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AMAH AND EVED AND THE ORIGIN OF
LEGAL RIGHTS

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AMAH AND EVED AND THE ORIGIN OF LEGAL RIGHTS

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“At this moment I pass a law, unalterable as that of the Medes and Persians, . . .’

‘They cannot be, sir, if they require a new statute to legalize them.’

‘They are, Miss Eyre, though they absolutely require a new statute: unheard-of combinations of circumstances demand unheard-of rules.’”¹

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1. CHARLOTTE BRONTE, JANE EYRE 157 (Penguin 1996).

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I. INTRODUCTION: SOCIAL DEMOTION, REDEMPTION, EXTRATERITORIALITY

It is a thesis of this article that, at least on occasion, the law arose, not out of lengthy progress or historical development, but rather from relatively brief, abrupt, discontinuous episodes. Not based upon plans, ideas or logic.²

It is not because people make momentous decisions that they are conscious of their importance and scope; many important steps are taken on the spur of the moment when 'provisional' measures have to be taken to fit new circumstances.³

Thus, great laws emerged "along some surprising roads and paths, which are as baffling to the logician as they are delightful to the historian."⁴

The magnificent edifice of the law began as a little mustard seed. A relatively small cause, a response to the exigencies of the moment, produced an enormous effect. A mere accident, such as for example, might arise by the mingling of diverse peoples and cultures might produce previously unknown fundamental and enduring principles. On occasion the law was so confusing to those that lived under it that a new hybrid law emerged, often based upon the misinterpretation of a statement that had itself been misunderstood before it found its way into the law books. "By the time a new trend or practice hardens into a new system or institution

2. Conversely as well, laws based upon ideas and theories, especially as embodied in ideologies denoted by the suffix "ism," though perhaps quite logical and rationally explainable, tend to be disastrous in practice. Indeed, I have a saying: "Isms isn'ts." Ideas, though they may seem ever so clever, experience shows, produce a dictatorship that leads to perdition. The classic example of a bizarre cultural idea that is logical, but extraordinarily counter-intuitive, was the practice of Carthaginians to sacrifice their first born. It demonstrated their strength of character and dedication. But while rational and logical, the practice was not sensible. Unfortunately, modern history has had more than its share of laws based upon ideas. The seemingly inferior, not entirely logical, feelings that translated into stories and concepts produce confusion and thought are the origin of great, enduring and beneficial legal systems, not clever ideas. It is important, as well, to understand the origin of rights in order to deal with the seemingly intractable problems of peoples, who perceive themselves as holders of rights, which result in their being in conflict with their neighbors. Examples are Northern Ireland, former Yugoslavia, Nigeria and Rwanda. Notions of rights based upon events may not always produce beneficial results, as with the case when people see their rights as being opposed to some other group.

3. R. C. VAN CAENEGEM, *THE BIRTH OF THE ENGLISH COMMON LAW* 33 (1997).

4. *Id.* at 28.

and is seen as such, people can seldom remember how it all started."⁵

I shall investigate three cases of the origin of the notion of rights: in the laws of Moses, in the nascent Common Law of Norman England, and in the struggle for civil rights in the courts of the United States. What makes the exercise so interesting (nay delightful) to the historian is that the origin of the law is based in significant part, if not entirely, upon fiction. Because historical events happen abruptly, there was discontinuity, and the lack of factual development necessitated supplying fictitious factual rationales. Thus, the events recounted may not have happened, or, if they happened, differed significantly from recorded versions. If not that the events were fictitious, then that the gloss put on them was. But, the fictitious nature of those events does not detract from the massive intellectual effort of the ensuing legal systems. Indeed, the enormity of the intellectual development may be due to the difficulty necessarily attendant upon understanding principles based upon fiction. If the underlying rationale were factual, its analysis would be more straightforward, and would not require such extraordinary development.

In investigating we shall not ask why. We shall ask how, using a physical, geometric approach, not an algebraic one.⁶ So, even if we were never to open any of the books, we might be struck by the sheer visual enormity of English Common Law and the Jewish Law—the sheer number of books needed to contain it all and the sheer number of rooms necessary to contain the books. Far too many books, incidentally, to explain the law by positivism. We shall not ask the question, "Why did they bother to create this great edifice of law?" Rather we shall examine how it happened that people devoted so much time, effort and energy to produce that enormous physical volume of law. Thus, even if we were to relegate the stories of how the law came about to the level of mere myths, without any historical basis, made up after the fact to legitimize, justify or deal with current events, nevertheless, the choice of subject matter is remarkably interesting and provides clues to its meaning.

A process of morphing or transmogrifying preexisting feelings into conceptual rights can be better felt than explained. And hence also, the involvement of an externality, or in legal terms extraterritorial rights. The externality or extraterritoriality makes the rights explainable. Since they are based on fiction, rights have a *deus ex machina* quality to them.

