow and leave it alone.

The poor of your people may eat (from it), and whatever they leave over the wild animals may eat. You are to do likewise with *your vineyard* and your olive trees.

Lev 25:3–7

For six years you may sow your fields and for six years you may prune your vineyard and gather its produce; but in the seventh there is to be a Sabbath rest for the land, a Sabbath to Yahweh. You must not sow your field or prune your vineyard; the spilled grain of the (previous) harvest you must not harvest, nor harvest the grapes of the unpruned vines. It is to be a Sabbath year for the land.

(The produce) of the Sabbath of the land will become your food, for you and your male and female slaves, your hired man and the sojourner staying with you, for your cattle and for the livestock which are on your land. All the produce will be for food.

In the two versions of the law I have italicized those portions of the two texts that are strictly parallel to facilitate discussion.

Fishbane's view is that the Exod 23:10–11 law originally contained only a reference to the sowing of the land in verses 10–11a and that verse 11b ("You are to do likewise with your vineyard and your olive trees") is an addendum by a redactor. However, in his view, this left too much unspecified, which may have been supplemented by a tradition of oral exegesis. The version in Lev 25:3–7, therefore, represents a written version of such "an expanded exegetical revision," which not only

comments on the original law in Exod 23:10–11a, which it takes over “quite precisely,” but also incorporates the addendum of verse 11b into the body of the law, albeit somewhat awkwardly. Apart from the Leviticus law giving much greater detail, Fishbane regards the law as a revision only in the broader inclusion of those who may eat from the produce of the seventh year. For Fishbane, “all this gives clear witness to a determined exegetical venture.”⁹⁹

For Fishbane, the model for understanding the history of legal development is that of later Jewish halakhah. The law grows by a process of addendum and by exegetical expansion, first in oral law and then in a written codified version like the Mishna. He knows that the shorter version in the Covenant Code is the older one, and the method of getting from the one to the other is halakhic exegesis. Yet such an approach is anachronistic and does not do justice to the major differences that exist between these two laws. The first question that must be raised about Fishbane’s position is whether the “addendum” to the law in Exod 23:11b is in need of the clarification he suggests.¹⁰⁰ When it says that one is to do likewise to vineyard and olive trees, it refers back to the two verbs in verse 11a, שָׁמַט “to release, let lie fallow,” and נָטַשׁ “to leave alone,” which certainly includes all husbandry and harvesting activity. It is pedantic to make a problem out of this.

The second question is whether one must assume, as Fishbane does, that the Covenant Code is earlier than the Holiness Code in order to make sense of the relationship of the two laws. The answer is no. It is just as easy to assume that the Covenant Code law requires knowledge of the other law and therefore does not repeat certain of the details about not pruning the vineyard that are mentioned there.¹⁰¹ Furthermore, the Covenant Code adds a reference to the olive trees that is not included in Lev 25, as one would expect in an amplified law. Contrary to the principles of legal exegesis suggested by Fishbane, it is the Covenant Code that constantly shortens the legal material that it borrows from the Deuteronomic Code and the Holiness Code.

The main problem with Fishbane’s argument, however, is the assertion that Lev 25:3 has taken over Exod 23:10–11a “quite precisely.” In point of fact, apart from the opening phrase “in the seventh year” there is a very astonishing difference, a major revision of the law in two respects. The one is to treat the cessation of work on the land as a Sabbath taboo, a “Sabbath to Yahweh” in Lev 25:3–7. There is no such religious interpretation in Exod 23:10–11, for which the act of letting the land lie fallow has a very different purpose. The second difference is that in Lev 25:6–7, the produce of the seventh year is still to be used by the household and animals of the landowner, while in Exod 23:11 it is not. It is quite misleading for Fishbane to suggest that the one is merely the expanded list of the other. Fishbane has failed to explain how it is that “legal exegesis” would make such radical revisions in the law.

This difference between the two laws in the understanding of the fallow year leaves us, of course, with the task of explaining the change from Lev 25:3–7 to Exod 23:10–11, if that is the direction of the dependence. The clue to this lies in the use of the verb שָׁמַט in Exod 23:11. This is clearly related to the notion of the seventh-year release (שְׁמִטָּה) from debt in Deut 15:1–3, 7–11, instituted for the first time by the Deuteronomic Code, in order to give relief to “the poor” (אֲבִיּוֹן) from among their fellow Israelites. But it says nothing about the corresponding release of the land to lie fallow for the sake of the poor, which is surprising if such a practice existed.¹⁰² The eighth-century prophets, in

their concern for the poor and needy, also know of no such regulations, either of debt relief or of produce for the poor from fallow land.

The idea of a “remission of debts” שְׁמִטָּה every seven years, along with the sharing of the bounty of the land as relief for the poor, is a theological construct of the Deuteronomic legislators. It expresses the right of the deity Yahweh, in his capacity as owner of the land and supreme sovereign, to declare a release of debts for all Israel every seven years. This has been combined by J with the seven-year cycle of fallow land suggested by the Holiness Code.¹⁰³ It is in this way that the “Sabbath” year has become a means of humanitarian relief. In J’s version, it is quite clear that the produce of the seventh year is not to be eaten by the landholder but only by the poor. He avoided the idea that the seventh year was a Sabbath of the land as in the Holiness Code (which was hopelessly idealistic) and merely speaks of it as “released.”

Although Deuteronomy has a seventh-year release of debts, it knows nothing of either the seventh-year Sabbath or the fallow year.¹⁰⁴ Deuteronomy dealt with the problem of relief for the poor by the transfer of tithes of the produce of the land every third year to the Levites, aliens, orphans, and widows (Deut 14:27–29).¹⁰⁵ The problem with this solution was that the tithe was soon claimed by the priestly class as their holy due so that it did not work as relief for the poor (Neh 10:38–40 [37–39]). It would appear that J in the Covenant Code was attempting to revise the Sabbath year in such a way as to make it accommodate the same purpose as the Deuteronomic Code’s tithe. He therefore avoided the idea that the seventh year was a Sabbath year as in the Holiness Code and merely speaks of it as “released.” The close connection between the seventh-year שְׁמִטָּה and the secularized fallow year is seen in Neh 10:32b [31b]: “We shall let (the land) lie fallow in the seventh year and give relief from debt (in it).” In very summary fashion, it refers to both Exod 23:10–11 and Deut 15:2.¹⁰⁶ This clearly follows the wording of the Covenant Code rather than the Holiness Code and knows nothing of the jubilee year.¹⁰⁷

If the seventh-year release of the land was not tied to a universal Sabbath taboo, as in the Holiness Code, but was viewed on the analogy of the slave-law pattern in which each period of seven years was viewed individually, then only part of the land would need to lie fallow at any one time. Economically, this is the only way that such legislation could work, both for the individual farmer and for the land as a whole. The only problem with this view is that the close association of the seventh-year of land release with the שְׁמִטָּה year of release suggests that both were thought of as part of a regular cycle. Yet because the release of the Hebrew slave from servitude after six years also follows the שְׁמִטָּה pattern but is still applied individually, I see nothing in the fallow-year law that would prevent it from being applied in a similar fashion.

Sabbath, or Seventh-Day, Rest

Let us turn now to the law of the seventh-day rest in Exod 23:12. The designation of the “Sabbath” as a religious observance does not occur in this law and therefore raises a set of interesting questions concerning its origin and relationship to the Sabbath law of the Decalogue. The law in Exod 23:12 states:

Six days you may do your work, but on the seventh you are to cease (שָׁבַת) in order that your ox and your donkey may rest and your slave and the stranger may be refreshed.

The history of the Sabbath is a complex problem that cannot be discussed here.¹⁰⁸ Most such studies assume the antiquity of this law and use it as a basis for the history of the institution, so they are not very helpful for this comparative study.¹⁰⁹ However, if we look at the institution of the Sabbath as reflected in the eighth-century prophets (Isa 1:13; Hos 2:13; Amos 8:5), the differences in perspective could not be more sharply drawn. It is a religious holiday like the new moons, a time of cultic convocation, and many identify it with the day of the full moon.¹¹⁰ It clearly has no humanitarian purpose or legitimation to which the prophetic social concerns can be related. In the Covenant Code, the opposite is the case. Nothing is said of its sanctity; only its humanitarian purpose is mentioned.

This has led a number of scholars to suggest that in the preexilic period, there was an institution of a seventh-day rest that originally had nothing to do with the Sabbath but was associated with the agricultural seasons. Thus, Robinson argues that the seventh-day rest (as reflected in Exod 23:12) was an extension of the seven-year *שַׁמַטָּה* institution and “was reckoned as starting from the two major agricultural festivals, the feast of massot . . . and the feast of sukkot.”¹¹¹ The only evidence for a preexilic seventh-day rest is Exod 23:12 and its parallel in Exod 34:21, which are ascribed by Robinson to E and J respectively. For the purposes of this study, the preexilic dating of both texts cannot be taken for granted. Furthermore, if the seventh-day rest is to be understood as an extension of the seventh-year *שַׁמַטָּה*, the latter seems to have been an innovation at the hands of the Deuteronomic legislators, and this code does not yet know of any extension to a seventh-day rest. Likewise, the association of the seventh-day rest with a seven-day Massot (Unleavened Bread) festival is equally problematic because Massot is a festival that was created by the conditions of the exile and not before. There is no evidence for a Massot festival in preexilic times,¹¹² so that a seventh-day rest separate from a seventh-day Sabbath remains without explanation.

The only way to account for the development of a seventh-day rest in Exod 23:12 is to see Deut 5:12–15, the Decalogue, as the way by which one moves from the sacred, taboo day to the humanitarian concern for a day of rest. The text of Deut 5:12–15 states:

¹²Observe the Sabbath day and keep it holy as Yahweh your God commanded you. ¹³Six days you may labor and do all your work, ¹⁴but the seventh day is to be a Sabbath to Yahweh your God. You must not do any work, neither you nor your son nor your daughter nor your male or female slave nor your ox nor your donkey nor any of your animals nor the alien who resides in your community, in order that your male and female slaves may rest as you do. ¹⁵Remember how you were slaves in the land of Egypt and Yahweh brought you out from there with a strong hand and an outstretched arm. Therefore, Yahweh your God commands you to keep the Sabbath day.

This law sets forth the following: (1) It is first declared to be a sacred day (v. 12). (2) The specification of six days of work followed by the seventh of cessation is presented as an apodictic command by Yahweh. It is noteworthy that the command refers to Yahweh in the third person as if mediated by Moses or reported in retrospect. (3) The law pertains to all the persons of the household and the work animals, and even the resident alien (vv. 13–14). (4) The humanitarian motivation is then added: “in order that your male and female slaves may rest as you do” (v. 14b). (5) The historical motivation of remembering the exodus from Egypt, where they too were slaves, is finally given (v. 15).

The emphasis in the law is on the sanctity of the Sabbath, which is recognized by the complete cessation of work by the whole household. It also appears that the humanitarian concern for the slaves (4) and the historical motivation (5) are not actually part of the divine command but represent the parenthesis of the speaker, Moses.

Exod 23:12 gives a very shortened version of the law that is not in the negative apodictic style. The whole law is now in the direct speech of the deity. Yet there is no mention of the Sabbath's sanctity and only a very brief statement about ceasing to work on the seventh day (v. 12a). This is followed by an expanded humanitarian motivation as the primary reason for the law. It is given in two parts: (1) in order that the animals (ox and donkey) may rest, and (2) in order that the slaves and the stranger may be refreshed. This is an interesting reordering of the material in Deuteronomy to broaden greatly the scope of the humanitarian concern to include not just the household slaves but also the animals and the stranger. Why the stranger should be the object of the Covenant Code's concern here is not clear from within the law itself. How does cessation of work by a landowner bring refreshment to the stranger? Yet Deuteronomy makes clear that the law applies to all who reside within the Israelite community, including the alien. Furthermore, including the alien within this clause of the Sabbath law ties it to the earlier humanitarian laws that deal with strangers (Exod 22:20–23; 23:9). In the same way, concern for the animals is paralleled by a similar concern reflected in 23:4–5. Many scholars are quick to identify the humanitarian clause in 23:12b as the work of a Dtr redactor, in spite of its differences with the Decalogue. It would be remarkable for such a redactor to fail to identify the seventh day as the Sabbath and as a holy day.

In the scholarly discussion of the Sabbath law in 23:12, no consideration has been given to J's account of the origin of the Sabbath in Exod 16:1a, 2–7, 13b–15, 21, 27–31, and 35a.¹¹³ Yet the treatment of the Sabbath in both J texts is very similar. In J's story of the gift of manna, the Sabbath is regarded, not as a special, sacred day, but as a test of obedience to Yahweh: whether or not they will believe that he will provide enough for them on the sixth day so that they can “rest” (שבתה) from their gathering activity on the seventh day. Thus, he states in verses 29a [30a] and 30:

You see that Yahweh has given you the “Sabbath.” For this reason, he has given you on the sixth day enough food for two days. . . . So the people rested/kept the Sabbath (שבתה) on the seventh day.

Whatever the original meaning of “Sabbath” may have been, it is J who has interpreted it to mean a day of cessation of normal activity. The verb שבתה in verse 30 is made to do double duty and means “to rest” and “to keep the Sabbath.” The verb שבתה in J may be used without further explanation or qualification, and this is precisely how it is used in 23:12. There is nothing in J's account of the gift of the Sabbath in the wilderness in Exod 16 that gives to the day any special sanctity or taboo. It is merely a sign of obedience to Yahweh's laws (“in order that I may test them, whether or not they will walk in my law”). This approach to the Sabbath is in complete agreement with the “secularized” Sabbath law in 23:12. The latter does not even use the term “Sabbath” but merely allows the verb שבתה to bear the whole weight of the meaning “keep the Sabbath.”

Nevertheless, there appears to be something of a semantic problem with the verb שבתה. Its primary meaning seems to be “to cease to exist,” “to come to an end”; that is, it has a very negative sense and is found in parallel with verbs of destruction. The other

use of the verb is as a denominative of שָׁבַת, meaning “to keep the Sabbath,” which almost certainly has an entirely different origin. The question is: How do these two meanings come together in the meaning of “rest,” “desist from labor”? I believe that the answer lies in the Holiness Code.

The Holiness Code, in Lev 25:2 and 26:34–35, uses the verb שָׁבַת as a denominative for the land’s enjoying a Sabbath rest over an extended period of time. In 26:34–35, the verb שָׁבַת is used in the usual way as parallel to the noun שְׁבַת, “desolation,” but it also is linked in a wordplay with the reference to “Sabbaths.” The code states:

Then the land will enjoy its Sabbaths all the days of its desolation (הַשְׁמָדָה), while you are in the land of your enemies. Then the land will rest (שָׁבַת) and enjoy its Sabbaths. All the days of its desolation it will rest (שָׁבַת) the rest that it did not have (שְׁבַת) during your Sabbaths when you were living in it.

There seems to be a great effort to establish an etymological connection between the verb שָׁבַת in the sense of desolation in which the land is left bare and unworked and שְׁבַת as meaning to celebrate the Sabbath by rest and cessation of work. I believe that it was through this metaphorical use of the verb שָׁבַת that the author of the Holiness Code created the denominative form of the verb. That means that J and the Covenant Code derived this meaning from the Holiness Code.¹¹⁴ The meaning of the verb שָׁבַת in the denominative sense of “rest/keeping the Sabbath” is no older than the exilic period. It is this usage that is also adopted by P (Gen 2:2–3; Exod 31:17). It is not yet used in the Deuteronomic corpus, Jeremiah, or Ezekiel with reference to the Sabbath.

The effort by some scholars to create out of the laws in 23:10–12 (by eliminating “redactional” humanitarian clauses) primitive secular institutions—a seventh-day cessation of work and a fallow seventh year—is the result of completely circular reasoning.¹¹⁵ This would mean that the Deuteronomic Code took over the seventh-day rest law and combined it with the Sabbath but ignored the fallow-year law in spite of the code’s interest in a seventh-year release. The Holiness Code, on the other hand, adopted the fallow year as a Sabbath year but without any humanitarian interest, although in Lev 25:35–43, the code expresses strong concern about those who have become poor. This whole scenario seems to me entirely unlikely and quite unnecessary. Both the simplicity by which the author of the Covenant Code summarizes earlier laws and the humanitarian concern that he exhibits elsewhere in the laws point to the same post-Deuteronomic author of the cultic laws.

Festival Laws

Let us now look at the set of cultic laws in Exod 23:14–19. Until recently, the so-called ritual decalogue was regarded as the oldest part of the Covenant Code and premonarchic in date.¹¹⁶ The close correspondences with the series of laws in Exod 34:17–26, which was regularly considered to be a part of J or the oldest document in the Pentateuch, further encouraged the notion of its high antiquity. But more recently, the view of L. Perlitt that the setting of the laws in Exod 34 is Deuteronomistic and that the laws were secondarily incorporated into their present location by such a redactor has strongly affected the discussion of the placement of both sets of laws into the narrative.¹¹⁷ Yet this

has not greatly affected the view that the laws themselves reflect a period of much greater antiquity and are individually older than Deuteronomy.

The laws concerning the three annual festivals in Exod 23:14–17 have long been regarded as basic to the religious laws of the Covenant Code. Most of the discussion about these laws has centered on the debate as to whether the parallel laws in 34:18, 22–24 are earlier, and therefore a source for the Covenant Code, or later and part of a larger Deuteronomistic redaction. These issues have already been touched upon in chapter 1 and need not be repeated here. In my view, both sets of laws have a common authorship, J, and consequently the real issue is their mutual relationship with the other law codes, particularly Deuteronomy.

The laws having to do with the festival calendar in Deut 16:1–17, which is comparable to the festival calendar in the Covenant Code, have a number of literary problems that must be addressed before any comparative study can be made. First, Deuteronomy contains a series of three festivals: Passover (vv. 1–8), Weeks (vv. 9–12), and Booths (vv. 13–15). Yet in the summary in verses 16–17, the list of festivals includes Unleavened Bread (מִצוֹת) in place of Passover. The listing of the three feasts in verse 16aβ looks like a secondary gloss, and the summary refers to the three festivals actually set out in verses 1–15. Second, within the Passover regulations in verses 1–8, there are embedded some regulations having to do with the eating of unleavened bread for seven days (vv. 3b–4a, 8) that are inconsistent with the Passover observance and must be viewed as a secondary addition.¹¹⁸

On the basis of these observations, I have previously proposed that the festival of Unleavened Bread (מִצוֹת) is a later development of the festival calendar in the exilic period, a temporary substitution for the Passover that was recombined with a revived Passover celebration only in the Second Temple period. The implications of this for the Covenant Code are clear. The references to מִצוֹת in Exod 23:15 and 34:18, which are based upon 13:3–10, are all later than Deuteronomy and exilic in date. It is not possible to review the whole history of the discussion on the Passover and Unleavened Bread. There are, however, two recent studies that present alternatives to my position, and it would be useful to examine their views as a way of clarifying the comparative study of these laws.

In a major new study on *Deuteronomy and the Hermeneutics of Legal Innovation*, B. M. Levinson proposes to show “the transformation of Passover and Unleavened Bread in Deuteronomy 16”¹¹⁹ by the authors of the Deuteronomic reform. Levinson begins with the assumption, as many scholars do, that there were two separate religious rites of Passover and Unleavened Bread that were “enshrined by prestigious and authoritative texts” (i.e., in Exod 12:21–27 and 13:3–10 and in 23:14, 17, respectively) prior to their combination and transformation in Deuteronomy.¹²⁰ In this way, he argues against my view that מִצוֹת is an addition to Passover, but instead Deuteronomy is a creative combination of the two rites. This combination was accomplished by means of a literary drafting of a law that incorporated elements (“lemmas”) from the earlier authoritative laws.

Concerning Passover, Levinson asserts that it “was not technically a ‘festival’ (חג), that is, an observance requiring that the worshiper undertake a pilgrimage to one of the local sanctuaries to pay homage to the deity.”¹²¹ This means that Levinson must dissociate Exod 23:18 from Passover and explain Exod 34:25 as a late post-Deuteronomic

revision. He continues to follow the view that in origin it is an apotropaic ritualized slaughter by each household (as reflected in Exod 12) that has no connection with the sanctuary. He regards the rite as an element of popular religion that was anomalous in every way with respect to the Deuteronomic program of restricted cultic slaughter, and therefore in need of radical transformation. Consequently, nothing of the distinctive character of Passover is retained in Deuteronomy's transformation except the name. In terms of the "authoritative" texts, not a single "lemma" was used.

This reconstruction creates a rather strange situation in which a pre- or proto-Deuteronomic author or group is responsible for (1) the text of the Passover in Exod 12:21-27, in which the festival appears as a regular annual rite celebrating the exodus; (2) another text, in Exod 13:3-10, which refers to a second annual rite, the festival of Unleavened Bread, that also celebrates the same night of the exodus event, but without any connection between the two celebrations; and (3) a set of laws in Exod 23:14-18 that recognize the one rite (the festival of Unleavened Bread) but not the other (the Passover). Since the account in Exod 12:24 specifically refers to the rite of Passover as a statute for all time, one would certainly expect to find a reference to it in the Covenant Code's cultic laws and parts of it incorporated into Deuteronomy's form of the law.