As we shall see, there were similar themes in the history of the laws of Moses, the Common Law and American civil rights law: (1) the loss or

5. *Id.* at 33; Andrew Simmonds, *A History of the Blindfold of Justice*, N.Y.L.J., April 26, 1977, at 2, cl. 3; Andrew Simmonds, *The Blindfold of Justice*, A.B.A.J., Sept. 1977, at 1164. (The blindfold of justice began as a form of medieval graffiti protesting judicial incompetence over the reception of Roman law in the Holy Roman Empire. Ironically, the invention of the printing press caused the confusion. Woodcuts of judges with blindfolds over their eyes were mistaken for symbols of impartiality. Rather, the proper and traditional pose of Justice is with fierce visage to strike fear in the mendacious).

6. This concept comes from Benoit Mandelbrot.

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threatened loss of social status⁷ and (2) the right to be reclaimed or redeemed (3) based upon transcendent extraterritorial laws.

II. THE LAWS OF MOSES

A. AMAH AND EVED, THE RIGHTS OF WOMEN IN MARRIAGE

1. *Slavery, Freedom and Marriage*

Amah and Eved are the Adam and Eve⁸ of human rights. They are found in a very prominent place in the Bible: the first law in the Book of the Covenant⁹ (the series of ancient Biblical laws located after the Ten Commandments), many of which date back in their original conception four thousand years¹⁰ to the time of the ancient Mesopotamian cuneiform law codes of which the Laws of Hammurabi are the most famous.¹¹

I am not embarrassed to relate that Amah is a female slave and Eved is a male slave.¹² However, a long-standing puzzle regarding the rule of the Amah and Eved has been why such a prominent place in the Bible has been given to a rule on the topic of slavery.¹³ But then, slavery is also given

7. The greatest example of a reaction to social demotion was in the case of the child, Temujen, who grew up to become Genghis Khan. The son of a slain noble, his orphaned, widowed family was sent by the father's killers into the Siberian winter wilderness to die. They survived winter after winter upon little more than the discipline imposed by the mother and her unceasing admonitions to redeem the impoverished family to the prior noble status it held before the father was traitorously slain. ADAM T. KESSLER, *EMPIRES BEYOND THE GREAT WALL* 147-48 (Nat. Hist. Mus. L. A. Co. 1994) (Urgunde, 1990).

8. Separating the Ten Commandments and the Book of the Covenant is a small buffer consisting of a few rules relating to alters. This may refer back to Adam and Eve theme of using an alter to avoid being in the sight of God. CALUM CARMICHAEL, *THE ORIGINS OF THE BIBLE* 74 et seq. (1992). This theme is repeated by Moses acting as a go between with God for the people.

9. The Book of the Covenant is thought to be very ancient and added to the Bible in a cut and paste fashion in its current place right after the Ten Commandments. Carmichael, *supra* note 8; DAVID DAUBE, *THE EXODUS PATTERN IN THE BIBLE* 18 (1963). Presumably, the Book of the Covenant is placed right after the Ten Commandments to emphasize the importance and ancientness of both.

10. By way of reference these laws were at least as old in the time of Jesus as Jesus is to our time.

11. The Book of the Covenant is found in Exodus 20:22 to 23:33. See *ENCYCLOPEDIA JUDAICA*, *Book of the Covenant* 1214-16. (In both form and content many of these laws are indebted directly or indirectly to laws found in earlier cuneiform collections, i.e., Urukagina (ca. 2350) Ur-Nammu (ca. 2100) and Lipit-Ishtar (ca. 1930) written in Sumerian; Eshnunna (ca. 1900) and Hammurapi (ca. 1775) written in Akkadian; Middle Assyrian Laws and Hitite Law); The supposed time of Moses and the Book of the Covenant was roughly the thirteenth century. There are many parallels between the laws and customs of the patriarchs and the Book of the Covenant and the laws of the Nuzi located in northern Iraq, which was destroyed by the Assyrians in the fourteenth century. See *ENCYCLOPEDIA JUDAICA*, *Nuzi* 1287 et seq.; *ANCHOR BIBLE DICTIONARY*, *Nuzi* vol. IV, at 1156 et. seq.

12. Amah and Eved are the Hebrew terms used in Exodus for the female and male slaves respectively. See Bernard S. Jackson, *Modeling Biblical Law: The Covenant Code*, 70 *CHI. KENT L. REV.* 1745, 1770, 1778, 1782, 1787, 1790, 1801 (1995).

13. CALUM CARMICHAEL, *THE ORIGINS OF BIBLICAL LAW* 77. This puzzle is doubly interesting because Leviticus 25:39 tells you not to make your countryman your slave. Even though we are told not to have slaves, the rules regarding slaves are elaborate and have implications way beyond slavery. See *ENCYCLOPEDIA JUDAICA*, *Slavery*. Among other things, a

great prominence in the defining story of the people, the story of Exodus.¹⁴

In ancient Mesopotamia land was subdivided upon a person's death among his (or occasionally her) heirs. That may have been a contributing cause of the general pauperization within the private economy that appears to have taken place in the second millennium.¹⁵ Increasingly smaller plots and dependence upon fickle weather conditions drove descendants of formerly relatively prosperous ancestors deep into debt. Government attempts at general debt remission or land reform to reverse the trend met with no apparent success.¹⁶ In the second millennium, debt slavery was a major problem.¹⁷

The rule of the Amah and the Eved is (and so indeed is the story of Exodus) about family relationships, like husband and wife or parent and child.¹⁸ The term "slave" denoted not only actual slaves, but also persons in subordinate positions, such as, vassals of the king, or wives and children in relation to the husband/father in the paterfamilial society of the time.¹⁹

Daube has suggested that the "affliction" in Egypt was the denial to the people of conjugal rights in order to lessen their numbers.²⁰ Pharaoh feared the increasing numbers of the Israelites and sought to decrease their population. In the end he worked them until they did not have a moment of time to reproduce.²¹ The slave owner had the right (under most laws) to control the ability of slaves to marry and reproduce.²² Ordinarily, the

large part of Judeo-Christian theology is based upon redemption from slavery. CATHOLIC ENCYCLOPEDIA, *Redeem*.

14. The importance of this slave/sex theme is demonstrated by its prominent appearance in the Iliad. In the beginning of the Iliad, the priest of Apollo seeks to redeem his daughter, Chryseis, reduced by the misfortunes of war to Agamemnon's sex slave. When Agamemnon refused the priest's request, divine plagues rained upon the Greeks forced Agamemnon to relent. The Iliad ends with Achilles relenting on his oath to his dead friend, Patroklos, to permit Priam, king of Troy, to redeem the body of his son, Hector, slain by Achilles in redemption of his friend's death by Hector. Achilles had sworn on the body of his beloved friend Patroklos that he would never allow Hector's body to be redeemed. Patroklos was a favorite of Achilles' sex slave, the fair-cheeked Breseis, taken from Achilles by Agamemnon, because Patroklos promised her that he would persuade his friend Achilles to make Breseis his wife. This theme of redeeming the killing of a loved one by killing his or her killer is repeated in Virgil's Aeneid.

15. MAYNARD PAUL MAIDMAN, NUZI: PORTRAIT OF AN ANCIENT MESOPOTAMIAN PROVINCIAL TOWN 946 in JACK M. SASSON, ED. CIVILIZATIONS OF THE ANCIENT NEAR EAST, VOL. II (1995); Wilhelm, *infra* note 162, at 47.

16. *Id.*

17. Jackson, *supra* note 12, at 1782; ANCHOR-BIBLE DICTIONARY, VOL. 6 58-60 (1992). In Nuzi, debt slavery was widespread, self-sale in order to obtain food and clothing was very widespread. *Id.* However, in the first millennium, debt and familial slavery were insignificant and rare. *Id.*

18. This theme is extensively examined by DAVID DAUBE, THE EXODUS PATTERN, *supra* note 9.

19. Muhammed A. Dandamayev, *Slavery*, ANCHOR BIBLE DICTIONARY 62.

20. DAVID DAUBE, THE EXODUS PATTERN, *supra* note 9, at 26. (The term "afflict" occurs in such instances as "taskmasters afflict," "thou shalt not afflict widows and orphans," "thou shalt not afflict my daughters taking wives besides my daughters." Sarah afflicted Hagar, Sarah's maid and her husband, Abraham's, mistress).

21. KIDDUSHIN, THE TALMUD, TRACTATE KIDDUSHIN, ARTSCROLL series (R. Hersh Goldwurm ed., 1999) (hereinafter KIDDUSHIN). (A master can force the male slave to have a Canaanite slave wife in order to create slave children for the master. This was called working for the master double, both night and day).

22. See, e.g. SARAH B. POMEROY, GODDESSES, WHORES, WIVES AND SLAVES 27 (1979)

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master of the female slave, the Amah, would have relations with her himself, or give her to his son, or give her as a wife to his Eved, the male slave. Pharaoh in Exodus violated that norm.²³

The fact that in Exodus the Egyptians showered the departing Israelites, particularly the women, with presents of gold and silver jewelry and garments depicts the Exodus as a bride's triumphal dowry.²⁴ Indeed, Moses insisted upon the gifts before he would lead the people out of Egypt. This so-called despoiling of Egypt by the departing Israelites (Exodus 3:22; 12:35) represents a dowry as would be given in marriage.²⁵ The departing Israelites went as a bride more than as an expulsion.²⁶ Indeed, in ancient times international agreements often involved marriages.²⁷