The situation with Unleavened Bread, however, is altogether different. According to the texts in Exod 13:3-10, there was to be a national annual festival in celebration of the exodus, just as described in J and recognized in the Covenant Code in 23:15.¹²² Levinson states: "As a 'pilgrimage festival,' the observance of Unleavened Bread was crowned with a sacrifice at the local sanctuary."¹²³ This remark is interesting in two respects. First, there is nothing in the description of Unleavened Bread in Exod 13:3-10 about a sanctuary or about sacrifice. This must be taken from Exod 23:18, which is interpreted as a reference to the sacrifice offered at each feast and not to Passover. When this is contradicted by Exod 34:25b, the latter is made part of a post-Deuteronomic redaction.¹²⁴ Yet there is no evidence prior to P that animal sacrifices were associated with any of the other pilgrimage festivals. Second, Levinson stresses the idea of "pilgrimage" to the local shrine before centralization, but that is totally contradictory. The terms "local" and "pilgrimage" are mutually exclusive. *Pilgrimages* for such festivals were simply nonexistent before centralization. Furthermore, the requirement to get rid of all leaven locally just does not make sense alongside the concept of pilgrimage to another place to keep the festival.

Now, when it comes to the incorporation of the festival of Unleavened Bread into the centralization scheme by Deuteronomy, all of the essentials are included verbally, except that the name is changed, and according to Levinson "it is Passover that diverted to the central sphere, leaving Unleavened Bread to be celebrated locally, with the original pilgrimage element entirely voided."¹²⁵ However, based on the present text of Deut 16:1-8 that Levinson uses, I fail to see how anything is voided that is also present in Exod 13:3-10. The real question is how to understand the meaning and relationship of the two texts. The one in Exod 13:6 states:

Seven days you are to eat unleavened bread, and on the seventh a feast to Yahweh.

And in Deut 16:8:

Six days you are to eat unleavened bread and on the seventh a solemn assembly to Yahweh your God. You are not to do any work.

There are two differences between the two that are easily accounted for. First, the change from seven to six days in Deut 16:8 is simply because the first day has already been used for the Passover, so only six remain after they return home. Second, in both cases, the eating of unleavened bread is to be observed locally, in the home, and only on the seventh is there to be a religious assembly. For this, Exod 13:6 uses the term *הַ* while Deut 16:8 uses the term *עֲצֵרֶת*, but they mean the same thing. It is clear that *הַ* was not used in the second case because that would create confusion with the observance of the first day, Passover. But it was now, in this version, all part of the same seven-day festival.¹²⁶ Furthermore, Levinson has difficulty explaining why Deut 16:16 still refers to Unleavened Bread and not Passover as the first festival, exactly as it is in Exod 23:14–17.

It is, nevertheless, remarkable that the authors of Deuteronomy are so bound to the traditional lemmas of the authoritative texts on Unleavened Bread that they use them even at the cost of some incoherence in the text while at the same time ignoring all of the details of the same authoritative texts on Passover. And then to make matters worse, the P authors of the Persian period (to use Levinson's own dating) ignore all that Deuteronomy has to say about Passover and go back to the pre-Deuteronomistic texts and follow them with only minor variation. That is a scenario that remains incomprehensible to me.

In his recent study on the history of the Passover, T. Veijola addresses these problems of the relationship of Passover to Unleavened Bread in a different way. He accepts with me the fact that the references to *מִצֵּוֹת* in Deut 16:1–8 are secondary later additions, but he rejects my conclusions and still argues for an earlier date for *מִצֵּוֹת* and for the regulations of the Covenant Code.¹²⁷ Veijola states as his thesis: "In Deut 16,1–8 there is one stratum belonging to the reform of King Josiah, but in addition the more recent stages in the development of the Festival of Passover-Mazzot, which are typical of Priestly writers or even later, have left their imprint on this text."¹²⁸ I agree with him in one important respect, namely, that the instructions having to do with the observance of *מִצֵּוֹת* (vv. 3b–4a, 8) are secondary. He attributes these additions to a Priestly or post-Priestly redaction of the late Second Temple period. This is entirely likely although I do not see the need for more than one redaction, but our differences on this point do not affect the larger question at issue.

In the earlier text of 16:1–3a, 4b–7, Veijola identifies at least two layers, the second of which is seen in the time designations "by night" (v. 1) and "in the evening as the sun goes down, the time when you came out of Egypt" (v. 6b), and in the instructions for the way the Passover is to be eaten in verses 3a, 4b, and 7. I fail to see any compelling reason for his distinction here and would retain this level of the text as a unity. All of it in 16:1–3a, 4b–7 is in agreement with the Dtr view of the Passover as also reflected in 2 Kings 23:21–23 (viewed by Veijola as a late Dtr text).

The real differences between us come when Veijola attempts to describe the relationship of Deuteronomy's Passover to the Covenant Code's *מִצֵּוֹת* festival. For Veijola, as for so many others, Deuteronomy is a "conscious reformulation of the more ancient festival calendar of the Covenant Code in Ex 23,14–17 . . . from the point of view of the centralization of the cult."¹²⁹ Yet, there is, in fact, nothing in the Covenant Code's festival calendar that is in conflict with centralization, so the point of the "reformulation" cannot be the centralization of the Covenant Code's calendar. It must be something else. Thus, he finds the crucial contradiction between the two cultic calendars in

the fact that the Covenant Code has the feast of Unleavened Bread and Deuteronomy has the Passover. Therefore, Veijola sees this as a deliberate substitution of Passover by Deuteronomy for Unleavened Bread in the Covenant Code. The reason for this substitution is that מצותה was an ancient agricultural festival with a Canaanite background and for this reason was replaced by Passover.

Veijola is aware of recent criticisms of the view that מצותה originally represented a harvest festival, and he attempts to deal at some length with one of these, namely, that it is possible in some parts of the country to find young barley from which to bake מצותה in the month of Abib. All of this, however, misses the point that neither within the Old Testament nor in any extrabiblical source is there any evidence for such a harvest festival or any connection between מצותה and barley. The feast of Unleavened Bread within Exod 23:14–17 is not viewed as a harvest festival at which “first fruits” are offered, as are the other two harvest festivals. If this Canaanite character of the festival has already been suppressed by means of its historicization by a proto-Deuteronomistic editor within the Covenant Code, as Veijola believes, I do not see what point was served by the substitution of Passover for מצותה. Furthermore, why was מצותה viewed as more “Canaanite” than the other, unhistoricized harvest festivals or than a sacrifice of first-born animals (Deut 15:19–23), which Veijola sees as the origin of Passover? The idea that during the period of the monarchy there were festivals in Israel that could be recognized as “Canaanite” is very dubious.

The other major objection to Veijola’s scheme is that it proposes a most unlikely historical development. It first suggests that מצותה as a feast was suppressed and replaced by Passover. At the same time, the Covenant Code continued to be consulted and to be used to modify the Passover law and other Deuteronomistic festival laws from time to time while the celebration of מצותה continued in abeyance as a rejected Canaanite practice. Only at a very late stage in the P code was the festival reinstated, as reflected in the secondary additions to the P document and the P additions to Deuteronomy.

But then, where do Exod 13:3–10 and 34:18, which not only present מצותה as distinct from Passover but also substitute מצותה for Passover, fit into this whole scheme? They are too quickly dismissed by Veijola as “late.”¹³⁰ These texts are usually now characterized as “Deuteronomistic,” but that means that according to Veijola’s scheme, a Dtr editor reversed the reform of Deuteronomy back to the original “Canaanite” calendar and again made מצותה and not Passover the primary festival for celebrating the exodus. Furthermore, from the time of the Covenant Code to the time of the late reversion in Exod 34:18 (and Exod 13:3–10), did the people continue to observe מצותה during the time of the Josianic reform until the late Persian period? Veijola says that the feast of מצותה was simply “ignored by the Deuteronomistic editor, who replaced it with Passover,” and that it was only “recollected and combined with Passover” by a late Priestly writer.¹³¹ How is it possible to ignore for centuries a popular festival that Veijola admits was already used to celebrate the same event (the exodus) at the same time of year (Abib) as Passover and that continued to be part of the authoritative law frequently consulted by all his Dtr editors? The history of Passover and מצותה as Veijola has reconstructed it from his redactional study of Deut 16:1–8 seems to me quite improbable.

Furthermore, his literary history is also problematic. According to Veijola, a second Dtr editor of Deut 16:1–7 who still rejects the celebration of מצותה has, nevertheless, again consulted the Covenant Code in order to expand the Deuteronomistic text, this

time, however, for no apparent polemical reason. So he adds the instructions about how the paschal sacrifice is to be eaten in verses 3a α and 4b from Exod 23:18, which, according to Veijola, did not originally refer to Passover, as well as adding the remark about the time when the Israelites came out of Egypt in verse 6b (“the appointed time when you came out of Egypt”), which he took from Exod 23:15. The problem with Veijola’s view is that if this editor wished to identify the time of the exodus more precisely, then it is difficult to understand why he missed the mark so badly. If he had J’s account of the exodus event in Exod 11:4–8 and 12:29–39 before him, then he must have known that it was not “in the evening at the going down of the sun” but at midnight that the exodus took place. It would appear that Deuteronomy at this point in its development does not yet know of this account. Consequently, I continue to hold the view that the basic text of Deuteronomy that contained the account of the Passover is Deut 16:1–3a α , 4b (without “in the evening on the first day”), 5–7.

If we approach the text of Deuteronomy’s Passover without the prejudice of the early date of the Covenant Code, what is clearly being presented in Deut 16:1–3a α , 4b*–7, is the fact that a well-established festival, Passover, that was closely associated with the new spring lambs and calves is being historicized and centralized, just as occurred with the rest of the festivals. It is no longer a local festival but entails a pilgrimage to a central place of worship. Each of the festivals was related to the agricultural sphere of Israelite life: the firstborn of the domestic animals (15:15–23), the first of the grain harvest, and the first of the fall fruit crop. These were local festivals until Deuteronomy added the centralization, and this clearly creates some tension between the local celebrations, in which the whole community was involved, and pilgrimage to the central sanctuary. The latter was made the obligation of all the males, three times a year, and included the offering of sacrificial gifts to Yahweh suited to the occasion.

The festival law in Exod 23:14–17 has the same general scheme but with some significant differences. Verse 14 introduces the series but is very vague about location. The use of the first-person referent, “to me,” which is characteristic of the Covenant Code as a whole, probably does not suggest a place but merely that it is a Yahweh feast, “for me.” The first feast in verse 15a, however, is not Passover but מצות, with a direct reference back to when this feast was inaugurated in Exod 13:3–10, which contains the regulations as to how the feast is to be observed. There can scarcely be any doubt about this interconnection, yet most scholars have viewed Exod 13:3–10 as Deuteronomistic. As we have seen, however, the seven-day festival of מצות conforms only to the later addition made to Deuteronomy’s law on the Passover, so that both Exod 13:3–10 and 23:15a represent a change from Deuteronomy. Therefore, neither Exod 13:3–10 nor 23:15a (= 34:18) are Dtr redactions and must belong to a literary work later than Deuteronomy.

A recent objection has been raised by Houtman to my dating of Exod 13:3–10 and the origins of מצות to the exilic period when the Temple cultus was in ruins.¹³² He points out that the closely related law in Exod 13:11–16 does speak of the need to sacrifice the first-birth of the womb of male animals to Yahweh, and this would suggest the existence of a sanctuary. As we have seen above, however, it is quite certain that this law with its provision for the redemption of the firstborn of male humans is later than Ezek 20:25–26 and therefore cannot be preexilic in date. It is also a revision of the law of the firstlings in Deut 15:19–23. It could have had in mind the possibility of such a practice in the homeland at the altar in Jerusalem, even before the restoration of the Temple or

in anticipation of its rebuilding. At any rate, the close association of the two laws in Exod 13:3–10 and 11–16 confirms the late development of the *מצותה* festival.

The injunction that follows in Exod 23:15b seems out of place. As it stands, it states: “My face will not be seen empty-handed” or “One/they will not appear (in) my presence empty-handed.” The passive (niph) third-person plural form of the verb would seem to require that the plural form “my face” (פני) be the subject of the verb. Yet the text cannot mean that God’s “presence” is not to appear empty-handed. It must refer to those in the immediately preceding statement addressed in the second-person singular who are under obligation, but the connection is very unclear.

The parallel in Deut 16:16–17, however, contains the original injunction:

Three times in the year all your males are to appear (in) the presence of Yahweh your God . . . and one is not to appear (in) the presence of Yahweh empty-handed. Each is to have a gift in his hand according to the blessing of Yahweh your God, which he has given to you.

This makes abundantly clear that Exod 23:15b should follow the statement in Exod 23:17: “Three times in the year all your males will appear before the Lord, Yahweh.” The third person would then refer back to “your males”¹³³ as it does in Deuteronomy.¹³⁴ Furthermore, the reference to “my face” (פני) must be accusative and not the subject of the niph) form of the verb *ראה*, “appear.” It would seem that originally the verb was a qal form and read, “see my face,” which was likely the original form of Deut 16:16, “see the face of Yahweh.” The Covenant Code has also changed the third-person reference to the deity into the personal form “my face” in keeping with the divine voice of the code as in verse 14.

Finally, the statement about not appearing empty-handed comes too soon, before the other two harvest feasts and after *מצותה*, where it is not appropriate because in this feast nothing is offered to God at the sanctuary as a sacrifice. One can hardly attribute verse 15b to a Dtr redactor because such a redactor would have no reason to separate verse 15b from verse 17, thereby making it inconsistent with Deuteronomy. However, verse 14, which states, “Three times a year you will make a pilgrimage feast to me,” has obviously been constructed as a parallel to verse 17 in order to introduce the series of festivals. The injunction in verse 15b then has been moved to stand in close connection with it, but after the first feast. It was then felt unnecessary to repeat it at the end of verse 17.¹³⁵ The reference to the two harvest festivals in verse 16 has often been viewed as more archaic in form than its parallel in Deut 16:9–15 and the mixed terminology of Exod 34:22. The use of this particular terminology, however, proves nothing. In both Exod 23:16 and 34:22, the author has used an abbreviated style of referring to these festivals while assuming the more detailed statement in Deuteronomy.

The summary injunction in 23:17, “Three times in the year all your males are to appear in the presence of the Lord, Yahweh,” has been retained from Deut 16:16a but without the centralization formula.¹³⁶ The same formula is used in Exod 34:23, but the author adds in verse 24b “No man shall desire your land when you go up to appear before Yahweh your God three times in the year.” This makes quite explicit the obligation to visit the central sanctuary. It seems to me that there is no other reasonable way to interpret the reference to males appearing three times a year before Yahweh except as a reference to appearing at a central sanctuary. It is hardly an obligation to require the

males to visit the local sanctuary three times a year. Exod 23:17 and 34:23–24 must be dependent upon Deuteronomy.

The law in Exod 23:18 is very curious and problematic in several respects. It states: “You shall not offer the blood of my sacrifice with leavened bread, nor let the fat of my feast remain overnight until the morning.” There is a difference of opinion as to whether it refers to sacrifice in general¹³⁷ or specifically to the Passover. The parallel in Exod 34:25 makes the Passover connection quite explicit, but that has not convinced everyone that the same holds for Exod 23:18. The reference to “my feast” (חגי), however, can only relate to a special occasion and not to sacrifice in general, and this must be the Passover. But it is a very curious way of legislating for the feast as a whole. And it leaves entirely unanswered why Passover as such is not considered one of the three feasts previously mentioned. The problem is no different for Exod 34:25, in which Passover is again mentioned after the other three feasts. The vague conjecture that this reflects a secondary association of Passover with an earlier and separate feast of מצות would mean that the editor who added it was very careless. He should have placed it with the law on מצות in verse 15. That is so obvious, as the parallel in Deut 16:3–4 shows, that there must be a reason for its separate treatment here.

Now if, as I have argued, the reference to the seven days of מצות is secondary in Deut 16:3–4, then the original text would have read: “You shall not eat leavened bread together with it [the Passover sacrifice], and you shall not permit to remain overnight (לין) any of the flesh which you sacrifice until morning.” This is part of a series of simple directions on keeping the Passover, one of the three feasts. The directions are stated as follows: (1) “You are to offer (זבח) the Passover sacrifice . . . of flock or herd” (v. 2a). (2) “You are not to eat with it anything leavened (חמץ)” (v. 3a). (3) “You are not to let any of the flesh which you sacrifice remain overnight (לין) . . . until morning” (v. 4b). (4) “You are to cook it and eat it in the place that Yahweh your God will choose and return home in the morning” (v. 7). There are enough distinctive terms that Exod 23:18 (and 34:25) shares with Deut 16:2–7 in its original form that Deuteronomy must be the source of the Covenant Code and not vice versa. The dating of the festival “in the month of Abib” and the connection with the exodus (Deut 16:1) have already been made with מצות in verse 15. Exod 23:18 summarizes, in the shortest way possible, regulations 1–3 of Deuteronomy and only makes sense if the longer text is known. Deuteronomy’s law, however, could hardly derive from the Covenant Code.

If we accept that Exod 23:18 was derived from Deuteronomy, then we must still account for why this reference to Passover was not included together with the feast of מצות in verse 15. As I have argued elsewhere,¹³⁸ the seven-day feast of מצות comes about as a response to the exilic situation and, for the diaspora, replaces the Passover, which according to Deuteronomy is a slaughter of animals that can only take place at the central sanctuary. Since the other two feasts were merely agricultural festivals, they could be observed in the diaspora. Yet for those who were in the homeland, where at least an altar in Jerusalem was possible, the slaughter of the Passover animal could still be observed in the proper way, though it could not be obligatory for all (i.e., as part of one of the three feasts). So it is mentioned in the briefest way possible, but it certainly presupposes the longer law of Deuteronomy.

The short injunction in Exod 23:19a (= 34:26a) is beset with a number of curiosities and problems that commentators easily overlook or ignore.¹³⁹ The text states:

The first of the first fruits of your land you will bring (to) the house of Yahweh your God.

One should observe that one of the first two terms, ראשית and בכורי, both meaning “first fruits,” is redundant. This is obvious from the parallels in Deut 18:4 and 26:2, where ראשית is used alone. The term בכורי, when used of agricultural products, is not part of Deuteronomy’s vocabulary. But בכורי is used of the grain crops by the Covenant Code in verse 16. So the text is not an addition by Dtr but is intended by the author of the Covenant Code to relate directly to the previous agricultural festivals.

Another problem is the reference to “the house of Yahweh your God.” The cultic laws generally are presented as the first-person speech of Yahweh, and in the immediately preceding verse, there are references to “my sacrifice” and “my feast.” The phrase “house of Yahweh your God” is rather rare and occurs only once in Deuteronomy, Deut 23:19 [18]. But the phrase “Yahweh your God” is very common throughout Deuteronomy, whereas its only other occurrences in J are in Exod 15:26 and 34:24, both usually considered Dtr expansions. The obvious parallel to Exod 23:19a is Deut 26:2–3, which states as follows:

You are to take some of the first fruits (בראשית) of all the produce of the ground which you will bring from your land which Yahweh your God is giving you and you will put it in a basket and you will go to the place which Yahweh your God will choose. . . . Then the priest will take the basket from your hand and set it down before the altar of Yahweh your God.

It is not hard to see that Exod 23:19a has summarized this text. The term ראשית has been taken over from Deuteronomy, but instead of “all the produce of the ground,” the Covenant Code uses its own term “first fruits,” בכורי, creating some redundancy. The term “your ground/land” (ארמוןך) combines in one term both “ground” and “your land which Yahweh your God is giving you.” The one verb “you will bring” simply does service for the string of verbs in Deuteronomy: “take,” “bring,” “go.” And “the house of Yahweh your God” corresponds to “the place which Yahweh your God will choose” and “before the altar of Yahweh your God.” In the process, however, the author of the Covenant Code has taken over the phrase “Yahweh your God” from his source. This short unit in Exod 23:19a, rather than reflecting a verbose Dtr glossator, points instead to the predominant style of the Covenant Code, that of reducing longer laws in Deuteronomy to short formulae whenever possible.

The most important question that this text poses, however, is why it was felt necessary to add this injunction. The requirement clearly relates to at least the second, and very likely also the third, festival of verse 16. Why was it not incorporated within them? Once again, I think we can make sense of it if we view it in the same way as that of verse 18, from the perspective of the diaspora and the exile. For those still living in the homeland (“your land”), the Deuteronomic law of bringing produce to the “house of Yahweh” in Jerusalem still held. But, as with Passover in verse 18, this could not be required of those who were in the diaspora and who did not have the “first fruits” of their own land/country.

Confirmation of this interpretation can be found in Neh 10:28–39, in which the religious community takes upon itself a solemn oath to keep the law of God as given by Moses. The language used indicates that the injunctions mentioned are drawn from the various legal codes, including the Covenant Code. Neh 10:36 [35] specifically men-

tions the commitment “to bring the first fruits (בכורי) of our land and the first fruits (בכורי) of all the fruit of every tree annually to the house of Yahweh.” It seems clear that the law of the Covenant Code was formulated in anticipation of the Temple’s restoration.