Under the basic²⁸ form of the rule of the Amah and Eved, after laboring a certain number of years—three in Hammurabi,²⁹ six in the Bible³⁰—slaves³¹ went free.³² The periodicity of the rule was in marked contrast to conditions in the past. From time immemorial ameliorative laws had been used by rulers as expedients in times of danger, most commonly upon their accession to the throne, in order to curry favor with

("A slave of either sex was actually the property of the master and was not permitted sexual relationships without the master's consent"). In Exodus Pharaoh and Moses engage in a lengthy negotiation over the "taph" that must stay behind (children and woman), but Moses insists that women and children, and cattle and flocks all go as well. DAUBE, EXODUS PATTERN, *supra* note 9, at 47 et seq.

23. DAUBE, EXODUS PATTERNS, *supra* note 9. (The story of Exodus is after the fashion of the girl prevented by her father to join her bride groom).

24. DAUBE, THE EXODUS PATTERN *supra* note 9, at 55 et seq. (In an elaborate ceremony the men gave presents to the men and the women gave presents to the women, who put them on the heads of their children signifying that they had the rights of an honorable marriage).

25. KIDDUSHIN, *supra* note 21, at 1663 et seq. (regarding severance gifts for slaves).

26. RAYMOND WESTBROOK, PROPERTY AND THE FAMILY IN BIBLICAL LAW 152 (1991).

27. See RAYMOND COHEN AND RAYMOND WESTBROOK, AMARNA DIPLOMACY (1999).

28. The Bible, as is also the case in Greek culture, involves basic themes that are worked on and refined into more elaborate subplots. So, for example, the Iliad is a subplot on earlier Greek myths and stories. Later, parts of the Iliad (the fall of Troy, for example) were used as plots for plays by Aeschylus and Euripides. The fall of Troy was later further elaborated upon in the Aeneid, and still later in sixteenth century a France Racine reinterpreted the story of Andromache (Hector's wife) told by Euripides. This sequence of interpretation from the basic to the derivative is a fingerprint for dating events in the Bible. In a number of cases the Bible, rather than coming up with a new rule, makes an amendment to the old rule of the cuneiform codes. Since the rule of the Amah and Eved is a more elaborate amendment of the rule in Hammurabi, we can date it as being a later development. Furthermore, since debt slavery was abolished by Pharaoh Bocchoris in Egypt in the seventh century, by Solon in Athens in 594 and by the Lex Poetelia Papiria in Rome in 326, we can date the rule of the Amah and Eved as being of an earlier time when debt slavery was widespread and legal.

29. See MARTHA ROTH, LAW COLLECTIONS FROM MESOPOTAMIA AND ASIA MINOR 117 (1997).

30. See EXODUS 21:2.

31. Putting aside differences of nationality or the type of slave (e.g. war booty, debt service, famine).

32. The facts that Hammurabi preceded Moses by six hundred years, and that the Biblical rule is a more intricate model of the basic rule (that that all slaves went free) would indicate that the Biblical rule of freedom in the Sabbath year (as well as in the year of jubilee, the fiftieth year, computed as the year after seven times seven years) is very ancient and may be much older than the Sabbath day. If so, the Sabbath year may have influenced the development of the Sabbath day.

the people and, thereby, solidify their positions of power.³³ These sorts of laws or charters are called "clean slate" laws or "social overrides" whereby in theory the people are restored to a halcyon status quo ante.³⁴ They may get back their land, their family, their freedom. Among the most famous of these laws was the charter of Solon compromising the debts of the poor Athenians recounted in Plutarch.

But what the monarch gives, he can also withhold, and many times clean slate laws were merely wished for, or, even if promulgated, were quickly disregarded.³⁵ Hence, such rights were illusory. Rulers tended to grant and to take away rights when it was expedient for them to do so.³⁶ The law of Hammurabi limiting the duration of slavery was an extraordinary advance over clean slate laws. It was a periodic law, not dependent upon the ruler. Indeed, it was a forerunner of the rule that the master must give the Sabbath day of rest to his slaves.³⁷

Like the contract of debt, this law of liberation from slavery after a fixed period was based upon negotiations (real or presumed) between the slave or the slave's relative and the master prior to the relationship of slave/master arising. This arose most typically in the case of debt slavery where a man sold himself and his wife or one or more of their children into slavery to pay debts, or in the case of famine slavery where a person entered into slavery in exchange for food and support in order to avoid starvation in a time of famine.³⁸ The unfortunate slave was in a very weak bargaining position, and so, based upon an appeal to the crown, the law provided for periodic liberation from slavery, at least for members of the same national group, who due to debt or famine had descended into slavery.³⁹

33. See e.g., ANCHOR BIBLE DICTIONARY MESOPOTAMIA, HISTORY OF (BABYLONIA), Vol. IV, at 770 asserting that:

[i]t is known that in late Sumerian times, and the early Old Babylonian period, kings, when they first came to the throne, frequently issued numerous decrees to correct abuses which had been developing during previous reigns. . . for example too many people had been falling into debt slavery.