The law about the bringing in of the first fruits to the house of Yahweh is followed in 23:19b by the law that forbids boiling a kid in its mother’s milk. This seems like a rather curious juxtaposition of laws, and yet the same law occurs in Deut 14:21b, where it precedes the law about the bringing of the annual tithe of the land’s produce to the place that Yahweh has chosen, that is, his Temple. The combination of this unusual law about boiling a kid in its mother’s milk with a quite different law about offering of the first fruits or annual tithe of the land’s produce occurs in both codes and cannot be accidental. During the development of Deuteronomy, it is likely that the legislation of the tithe directly followed chapter 13 and that the special dietary laws of 14:1–21 are a later development of the law, to which the law in verse 21b was attached. It is this later stage of the law that forms the basis for the combination of laws in Exod 23:19, further confirming the dependence of the Covenant Code on Deuteronomy.

Conclusion

In the past, one of the strongest arguments for the early dating of the Covenant Code was the supposed primitive character of the cultic legislation. Our close examination of these laws in comparison with the related cultic demands in the other codes does not bear this out. The greatly simplified cultic demands relate, not to a primitive stage in the evolutionary development of Israelite religion, but to a social setting in the diaspora that made such a revision necessary. In this setting, there is no need for a priesthood and elaborate cultus, only the annual celebration of three festivals and a few simple religious customs. Even the Sabbath, which is desacralized, is observed for humanitarian reasons as a simple day of rest. Exactly what communal form these celebrations and gatherings took is not so easy for us to recover, and I will not speculate on what their shape and character might have been. Yet diaspora religion has always had more in common with the requirements of the Covenant Code than with any of the other codes.

Summary and Conclusion

It would be a mistake to interpret this study as simply a matter of lowering the dating of the Covenant Code in keeping with the recent trend in Pentateuchal studies. The dating of this code has been moved up and down a few centuries without greatly affecting the general study of Hebrew law. What is first and foremost at stake is the question of its priority over the other codes, especially the Deuteronomic Code. The consensus view has set the agenda for all comparison of similar biblical laws and their legal, social, and religious development. However, as we saw in chapter 1, the “pillars” supporting the priority of this code have been badly shaken, if not demolished. Neither in the Documentary Hypothesis’s “early sources” nor in the search for primitive forms and institutions in form criticism nor in the multiple layers of redaction criticism is there any basis for the priority of the Covenant Code over the Deuteronomic Code and the Holiness Code. The pillar of the great antiquity of the casuistic laws, based upon comparison with the Babylonian codes, was the one that seemed the most secure, and all the other pillars leaned heavily upon it. But this too has toppled because the most reasonable time for direct literary influence of these codes upon Hebrew law is the time of the Babylonian exile and not the period of Israel’s origins. In the whole history of research on the Covenant Code, there is no longer a single compelling reason to assume the priority of the Covenant Code over that of Deuteronomy and the Holiness Code. Only a careful comparison between the codes without that assumption can settle the question of their historical intertextuality.

Without the assumption of priority or of the Covenant Code’s great antiquity, there is likewise no basis for the code’s original independence from its narrative setting, and this has made it possible to relate the code of laws more closely within the literary work of the exilic Yahwist. All the strained arguments for maintaining its independence can be seen as special pleading for the code’s antiquity. The code is the single unified work of the author J, which he calls “the Book of the Covenant” and which he makes the sole basis of the law given by Yahweh through Moses at Sinai. The scene on the mountain between Moses and the deity leads seamlessly into the opening laws. As a set of laws dictated by the deity to Moses, the code as a whole constantly exhibits the divine voice within the laws, which are addressed to the assembled Israelites, as the setting

requires. The epilogue looks forward from the law-giving to the subsequent journey in the desert and the conquest, and it emphasizes, in the person of the “messenger,” the distinctive theme of divine guidance and protection that is so characteristic of J’s account of the exodus and desert wanderings. At the same time, this framework of the code shows unmistakable dependence upon the Deuteronomic tradition.

Such a view of the code’s authorship leads to an entirely different form of literary analysis from those currently practiced by historians of biblical law. The code is not the result of a long period of accumulation of bits and pieces of laws and lore that were combined and refined through countless stages of editing but is the diligent creative work of one author. It is unnecessary to posit any redactors in the whole code! Once this principle is grasped, or at least the possibility admitted, the form of analysis of these laws becomes entirely different. Such an approach is revolutionary because all previous scholars have used “redactors” to solve problems that have arisen from their previous dependence upon one or more of the “pillars” of priority. Even Westbrook, who argues strongly for the code’s unity and against Otto and others for their redactional methodology, still greatly reduces the corpus of laws to the real core—the casuistic code—and pays no attention to the rest of the laws or the narrative setting. That implies an editorial process, as Levinson has argued, that is little different from that posited by many other scholars who seek to explain the history of these laws. What I am proposing is fundamentally different. Not only is the whole code of Exod 20:22–23:33 a single composition, the work of a single author, but it is also an integral part of a larger Pentateuchal source—the exilic Yahwist.

As we have seen above, the author shows a remarkable mastery of the Babylonian legal tradition. Even when he follows the general sequence of laws in the Hammurabi Code, he is able to alter the arrangement and make adjustments to make them fit his own concerns. And he can imitate the casuistic style to make it fit material from his own legal tradition. Into the block of civil laws he fits, from the Hebrew legal tradition, the law of the Hebrew slave, the participial prohibitions on capital crimes, the law of asylum, the extended narrative on the injury to the pregnant woman with the *lex talionis* series, and his humanitarian concern for the treatment of slaves, all of them qualifying and transforming the Babylonian tradition that he has assimilated. The second half of the code is entirely inspired by, and imitates, the Hebrew legal tradition of Deuteronomy and the Holiness Code, as it has to do with ethics and religious obligations, but is modified for the purposes of the new social environment, the diaspora. The new legal formulations often show a studied conflation of elements drawn from his different legal and nonlegal sources to form a new entity within his own work. To construe such elements as editorial or late “redactional” additions is to seriously misunderstand the genius of the work and to impose upon it the anachronism of modern copyediting, which is hardly appropriate for ancient manuscript “publication.”

As I have argued in numerous works for several decades, the author J is an exile in Babylonia during the latter days of the Neo-Babylonian Empire. He was familiar with, and made use of, Babylonian literature, as is evident in his imitation of the Babylonian Flood story. And there are many other allusions to this historical period, such as his references to Ur and Harran in the patriarchal narratives. Therefore, it is not remarkable that he had direct access to some Babylonian law codes and could read and imitate them for his own code. There is clear attestation in surviving copies of the Hammurabi

Code and other ancient laws that the ancient Babylonian legal tradition was known in the Neo-Babylonian period, and it is even likely that one of several copies of the original stele was still extant in Babylon in this period. J was, of course, completely familiar with a substantial corpus of Hebrew writings that included Deuteronomy and the Deuteronomistic History and a Priestly collection that now makes up part of the Holiness Code, as well as some prophetic collections. His mode of composition was a rather eclectic borrowing or imitation from the various codes, often combining elements from different sources or revising an earlier law. Most often his concern seems to have been to fill in gaps in older laws. Since the Yahwist's work as a whole was intended to form a major supplement to the Deuteronomistic History, he did not need to include or repeat everything in the other corpus. All of the "late" Deuteronomistic or prophetic elements in the law are therefore not secondary redactional additions but the work of an author for whom the Deuteronomistic History and the preexilic and exilic prophets were part of the Hebrew literary tradition. However, even though he made use of some laws in the Holiness Code, J shows no evidence otherwise of any dependence upon the Priestly Code. There are no priests mentioned in the Covenant Code, not even in connection with cultic observances, just as there are no Hebrew priests in the whole of J. Not even Aaron functions as a priest, and the only priests mentioned are foreign, such as Jethro, Moses' father-in-law. Indeed, both within the code and in the broader context, the people as a whole are "consecrated persons" (Exod 22:30 [31]) and "a kingdom of priests" (Exod 19:6).

The Covenant Code is a law for the diaspora. It is specifically suited to the environment of the exiles in Babylonia. It has a set of civil laws that are similar to the Babylonian laws but yet distinctive from them and conveyed to the Hebrew people from the divine source by their own leader Moses, a figure greater than Hammurabi. The code embodies its own ethical tradition of humanitarian concerns that is heavily influenced by the preexilic prophetic movement. It also moves beyond the nationalistic brotherhood of Deuteronomy to recognize a broader humanity among whom the diaspora community must live. The religious obligations, concentrated primarily in the annual festivals, are the primary basis of corporate identity, and yet these need no elaborate cultic or institutional apparatus. Every aspect of the Covenant Code is therefore appropriate to a semi-autonomous community of exiles resident in Babylonia. Even the leadership of such a community, the מֶלֶךְ, "prince" (cf. Ezra 1:8), and the elders form the kind of polity that one would expect and the authority by which the laws could be enforced. That is not to suggest that the Covenant Code was a corpus of legislative enactments or a collection of verdicts. Rather, it is the embodiment of practice and the articulation of ideals within the larger account of their "history" of origins and identity. This narrative setting, especially in the theophany account of Exod 19–20 and the covenantal ceremony in 24:3–8, makes the observance of the laws fundamental to the preservation of the community's identity as the people of Yahweh. The "publication" of the narrative with the laws of Sinai within it created the authoritative tradition by which the community ordered its social life.

With only a few exceptions, the Covenant Code is not presented as a law for life in the future Promised Land. Instead, it is expected to apply immediately to daily life. In this respect, it is fundamentally different from the legal fiction of the Deuteronomistic Code, which sees that body of law as specifically geared to life "in the land that Yahweh

your God is giving you.” Of course, the Covenant Code is not for life in the desert literally but in the “wilderness of the peoples” (Ezek 20:35) and in the “land(s) of your enemies” (Lev 26:36–45). It is this contrast with Deuteronomy’s orientation toward the Promised Land that has led scholars to suppose that the Covenant Code was an independent corpus arising in Canaan itself. But that misunderstands its purpose. It is basically diaspora law.

However, important exceptions to the laws do not pertain to life in exile. As we saw above, the altar law (20:24–26) alludes to a future construction, and all the close parallels (Deut 27:1–8; Josh 8:30–35) suggest that it has in mind the building of this altar in the land to which the people are going. The appointment of a place of asylum associated with this altar (21:13–14) also has a similar future orientation, and its parallel to the altar law in Deut 12 suggests that Jerusalem is intended for such a place. Among the cultic laws, the ones related to the Passover in Exod 23:18 and the bringing of the first fruits of the land to the “house of Yahweh” also seem to reflect a future reference. Yet, it is especially in the epilogue that the attention shifts decisively to the future occupation of the Promised Land. This has in view the gradual occupation of the land over a prolonged period and the displacement of the current population “little by little” until the Israelites take possession of the whole region from the Euphrates to the border of Egypt.

The Covenant Code is a remarkable literary achievement. Not only does it assimilate the essentials of the legal tradition of its broader Babylonian environment, but it imitates them in the construction of new laws. It likewise draws upon and imitates the laws of the Hebrew legal tradition of Deuteronomy and the Holiness Code to construct a humanitarian ethic in the prophetic tradition. To have created such a succinct code for his diaspora community would have been a significant achievement in itself. However, by making it part of a much larger work that exhibits a mastery of narrative style and a remarkable number of literary genres, J has shown himself to be one of the great authors of the Hebrew Bible.

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Notes

Introduction

1. For a survey of the modern study of the Pentateuch, see J. Van Seters, *The Pentateuch: A Social Scientific Commentary* (Sheffield: Sheffield Academic Press, 1999). See also J. Blenkinsopp, *The Pentateuch* (New York: Doubleday, 1992). The Documentary Hypothesis identifies the sources of the Pentateuch as the Yahwist (J), the Elohist (E), Deuteronomy (D), and the Priestly Writer (P). J and E are viewed as the oldest, and P the most recent.

2. The Priestly Code is contained primarily in Exod 25–31, 35–40; Leviticus; Num 1–10, 15, 18–20, 26–30, 34–36. In addition to the law code, there are Priestly narratives in Genesis, Exodus, and Numbers, whose relationship to the code is much debated. This need not concern us in this study.

3. Some scholars attribute it to E, but as explained above, I do not recognize E as a separate source within J. The matter will be taken up in detail below.

4. I exempt, of course, my own position, which is the sole exception to this view.

5. Because there is little subject matter that is common to both the Covenant Code and the Priestly Code, the latter will receive little attention in this study.

6. This Hebrew word has become a technical term for this block of casuistic laws, and I will use it as such in this transliterated form throughout this study.

Chapter 1

1. See J. Wellhausen, *Prolegomena to the History of Israel* (New York: Meridian, 1957), 29–30, 83–89. While Wellhausen used the inclusive term Jehovist (JE) for the earlier sources, the distinction between the Covenant Code of E and the cultic Decalogue of J is soon apparent in the works of S. R. Driver, *An Introduction to the Literature of the Old Testament* (New York: Meridian, 1957), 31–40.

2. See such works as J. M. P. Smith, *The Origin and History of Hebrew Law* (Chicago: University of Chicago Press, 1931); T. J. Meek, *Hebrew Origins* (New York: Harper & Brothers, 1950), chap. 2. Cf. J. Morgenstern, “The Book of the Covenant, Part II,” *HUCA* 7 (1930): 241–58, where he disputes any direct connection with the Near Eastern codes and contends only that Israel passed through a similar cultural evolution. See below for further discussion.

3. A. Alt, “The Origins of Israelite Law,” in *Essays on Old Testament History and Religion*, by A. Alt, trans. R. A. Wilson (Oxford: Blackwell, 1966), 79–132. See W. F. Albright’s comment

on Alt in *From the Stone Age to Christianity: Monotheism and the Historical Process* (Baltimore: Johns Hopkins Press, 1940), 204–5.

4. See E. Gerstenberger, *Wesen und Herkunft des "apodiktischen Rechts,"* WMANT 20 (Neukirchen-Vluyn: Neukirchener Verlag, 1965); see also the excellent survey by W. M. Clark, "Law," in *Old Testament Form Criticism*, ed. J. H. Hayes (San Antonio, Tex.: Trinity University Press, 1974), 99–139.

5. R. H. Pfeiffer, *Introduction to the Old Testament* (New York: Harper & Brothers, 1941), 210–26. See also R. H. Pfeiffer, "The Transmission of the Book of the Covenant," *HTR* 23 (1931): 99–109; O. Eissfeldt, *The Old Testament: An Introduction*, trans. P. R. Ackroyd (New York: Harper & Row, 1965), 212–19; G. Fohrer, *Introduction to the Old Testament* (Nashville: Abingdon, 1965), 133–37; A. Bentzen, *Introduction to the Old Testament*, 4th ed. (Copenhagen: G. E. C. Gad, 1958), 2:55–56.

6. Pfeiffer, *Introduction*, 170.

7. *Ibid.*, 211.

8. Deut 15:12–18; 19:16–20; 21:15–21; 22:13–29; 24:1–4, 7; 25:1–3, 5–12.

9. M. Noth, *Exodus: A Commentary* (London: SCM Press, 1962), 173–94. A similar discussion of how an independent corpus of laws was incorporated into the Sinai pericope is given by Eissfeldt, *Old Testament*, 212–19.

10. Noth, *Exodus*, 173; see also M. Noth, *A History of Pentateuchal Traditions*, trans. B. W. Anderson (Englewood Cliffs, N.J.: Prentice-Hall, 1972), 36 n. 139. A very similar statement is made by Eissfeldt, *Old Testament*, 218.

11. Noth, *Exodus*, 173.

12. *Ibid.*, 174.

13. G. E. Mendenhall, *Law and Covenant in Israel and in the Ancient Near East* (Pittsburgh: Biblical Colloquium, 1955); K. Baltzer, *The Covenant Formulary in Old Testament, Jewish and Early Christian Writings* (Oxford: Blackwell, 1971); D. J. McCarthy, *Treaty and Covenant*, AnBib 21 (Rome: Pontifical Biblical Institute, 1963); D. J. McCarthy, *Old Testament Covenant: A Survey of Current Opinions* (Oxford: Blackwell, 1972).

14. J. A. Fitzmyer, *The Aramaic Inscriptions of Sefire*, BibOr 19 (Rome: Pontifical Biblical Institute, 1967).

15. D. J. Wiseman, *The Vassal Treaties of Esarhaddon*, Iraq 20 (London: British School of Archaeology in Iraq, 1958); S. Parpola and K. Watanabe, *Neo-Assyrian Treaties and Loyalty Oaths*, State Archives of Assyria 2 (Helsinki: Helsinki University Press, 1988); R. Frankena, "The Vassal-Treaties of Esarhaddon and the Dating of Deuteronomy," *OTS* 14 (1965): 122–54.

16. W. Beyerlin, *Origins and History of the Oldest Sinaitic Tradition* (Oxford: Blackwell, 1965).

17. See n. 4 above.

18. E. Gerstenberger, "Covenant and Commandment," *JBL* 84 (1965): 38–51.

19. V. Wagner, "Zur Systematik in dem Codex Exodus 21,2–22,16," *ZAW* 81 (1969): 176–82; H. Petschow, "Zur Systematik und Gesetztechnik im Codex Hammurabi," *ZA*, n.s., 23 (1965): 146–72.

20. Wagner, "Zur Systematik in dem Codex Exodus 21,2–22,16," 182.

21. G. Liedke, *Gestalt und Bezeichnung alttestamentlicher Rechtssätze*, WMANT 39 (Neukirchen-Vluyn: Neukirchener Verlag, 1971).

22. J. Morgenstern, "The Book of the Covenant, Part III," *HUCA* 8–9 (1931–32): 1–150.

23. L. Peritt, *Bundestheologie im Alten Testament*, WMANT 36 (Neukirchen-Vluyn: Neukirchener Verlag, 1969), 157–58.

24. *Ibid.*, 182–83. See also E. W. Nicholson, "The Interpretation of Exodus XXIV 9–11," *VT* 24 (1974): 77–97; E. W. Nicholson, "The Antiquity of the Tradition in Exodus XXIV 9–11," *VT* 25 (1975): 69–79; E. W. Nicholson, "The Origin of the Tradition of Exodus XXIV 9–

11,” VT 26 (1976): 148–60; E. W. Nicholson, *God and His People: Covenant Theology in the Old Testament* (Oxford: Clarendon, 1986), 121–33.

25. B. S. Childs, *The Book of Exodus*, OTL (Philadelphia: Westminster, 1974), 440–96.

26. See Childs’s earlier discussion in *ibid.*, 351–52.

27. *Ibid.*, 465; see also E. W. Nicholson, “The Decalogue as the Direct Address of God,” VT 27 (1977): 422–33.

28. See also Eissfeldt, *Old Testament*, 213, 216.

29. See also Childs, *Exodus*, 351–60.

30. *Ibid.*, 457. One can say with some certainty that the sophisticated and literate legal conventions of the casuistic laws and their references to slavery do not reflect the illiterate village society of ancient Israel.

31. *Ibid.*, 458.

32. J. Halbe, *Das Privilegrecht Jahwes: Ex 34,10–26; Gestalt und Wesen, Herkunft und Wirken in vordeteronomischer Zeit*, FRLANT 114 (Göttingen: Vandenhoeck & Ruprecht, 1975), 391–505.

33. *Ibid.*, 411–12. See my remarks above on Pfeiffer.

34. E. Blum, “Das sog. ‘Privilegrecht’ in Exodus 34,11–26: Ein Fixpunkt der Komposition des Exodusbuches?” in *Studies in the Book of Exodus*, ed. Marc Vervenne, BETL 126 (Leuven: University Press, 1996), 347–66.

35. *Ibid.*, 366; “beinahe ganz am Ende der biblischen Torüberlieferung.”

36. H. J. Boecker, *Law and the Administration of Justice in the Old Testament and the Ancient Near East* (Minneapolis: Augsburg, 1980), 135–75.

37. *Ibid.*, 136. For a similar position see D. Patrick, “The Covenant Code Source,” VT 27 (1977): 145–57; also D. Patrick, *Old Testament Law* (Atlanta: John Knox, 1985), 63–65. He considers Exod 19:3b–8 and 24:3–8 as a pre-D source of the Northern Kingdom before 721 B.C.E. that was composed as a setting for an independent Covenant Code and then combined with E and the Sinai narrative. The code itself he dates to the premonarchy period.

38. Boecker’s treatment of apodictic law is taken up separately in *Law and the Administration of Justice*, 191–207.

39. *Ibid.*, 141.

40. See *ibid.*, 196. Here he is also heavily dependent upon Liedke’s discussion of apodictic law.

41. *Ibid.*, 143.

42. *Ibid.*, 150–55.

43. *Ibid.*, 153.

44. *Ibid.*, 154–55.

45. B. Gemser, “The Importance of the Motive Clause in Old Testament Law,” in *Congress Volume, Copenhagen*, VTSup 1 (Leiden: E. J. Brill, 1953), 50–66.