Id. These led to more permanent rules. The same scenario occurred in Norman England when coronation oaths correcting prior abuses became the precedent for the Magna Carta.

34. See Westbrook, *supra* note 26, at 48; The laws of Lipit-Ishtar, circa 1930, for example, stress his role as a restorer of justice and social order. Roth, *supra* note 29, at 23.

35. Westbrook, *supra* note 26, at 9, 48. Such laws based on royal prerogative were untrustworthy, unpredictable, irregular, dependent upon the will of the king and limited to present circumstances, not the future. *Id.*

36. *Id.*

37. The rule of the liberation of slaves after serving for a set period existed many hundreds of years before the time of Moses. On the other hand there is little to indicate that the Sabbath day was observed among the Jews, or any other people, before the time of Moses. The Greeks, Romans and Egyptians forbade work on public holidays, but they did not have regular, repeating periodic holidays based upon a set number of days.

38. See Jackson, *supra* note 12, at 1782.

39. Just as the rule of the Amah and Eved represents an amendment and improvement upon the rule in Hammurabi, which in turn improved prior harsher conditions, after the rule of the Amah and Eved further changes improved the lot of the debt slave. Egyptian pharaoh Bocchoris (722-715) abolished debt slavery in Egypt. In 594 Solon forbade enslavement for debt in Athens, and in 326 the Lex Poetelia Papiria did the same for Rome. The Talmud makes a distinction between slaves who sold themselves and those that were sold by a court. By Talmudic

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With respect to other types of slaves, such as purchased foreign slaves, they might remain in slavery forever.⁴⁰ Many slaves were women and children taken as war booty. Until the Romans changed the practice, it was the custom in Greece and the ancient Near East to kill all the men among a vanquished foe and enslave the women and children. The women were doled out as wives and concubines of the victors.⁴¹

The law, at least Jewish law, forbade immorality, but an exception was made for the conquering warrior.⁴² The law bowed to practicality and applauded the excesses of the hero as the lesser of two evils. And because the moral code of the times chose the lesser of two evils, the union was encouraged to be made or presumed legal, rather than meretricious.⁴³

But this state of affairs produced a socially destabilizing phenomenon. Husbands, who were successful warriors,⁴⁴ could satisfy their sexual desires

times Hebrew slavery was a dead letter, a *rara avis*, occurring in two instances: a thief, unable to pay his debts, and sold by a court was required to work day and night. He could be required to produce children for the master. Second, destitute persons could sell themselves, but they did not have to work nights to product children for the master. Debt slavery no longer existed. KIDDUSHIN, *supra* note 21, *Introduction* at xxxvi, 5a. Even though in debt slavery died out, the laws developed out of debt slavery enshrined in the Laws of Moses were carried forward as the rights of women in marriage and then more generally.

40. LEVITICUS 25:44-45; see David M. Cobin, *A Brief Look at the Jewish Law of Manumission*, 70 CHI. KENT L. REV. 1229, 1341 (1995).

41. One of the very oldest laws was: to the victor go the spoils or treasure. Thus, little David received Goliath's armor even though it was of little practical use to him. For the most part the useful spoils were women, children and animals. The rule of to the victor go the spoils was so strong that the only way of preventing it was that, as an alternative, the conquered were slaughtered and their property destroyed. That is, they and their property were God's share of the spoils inviolate from the human victors. It was not until the Romans that the practice developed that soldiers would receive no part of the spoils and the conquered would become a tax paying province of Rome. The importance of sharing of the spoils among the victorious army is illustrated in the rules laid down by David in Numbers 31:27-47 and Samuel 30:24. The enemy army had made off with David and his men's wives and children. David and his army rushed after them. Exhausted, half the men had to stop for rest. The remainder continued and finding the enemy surprised, they attacked and vanquished them. David ruled that the booty of the battle, did not become the property alone of those who had fought, but would be shared among the army including those who, exhausted, had stayed behind with the baggage. In this way each man received back his wife and children rather than having to redeem them from those who had fought in the battle. So strong was the rule of to the victor go the spoils that David's ruling was in the context of the appropriate division of the spoils among the army, not based upon the prior familial relationship of the soldiers and their wives and children. Implicit or explicit *ex ante* agreements as to the division of spoils and their inviolability were bedrock ancient rules of conduct. That is why the Iliad begins with Agamemnon initial refusal to honor a father's ransom of his enslaved child, and when force by plagues to give the girl up, Agamemnon's takes in her place Achilles' slave girl, Breseis, a horrible illegal act: an *ex post*, unilateral, unconsented to modification of the venerable customs and contract of battle, the division of spoils. It was also a terrible breach of the laws of marriage governing the relationship between Achilles and his beautiful girl slave, Breseis. When finally Agamemnon had to return Breseis Achilles, he swore profusely and formally that he had had no carnal relations with her.

42. DEUTERONOMY 21:10-14; DAVID DAUBE, *CONCESSIONS TO SINFULNESS IN JEWISH LAW*, COLLECTED WORKS OF DAVID DAUBE, VOL. 1, TALMUDIC LAW 1 et seq. (1992).

43. DAVID DAUBE, *CONCESSIONS TO SINFULNESS* *supra* note 42, TALMUDIC LAW 7 (Calum M. Carmichael, ed., 1992); See KIDDUSHIN at 21b¹-22a¹ (The law of the Beautiful Captive is a novelty. Even a married woman may be taken. But two-fers are not allowed, limit one each). And no substitutions (the Iliad). The foreign female captive was required to convert. See Pearl Elman, *Deuteronomy 21:10-14: The Beautiful Captive Woman*, available at <www.utoronto.ca/wjudaism/pevious/vol1n1/v1n1elma.htm>.

44. Although the practice may have had its origins and justification in female slaves being the booty of war, no doubt men rich enough could buy slaves for their enjoyment.

upon young slaves. Slaves were often used, and it was no secret, for sex. It was simply assumed that the female slave, the Amah, was the master's concubine and wife.⁴⁵ If she was not his wife, then it was assumed he had given her to his son or his Eved. This practice of sex from slaves helped bring down Greek civilization. In the fifth century Greek men became drunk with their improbable success against the much larger Persian foe. But there was no role for the women to play in the Greek victory and ensuing glorious renaissance. In the Greek golden age,

the personal liberty and social and political responsibility of every male citizen had increased immeasurably; and in this exhilarating expansion women had very little share. Yet the personal qualities, which in men produced the greatness of Athens, must have been present in women, and, denied proper expression, can only have engendered the poison of resentment and perverted ambition.⁴⁶

Greek plays such as *Medea*, *Agamemnon*, *Andromache*, and *Women of Trachis* document this well. Greek women were humiliated by husbands that preferred concubines, the booty of battle. According to the Greek dramatists, after the Trojan war, returning Greek husbands, accompanied by Trojan mistresses and wives, humiliated their Greek wives.

The slave women fared worse. Euripides and Aeschylus wax eloquent on the severest degradation and suffering under reversal of fortune of the royal family of Troy, particularly, Hecuba, king Priam's wife, Andromache, Hecuba's son, Hector's, wife and Cassandra, her daughter. The theme of social demotion is no less found in the Greek literature than in the Bible. Unfortunately, the Greeks did not produce a solution to the problem of spousal social demotion like the rule of the Amah in the Bible.⁴⁷ And because the Greeks lacked a rule like the rule of the Amah that protected wives,⁴⁸ as Greek plays attest, Greek heroines suffered tragically.

2. The Status of Women

On the other hand, based upon their art, the ancient Egyptians admired women more than the Greeks. Indeed, Egypt produced the ideal

45. UMBERTO CASSUTO, A COMMENTARY ON THE BOOK OF EXODUS 268.

46. AESCHYLUS, THE ORESTEIAN TRILOGY, *Introduction*, 21 (Philip Vellacott trans). (Penguin 1982); SARAH B. POMEROY, GODDESSES, WHORES, WIVES AND SLAVES 78 (1979) The condition of women between Archaic and Classical Athens deteriorated. Women fared better under aristocracy than (male) democracy. Moreover, the position of women among the noble Romans was considerably higher than among the Greeks.

47. The rule of the Amah evolved in polygamous societies which sought to protect the position of women. Greece, a monogamous society, did not develop a law of the Amah. Women and girls were used for companionship and child bearing without becoming wives and the one wife was no better for it. YEDIDA K. STILLMAN, ATTITUDES TOWARDS WOMEN IN TRADITIONAL NEAR EASTERN SOCIETIES, STUDIES IN JUDAISM AND ISLAM 356 (Ben-Ami, et al, eds., 1981) (claiming that much of the misogyny of medieval Islamic and Jewish thinkers was taken directly from the spread of Greek culture into the region).

48. GUY CARLETON LEE, HISTORICAL JURISPRUDENCE 182-83 (The wife's position in the Greek household was one of great subordination. She lived in relative seclusion. The Athenian wife was not allowed to own any property. The Spartan woman enjoyed much greater freedom than did her sisters in other parts of Greece on account of her standing as the mother of Spartan youths).