46. R. Sonsino, *Motive Clauses in Hebrew Law*, SBLDS 45 (Chico, Calif.: Scholars Press, 1980).

47. H. W. Gilmer, *The If-You Form in Israelite Law*, SBLDS 15 (Missoula, Mont.: Scholars Press, 1975).

48. G. A. Chamberlain, “Exodus 21–23 and Deuteronomy 12–26: A Form-Critical Study” (Ph.D. diss., Boston University, 1977).

49. In a recent study that compares Deuteronomy and the Covenant Code, B. M. Levinson (*Deuteronomy and the Hermeneutics of Legal Innovation* [Oxford: Oxford University Press, 1997]) makes only brief mention of Chamberlain’s work in some footnotes and does not address any of his arguments.

50. Chamberlain, “Exodus 21–23 and Deuteronomy 12–26,” 10.

51. *Ibid.*, 36–37.
52. *Ibid.*, 101.
53. See, e.g., Eissfeldt, *Old Testament*; and Fohrer, *Introduction*.
54. E. Otto, *Wandel der Rechtsbegründungen in der Gesellschaftsgeschichte des antiken Israel: Eine Rechtsgeschichte des "Bundesbuches" Ex XX 22–XXIII 13*, StudBib 3 (Leiden: E. J. Brill, 1988); E. Otto, "Kultus und Ethos in Jerusalemer Theologie," ZAW 98 (1986): 169–74; E. Otto, "Aspects of Legal Reforms and Reformulations in Ancient Cuneiform and Israelite Law," in *Theory and Method in Biblical and Cuneiform Law: Revision, Interpolation and Development*, ed. B. M. Levinson, JSOTSup 181 (Sheffield: Sheffield Academic Press, 1994), 160–96; E. Otto, *Theologische Ethik des Alten Testaments* (Stuttgart: W. Kohlhammer, 1994); E. Otto, "Town and Rural Countryside in Ancient Israelite Law: Reception and Redaction in Cuneiform and Israelite Law," JSOT 57 (1993): 3–22.
55. Otto, "Aspects of Legal Reforms," 183. The use of the asterisk (*) denotes a verse or verses that contain some later additions or interpolations.
56. *Ibid.*, 186–89.
57. *Ibid.*, 163–82.
58. The redactional approach to the history of ancient Near Eastern and classical law follows the lead of the legal historian P. Koschaker, but it is a viewpoint that is hotly disputed in current scholarship.
59. This is so much more obvious for the parallel law in Deut 15:12–18, which Otto also characterizes as "social laws of God's privilege" (*ibid.*, 194). Yet for Otto's scheme, it is anachronistic to use Deuteronomy to understand a law in the Covenant Code.
60. See Otto, *Wandel der Rechtsbegründungen*, 35.
61. L. Schwienhorst-Schönberger, *Das Bundesbuch (Ex 20,22–23,33)*, BZAW 188 (Berlin: W. de Gruyter, 1990), 1–2; see also L. Schwienhorst-Schönberger, "'Dies sind die Rechtsvorschriften, die du ihnen vorlegen sollst': Zur Structur und Entstehung des Bundesbuches," in *Vom Sinai zum Horeb*, ed. F.-L. Hossfeld (Würzburg: Echter, 1989), 119–43.
62. These include Exod 21:20–27, 30; 22:1–2 [2–3], 9–10 [10–11], 15–16 [16–17].
63. Note that Otto does not include Exod 23:13–19 in his pre-Dtr Covenant Code.
64. Y. Osumi, *Die Kompositionsgeschichte des Bundesbuches Exodus 20,22b–23,33*, OBO 105 (Freiburg, Switzerland: Universitätsverlag; Göttingen: Vandenhoeck & Ruprecht, 1991). See the summary and conclusions on pp. 219–220.
65. See also F. Crüsemann, *The Torah: Theology and Social History of Old Testament Law* (Minneapolis: Fortress Press, 1996), 109–200.
66. *Ibid.*; see also F. Crüsemann, "Das Bundesbuch: Historischer Ort und institutioneller Hintergrund," *Congress Volume, Jerusalem, 1986*, VTSup 40 (Leiden: E. J. Brill, 1988), 27–41.
67. Crüsemann, *The Torah*, 109.
68. *Ibid.*, 112.
69. Peritt, *Bundestheologie*, 203–32; Blum, "Das sog. 'Privilegrecht' in Exodus 34,11–26." See also J. Van Seters, *Life of Moses: The Yahwist as Historian in Exodus–Numbers* (Louisville, Ky.: Westminster/John Knox; Kampen, the Netherlands: Kok Pharos, 1994), 323–33.
70. Crüsemann, *The Torah*, 143.
71. Crüsemann's individual treatment of laws will be discussed in the subsequent chapters.
72. Crüsemann, *The Torah*, 165–69.
73. *Ibid.*, 165–66.
74. *Ibid.*, 167.
75. *Ibid.*, 170.
76. *Ibid.*, 196.
77. *Ibid.*, 197.
78. C. Houtman, *Das Bundesbuch: Ein Kommentar*, Documenta et Monumenta Orientalis

Antiqui 24 (Leiden: E. J. Brill, 1997), 7–48. A shorter version of the same introduction may be found in his *Exodus* (Leuven: Peeters, 2000), 3:78–98 (chaps. 20–40).

79. In this, Houtman supports Westbrook, Boecker, Schwienhorst-Schönberger, and others.

80. Houtman, *Bundesbuch*, 16–17 (2.8–9); Houtman, *Exodus*, 3:84–85 (2.2.8–9).

81. Houtman, *Exodus*, 3:90. In *Bundesbuch*, 26, the same statement appears without the negative: “Es muss auf jeden Fall jünger als das Deuteronomium sein.”

82. In n. 45 on the same page (*Bundesbuch*, 26), against my position, Houtman states: “Meine Anmerkung bezüglich der relative Datierung des Bundesbuches hat Bezug auf den Inhalt, nicht auf den Zeitpunkt der Komposition. Es ist möglich, dass im Rahmen der Komposition des Pentateuch als ganzen dieselben (deuteronomistischen) Autoren verantwortlich gewesen sind für die Abfassung des Gesetzbuches vom Sinai und auch für die autoritative Interpretation davon im Deuteronomium.” His proposal must strike anyone dealing with these law codes as very unlikely, but only a close scrutiny of the parallel laws can settle the matter.

83. C. Houtman, *Der Pentateuch: Die Geschichte seiner Erforschung neben einer Auswertung* (Kampen, the Netherlands: Kok Pharos, 1994).

84. M. Malul, *The Comparative Method in Ancient Near Eastern and Biblical Legal Studies*, AOAT 227 (Kevelaar: Butzon & Bercker; Neukirchen-Vluyn: Neukirchener Verlag, 1990).

85. *Ibid.*, 13.

86. *Ibid.*, 14.

87. See already Morgenstern, “Book of the Covenant, Part II,” 241–58; also Boecker, *Law and the Administration of Justice*, 154–55, for his advocacy of the typological/evolutionist approach to comparison of the Covenant Code with Near Eastern law.

88. Malul, *Comparative Method*, 93.

89. *Ibid.*, 107.

90. See M. Smith, “The Present State of Old Testament Studies,” *JBL* 88 (1969): 30; W. G. Lambert, “The Laws of Hammurabi in the First Millennium,” in *Reflects des deux fleuves: Volume de mélanges offerts à André Finet*, ed. M. Lebeau and P. Talon, Akkadica Supp. 6 (Leuven: Peeters, 1989), 95–97.

91. This is noted by Malul (*Comparative Method*, 105) but not taken up.

92. *Ibid.*, 105–7 n. 13.

93. *Ibid.*, 159.

94. J. Bottéro, “The ‘Code’ of Hammurabi,” in *Mesopotamia: Writing, Reasoning, and the Gods*, trans. Z. Bahrani and M. Van De Mierop (Chicago: University of Chicago Press, 1992), 156–84.

95. *Ibid.*, 161.

96. *Ibid.*, 162.

97. Bottéro is making use of the important study of J. J. Finkelstein, “Amisaduqa’s Edict and the Babylonian Law Codes,” *JCS* 15 (1961): 19–104.

98. F. R. Kraus, “Ein zentrales Problem des altmesopotamischen Rechts: Was ist der Codex Hammurabi?” *Genava*, n.s., 8 (1960): 283–96. See Finkelstein, “Amisaduqa’s Edict.”

99. R. F. Willetts, *The Law Code of Gortyn* (Berlin: W. de Gruyter, 1967).

100. See S. Hornblower and A. Spawforth, eds., *Oxford Classical Dictionary*, 3d ed. (Oxford: Oxford University Press, 1996), s.v. “Law, Roman, sociology of” (823–25).

101. D. Daube, *Studies in Biblical Law* (Cambridge: Cambridge University Press, 1947).

102. B. S. Jackson, *Essays in Jewish and Comparative Legal History* (Leiden: E. J. Brill, 1975).

103. See his remarks in *ibid.*, 22–24; quotations taken from p. 23; see also his discussion of the goring ox, 108–52.

104. See Otto, “Town and Rural Countryside in Ancient Israelite Law.” His test case, the law having to do with injury to a pregnant woman, will be taken up in detail below, chap. 3.

105. A. Fitzpatrick-McKinley, *The Transformation of Torah from Scribal Advice to Law*, JSOTSup

287 (Sheffield: Sheffield Academic Press, 1999). This is a dissertation completed in 1993 with no apparent addition since that time so that it contains no discussion of studies on law after 1991.

106. *Ibid.*, 81.

107. *Ibid.*, 82.

108. *Ibid.*, 92.

109. *Ibid.*, 95.

110. Karel van der Toorn, *Sin and Sanction in Israel and Mesopotamia: A Comparative Study* (Assen: Van Gorcum, 1985).

111. Fitzpatrick-McKinley, *Transformation of Torah*, 144–45.

112. *Ibid.*, 150–51. There is a mistake in the citation. She likely intends the last verse to be Exod 22:3 [4].

113. *Ibid.*, 151–52.

114. *Ibid.*, 152.

115. *Ibid.*, 153.

116. *Ibid.*, 168–69.

117. R. Westbrook, “What Is the Covenant Code?” in *Theory and Method*, 15–36.

118. *Ibid.*, 15.

119. Westbrook uses “historical” in a manner different from Malul, which produces some confusion. Under “historical,” Westbrook includes not only the evolutionist method but also those historical approaches that admit change or modification in the law over time, as most diffusionists do.

120. *Ibid.*, 21.

121. *Ibid.*, 23–24.

122. This approach has all the marks of the older “pan-Babylonianism” of the turn of the century, which understood the whole of “Semitic” culture as diffused from the Babylonian center of civilization. For a convenient summary of this view see J. Z. Smith, *Imaging Religion: From Babylon to Jonestown* (Chicago: University of Chicago Press, 1982), 26–29.

123. Westbrook, “What Is the Covenant Code?” 24. See also Kraus, “Ein zentrales Problem.”

124. Westbrook, “What Is the Covenant Code?” 28.

125. *Ibid.*, 28–29.

126. *Ibid.*, 32.

127. *Ibid.*, 35–36.

128. *Ibid.*, 36. He cites Malul, *Comparative Method*, but Westbrook does not actually say how he understands the diffusion of this “widespread literary-legal tradition.”

129. See B. M. Levinson, “The Case for Revision and Interpolation within the Biblical Legal Corpora,” in *Theory and Method*, 37–59.

130. *Ibid.*, 40–43.

131. *Ibid.*, 53–54.

132. See Boecker, Daube, Otto, and Jackson above.

133. Levinson, “Case for Revision,” 59.

134. V. Matthews, “The Anthropology of Slavery in the Covenant Code,” in *Theory and Method*, 119–35.

135. S. Greengus, “Issues Relating to the Comparability of Laws,” in *Theory and Method*, 60–87.

136. Westbrook, “What Is the Covenant Code?” 28.

137. S. Lafont, “Ancient Near Eastern Laws: Continuity and Pluralism,” in *Theory and Method*, 91–118, quotation on p. 96.

138. The possible exception to this is the Chronicler’s understanding of David as a second Moses, but this is a late theological interpretation of David’s reign long after the demise of the monarchy.

139. W. Morrow, "A Generic Discrepancy in the Covenant Code," in *Theory and Method*, 136–51. I will address this particular problem in the treatment of these laws below.
140. D. Patrick, "Who Is the Evolutionist?" in *Theory and Method*, 152–59, quotation on p. 158.
141. See Otto's response, "Aspects of Legal Reforms."
142. See Levinson, "Case for Revision."
143. Lafont, "Ancient Near Eastern Laws," 105–6.
144. See my article "Creative Imitation in the Hebrew Bible," *SR* 29 (2000), 395–409.
145. B. S. Jackson, "Modelling Biblical Law: The Covenant Code," *Chicago-Kent Law Review* 70 (1995): 1745–1827.
146. See most recently J. Van Seters, "In the Babylonian Exile with J: Between Judgment in Ezekiel and Salvation in Second Isaiah," in *The Crisis of Israelite Religion: Transformation of Religious Tradition in Exilic and Post-Exilic Times*, ed. B. Becking and M. C. A. Korpel, OTS 42 (Leiden: E. J. Brill, 1999), 71–89.
147. J. Van Seters, *Abraham in History and Tradition* (New Haven: Yale University Press, 1975); J. Van Seters, *Prologue to History: The Yahwist as Historian in Genesis* (Louisville, Ky.: Westminster/John Knox; Zurich: Theologischer Verlag, 1992); Van Seters, *Life of Moses*.
148. S. Hornblower and A. Spawforth, eds., *Oxford Classical Dictionary*, 3d ed. (Oxford: Oxford University Press, 1996), 749, 1188.
149. See my examples in my article "Creative Imitation."

Chapter 2

1. See the standard introductions: S. R. Driver, *An Introduction to the Literature of the Old Testament* (New York: Meridian, 1957), 31–37; O. Eissfeldt, *The Old Testament: An Introduction*, trans. P. R. Ackroyd (New York: Harper & Row, 1965), 200–203; G. Fohrer, *Introduction to the Old Testament* (Nashville: Abingdon, 1965), 133–37, 154.
2. See Eissfeldt, *Old Testament*, 213. A number of scholars surveyed in chapter 1 have followed this suggestion.
3. M. Noth, *Exodus: A Commentary* (London: SCM Press, 1962), 154.
4. *Ibid.*, 174.
5. M. Noth, *A History of Pentateuchal Traditions*, trans. B. W. Anderson (Englewood Cliffs, N.J.: Prentice-Hall, 1972), 36 n. 139.
6. See F. V. Winnett, *The Mosaic Tradition* (Toronto: University of Toronto Press, 1949), 20–24; B. S. Childs, *The Book of Exodus*, OTL (Philadelphia: Westminster, 1974), 349.
7. L. Peritt, *Bundestheologie im Alten Testament*, WMANT 36 (Neukirchen-Vluyn: Neukirchener Verlag, 1969), 156–238.
8. Childs, *Exodus*, 340–64, 440–64.
9. *Ibid.*, 351–52. See also Eissfeldt, *Old Testament*, 201, 213.
10. Childs, *Exodus*, 465.
11. *Ibid.*, 351–60.
12. See A. D. H. Mayes, *Deuteronomy*, NCBC (Grand Rapids, Mich.: W. B. Eerdmans, 1979), 161.
13. *Ibid.*
14. E. W. Nicholson, "The Decalogue as the Direct Address of God," *VT* 27 (1977): 422–33.
15. A. Phillips, "A Fresh Look at the Sinai Pericope," *VT* 34 (1984): 43.
16. A. Phillips, *Ancient Israel's Criminal Law* (Oxford: Blackwell, 1970).
17. E. Blum, *Studien zur Komposition des Pentateuch*, BZAW 199 (Berlin: W. de Gruyter, 1990), 96 n. 222.

18. D. Patrick, "The Covenant Code Source," *VT* 27 (1977): 145–57.

19. F. Crüsemann, *The Torah: Theology and Social History of Old Testament Law* (Minneapolis: Fortress Press, 1996); E. Zenger, "Wie und wozu die Tora zum Sinai kam: Literarische und theologische Beobachtungen zu Exodus 19–34," in *Studies in the Book of Exodus*, ed. M. Vervenne, BETL 126 (Leuven: University Press, 1996), 265–88; E. Otto, "Die nachpriesterschriftliche Pentateuchredaktion im Buch Exodus," in *Studies in the Book of Exodus*, 61–111; cf. also E. Blum, "Das sog. 'Privilegrecht' in Exodus 34,11–26: Ein Fixpunkt der Komposition des Exodusbuches?" in *Studies in the Book of Exodus*, 347–66.

20. J. Van Seters, "Is There Evidence of a Dtr Redaction in the Sinai Pericope (Exodus 19–24, 32–34)?" in *Those Elusive Deuteronomists: The Phenomenon of Pan-Deuteronomism*, ed. L. S. Shearing and S. L. McKenzie, JSOTSup 268 (Sheffield: Sheffield Academic Press, 1999), 160–70.

21. Blum, *Studien zur Komposition des Pentateuch*, 45–99; E. Blum, "Israël à la montagne de Dieu: Remarques sur Ex 19–24, 32–34 et sur le contexte littéraire et historique de sa composition," in *Le pentateuque en question*, ed. A. de Pury (Geneva: Labor & Fides, 1989), 271–300.

22. C. Houtman, *Das Bundesbuch: Ein Kommentar*, Documenta et Monumenta Orientalis Antiqui 24 (Leiden: E. J. Brill, 1997), 1–6.

23. Winnett (*Mosaic Tradition*, 30–56) also regarded Exod 19:20–25 and 20:1–17 as a P supplement to an originally unified account of the Sinai pericope. However, he regarded the older, non-P material as older than Deuteronomy, and his elaborate reconstruction is based upon this view.

24. See the full discussion in my *Life of Moses: The Yahwist as Historian in Exodus–Numbers* (Louisville, Ky.: Westminster/John Knox; Kampen, the Netherlands: Kok Pharos, 1994), 247–80.

25. See E. W. Nicholson, *God and His People: Covenant Theology in the Old Testament* (Oxford: Clarendon, 1986), 164–78; Van Seters, *Life of Moses*, 282–85; A. Schenker, "Les sacrifices d'alliance, Ex XXIV,3–8, dans leur portée narrative et religieuse: Contribution à l'étude de la berit dans l'Ancien Testament," *RB* 101 (1994): 481–94 (reprinted in *Rech und Kult im Alten Testament*, OBO 172 [Freiburg, Switzerland: Universitätsverlag; Göttingen: Vandenhoeck & Ruprecht, 1999], 77–89; page citations below are to the reprinted article).

26. Other obvious J additions are Deut 31:14–15, 23; 34:1b–4, 6–8, 10–12. See Van Seters, *Life of Moses*, 451–56.

27. Contra Crüsemann, *Torah*, 90–98, 195–97.

28. Quoted from P.-A. Beaulieu, *Reign of Nabonidus, King of Babylon, 556–539* (New Haven: Yale University Press, 1989), 64.

29. See G. R. Driver and J. C. Miles, *The Babylonian Laws* (Oxford: Clarendon Press, 1952), 1:27–34.

30. See L. Schwienhorst-Schönberger, *Das Bundesbuch (Ex 20,22–23,33)*, BZAW 188 (Berlin: W. de Gruyter, 1990), 395–400, 406–14.

31. E. Otto, *Theologische Ethik des Alten Testaments* (Stuttgart: W. Kohlhammer, 1994), 231–32. I have given my critique of Otto's Pentateuchal redactor in "Is There Evidence of a Dtr Redaction in the Sinai Pericope?" 168–71.

32. See Childs, *Exodus*, 446–47; Houtman, *Bundesbuch*, 50–52.

33. See RSV, NRSV, NEB, REB, NJPSV.

34. So Houtman, *Bundesbuch*, 50–52.

35. Crüsemann, *Torah*, 198 n. 447.

36. *Ibid.*, 198–99; Y. Osumi, *Die Kompositionsgeschichte des Bundesbuches Exodus 20,22b–23,33*, OBO 105 (Freiburg, Switzerland: Universitätsverlag; Göttingen: Vandenhoeck & Ruprecht, 1991), 193–94.

37. See R. E. Clements, *Isaiah 1–39*, NCBC (London: Marshall, Morgan & Scott, 1980), 44, 46; O. Kaiser, *Isaiah 1–12*, 2d ed., OTL (Philadelphia: Westminster, 1983), 56–66.

38. The most comprehensive treatment of this unit was done by D. Conrad, *Studien zum Altargesetz, Ex 20:24–26* (Marburg: H. Kombächer, 1968). See also the review of more recent scholarship in Schwienhorst-Schönberger, *Bundesbuch*, 287–99; Houtman, *Bundesbuch*, 49–74.

39. As Schwienhorst-Schönberger (*Bundesbuch*, 287–99) shows, there is no agreement on what is the earliest form of the law and what is later redaction. See also Crüsemann, *Torah*, 171–74. The most recent treatment is P. Heger, *The Three Biblical Altar Laws: Developments in the Sacrificial Cult in Practice and Theology, Political and Economic Background*, BZAW 279 (Berlin: W. de Gruyter, 1999), 14–87. Contrary to the title of this book, it is primarily a collection of references to later Jewish discussion and interpretation of the altar laws and adds nothing new to the historical-critical discussion of the altar law in Exod 20:24–26. The author assumes a very early dating and origin from a simple nomadic past and then reconstructs the law and its social context accordingly.

40. B. Levinson, *Deuteronomy and the Hermeneutics of Legal Innovation* (Oxford: Oxford University Press, 1997), 3–52.

41. E. Robertson, “The Altar of Earth (Exodus xx, 24–26),” *JJS* 1 (1948/49): 12–21.

42. See also the altar law in Deut 27:5–7, where second-person singular is used.

43. Schwienhorst-Schönberger, *Bundesbuch*, 284–86.

44. *Ibid.*, 288.

45. On *Numeruswechsel*, see also Osumi, *Kompositionsgeschichte des Bundesbuches*, 30–35, 38–44. Similar to Schwienhorst-Schönberger, Osumi also uses the shift from second-person singular to plural as evidence of a major redactional revision of the laws.

46. A review of the older suggestions is contained in Robertson, “Altar of Earth,” 14–17. See E. Otto, “Aspects of Legal Reforms and Reformulations in Ancient Cuneiform and Israelite Law,” in *Theory and Method in Biblical and Cuneiform Law: Revision, Interpolation and Development*, ed. B. M. Levinson, JSOTSup 181 (Sheffield: Sheffield Academic Press, 1994), 187, where he states: “Within this structure [of the Book of the Covenant] the altar law in 20.24–26 claimed that each cultic place, where the laws of the BC were proclaimed, was a legitimate sanctuary.” See E. Otto, *Wandel der Rechtsbegründungen in der Gesellschaftsgeschichte des antiken Israel: Eine Rechtsgeschichte des “Bundesbuches” Ex XX 22–XXIII 13*, StudBib 3 (Leiden: E. J. Brill, 1988), 55–56. How invoking the name of the deity can be understood as proclaiming a legal code is not clear to me. Equally unlikely is the proposal by Crüsemann that it is intended to be a limited approval of some, but not all, cult places (*Torah*, 172–74). See also E. Reuter, *Kultzentralisation: Entstehung und Theologie von Dtn 12*, BBB 87 (Frankfurt: Anton Hain, 1993), 123–27.

47. See Exod 23:13; Josh 23:7; Isa 26:13. Cf. also Isa 12:4; 48:1; 63:7.

48. So also A. Jepsen, *Untersuchungen zum Bundesbuch*, BWANT 41 (Stuttgart: Kohlhammer, 1927), 53. The Syriac version confirms the second-person singular reading and cannot be dismissed as “secondary,” as does Childs (*Exodus*, 447).

49. N. P. Lemche questions the very existence of a distinct Canaanite culture and religion in the premonarchy period and views the ethnic designation as entirely the ideological construct of later biblical writers. See *The Canaanites and Their Land*, JSOTSup 110 (Sheffield: Sheffield Academic Press, 1991).

50. R. Sonsino, *Motive Clauses in Hebrew Law*, SBLDS 45 (Chico, Calif.: Scholars Press, 1980), 66–69.

51. See H. W. Gilmer, *The If-You Form in Israelite Law*, SBLDS 15 (Missoula, Mont.: Scholars Press, 1975).

52. See M. Anbar, “The Building of an Altar on Mount Ebal,” in *Das Deuteronomium: Entstehung, Gestalt und Botschaft*, ed. N. Lohfink, BETL 48 (Leuven: Peeters, 1985), 304–9; S. M. Olyan, “Why an Altar of Unfinished Stones? Some Thoughts on Exod 20,25 and Dtn 27,5–6,” *ZAW* 108 (1996): 161–71. Both authors assume the priority of the Covenant Code in their discussion of the parallels. So also Heger, *Three Biblical Altar Laws*.

53. On the problem of literary redaction of this unit, see Mayes, *Deuteronomy*, 340–43; M. Rose, 5. *Mose*, Zürcher Bibelkommentare (Zurich: Theologischer Verlag, 1994), 2:523–29. Although both regard the text as late, they have different assessments of what is secondary.

54. Most commentators agree that this is a later addition to Deuteronomy, but this does not matter for the purpose of our analysis.

55. I am rather doubtful that Josh 8:30–35 is as late as P (see J. G. Vink, *The Date and Origin of the Priestly Code in the Old Testament* [Leiden: E. J. Brill, 1969], 77–80). The only evidence of P terminology seems to be the phrase כָּנַר כְּאַזְרוֹרָה in v. 33, which seems very awkward in the context and looks like a clumsy addition.

56. Deut 27 also uses the two terms מִצְוָה, “commandment” (v. 1), and תּוֹרָה, “law” (v. 3), to speak of the Mosaic law. The former seems to refer specifically to the command to build the altar, whereas the “words of the torah” refer to the whole collection of Mosaic laws.

57. On the matter of versions of edicts and treaties written in two copies, one on a scroll and the other inscribed in stone, see R. Thomas, *Oral Tradition and Written Record in Classical Athens* (Cambridge: Cambridge University Press, 1989), 45–51.

58. It is true that Josh 8:30–35 does not say anything about setting up the plastered stones, so this detail must be assumed from the parallel text in Deut 27. This interpretation would seem preferable to the possibility that the law was inscribed on the stones of the altar.

59. On the ceremony of Exod 24:3–8, see Nicholson, *God and His People*, 164–78; Van Seters, *Life of Moses*, 282–85. The close association of this text with Exod 19:3–8 suggests a post-D construction for the whole scheme. Schenker, “Les sacrifices d’alliance,” 84–89, argues for a much closer integration of the pericope into the non-P corpus, from the call of Moses onward, than is usually conceded.

60. Olyan, “Why an Altar of Unfinished Stones?” 167.

61. See Anbar, “The Building of an Altar on Mount Ebal.”

62. Olyan, “Why an Altar of Unfinished Stones?” 166.

63. Heger (*Three Biblical Altar Laws*, 18–21) recognizes that Ezra 3:2 makes direct reference to the law in Exod 20:24–26, but he fails to see how this completely undercuts his view that the law is very primitive. He also badly misrepresents my own earlier discussion of these issues (*ibid.*, 138–41).

64. See Robertson, “Altar of Earth,” 19.

65. So J. Halbe, *Das Privilegrecht Jahwes: Ex 34,10–26; Gestalt und Wesen, Herkunft und Wirken in vordeuteronomischer Zeit*, FRLANT 114 (Göttingen: Vandenhoeck & Ruprecht, 1975).

66. Levinson, *Deuteronomy and the Hermeneutics of Legal Innovation*, 28–38.

67. The last phrase in 1 Kings 8:52b, “to listen to them whenever [or wherever] they call to you,” is very close to Exod 20:24b. The phrase כָּל with the infinitive can be construed both temporally and spatially.

68. See also G. A. Chamberlain, “Exodus 21–23 and Deuteronomy 12–26: A Form-Critical Study” (Ph.D. diss., Boston University, 1977), 157–59. He comes to similar conclusions by a somewhat different route.

69. An exhaustive three-volume review has been carried out by H. Ausloos, “Deuteronomi(sti)sche elementen in Genesis-Numeri: Een onderzoek naar criteria voor identificatie op basis van een literaire analyse van de epilog van het “Verbondsboek” (Exodus 23,20–33)” (Ph.D. diss., Katholieke Universiteit Leuven, 1997).

70. Noth, *Exodus*, 192.

71. J. P. Hyatt, *Exodus*, NCBC (London: Marshall, Morgan & Scott, 1971), 250.

72. N. Lohfink, *Das Hauptgebot: Ein Untersuchung literarischer Einleitungsfragen zu Dtn 5–11*, AnBib 20 (Rome: Pontifical Biblical Institute, 1963), 167–88, 309–10.

73. Peritt, *Bundestheologie*. Peritt has much to say about the Deuteronomic character of Exod

34:11–26 (pp. 216–32) but little to say about Exod 23:20–33 except that it probably belongs to the same period as Exod 34 (p. 225 n. 5).

74. Childs, *Exodus*, 460–61, 486–88.

75. *Ibid.*, 461.

76. *Ibid.*, 608, 613.

77. Halbe, *Das Privilegrecht Jahwes*, 483–505.

78. Crüsemann, *Torah*, 178–81.

79. Osumi, *Kompositionsgeschichte*, 63–70. A similar position is that of Schwienhorst-Schönberger (*Bundesbuch*, 407–10), in which he advocates a basic proto-D version as part of his *gottesrechtlichen Redaktion*, with some later minor Deuteronomistic additions.

80. Blum, *Studien zur Komposition des Pentateuch*, 361–82, esp. 370–74; Blum, “Das sog. ‘Priviligrecht’ in Exodus 34,11–26,” 347–66; E. Blum, “Der kompositionelle Knoten am Übergang von Josua zu Richter: Ein Entflechtungsvorschlag,” in *Deuteronomy and Deuteronomistic Literature: Festschrift C. H. W. Brekelmans*, ed. M. Vervenne and J. Lust, BETL 133 (Leuven: Peeters, 1997), 181–212, esp. 187–94.

81. Blum, “Das sog. ‘Priviligrecht’ in Exodus 34,11–26,” 354–66. See also E. Aurelius, *Der Fürbitter Israels: Eine Studie zum Mosebild im Alten Testament*, CBOTS 27 (Stockholm: Almqvist & Wiksell, 1988), 116–26; Van Seters, *Life of Moses*, 245–360.

82. Van Seters, *Life of Moses*, 356.

83. The subject in v. 28b is uncertain. Who wrote upon the tablets? (Blum does not discuss my solution.) He takes v. 28b to follow directly after v. 10 and to refer to the Ten Commandments.

84. Blum, *Studien zur Komposition des Pentateuch*, 377.

85. Blum, “Das sog. ‘Priviligrecht’ in Exodus 34,11–26,” 360–61.

86. *Ibid.*, 362–64. Blum sees this happening after the reestablishment of the Temple, but this is hardly reflected in the laws of Exod 34:11–26.

87. *Ibid.*, 354–55.

88. See Van Seters, *Life of Moses*, 327–31.

89. C. Brekelmans, “Die sogenannten deuteronomistischen Elemente in Gen.–Num.: Ein Beitrag zur Vorgeschichte des Deuteronomiums,” in *Congress Volume, Geneva, 1965*, VTSup 15 (Leiden: E. J. Brill, 1966), 90–96; Lohfink, *Hauptgebot*, 121–24. Lohfink, however, does not apply the term “proto-D” to Exod 23:20–33 or 34:11–16, which he treats in an entirely different way. He uses proto-D only for Exod 12:24–27a and 13:3–16.

90. J. Van Seters, “The So-Called Deuteronomistic Redaction of the Pentateuch,” in *Congress Volume, Leuven, 1989*, VTSup 43 (Leiden: E. J. Brill, 1991), 58–77, esp. 58–59.

91. M. Vervenne, “The Question of ‘Deuteronomistic’ Elements in Genesis to Numbers,” in *Studies in Deuteronomy in Honour of C. J. Labuschagne on the Occasion of His 65th Birthday*, ed. F. G. Martinez et al., VTSup 53 (Leiden: E. J. Brill, 1994), 243–68, esp. 244–54.

92. Vervenne acknowledges (“Question of ‘Deuteronomistic’ Elements in Genesis to Numbers,” 253–54) the correctness of much of Blum’s criticism of the way in which comparison has been made in the past to affirm the notion of a proto-D redaction. See Blum, *Studien zur Komposition des Pentateuch*, 164–76.

93. H. Ausloos, “The Need for Linguistic Criteria in Characterizing Biblical Pericopes as Deuteronomistic: A Critical Note to Erhard Blum’s Methodology,” *JNSL* 23/2 (1997): 47–56; H. Ausloos, “The Need for a ‘Controlling Framework’ in Determining the Relationship between Genesis–Numbers and the So-Called Deuteronomistic Literature,” *JNSL* 24/2 (1998): 77–89; H. Ausloos, “Deuteronomi(sti)c Elements in Exod 23,20–33?” in *Studies in the Book of Exodus*, ed. M. Vervenne, BETL 126 (Leuven: University Press, 1996), 481–500. See also n. 1 above.

94. Ausloos, "The Need for a 'Controlling Framework,'" 84–86.
95. C. Houtman, "Zwei Sichtweisen von Israel als Minderheit inmitten der Bewohner Kanaans: Ein Diskussionsbeitrag zum Verhältnis von J und DtrG," in *Deuteronomy and Deuteronomical Literature: Festschrift C. H. W. Brekelmans*, ed. M. Vervenne and J. Lust, BETL 133 (Leuven: Peeters, 1997), 213–31.
96. The verse is part of a late addition to the DtrH. See Van Seters, *Life of Moses*, 376–77.
97. T. W. Mann, "The Pillar of Cloud in the Reed Sea Narrative," *JBL* 90 (1971): 15–39; also T. W. Mann, *Divine Presence and Guidance in Israelite Traditions: The Typology of Exaltation* (Baltimore: Johns Hopkins University Press, 1977). See my own review of this comparison in *Life of Moses*, 136–39, 254–70.
98. Mann, "Pillar of Cloud," 19–24.
99. *Ibid.*, 22.
100. *Ibid.*, 23. On the close association of the cloud, tent, and ark, see *ibid.*, 24–30.
101. Blum "Das sog. 'Priviligrecht' in Exodus 34,11–26," 351–53; Ausloos, "Deuteronomi(stic) Elements in Exod 23,20–33?" 490–92.
102. See Van Seters, *Life of Moses*, 341–44.
103. *Ibid.*, 333–41.
104. Contra Ausloos, "The Need for a 'Controlling Framework,'" esp. 86.
105. Contra T. Ishida, *History and Historical Writing in Ancient Israel* (Leiden: E. J. Brill, 1999), 8–36.
106. See the index entries for "Ammuru, L," "Hatte(i), L," and "Hittite," in D. D. Luckenbill, *Ancient Records of Assyria and Babylonia*, 2 vols. (Chicago: University of Chicago Press, 1926–27); J. Van Seters, "The Terms 'Amorite' and 'Hittite' in the Old Testament," *VT* 22 (1972): 64–81; J. Van Seters, *Abraham in History and Tradition* (New Haven: Yale University Press, 1975), 43–52.
107. See A. K. Grayson, *Assyrian and Babylonian Chronicles* (Locust Valley, N.Y.: J. J. Augustin, 1975), Chronicle 5, pp. 99–102.
108. See N. Lohfink, "חָרָם *hāram*," in *TDOT* 5:180–99. However, Lohfink's diachronic discussion of the development of this and related terms is prejudiced by his early dating of the Covenant Code and other texts, such as 1 Sam 15, as pre-D.
109. H. Ringgren, "גָּרָשׁ *gārash*," in *TDOT* 3:68–69.
110. So M. Weinfeld, "The Ban on the Canaanites in the Biblical Codes and Its Historical Development," in *History and Traditions of Early Israel: Studies Presented to Eduard Nielsen*, ed. A. Lemaire and B. Otzen, VTSup 50 (Leiden: E. J. Brill, 1993), 142–60.
111. On the lateness of this text and its close association with Josh 24 (possibly from the same hand), see U. Becker, *Richterzeit und Königtum*, BZAW 192 (Berlin: W. de Gruyter, 1990), 144–45.
112. H. H. Schmid, "יָרַשׁ *yāraš*, to inherit," in *TLOT* 2:579.
113. N. Lohfink, "יָרַשׁ *yāraš*," in *TDOT* 6:368–96, esp. 375.
114. See also Num 32:21, which I attribute to J as well.
115. See Blum, "Das sog. 'Priviligrecht' in Exodus 24,11–26," 360–61.
116. See my discussion of these texts in *In Search of History* (New Haven: Yale University Press, 1983), 333–34.
117. Contra Mayes (*Deuteronomy*, 181–82), I see no redactional breaks in the text within vv. 1–16.
118. The opposite happens in Deut 7:4, where there is a shift from referring to the deity in the third person to the first person.
119. The principle of shortening an earlier source when adding new material is well illustrated in Assyrian royal inscriptions, which regularly summarize the accounts of earlier military campaigns copied from previous inscriptions when adding new details of the most recent mili-

tary activity. See my *In Search of History*, 62–64. The same principle applies to the synoptic problem of the Gospels in the New Testament.

120. See J. Van Seters, “In the Babylonian Exile with J,” in *The Crisis of Israelite Religion: Transformation of Religious Tradition in Exilic and Post-Exilic Times*, ed. B. Becking and M. C. A. Korpel, OTS 42 (Leiden: E. J. Brill, 1999), 87.

Chapter 3

1. This section is a revised and expanded version of my article “The Law of the Hebrew Slave,” ZAW 108 (1996): 534–46.

2. G. C. Chirichigno, *Debt-Slavery in Israel and the Ancient Near East*, JSOTSup 141 (Sheffield: Sheffield Academic Press, 1993). While Chirichigno makes a number of cogent observations about the Near Eastern legal materials, he takes an uncritical approach to the biblical texts and attempts to harmonize them and see them as contemporary documents. This produces very strained arguments.

3. An exception to this viewpoint is O. Loretz, *Habiru-Hebräer: Eine soziolinguistische Studie über die Herkunft des Gentiliciums 'brī vom Appellativum ḥabiru*, BZAW 160 (Berlin: W. de Gruyter, 1984).

4. See the various treatments in E. Otto, *Wandel der Rechtsbegründungen in der Gesellschaftsgeschichte des antiken Israel: Eine Rechtsgeschichte des “Bundesbuches” Ex XX 22–XXIII 13*, StudBib 3 (Leiden: E. J. Brill, 1988); L. Schwienhorst-Schönberger, *Das Bundesbuch (Ex 20,22–23,33)*, BZAW 188 (Berlin: W. de Gruyter, 1990); Y. Osumi, *Die Kompositionsgeschichte des Bundesbuches Exodus 20,22b–23,33*, OBO 105 (Freiburg, Switzerland: Universitätsverlag; Göttingen: Vandenhoeck & Ruprecht, 1991); and esp. C. Houtman, *Das Bundesbuch: Ein Kommentar*, Documenta et Monumenta Orientalis Antiqui 24 (Leiden: E. J. Brill, 1997), 75–101, with an extensive bibliography, pp. 75–77. Other recent treatments may be found in C. Pressler, “Wives and Daughters, Bond and Free: Views of Women in the Slave Laws of Exodus 21.2–11,” in *Gender and Law in the Hebrew Bible and the Ancient Near East*, ed. V. H. Matthews, B. L. Levinson, and T. Frymer-Kensky, JSOTSup 262 (Sheffield: Sheffield Academic Press, 1998), 147–72; A. Schenker, “The Biblical Legislation on the Release of Slaves: The Road from Exodus to Leviticus,” JSOT 78 (1998): 23–41 (reprinted in *Recht und Kult im Alten Testament*, OBO 172 [Freiburg, Switzerland: Universitätsverlag; Göttingen: Vandenhoeck & Ruprecht, 1999], 134–49).

5. See the dissertation by Jeffery M. Hamilton, *Social Justice and Deuteronomy: The Case of Deuteronomy 15*, SBLDS 136 (Atlanta: Scholars Press, 1992). Hamilton avoids any diachronic discussion in his comparison of the codes except in some “preliminary comments” about the relative dating of Deuteronomy and the Holiness Code (pp. 74–82). Among the older treatments is that of F. Horst, “Das Privilegrecht Jahwes,” in *Gottes Recht: Studien zum Recht im Alten Testament*, TB 12 (Munich: Chr. Kaiser, 1961), 94–103. Horst assumes the priority of the Covenant Code throughout.

6. G. R. Driver and J. C. Miles (*The Babylonian Laws* [Oxford: Clarendon Press, 1952], 1:211) cite a contemporary legal document that does mention a man selling himself into slavery for debt. See Chirichigno, *Debt-Slavery*, 67–72.

7. Chirichigno, *Debt-Slavery*, 70–71.

8. See also W. W. Hallo, “Slave Release in the Biblical World in Light of a New Text,” in *Solving Riddles and Untying Knots: Biblical, Epigraphic, and Semitic Studies in Honor of Jonas C. Greenfield*, ed. Z. Zevit, S. Gitin, and M. Sokoloff (Winona Lake, Ind.: Eisenbrauns, 1995), 79–94. Hallo discusses Old Babylonian edicts for release of debt-slaves, emphasizing the limited and periodic nature of the releases, which seem to mitigate and qualify the unrealistic terms of the Hammurabi “reform.”

9. On the use of slave-marks in the Near East, see V. A. Hurowitz, “‘His Master Shall Pierce His Ear with an Awl’ (Exodus 21.6): Making Slaves in the Bible in the Light of Akkadian Sources,” *Proceedings of the American Academy of Jewish Research* 58 (1992): 47–77.

10. For the general Near Eastern background to such proclamations of manumission, see M. Weinfeld, *Social Justice in Ancient Israel and in the Ancient Near East* (Jerusalem: Magnes Press, 1995), 152–68.

11. See R. Kilian, *Literarkritische und formgeschichtliche Untersuchung des Heiligkeitsgesetzes*, BBB 19 (Bonn: P. Hanstein 1963), 121–48; A. Cholewinski, *Heiligkeitsgesetz und Deuteronomium: Eine vergleichende Studie*, AnBib 66 (Rome: Pontifical Biblical Institute, 1976), 232–40.