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of womanly beauty that has persisted ever since.⁴⁹ Similarly, ancient Egyptian customs and law was unusually favorable to women.⁵⁰ The position of women was high—incomparably higher than in Greece or Canaan—and their freedom was respected.⁵¹ Under the so-called Mutterrecht landed property descended in the female line from mother to daughter more frequently than through the father.⁵² A man looked to his maternal grandfather as his protector.⁵³ The Greeks who came to Egypt after the conquest of Alexander were struck by the fact that Egyptian women enjoyed a legally recognized independent status.⁵⁴ Although polygamy was legal in Egypt, it was not widely practiced.⁵⁵ Women were granted full rights under the laws, they owned, inherited, and bequeathed property,⁵⁶ they could sue in the courts⁵⁷ and (unlike under Jewish law, for example) in Egypt women were competent witnesses in legal proceedings without the authority of fathers or husbands. Women were entitled to the same graves and funerary rites as men.⁵⁸ Divorce by the husband involved a substantial payment to the wife.⁵⁹ Egyptian law was admirable in its support of human rights for women. According to tradition, it was in Egypt that ideas of liberty and democratic equality arose.⁶⁰ According to Plutarch, the great Greek lawgiver, Solon, visited Egypt to study the Egyptian legal system. By the same token, according to Plutarch, the

49. The Egyptians considered adultery and male homosexuality sinful.

50. ARISTIDE THEODORIDES, *THE CONCEPT OF LAW IN ANCIENT EGYPT, THE LEGACY OF EGYPT* 291-92 (R. J. Harris, ed., 1971) (stating that "[t]here was real equality between man and wife in the eyes of the law"); ADOLF ERMANN, *LIFE IN ANCIENT EGYPT* 155 (1971) stating that:

[t]he esteem which the son felt for his mother was so great that in the tombs of the Old Empire, the mother of the deceased is as a rule represented there with the wife, while the father rarely appears. On the funerary stela of later times also, it is the usual custom to trace the descent of the deceased on the mother's side, and not, as we usually do, on that of the father.

Id.

51. GUY CARLTON LEE, *HISTORICAL JURISPRUDENCE* 76 (1900); William A. Ward, *The Egyptian Economy and Non-royal Women: Their Status in Public Life*, available at <www.stoa.org/diotima/essays/wardlect.shtml>.

52. MARGARET A. MURRAY, *EGYPT* (1963) (discussing the law of mother-daughter inheritance as producing brother-sister marriages); LEE, *supra*, at 76 (asserting that inheritance seems very frequently to have passed in the female line).

53. LEE, *supra* note 51, at 84 (showing that the maternal grandfather often played a very prominent part in the succession—much more so than the paternal grandfather).

54. J. GARDNER WILKINSON, *THE ANCIENT EGYPTIANS* 223 (1988) (Per Diodorus women were indulged with greater privileges in Egypt than in any other country).

55. JAMES HENRY BREASTED, *A HISTORY OF EGYPT* 85 (1912) (saying that "[a] man possessed but one legal wife, who was the mother of his heirs. She was in every respect his equal"); J. GARDNER WILKINSON, *THE ANCIENT EGYPTIANS* 224. (It was the practice of the Ancient Egyptians to have only one wife, as is shown by Herodotus and the monuments).

56. LEE, *supra* note 51, at 84. ("Certain it is that women were often possessed of property in their own right").

57. EUGEN STOUHAL, *ANCIENT EGYPTIANS* 59 (1992). (She enjoyed her own legal personality).

58. *Id.* at 58.

59. STOUHAL, *supra* note 57, at 61; BETSY M. BRYAN, *THE EGYPTIAN PERSPECTIVE ON MITTANI, in AMARANA DIPLOMACY*, 71, 81 (Raymond Cohen & Raymond Westbrook, eds., 2000) (noting that women had a claim to one third of the acquired marital estate).

60. THEODORIDES 319.

Romans at the founding of their legal system sent a delegation to Athens to learn the by then vaunted Athenian laws. Nonetheless, the enlightened Egyptian treatment of women was not adopted by the Greeks.⁶¹

In ancient Mesopotamia:

the status of women was relatively high, but as time went on, women's rights and prerogatives declined so that in later Babylonian history their status had greatly diminished.⁶²

The rule of the Amah originates from the earlier period.⁶³

3. Women's Rights In Marriage

As we have discussed, under the rule in Hammurabi after their set period of service elapsed all slaves were freed.⁶⁴ The Bible amends the basic form of the rule found in Hammurabi that all slaves are set free after a set period of slavery. Under the Biblical rule only the male slave, the Eved, was to go free.⁶⁵ The Amah was not to be freed in the manner of the Eved; she continued in her prior role as the wife or daughter-in-law of her master.⁶⁶ Since among the ancients slaves were commonly used for sex and producing children, and it was assumed in the Biblical rule that the Amah was the concubine of the master, or his son, or his Eved. Under the rule of the Amah, the Amah did not go free in the seventh year; instead she remained as the wife of the master, or his son.⁶⁷ That it was assumed that the female slave was the wife of the master or his son is made clear by the

61. According to Plutarch, "Solon's laws in general about women are his strangest." He permitted any one to kill an adulterer found in the act, but punished rape by a fine. He regulated the walks, dress, feasts and mourning of women. A husband of a noble woman was to consort with her thrice a month. If her husband failed her, she could take his nearest kinsman. However, irrespective of whatever literal laws existed, the position of women in Greece was far inferior to the status of women in Egypt and inferior to the status of the noble Roman matron as well.