12. See L. Perlitt, “‘Ein einzig Volk von Brüdern’: Zur deuteronomischen Herkunft der biblischen Bezeichnung ‘Bruder,’” in *Kirche: Festschrift für Günther Bornkamm zum 75. Geburtstag*, ed. D. Lüthmann and G. Strecker (Tübingen: Mohr, 1980), 27–52, esp. 46 ff.

13. I am inclined to agree with Kilian (*Untersuchung des Heiligkeitsgesetzes*, 141–48) that the jubilee regulation in vv. 40b–41 is secondary and breaks the continuity of the text. He takes the whole of the jubilee legislation throughout the chapter as a late postexilic addition. See also R. H. Pfeiffer, *Introduction to the Old Testament* (New York: Harper & Brothers, 1941), 240; O. Eissfeldt, *The Old Testament: An Introduction*, trans. P. R. Ackroyd (New York: Harper & Row, 1965), 235.

14. The references to the jubilee-year in vv. 50–52 and 54 are secondary and intrusive.

15. E. Otto, *Das Deuteronomium: Politische Theologie und Rechtsreform in Juda und Assyrien*, BZAW 284 (Berlin: W. de Gruyter, 1999), 305, 309.

16. H. W. Gilmer (*The If-You Form in Israelite Law*, SBLDS 15 [Missoula, Mont.: Scholars Press, 1975], 49) compares the if-you form of this text with its parallels in Deuteronomy and the Holiness Code, which all follow this style. But he concedes that the Exodus text may have originally had an initial third-person verbal form. On the other hand, Osumi (*Die Kompositionsgeschichte des Bundesbuches*, 149–53) disputes that it ever belonged to the regular mishpatim; instead, it was the product of the second-person singular author/redactor.

17. So Otto (*Wandel der Rechtsbegründungen*, 35), following Alt. More recently, Otto (“Deuteronomium und Pentateuch: Aspekte der gegenwärtigen Debatte,” *ZABR* 6 [2000]: 248–50), in what appears as a somewhat desperate effort to dispute my understanding of קנה in the simple sense of “purchase” (even though he would actually emend the text to מכר), suggests that the verb has a performative sense in which that which is acquired is made such by the acquisition. He refers to the fact that the verb קנה can also mean “create.” Yet all this is quite beside the point. The verb קנה is regularly used with the acquisition of property, and it is ridiculous to think that the article or object being purchased is actually being made at that moment.

18. N. P. Lemche (“The ‘Hebrew Slave’: Comments on the Slave Law Ex xxi 2–11,” *VT* 25 [1975]: 135) retains the verb קנה but corrects to third person to conform to casuistic style. This still leaves the designation עבד as “troublesome.”

19. S. Japhet, “The Relationship between the Legal Corpora in the Pentateuch in Light of Manumission Laws,” in *Studies in Bible, 1986*, ed. S. Japhet, *ScrHier* 31 (Jerusalem: Magnes, 1986), 63–89. This is a translation from Hebrew of a 1978 article. See the critique by S. A. Kaufman, “Deuteronomy 15 and the Recent Research on the Dating of P,” in *Das Deuteronomium: Entstehung, Gestalt und Botschaft*, ed. N. Lohfink, *BETL* 68 (Leuven: Peeters, 1985), 273–76; also Hamilton, *Social Justice*, 76–81.

20. See Cholewinski, *Heiligkeitsgesetz und Deuteronomium*; and Kaufman, “Deuteronomy 15.”

21. See Chirichigno, *Debt-Slavery*, 200–218. He cites the extensive literature and discusses the arguments, deciding for the gentile “Hebrew” as used elsewhere in the Old Testament. See also Loretz, *Habiru-Hebräer*.

22. Shalom Paul (in *Studies in the Book of the Covenant in the Light of Cuneiform and Biblical Law*, *VTSup* 18 [Leiden: E. J. Brill, 1970], 45–47) discusses the case for the appellative use of

עבֵרִי on the basis of Nuzi parallels. For an extensive critique of Paul's comparison, see Chirichigno, *Debt-Slavery*, 207–18; also Pressler, "Wives and Daughters," 151–52.

23. Gen 39:14; 40:15; 41:12; 43:22.

24. Exod 1:15, 16, 19; 2:6, 7, 11, 13; 3:18; 5:3; 7:16; 9:1, 12; 10:3. See esp. the discussion by Loretz, *Habiru-Hebräer*.

25. This would apply equally to those who retain the existence of an E source, since the gentile "Hebrew" is distributed equally in both J and E according to the commonly held source division.

26. Chirichigno (*Debt-Slavery*, 218–26) forces the parallel with LH §117. In this case, I do not think that Exod 21:2–6 ever belonged to a prior code of mishpatim. Cf. Pressler, "Wives and Daughters," 152, who also notes important differences between the Old Babylonian texts and the Covenant Code.

27. Transactions involving the sale and purchase of slaves are well documented in such collections as T. Kwasman, *Neo-Assyrian Legal Documents in the Kouyunjik Collection of the British Museum*, Studia Pohl: SM 14 (Rome: Pontifical Biblical Institute, 1988). See the listing of texts on p. xxi. See also I. Cardellini, *Die biblischen "Sklaven"-Gesetze im Light des keilschriftlichen Sklavenrechts*, BBB 55 (Bonn: P. Hanstein, 1981).

28. In a long note, Otto (*Das Deuteronomium*, 305 n. 451) disputes this interpretation of the text. He says that we must understand the text in a "colloquial" fashion such that to buy a slave does not necessarily mean that the person is already a slave. He compares it with saying, "a president has been elected," instead of the more correct "we have elected so-and-so as president." But the comparison is not appropriate. In the one case, the act of election is what makes the president, whereas in most instances, it is not the purchase that makes a person a slave. It is precisely for this reason that one must formulate the transaction in the way that Deut 15:12 has done it. It is also a little disingenuous for Otto to argue in this way when he also felt compelled to change the text to resemble Deuteronomy and to blame a redactor for the present text. There is no escape from the plain meaning of the text.

29. Otto (*ibid.*) further argues that Exod 21:3 must mean that the Hebrew slave married when he was still a free man. This is entirely possible but not demanded by the text. One could envisage the situation in which a man and his wife become enslaved for debt or any other reason to a foreigner and then are subsequently bought by a fellow Hebrew as a unit. What Otto cannot explain is why Deuteronomy completely ignores this issue if the Covenant Code is older, because it does not square with the principle of the release of all Hebrews (male and female) after six years.

30. Pressler, "Wives and Daughters," 165–72.

31. Note those texts in which a female slave is purchased for the specific purpose of providing a wife for a male slave: Kwasman, *Neo-Assyrian Legal Documents*, nos. 120, 124.

32. See also R. Westbrook, "Jubilee Laws," in *Property and the Family in Biblical Law*, JSOTSup 113 (Sheffield: Sheffield Academic Press, 1991), 36–37.

33. Å. Viberg, *Symbols of Law: A Contextual Analysis of Legal Symbolic Acts in the Old Testament*, CBOTS 34 (Stockholm: Almqvist & Wiksell, 1992), 77–88.

34. Viberg (*ibid.*, 80) also sees some connection with Deut 6:9 but fails to understand why "door" from Deut 15:17 and "doorposts" from Deut 6:9 both show up in Exod 21:6. As we have seen through our study of the Covenant Code, it is typical of this author to combine references from many different sources.

35. Van Seters, "Law of the Hebrew Slave," 541.

36. This is certainly not the reason for the sale of a daughter into slavery in LH §117.

37. To suggest, as Paul does (in *Studies in the Book of the Covenant*, 54), that עַם נִכְרִי means only "anyone who is not a member of that nuclear family" seems to me a case of special pleading. Pressler ("Wives and Daughters," 158 n. 27) also follows Paul in this meaning of the phrase.

38. Paul, *Studies in the Book of the Covenant*, 52–53.

39. See also the remarks by Chirichigno, *Debt-Slavery*, 246–47.

40. Cited from Kwasman, *Neo-Assyrian Legal Documents*, 254, no. 214. See the earlier publication in J. Kohler and A. Ungnad, *Assyrische Rechtsurkunden im Umschrift und Übersetzung nebst einen Index der Personen-Namen und Rechtsläuterungen* (Leipzig: E. Pfeiffer, 1913), 33–34, no. 37; and my earlier treatment in *Abraham in History and Tradition* (New Haven: Yale University Press, 1975), 83. This legal text has not been included in the previous discussion of Near Eastern parallels.

41. See Kohler and Ungnad, *Assyrische Rechtsurkunden*, 34 ff., nos. 38–40, where the same terminology is used for the sale of slaves.

42. See my discussion of this text in *Abraham in History and Tradition*, 81–83. Against this clear evidence, Otto argues (“Deuteronomium und Pentateuch,” 248–50) that since the woman in Exod 21:7 is not a slave before she is sold by her father, one must assume the same free status for the male slave in 21:2, since both laws are closely bound together. For him, both the male and female slaves are debt-slaves. His logic, however, is quite faulty. I have argued that the male slave in the Covenant Code is not a debt-slave, but neither is the female slave. The situation here is a special form of sale-marriage that simply does not permit for the release of the woman after seven years. That is why the law in the Covenant Code must stress that the woman cannot leave her master-husband (or father-in-law) in the usual case of such enslavement. But Otto considers Deut 15:12–18 as a revision of this very law. When Deut 15:17b says that the female slave must be treated in the same way as the male slave, are we to assume that instead of the arrangements in the Covenant Code, the father is simply to sell his daughter to someone as a concubine for six years and in the seventh year she will be released to return home? And is this considered a reform of the older system? When Deuteronomy speaks of a woman serving as a debt-slave, it does not have marriage or even concubinage in mind.

43. Pressler, “Wives and Daughters,” 155–60.

44. R. Westbrook, “The Female Slave,” in *Gender and Law in the Hebrew Bible and the Ancient Near East*, 218.

45. *Ibid.*, 230–31. In a paper by Rainer Kessler, “Die Sklavin als Ehefrau: Zur Stellung der ‘ama^h,” given at the meeting of the International Organization for the Study of the Old Testament, Basel, August 5–10, 2001 (see the abstracts, pp. 90–91), he cites texts from the Judean and Elephantine context (seventh to fifth centuries B.C.E.) in which the term אִמָּה is used to mean a full wife and not a concubine. He therefore considers it also to be the case in Exod 21:7–11.

46. See, recently, Weinfeld, *Social Justice*, 168–74.

47. Weinfeld does not make any reference to the Hebrew laws at this point, though he does refer to some interesting parallels with the reforms of Solon.

48. Loretz, *Habiru-Hebräer*, 122–65.

49. N. P. Lemche, “The Hebrew and the Seven Year Cycle,” *BN* 25 (1984): 65–75, esp. 70–71.

50. See my discussion of Exod 23:10–12, chap. 4.

51. N. P. Lemche, “The Manumission of Slaves—the Fallow Year—the Sabbatical Year—the Yobel Year,” *VT* 26 (1976): 38–59. On the complete artificiality of the jubilee year and its late dating, see Westbrook, “Jubilee Laws.”

52. Lemche, “Manumission,” 42. This dating has, in the meantime, been greatly modified by Lemche (“Justice in Western Asia in Antiquity, or: Why No Laws Were Needed!” in *Chicago-Kent Law Review* 70 [1995]: 1715–16) to the Persian or Hellenistic period, which would lead to quite different results.

53. The law of the jubilee (Lev 25:8–16, 26–34, 40b–41, 50–52, 54) is considered by many as secondary. See n. 51 above.

54. The general accusation by Otto (“Deuteronomium und Pentateuch,” 249) that my basic methodological shortcoming results from the fact that I treat Deuteronomy as an undifferentiated block from the perspective of its literary history is simply false, as any fair reading of my work makes clear. There are levels of development in Deuteronomy, including some additions by J at a rather late stage in its literary history, some of which Otto identifies as contributed by his Hexateuchal redactor. J’s reception of Deuteronomy includes all of those stages prior to him, and there is usually no need to discuss them in the context of a comparison of the Covenant Code with Deuteronomy. The added accusation that I am totally prejudiced by my larger Pentateuchal literary theory may simply be turned around and directed at him. It is his quite dubious and extreme redactional criticism that has often blinded him to what seems to me the obvious relationship between these texts. His argument that the Covenant Code could not possibly be the work of a single author J consists of the fact that so many scholars working on the Covenant Code all agree on its highly stratified nature. Yet they could be wrong, and truth does not depend on the majority opinion at any particular point in time. My method appears to him to be too unrefined, too *grob-schlüchtig*, and thus unfit for the literary-historical complexity of the legal corpora of the Pentateuch. My solutions may look complex enough to the novice, but they are nothing in comparison with the morass created by Otto and others, and it seems to me a virtue to find more economic solutions to these literary problems.

55. See E. Otto, “Aspects of Legal Reforms and Reformulations in Ancient Cuneiform and Israelite Law,” in *Theory and Method in Biblical and Cuneiform Law: Revision, Interpolation and Development*, ed. B. M. Levinson, JSOTSup 181 (Sheffield: Sheffield Academic Press, 1994), 182–96. See above, chap. 1.

56. Osumi, *Die Kompositionsgeschichte des Bundesbuches*, 87–134; F. Crüsemann, *The Torah: Theology and Social History of Old Testament Law* (Minneapolis: Fortress Press, 1996), 144–51. See above, chap. 1.

57. We may set aside for the moment the law of the Hebrew slave, which I have discussed above. Its connection with the Hammurabi Code is, at best, very indirect through Deuteronomy.

58. This pattern is not found in the Laws of Eshnunna, a slightly earlier law code from the same general region.

59. Morgenstern labels the former group as $\square\eta\eta$ but the latter as “pseudo- $\square\eta\eta$ ” and regards them as secondary. See J. Morgenstern, “The Book of the Covenant, Part III,” *HUCA* 8–9 (1931–32): 1–150. On the discussion of terminology, see also G. Liedke, *Gestalt und Bezeichnung alttestamentlicher Rechtssätze*, WMANT 39 (Neukirchen-Vluyn: Neukirchener Verlag, 1971), 154–86.

60. A. Alt, “The Origins of Israelite Law,” in *Essays on Old Testament History and Religion*, by A. Alt, trans. R. A. Wilson (Oxford: Blackwell, 1966), 79–132. See the useful review of past research by Schwienhorst-Schönberger, *Bundesbuch*, 214–16. See also my remarks about Liedke, Gerstenberger, and Boecker in the chapter 1.

61. Schwienhorst-Schönberger, *Bundesbuch*, 216; Osumi, *Die Kompositionsgeschichte des Bundesbuches*, 109–16. Both are critical of Otto, who still maintains the notion of a separate archaic apodictic series.

62. Lev 20:2, 9, 10, 15; 24:16, 17.

63. Morgenstern suggests that the term refers to execution by the state (“The Book of the Covenant, Part II,” *HUCA* 7 [1930]: 57). If this is the case, then Ezekiel has extended the principle beyond its normal usage where the deity is judge, because many of the offenses mentioned there (Ezek 18) are humanitarian and religious in character and hardly matters for the state.

64. W. Zimmerli, *Ezekiel I: A Commentary on the Book of the Prophet Ezekiel, Chapters 1–24*, Hermeneia (Philadelphia: Fortress Press, 1979), 375–76.

65. See also the equivalent expressions in vv. 18, 21.

66. Note that the predominant form used in the Neo-Babylonian Laws is *amēlu ša*, which is the direct equivalent of the Hebrew אִישׁ אִישׁ , “a man who. . . .”

67. G. Brin, *Studies in Biblical Law: From the Hebrew Bible to the Dead Sea Scrolls*, JSOTSup 176 (Sheffield: Sheffield Academic Press, 1994), 24–28.

68. *Ibid.*, 27.

69. Brin (*ibid.*, 28 n. 17) suggests that Deuteronomy knows of an earlier form of the Covenant Code than the one in the text of Exod 21:16 (i.e., one without the modification). That seems to me a case of special pleading.

70. Otto (*Das Deuteronomium*, 298–99) argues that Deuteronomy is dependent upon the Covenant Code by suggesting that the Exodus phrase “and he is found in his possession” is reflected in Deut 24:7 by the phrase “and treats him as a slave,” but that is hardly the case. Brin is surely correct in seeing the Exodus version as the later one.

71. Otto, *Wandel der Rechtsbegründungen*, 32.

72. Schwienhorst-Schönberger, *Bundesbuch*, 34, 284.

73. *Ibid.*, 316–30.

74. Osumi, *Die Kompositionsgeschichte des Bundesbuches*, 20–27, 133, 144–45.

75. For the noun כַּשָּׁפָה (in pl. only), see Mic 5:11; Nah 3:4; Isa 47:9, 12; 2 Kings 9:22. For the verb כַּשַׁף in piel, see 2 Chron 33:6, where the verb “to practice sorcery” has been added to the list of Manasseh’s crimes in 2 Kings 21:6, which supports the suggestion that כַּשַׁף is an addition in Deut 18:10 as well. The verb in participial form is used also in Exod 7:11 (P), Dan 2:2, and Mal 3:5. The form כַּשַׁף in the plural used in Jer 27:9 seems to be a direct loan from the Assyrian *kaššāpu*. See also G. André, “כַּשַׁף *kāšap*,” in *TDOT* 7:360–66.

76. See Schwienhorst-Schönberger, *Bundesbuch*, 329; Houtman, *Bundesbuch*, 217–21. Houtman renders the term מְכַשְׁפָּה as “Eine Frau, die zur Unzucht verführt.”

77. The use of the theme of “playing the harlot” in association with the use of mediums is also found in the Holiness Code (Lev 20:6).

78. B. S. Childs, *The Book of Exodus*, OTL (Philadelphia: Westminster, 1974), 477–78; see also Houtman, *Bundesbuch*, 220–21.

79. The reason for the emphasis on “all” animals may be explained by the possibility of a Near Eastern tradition which permitted some exceptions. This seems to be the case in the Hittite law code; see laws §§187, 188, 199, 200a.

80. Schwienhorst-Schönberger, *Bundesbuch*, 328. “This verse could be genuinely old.”

81. For a discussion of the textual problems, see Schwienhorst-Schönberger, *Bundesbuch*, 316–17. The effort to retain the MT as it is (so Childs, *Exodus*, 449) is mistaken. The placement of the phrase “except Yahweh alone” is very awkward after the verb and can only be explained by the loss of אֲחֵרִים. It also violates the divine voice of these prohibitions. The proposal to take only v. 19a in the MT without אֲחֵרִים (so Schwienhorst-Schönberger) makes no sense to me.

82. N. Lohfink, “חֵרֵם *hāram*,” in *TDOT* 5:180–99 (with literature), esp. 193–95.

83. C. Schäfer-Lichtenberger, “Bedeutung und Function von Herem,” *BZ* 38 (1994): 270–75.

84. Schwienhorst-Schönberger (*Bundesbuch*, 318–20) tries to see the development in the other direction, from Exod 22:17–19a to Deut 13, even though the latter says nothing about the themes in vv. 17–18. The whole argument is forced.

85. See also Lev 27:29 (P), where the term is applied to an individual and is equivalent to מוֹתֵי יִמּוֹת. But P seems directly dependent on this text on Exod 22:19. In the late text of Ezra 10:8, this same hophal form is used of goods that are “confiscated” and therefore is hardly appropriate to the Covenant Code text.

86. See J. Van Seters, “Joshua 24 and the Problem of Tradition in the Old Testament,” in *In the Shelter of Elyon: Essays on Ancient Palestinian Life and Literature in Honor of G. W. Ahlström*, ed. W. B. Barrick and J. R. Spencer, JSOTSup 31 (Sheffield: JSOT Press, 1984), 139–58.

87. See A. Rofé, “The History of the Cities of Refuge in Biblical Law,” in *Studies in Bible*, 1986, ed. S. Japhet, *ScrHier* 31 (Jerusalem: Magnes, 1986), 205–39.

88. Rofé (ibid., 210–14) argues convincingly in support of Wellhausen that the three cities of refuge must belong to the Josianic reform (Rofé D2 stratum).

89. Ibid., 214–19.

90. One must therefore reject the view of Houtman (*Exodus* [Leuven: Peeters, 2000], 3:134–35, 139–44) that D and P could no longer tolerate the use of Jerusalem as a place of asylum because it would contaminate the altar. That simply does not square with the evidence.

91. Curiously, Rofé does not discuss this text but merely seems to accept that it is early (“Cities of Refuge,” 213–14). It is typical to assume that the Exodus text is older and Deuteronomy a revision of it. See Houtman, *Exodus*, 3:134.

92. On the development of the juridical process subsequent to the Josianic reform, see Rofé, “Cities of Refuge,” 228–30.

93. On this point of comparison between Exod 21:13–14 and Deut 19:2–13, the argumentation and logic of Otto in defense of the priority of the Covenant Code become quite remarkable (*Das Deuteronomium*, 253–56). His claim is that the Deuteronomic version of the law is a reformulation of the Covenant Code law. He takes מקדש in Exod 21:13 to be a sanctuary but then asserts that it cannot refer to a single sanctuary but must refer to many sanctuaries. The evidence adduced for this is the reference to “my altar” in v. 14, which links the law back to Exod 20:24–26, the law of the altar, which in his view also refers to many altars. As seen above in our discussion of this law, that is by no means certain or even likely. He then argues that when the Deuteronomic author read the Covenant Code law, he understood it as a reference to the single “place,” Jerusalem, and merely extended the single place of asylum to a plurality of places. This type of argumentation is surely special pleading. Otto turns the singular “place” into the plural “places” at his own convenience, even though he admits that the simple and direct reading of the text would seem to point to the centralization law of Deuteronomy. If Deuteronomy had no difficulty in referring to a plurality of places of asylum, there is no reason to believe that the lawmaker in the Covenant Code could not have done the same.

94. Morgenstern saw this and states that the use of the first person and the reference to the single מקדש and single altar all point to a central sanctuary and late D editing (“Book of the Covenant, Part II,” 61–62).

95. So also Schwienhorst-Schönberger, *Bundesbuch*, 41–42.

96. A parallel to the law of asylum in 21:13–14 that is often cited is the case of Joab’s use of the altar in Jerusalem in 1 Kings 2:28–34, which is regarded as a pre-Deuteronomic witness to the practice. See Houtman, *Bundesbuch*, 123–26; Houtman, *Exodus*, 3:142–43. There are, however, some problems with this parallel. In the first place, the so-called Succession Narrative, which contains the Kings reference, is a late post-Deuteronomic fiction, as I have shown elsewhere, and cannot be used for an earlier period. Second, Joab is not handed over to a לֹאֵל of one of the victim’s families, and the use of asylum at the altar is many years after the killings in question and is out of fear of Solomon. This is a crass political vendetta that makes use of the assassination at the altar to brutalize the actions of Solomon and his general but has nothing to do with the practice of the law in any period. See J. Van Seters, *In Search of History* (New Haven: Yale University Press, 1983), 277–91; J. Van Seters, “The Court History and DtrH: Conflicting Perspectives on the House of David,” in *Die sogenannte Thronfolgeschichte Davids*, ed. A. de Pury and T. Römer, OBO 176 (Freiburg, Switzerland: Universitätsverlag, 2000), 70–93.

97. Rofé, “Cities of Refuge,” 215–17. See Houtman, *Exodus*, 3:134, for the contrary view.

98. M. Anbar takes this similarity to indicate that Exod 21:13–14 is dependent upon Deut 19 (“L’influence deutéronomique sur le Code de l’Alliance: Le cas d’Exode 21:12–17,” *ZABR* 5 [1999]: 166).

99. See G. R. Driver and J. C. Miles, *The Babylonian Laws*, 2 vols. (Oxford: Clarendon Press, 1952–55), 1:314–15.

100. The translation is from M. T. Roth, *Law Collections from Mesopotamia and Asia Minor*,

Writings from the Ancient World—Society of Biblical Literature 6 (Atlanta: Scholars Press, 1995), 122, but see also the following note.

101. To render *risbatum* as a “brawl” involving a number of persons (so Roth following Driver and Miles, *Babylonian Laws*, 2:249), instead of “fight” or “scuffle,” does not seem to me very likely. To assign specific injuries to specific individuals but no responsibility to the others involved is not reasonable. The set of laws here makes the best sense when restricted to two persons.

102. See E. Otto, “Town and Rural Countryside in Ancient Israelite Law: Reception and Redaction in Cuneiform and Israelite Law,” *JSOT* 57 (1993): 17.

103. Contrary to Otto (*ibid.*, 16), I do not think that the reason for this difference is that the Israelite law “mirrors” the legal practice of the local courts in Israel. I will discuss this further below.

104. A bibliography on the subject and a review of the issues may be found in Houtman, *Bundesbuch*, 154–68; Houtman, *Exodus*, 3:160–71.

105. See Otto, “Town and Rural Countryside.” See also E. Otto, “Die Geschichte der Talion im Alten Orient und Israel,” in *Ernten, was man sät: Festschrift für Klaus Koch zur seiner 65. Geburtstag*, ed. D. R. Daniels, U. Glessmer, and M. Rösel (Neukirchen-Vluyn: Neukirchener Verlag, 1991), 101–30.

106. Otto, “Town and Rural Countryside,” 7. This position is taken from that presented by J. J. Finkelstein, *The Ox That Gored*, Transactions of the American Philosophical Society 71:2 (Philadelphia: American Philosophical Society, 1981), 19 n. 11.

107. Otto, “Town and Rural Countryside,” 7.

108. *Ibid.*, 16.

109. *Ibid.*, 6.

110. *Ibid.*, 18.

111. For such a dating of the Covenant Code, see J. Van Seters, “Cultic Laws in the Covenant Code and Their Relationship to Deuteronomy and the Holiness Code,” in *Studies in the Book of Exodus*, ed. M. Vervenne, BETL 126 (Leuven: University Press, 1996), 319–45.

112. See also Schwienhorst-Schönberger, *Bundesbuch*, 109–15. He largely follows Otto but he wants to have it both ways. He suggests that in the case of Exod 21:22 the lawgiver could have a double orientation, one in which he was thoroughly familiar with Near Eastern law and the other in which such a situation could arise out of Israelite society (p. 115).

113. See A. Johns, *The Nature of the Book: Print and Knowledge in the Making* (Chicago: University of Chicago Press, 1998), 321–22. Until the seventeenth century, common law as practiced by the judges was custom that belonged to an oral culture. It was only in the early modern period that reports of learned judges were collected and printed, thus producing the first lawbooks. It is an anachronism to suppose that ancient law codes originated in the same way.

114. Otto (*Wandel der Rechtsbegründungen*, 28) explains the change of person by pointing to Deuteronomic parallels, but this is a particular feature of Deuteronomic law that should have suggested the text’s dependence upon Deuteronomy.

115. F. Crüsemann, “‘Auge um Auge . . .’ (Ex 21,24f): Zum sozialgeschichtlichen Sinn des Talionsgesetzes im Bundesbuch,” *EvTh* 47 (1987): 411–26; Y. Osumi, “Brandmal für Brandmal: Eine Erwägung zum Talionsgesetz im Rahmen der Sklavenschutzbestimmungen,” *AJBI* 18 (1992): 3–30.

116. For a discussion of *lex talionis* within cuneiform law, see Otto, “Geschichte der Talion,” 107–17.

117. Schwienhorst-Schönberger (*Bundesbuch*, 112–13) also uses Deut 25:11–12 but only as an analogy to fill in the details that are missing from the Exodus law. He sees no literary connection between them. A. Rofé (“Family and Sex Laws in Deuteronomy and the Book of the Cov-

enant,” *Henoch* 9 [1987]: 134–35) points to the similarity of Deut 25:11–12 and Exod 21:22–25 to each other as evidence that they derive from the same source. But that does not explain why the Deuteronomic law should have Deuteronomic features (“his brother”) and the other not, and why the Deuteronomic law is clear where the other is obscure, and why the switch to second person is standard for Deuteronomy but exceptional for the Covenant Code. Rofé must suppose that this law (Exod 21:22–25) did not originally belong to the Covenant Code. But the interconnections with what follows contradict this.

118. See Otto, *Das Deuteronomium*, 3, for a comparison between MAL A§8 and Deut 25:11–12.

119. See his most recent discussion of this position in *ibid.*, 203–17.

120. Yet it should be pointed out that it is just as much a problem trying to locate these Assyrian laws in a Judean context of the seventh century as it is the Babylonian laws in preexilic Judah as a source for the Covenant Code. See especially the review of Otto’s *Das Deuteronomium* by W. Morrow in *Biblica* 82 (2001): 422–26. Consequently, I would date the family and sex laws of Deuteronomy to the early exilic period and the Covenant Code a few decades later.

121. Schwienhorst-Schönberger, *Bundesbuch*, 89–94. He attributes v. 25 to his Dtr redactor (*ibid.*, 116–21), but the language of this text is completely foreign to Deuteronomy.

122. For a discussion of the troublesome terminology in this text, see Houtman, *Bundesbuch*, 157–60.

123. Osumi, “Brandmal für Brandmal,” 3–30.

124. For all the translations, I am using the edition of Roth, *Law Collections from Mesopotamia and Asia Minor*.

125. See the next section.

126. So R. Westbrook, “Lex talionis and Exodus 21,22–25,” *RB* 93 (1986): 52–69. For a critique of Westbrook’s view, see Schwienhorst-Schönberger, *Bundesbuch*, 89–92.

127. See above for a similar use of this phrase in MAL A§50.

128. The three categories in the talionic series of the Holiness Code also correspond to those in LH.

129. Houtman, *Exodus*, 3:166; Houtman, *Bundesbuch*, 165.

130. Contra Otto and others. See also A. Schenker, “Die Analyse der Intentionalität im Bundesbuch,” *JNSL* 24/2 (1998): 6–10. Schenker disputes Otto’s claim since those engaged in a fight do intend to cause harm, and because a pregnant woman is particularly vulnerable, the penalty is the more severe.

131. *Ibid.*, 6.

132. Osumi, “Brandmal für Brandmal,” 28–29.

133. There is one law in Lev 19:20–22 that deals with the sexual violation of a betrothed slave girl. I view this as a late addition of P and will discuss it in another context below.

134. The translation follows that of Roth, *Law Collections from Mesopotamia and Asia*, 128. See also LE §§54–55.

135. On this see chapter 4.

136. The language is Otto’s, “Town and Rural Countryside,” 18.

137. Contra Otto, “Die Geschichte der Talion,” 124–28. I strongly dispute Otto’s attribution of these verses to his late P redactor, but that is an issue that cannot be dealt with here.

138. R. Yaron, *The Laws of Eshnunna* (Jerusalem: Magnes Press, 1969), 193.

139. Finkelstein, *The Ox That Gored*, 19–20.

140. See M. Malul, *The Comparative Method in Ancient Near Eastern and Biblical Legal Studies*, AOAT 227 (Kevelaer: Butzon & Bercker; Neukirchen-Vluyn: Neukirchener Verlag, 1990), 113–52, 159. Houtman also supports Malul against Otto (Houtman, *Exodus* 3:91; Houtman, *Bundesbuch*, 27–28). See also chapter 1.

141. See Malul, *Comparative Method*, 125–52.

142. *Ibid.*, 125–29.

143. Otto (in *Das Deuteronomium*) uses exactly this same principle to account for the differences between Deuteronomy and its Assyrian sources.

144. Pfeiffer, *Introduction*, 216.

145. Otto (*Das Deuteronomium*, 272–74) ignores this difficulty and merely sticks to his principle that Deuteronomy is an extension of the laws in the Covenant Code. I agree with Pfeiffer that this is hardly likely. It would be most curious if Deuteronomy added a whole series of family laws and ended it with a repetition of only half of the law in the Covenant Code. By contrast, the Covenant Code could not make its addition to the Deuteronomic Code without repeating the last law in the Deuteronomic Code as its appropriate context.

146. Again, the position of Otto (*Das Deuteronomium*, 203–17, 272–74) is inconsistent. He attributes the Deuteronomic family and sex laws to direct Assyrian legal influence, but he does not make any connection between the second half of MAL A§55 and Exod 22:16 [17], which is missing in the Deuteronomic laws. He merely regards the Covenant Code law as arising out of local legal practice.

147. See Schwienhorst-Schönberger, *Bundesbuch*, 50, and others cited there.

148. Rofé, “Family and Sex Laws,” esp. 131–35. To this common source, he also attributes Exod 21:22–25, together with its parallel in Deut 25:11–12.

149. *Ibid.*, 134.

150. For a review of past discussion and recent new proposals, see B. J. Schwartz, “A Literary Study of the Slave-Girl Pericope: Leviticus 19:20–22,” in *Studies in Bible*, 1986, ed. S. Japhet, *ScrHier* 31 (Jerusalem: Magnes Press, 1986), 241–55; R. Westbrook, *Studies in Biblical and Cuneiform Law*, *Cahiers de la Revue biblique* 26 (Paris: Gabalda, 1988), 103–9.

151. See Westbrook, *Studies in Biblical and Cuneiform Law*.

152. Schwartz, “Slave-Girl,” 248–51.

153. Actually there is no biblical law in which the betrothed man is paid damages.

Chapter 4

1. See L. Schwienhorst-Schönberger, *Das Bundesbuch* (Ex 20,22–23,33), *BZAW* 188 (Berlin: W. de Gruyter, 1990), 331–59, 378–88, for recent discussion and literature. Schwienhorst-Schönberger views these texts as part of the proto-D redaction with some Dtr additions.

2. Morgenstern’s study of Exod 22:20–26 and 23:1–9 was published as “The Book of the Covenant (Concluded),” *HUCA* 33 (1962): 59–105, but it was part of his earlier series: “The Book of the Covenant,” *HUCA* 5 (1928): 1–151; “The Book of the Covenant, Part II,” *HUCA* 7 (1930): 19–258; “The Book of the Covenant, Part III,” *HUCA* 8–9 (1931–32): 1–150.

3. See B. S. Childs, *The Book of Exodus*, *OTL* (Philadelphia: Westminster, 1974), 456; Schwienhorst-Schoenberger, *Bundesbuch*, 331–59; Otto, “Kultus und Ethos in Jerusalemer Theologie,” *ZAW* 98 (1986): 169–74.

4. Morgenstern, “Book of the Covenant, Part IV,” 63.

5. The secondary character of the motive clauses is disputed in the studies of B. Gemser, “The Importance of the Motive Clause in Old Testament Law,” in *Congress Volume, Copenhagen*, *VTSup* 1 (Leiden: E. J. Brill, 1953), 50–66; R. Sonsino, *Motive Clauses in Hebrew Law*, *SBLDS* 45 (Chico, Calif.: Scholars Press, 1980); H. W. Gilmer, *The If-You Form in Israelite Law*, *SBLDS* 15 (Missoula, Mont.: Scholars Press, 1975).

6. Morgenstern, “The Book of the Covenant, Part IV,” *HUCA* 33: 61.

7. See Childs, *Exodus*, 452–58; Otto, “Kultus und Ethos”; and earlier works cited in these discussions.

8. Gilmer, *The If-You Form in Israelite Law*, 46–56.

9. G. A. Chamberlain, “Exodus 21–23 and Deuteronomy 12–26: A Form-Critical Study” (Ph.D. diss., Boston University, 1977), 101.

10. W. Morrow, “A Generic Discrepancy in the Covenant Code,” in *Theory and Method in Biblical and Cuneiform Law: Revision, Interpolation and Development*, ed. B. M. Levinson, JSOTSup 181 (Sheffield: Sheffield Academic Press, 1994), 136–51.

11. We have already seen this to be the case in the law of the Hebrew slave in Exod 21:2–6, which is basically humanitarian and which is dependent upon Deut 15:12–18. It also begins with a conditional clause in the second person.

12. Gemser, “Importance of the Motive Clause”; Sonsino, *Motive Clauses in Hebrew Law*.

13. For the literature and the textual and philological matters, see C. Houtman, *Bundesbuch: Ein Kommentar*, Documenta et Monumenta Orientalis Antiqui 24 (Leiden: E. J. Brill, 1997), 224–41; also Schwienhorst-Schönberger, *Bundesbuch*, 331–59.

14. See Deut 14:29; 16:11, 14; 24:19–21; 26:11–13; also 5:14.

15. A. D. H. Mayes (*Deuteronomy*, NCBC [Grand Rapids, Mich.: W. B. Eerdmans, 1979], 207–8) considers this text as part of a larger unit in 10:12–11:32 that belongs to the same late stratum in Deuteronomy as 4:1–40, which agrees closely with my understanding of the development of ethical concerns proposed here.

16. The change in form is interesting. In Lev 19:33–34, the “if-you” form is used, but in Exod 22:20 [21], it is the more direct “you shall” form. Yet as Gilmer has shown (*The If-You Form in Israelite Law*, 45–56), there is little difference between these two groups. Thus, in Exod 23:4–5, the “if-you” form is used, but in its parallel in Deut 22:1, 4, the “you shall” form appears, just the reverse of what we have here.

17. Schwienhorst-Schönberger (*Bundesbuch*, 340–41) is aware of these interconnections but merely designates them as redactional additions.

18. The meaning of *חַוֵּץ* is very close to that of its parallel *לְחַוֵּץ* in Exod 22:20 [21].

19. F. Crüsemann, “Das Bundesbuch: Historische Ort und institutioneller Hintergrund,” in *Congress Volume, Jerusalem, 1986*, VTSup 40 (Leiden: E. J. Brill, 1988), 34.

20. T. Krapf, “Traditionsgeschichtliches zum deuteronomischen Fremdling-Waise-Witwe-Gebot,” VT 34 (1984): 87–91; H. J. Zobel, “Das Recht der Witwen und Waisen,” in *Gottes Recht als Lebensraum: Festschrift für H. J. Boecker*, ed. P. Mommer et al. (Neukirchen-Vluyn: Neukirchener Verlag, 1993), 33–38; N. Lohfink, “Poverty in the Laws of the Ancient Near East and the Bible,” TS 52 (1991): 34–50.

21. Lohfink, “Poverty,” 40.

22. For Morgenstern’s detailed discussion on the development of laws against usury, see “Book of the Covenant, Part IV,” 69–81.

23. *Ibid.*, 70–72.

24. Morgenstern (*ibid.*, 71) regards these Ezekiel texts as “the oldest passages” for the use of *נִשְׁךְ*.

25. See the discussion in J. Van Seters, *Life of Moses: The Yahwist as Historian in Exodus-Numbers* (Louisville, Ky.: Westminster/John Knox; Kampen: Kok Pharos, 1994), 346–51.

26. See Morgenstern, “Book of the Covenant, Part IV,” 89–95; E. Otto, “Aspects of Legal Reforms and Reformulations in Ancient Cuneiform and Israelite Law,” in *Theory and Method in Biblical and Cuneiform Law*, 188; E. Otto, *Theologische Ethik des Alten Testaments*, Theologische Wissenschaft (Stuttgart: W. Kohlhammer, 1994), 100–102. Those in 23:4–5 are obviously of a different character.

27. See also LH 1–4.

28. See the situation in 1 Kings 21:8–14.

29. The expedient of Schwienhorst-Schönberger (*Bundesbuch*, 380–81) of eliminating the reference to “malicious witness” from the end of 23:1b as an expansion based on Deuteronomy misses the whole point of what is going on in this law and results in a meaningless generality.

30. The repetition of the phrase “after the many” (*אֲחֵרֵי־רַבִּים*) and the verb “to incline” (*נָטָה*) in two senses are awkward. The final verb (*נָטָה* in the *hiphil*), “to pervert,” lacks an object. The

phrases לרעה, “to evil deeds,” (?) and על־דבר, “against litigation(!),” do not make much sense as vocalized.

31. See Childs, *Exodus*, 450; Houtman, *Bundesbuch*, 258–59.

32. See also LH §3. The phrase לַמַּסָּע אַחֲרַי רַבִּים may also be an addition based on dittography. See the reconstruction of Morgenstern (“Book of the Covenant, Part IV,” 90–92), who suggests the following: וְלֹא תִהְיֶה אַחֲרַי־רַבִּים לְרֵעָה / וְלֹא תִעֲנֶה עַל־דָּבָר לְהַטָּה מִשֹּׁפֵט, “You shall not follow after the masses to work evil; neither shall you testify against a litigant (רַב) in order to pervert justice.”

33. The only law in the Hammurabi Code having to do with the behavior of judges, LH §5, is limited to court procedures and is not parallel to any of these.

34. See also Isa 10:2 and Lam 3:35–36.

35. Childs (*Exodus*, 450) rejects this emendation, as does Houtman (*Bundesbuch*, 261–62, with discussion). The latter regards Lev 19:15 as a later correction of Exod 23:3, but how this is possible escapes me. See also G. Brin, *Studies in Biblical Law: From the Hebrew Bible to the Dead Sea Scrolls*, JSOTSup 176 (Sheffield: Sheffield Academic Press, 1994), 88–89, who merely cites the parallel law in Lev 19:15 as “the more complete law” but does not suggest how they are related.

36. It is likely that the proximity of the term אֲבִיָּן (v. 6), which is regularly paired with דָּל, led to the corruption.

37. Houtman, *Bundesbuch*, 269, 272.

38. See 1 Sam 2:8; Ps 72:13; 82:4; 113:7; Prov 14:31; Isa 14:30; 25:4; Amos 4:1; 8:6.

39. A good recent example is A. Cooper, “The Plain Sense of Exodus 23:5,” *HUCA* 59 (1988): 3. Cooper cites a few older exceptions, such as Kuenen and Baensch, but he fails to mention Morgenstern (“Book of the Covenant, Part IV,” 96–101), who offers reasons for Deuteronomy as the older version. Similar to Cooper’s solution is the view of M. Fishbane, *Biblical Interpretation in Ancient Israel* (Oxford: Clarendon, 1985), 177.

40. There is no reason to see in v. 3 a secondary expansion, as Fishbane does (*Biblical Interpretation*, 178). It simply extends the injunction over other items that would apply to both a known and an unknown owner.

41. See L. Peritt, “‘Ein einzig Volk von Brüdern’: Zur deuteronomischen Herkunft der biblischen Bezeichnung ‘Bruder,’” in *Kirche: Festschrift für Günther Bornkamm zum 75. Geburtstag*, ed. D. Lührmann and G. Strecker (Tübingen: Mohr, 1980): 27–52.

42. See the study of H. B. Huffmon, “Exodus 23:4–5: A Comparative Study,” in *A Light unto My Path: Old Testament Studies in Honor of Jacob M. Myers*, ed. H. N. Bream, R. D. Heim, and C. Moore (Philadelphia: Temple University Press, 1974), 271–78. He does not really address the question of priority but assumes that the Covenant Code law is the earliest.

43. Houtman, *Bundesbuch*, 265.

44. M. Noth, *Exodus: A Commentary* (London: SCM Press, 1962), 189. Von Rad (*Deuteronomy*, OTL [Philadelphia: Westminster, 1966], 140–41) has a similar explanation of the enemy as one who is an opponent in a lawsuit. Deuteronomy is then understood as a more general principle to include all Israelites. But in Deuteronomy, “enemy” is certainly never included within the category of the “brotherhood.” See also E. Otto, *Das Deuteronomium: Politische Theologie und Rechtsreform in Juda und Assyrien*, BZAW 284 (Berlin: W. de Gruyter, 1999), 282–84, who opposes my view (n. 377) with appeal to von Rad and others.

45. E. Otto, “Deuteronomium und Pentateuch: Aspekte der gegenwärtigen Debatte,” *ZABR* 6 (2000): 245–47.

46. See Huffmon, “Exodus 23:4–5: A Comparative Study,” 272–73.

47. So Houtman, *Bundesbuch*, 264. If that were the intention, then it would be better not to get involved at all.

48. The participle אֲנִי is often used as a synonym for אֹיֵב, “enemy,” as it is in Exod 1:10 and Lev 26:17; cf. also Gen 24:60.

49. The Hebrew is certainly awkward, especially the verbal phrase עָבַד הַעֲבוֹדָה. Huffmon (“Exodus 23:4–5: A Comparative Study,” 274) appeals to Ugaritic *‘db* for the meaning “prepare, arrange” and so renders the final clause “You must arrange (it) [i.e. the lifting of the animal] together with him.” See also Childs, *Exodus*, 450; Houtmann, *Bundesbuch*, 264–68.

50. Cooper, “Plain Sense,” 1.

51. The REB captures the sense very well: “Should you see the donkey of someone who hates you lying helpless under its load, however unwilling you may be to help, you must lend a hand with it.” See also NRSV.

52. Otto (in *Theologische Ethik*, 187) wants to argue that since Deuteronomy is dependent upon the Covenant Code, the brotherhood of Deuteronomy must include the enemy of the Covenant Code. Nowhere in Deuteronomy, however, is any such attitude toward the enemy and his goods expressed. On the contrary, in Deut 20, the “enemy” should be destroyed and his goods taken as booty. Only the conviction that the Covenant Code is earlier than Deuteronomy would lead to such a forced proposal.

53. F. Crüsemann, *The Torah: Theology and Social History of Old Testament Law* (Minneapolis: Fortress Press, 1996).

54. See my discussion of Halbe and Osumi in chapter 1, above.

55. So Noth, *Exodus*. For a history of the discussion see Schwienhorst-Schönberger, *Bundesbuch*, 361–66.

56. Schwienhorst-Schönberger, 361–66.

57. E. Otto, *Wandel der Rechtsbegründungen in der Gesellschaftsgeschichte des antiken Israel: Eine Rechtsgeschichte des “Bundesbuches” Ex XX 22–XXIII 13*, StudBib 3 (Leiden: E. J. Brill, 1988), 10; R. H. Pfeiffer, *Introduction to the Old Testament* (New York: Harper & Brothers, 1941), 226; cf. Y. Osumi, *Die Kompositionsgeschichte des Bundesbuches Exodus 20,22b–23,33*, OBO 105 (Freiburg, Switzerland: Universitätsverlag; Göttingen: Vandenhoeck & Ruprecht, 1991), 59.

58. Osumi (*Kompositionsgeschichte*, 59) tries to find the reason for this in the prior reference to Elohim in 22:8 [9], but that is not very convincing.

59. Read with LXX^{BA}. The personal pronoun seems most doubtful here.

60. See Osumi, *Kompositionsgeschichte*, 58–59. The parallels are particularly strong between Exod 22:28–29 [29–30] and 23:10–12.

61. See the comments on this text by Childs, *Exodus*, 450; also Houtman, *Bundesbuch*, 243–44.

62. See the useful discussion by Fishbane, *Biblical Interpretation*, 60–63.

63. This discussion on child sacrifice was previously published as “The Law on Child Sacrifice in Exod 22,28b–29,” *ETL* 74 (1998): 364–72. The literature on this text and on the larger subject of child sacrifice is quite extensive. Most useful for this study are the works of Fishbane, *Biblical Interpretation*, 181–89; Brin, *Studies in Biblical Law*, 166–281; J. D. Levenson, *The Death and Resurrection of the Beloved Son: The Transformation of Child Sacrifice in Judaism and Christianity* (New Haven: Yale University Press, 1993), 3–17.

64. Fishbane, *Biblical Interpretation*, 181–84.

65. See all of the examples of child sacrifice cited by Levenson, *Death and Resurrection*, 12–17. None of them conform to the requirement of this law, but he says nothing about this difficulty.

66. See Brin, *Studies in Biblical Law*, 191.

67. *Ibid.*, 215–17.

68. Levenson, *Death and Resurrection*.

69. See R. de Vaux, *Studies in Old Testament Sacrifice* (Cardiff: University of Wales, 1964), 70–73. De Vaux views the law in Exod 22:28–29 as Elohistic and that in Exod 34:19–20, which prescribes the redemption of the firstborn, as Yahwistic and therefore older. On this basis, the

practices reflected in Jeremiah and Ezekiel are a “scandalous misinterpretation” of the law on the eve of the exile.

70. The literature on this text and on the larger subject of child sacrifice is quite extensive. See J. Day, *Molech, A God of Human Sacrifice in the Old Testament* (Cambridge: Cambridge University Press, 1989); G. C. Heider, *The Cult of Molek: A Reassessment*, JSOTSup 43 (Sheffield: JSOT Press, 1985); G. C. Heider, “Molech,” in *ABD* 4:895–98; G. C. Heider, “Molech,” in *Dictionary of Deities and Demons in the Bible* (Leiden: E. J. Brill, 1995), cols. 1090–97; J. Lust, “The Cult of Molek/Milchom: Some Remarks on G. C. Heider’s Monograph,” *ETL* 64 (1988): 361–66; M. Weinfeld, “The Worship of Molech and the Queen of Heaven,” *UF* 4 (1972): 133–54; G. Brin, *Studies in Biblical Law*. For additional literature and a convenient review of the discussion, see R. Albertz, *A History of Israelite Religion in the Old Testament Period*, OTL (Louisville, Ky.: Westminster/John Knox, 1994), 1:186–87, 190–93; C. Houtman, *Bundesbuch*, 241–53. It is not my purpose to debate the whole issue of child sacrifice or the cult of Molek here. The object of this study is limited to exploring the relationship of the text in Exod 22:28b–29 to the prophetic texts and to certain other texts in the Pentateuch to which it may be related.

71. On these, see especially the remarks by Levenson, *Death and Resurrection*, 3–12.

72. R. P. Carroll (*From Chaos to Covenant: Prophecy in the Book of Jeremiah* [New York: Crossroad, 1981], 303–4 n. 14) follows Weinfeld in the view that the prophets were polemical and misrepresent the actual practice of dedication.

73. The suggestion in some texts (Lev 18:1; 20:2–5; Deut 12:31; 2 Kings 23:10; Jer 32:35; Ezek 23:37–39) that the practice was connected with foreign gods and not Yahweh seems to me a later development of the theme.

74. W. Zimmerli (*Ezekiel 1: A Commentary on the Book of the Prophet Ezekiel, Chapters 1–24*, Hermeneia [Philadelphia: Fortress Press, 1979], 1:411) takes this text as a reference to child sacrifice and understands it as a practice based upon Exod 22:28. See also M. Greenberg, *Ezekiel, 1–20*, AB 22 (Garden City, N.Y.: Doubleday, 1983), 368–70.

75. Levenson, *Death and Resurrection*, 11–12.

76. On the dating of Josh 24:1–13, see H. W. Wolff, *Dodekapropheten 4: Micha*, BKAT 14/12 (Neukirchen-Vluyn: Neukirchener Verlag, 1982), 142–45.

77. Levenson’s dating of this text to the eighth-century prophet, with all the implications that he sees in this, is therefore to be rejected (*Death and Resurrection*, 10–11).

78. Fishbane, *Biblical Interpretation*, 182.

79. This issue is not really discussed by Fishbane (*ibid.*, 182–84). However, in the work of Brin (*Studies in Biblical Law*, 170–71), which he follows, Brin states that the author added 13:1–2 as a “general rule” to the law in 13:11–13, which he already had in front of him. Yet he seems to contradict himself by asserting, against Wellhausen, that this P law in 13:1–2 is the earlier version of the law.

80. See Van Seters, *Life of Moses*, 122–23.

81. I do not consider it legitimate to use P’s terminology “to consecrate” as a way of understanding the meaning of עָבַר (hiphil) as Carroll does (*From Chaos to Covenant*).

82. If animals were a part of the original law, then this looks like a regular priestly regulation and could very well also be part of the original cultic law on first-birth. It would hardly be a matter of protest in Jeremiah or Ezekiel. However, if the child sacrifice is to be connected with the Molek offerings, it seems less likely that the original law also included the sacrifice of firstling animals as well.

83. The relationship between the two has been a matter of debate and speculation for a long time. See J. Wellhausen, *Prolegomena to the History of Ancient Israel* (New York: Meridian, 1957), 88–90.

84. Fishbane (*Biblical Interpretation*, 183) compares the two laws only to emphasize the differences. He sees no relationship between them.

85. The suggestion by Brin (*Studies in Biblical Law*, 191) that the Deuteronomy firstlings law was merely an attempt to centralize the practice as reflected in Exod 22:29 from offerings of newborn animals at a local sanctuary does not seem to me in the least bit plausible.

86. Brin (*Studies in Biblical Law*, 211) and Fishbane (*Biblical Interpretation*, 213–16) regard Neh 10:36–37 as referring to Num 18:15. However, the language there is entirely different. H. G. M. Williamson (*Ezra, Nehemiah*, WBC 16 [Waco, Tex.: Word Books, 1985], 337) points to texts in Exod 13:13; 34:20; and Num 18:15 as “doubtless presupposed,” as well as the similarity with Deut 15:19–23, but says nothing about Exod 22:28–29. He does admit to some Priestly editing of the larger unit, which would suggest that the version in Num 18:15 was later than this text.

87. I believe that the biblical and nonbiblical evidence points to the practice of child sacrifice. But even if the texts reflect some other form of dedication to the deity, as a number of scholars believe, that does not affect the argument presented here for the relationship of these texts to each other.

88. It would appear that the law of Lev 12:1–8 concerning purification after birth and circumcision on the eighth day is also related to the dedication of the firstborn.

89. The shift to the second-person plural is used by many scholars to regard this text as a later addition, and comparison with Deuteronomy and the Holiness Code is merely used to establish this point of view. See especially the survey of research in Schwienhorst-Schönberger, *Bundesbuch*, 368–77. His own position is to consider 22:30 [31] to be the work of a Dtr redactor. Osumi (*Kompositionsgeschichte*, 200–204) regards it as the work of his second-person plural final redactor, but for him it is still pre-Deuteronomistic and the oldest of all the parallel texts.

90. The following analysis is indebted to the study of K. Sparks, “A Comparative Study of the Biblical *nblh* Laws,” *ZAW* 110 (1998): 594–600.

91. See the full discussion by in *ibid.*, 595–96.

92. See M. Noth, *Leviticus*, OTL (Philadelphia: Westminster, 1965), 160.

93. Sparks, “Comparative Study,” 597.

94. Pfeiffer (*Introduction*, 247) regards Exod 22:30 [31] as later than both Lev 17:15 and 22:8.

95. For more discussion of the Priestly revision, see Sparks, “Comparative Study,” 598–99.

96. See recently E. W. Nicholson, *God and His People: Covenant Theology in the Old Testament* (Oxford: Clarendon, 1986), 166–67.

97. A typical recent example of this may be seen in C. J. H. Wright, “Sabbatical Year,” in *ABD* 5:857–61; also Otto, *Das Deuteronomium*, 313–16.

98. Fishbane, *Biblical Interpretation*, 179–81.

99. *Ibid.*, 180.

100. In the larger discussion by Fishbane (*Biblical Interpretation*, 177–87), he understands the phrase “Thus you will do” as the marker of a redactional expansion. However, I have argued above that in the other two instances, Deut 22:3 and Exod 22:29, it does not indicate a redactional expansion, and it is not the case here also.

101. Wright (“Sabbatical Year,” 857–58) wants to have it both ways. He suggests that certain things mentioned in later laws may be assumed by Exod 23:10–11 because they really reflect old customs of early Israel. But then he argues that the close verbal parallels between the Covenant Code and Lev 25:2–7 show “that it is obviously dependent on it.” There is never any question for him that Exod 23:10–11 is the older text.

102. Otto (*Das Deuteronomium*, 313–16) argues that the Deuteronomistic *שְׁמִיטָה* law is tied to the Covenant Code law as an extension and grows out of it. This is hardly likely. Deuteronomy knows nothing of any such provision for the poor. Otto says nothing about the parallel law in Lev 25:2–7.

103. G. Robinson (*The Origin and Development of the Old Testament Sabbath*, BBET 21 [Frankfurt am Main: P. Lang, 1988], 109–25; G. Robinson, “Das Jubel-Jahr: Die Lösung einer

sozial-ökonomischen Krise des Volkes Gottes,” in *Ernten, was man sät: Festschrift für Klaus Koch zu seiner 65. Geburtstag*, ed. D. R. Daniels, U. Glessmer, and M. Rösel [Neukirchen-Vluyn: Neukirchener Verlag, 1991], 183–85) clearly sees the relationship between the שְׁמִטָּה and the seventh-year release of the land, but he is so committed to the early dating of Exod 23:10–11 that he fails to see the implications of this connection. He merely identifies the motivation clause in v. 11b as Deuteronomistic.

104. The idea that the שְׁמִטָּה of Deuteronomy grew out of the fallow year as an extension of this “release” (so Otto, *Das Deuteronomium*, 313–16) has nothing to commend it. The שְׁמִטָּה is a Near Eastern institution that deals with the consequences of high interest on debt and relief from this and has nothing to do with fallow land. Deuteronomy’s tithe deals with those in poverty. The Covenant Code does not even allow the charging of interest on debt, as we have seen.

105. On the place of the tithe in the Deuteronomic Code, see Crüsemann, *Torah*, 215–34.

106. See Williamson, *Ezra, Nehemiah*, 334–35.

107. The jubilee year of Lev 25:8–17 is a still later development. It takes up the idea of the sabbatical year in the Priestly tradition of the Holiness Code but is now associated with the year following a Sabbath of Sabbath years, the fiftieth year. It combines with this the themes of the seventh-year release of debts, the seventh-year release of Hebrew slaves, and the seventh-year release of the land. It is a quite late artificial construction by the P writer that has no bearing on our problem.

108. See Robinson, *Origin and Development of the Sabbath*; and the literature cited by Houtman, *Bundesbuch*, 275, and his review of the discussion in 284–90. See also G. F. Hasel, “Sabbath,” in *ABD* 5:849–56. While this last article is useful as a review of the historical discussion, it has very little comment on Exod 23:12.

109. See Houtman, *Bundesbuch*, 286–89. The notion proposed by some scholars (Schwienhorst-Schönberger, *Bundesbuch*, 389) that in the preexilic period there was a seven-day week independent of the Sabbath has only Exod 23:12 and 34:21 as evidence, which is entirely circular. The only reason for such an unlikely proposal is that it avoids the contrary evidence from the prophetic literature.

110. See Houtman, *Bundesbuch*, 284–86, for a review of this position; also T. Veijola, “Die Propheten und das Alter des Sabbatgebots,” in *Prophet und Prophetenbuch: Festschrift für Otto Kaiser zum 65. Geburtstag*, ed. V. Fritz, K.-F. Pohlmann, and H.-C. Schmitt, *BZAW* 185 (Berlin: W. de Gruyter, 1989), 246–64. Even if one argues that it was a weekly day of rest at this time, that does not affect the argument here.

111. Robinson, *Origin and Development of the Sabbath*, 167. For the full discussion, see *ibid.*, 126–67. He is followed by Schwienhorst-Schönberger, *Bundesbuch*, 389; and Albertz, *History of Israelite Religion*, 2:408–10.

112. This issue will be taken up below.

113. See the discussion of this unit and the arguments for this source division in Van Seters, *Life of Moses*, 181–91.

114. There may be a similar effort at etymological wordplay in J’s manna story in that the manna “ceased” on the seventh day.

115. See Schwienhorst-Schönberger, *Bundesbuch*, 389–93; Robinson, “Jobel-Jahr,” 483–85. There is an obsession among many scholars dealing with these texts to rid them all of motivation clauses and make them into primitive prohibitions. This is idle speculation which has nothing to commend it and completely prejudices the historical discussion. To have some unknown authority issuing prohibitions, for no apparent reason, against working the land on the seventh year or doing work on the seventh day carries the principle of reconstructing primitive simple forms to absurdity.

116. See Pfeiffer, *Introduction*, 221–23; H. J. Boecker, *Law and the Administration of Justice in the Old Testament and Ancient Near East* (Minneapolis: Augsburg, 1980), 136–38; D. Patrick, *Old Testament Law* (Atlanta: John Knox, 1985), 94.

117. See L. Peritt, *Bundestheologie im Alten Testament*, WMANT 36 (Neukirchen-Vluyn: Neukirchener Verlag, 1969), 219–28; Noth, *Exodus*, 173–74, 261–65. See already Pfeiffer (*Introduction*, 221), who regarded Exod 34:10–26 as a late Deuteronomistic edition of the laws.

118. See Van Seters, *Life of Moses*, 119–20. Cf. M. Rose, *5. Mose*, Zürcher Bibelkommentare (Zurich: Theologischer Verlag, 1994), 1:41–51. He reconstructs the development of the Passover-Unleavened Bread feast entirely on the basis of Exod 23:14–15 as the earlier text.

119. B. M. Levinson, *Deuteronomy and the Hermeneutics of Legal Innovation* (Oxford: Oxford University Press, 1997), 53–97. The quotation is the title of chapter 3.

120. *Ibid.*, 54.

121. *Ibid.*, 57.

122. Levinson (*ibid.*, 65–69) does not see any problem, as other scholars do, with the Dtr nature of these texts or parts of them.

123. *Ibid.*, 68.

124. *Ibid.*, 69–70.

125. *Ibid.*, 69.

126. This final version in Deuteronomy, however, remains problematic, and we will return to this below.

127. T. Veijola, “The History of the Passover in the Light of Deuteronomy 16,1–8,” *ZABR* 2 (1996): 53–75.

128. *Ibid.*, 54.

129. *Ibid.*, 58.

130. Exod 34:18–25 is referred to in only one footnote (*ibid.*, 58 n. 23), in which Veijola states: “The parallel regulations to Ex 23,14–19 occurring in Ex 34,18–25 are presupposed nowhere in Deut 16,1–17. This is a clear sign of the relatively late origin of Ex 34,18–25.” But the same holds for Exod 23:14–19, so why should it not also be considered to be equally late?

131. *Ibid.*, 67.

132. Houtman, *Bundesbuch*, 317.

133. זָכַר is a collective noun and can be used with either singular or plural verb form.

134. See also the similar misplacement of this phrase in Exod 34:20.

135. A similar displacement occurs in Exod 34:20bβ. Since vv. 19–20bα also include the law of the first-birth, in keeping with their agreement with Exod 13:3–16, and since there is no introduction to the three feasts as in Exod 23:14, the displacement of the remark is even more obvious.

136. Here the niphal of אָרַח is followed by the preposition אֶל + פָּנִים, which is clearly the latest form of the expression. But whether this reflects the original form of the law or a later scribal modification is difficult to say.

137. See Veijola, “History,” 65. He suggests that Exod 23:18 has to do with “fixed sacrifices in general, whereas the cultic-ritual editor of Deut 16:1–8 made them distinctive features of the nocturnal Passover sacrifice.” This is contradicted by the parallel in Exod 34:25, which is dismissed by Veijola as late, but how late? Furthermore, why should “my feast” in Exod 23:18 refer to more than one festival? At what other festival in the calendar are such sacrifices to be made? The association of animal sacrifices with other feasts is a late P innovation.

138. J. Van Seters, “The Place of the Yahwist in the History of Passover and Massot,” *ZAW* 95 (1983): 167–82.

139. J. Morgenstern (“The Oldest Document of the Hexateuch,” *HUCA* 4 [1927]: 60) is an exception. He regards the texts in both Exod 23:19a and 34:26a as Deuteronomistic insertions.

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