62. It might seem that women's rights in antiquity were virtually non-existent and that misogyny was the rule. However, in the Ancient Near East of the second millennium the status of women was in many instances quite high, considerably high than in later antiquity with which we tend to be more familiar. See e.g., ANCHOR BIBLE DICTIONARY, *Nuzi* vol. IV, at 1158. Nuzi, which was destroyed by the Assyrians in the fourteenth century, had many of the same customs and laws as in patriarchal Biblical times; ENCYCLOPEDIA JUDAICA, *Nuzi* at 1287; ENCYCLOPEDIA JUDAICA, *Book of the Covenant*, at 1215. ("In several of the laws the females are put on an equal rank with their male counterparts"); ANCHOR BIBLE DICTIONARY, MESOPOTAMIA, HISTORY OF (BABYLONIAN) Vol. IV, at 771. It is stated in this work that:

The status of women in Babylonian society is best discussed under the legal structure, since there is more information about the legal status of women than about other areas. In the Old Babylonian period, the status of women was relatively high, but as time went on, women's rights and prerogatives declined so that in later Babylonian history their status had greatly diminished.

Id. The extreme reverence in which the laws of the Book of the Covenant were held by succeeding generation of Jews insured that the rights of women were carried forward in mind, if not always in practice. The Talmud discusses at great length women's rights derived from the rule of the Amah. Even if sometimes, even often, honored in the breach, the rule of the Amah, indeed in exalted form, remained on the books.

63. *Id.*

64. CASSUTO, A COMMENTARY ON THE BOOK OF EXODUS 268-69 (1997). (The Torah took pity on her and granted her a greater privilege than the manumission of Hammurabi).

65. EXODUS 21:2.

66. EXODUS 21:7-11.

67. EXODUS 21:7.

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Talmud. A slave girl who matured to womanhood in puberty had to be set free or married.⁶⁸

The implication was clear, the Amah was better off remaining the wife of the master or his son than being freed, but leaving her marriage. This amendment in the Bible to the rule in Hammurabi treats the female slave much more favorably than before. From the point of view of the woman, "freedom" and rights depended upon her status as "wife" and mother. In antiquity, freedom for women was the disability of men to discard them. For the Amah, she finds her rights in the marriage.⁶⁹

Out of this assumption that the Amah fared better in marriage than in freedom came profound corollary principles regarding the conditions that the Amah had the right to expect. And if the Amah had such rights, a fortiori, a prior noble wife could expect at least as good conditions as the Amah. The logic went that if the slave girl had these rights, then surely the wife of a more formal marriage should have at least as good.⁷⁰ The rights of the Amah came to mean that a wife had the right from her husband that she not to be diminished in the marriage.

Hence, the rights of the slave, the Amah, became the rights of the wife in marriage. Ironically, the rights of the slave woman produced the solution to the problem of slave women (that the Greeks never solved), i.e.

68. KIDDUSHIN, *supra* note 21, at 18a2; Cobin, *supra* note 40, at 1340 (explaining that a Jewish female slave gained her freedom upon puberty). The Amah marries herself. KIDDUSHIN, *supra* note 21, at 22b1 & n. 10; CALUM CARMICHAEL, THE ORIGINS OF BIBLICAL LAW 87-99 (1992); CALUM CARMICHAEL, THE THREE LAWS OF THE RELEASE OF SLAVES *Ex* 21, 2-11; *Dtn* 15, 12-18; *Lev* 25, 39-46, at. 509, 510-23; ZEISCHRIFT FÜR DIE ALTTESTAMENT LICHE WISSENSCHAFT (2000). Once she is married her father loses jurisdiction over her. Even if her husband dies, vis-a-vis her father she has the rights of the wife of her husband. The rights and obligations of the husband from the grave trump those of the father. KIDDUSHIN, *supra* note 21, at 1961-20a. The status of women in biblical times was better than in post-biblical times. Many of the negative attitudes towards women, their exclusion from society at large, and their confinement behind the veil came under the influence of Hellenism and Greek ideals into the Near East. The ancient Israelites and Arabs never segregated their women as totally as did medieval and early modern Near Eastern societies. The Talmudic formulation that a girl who passes puberty must be freed or married reflects an unhealthy custom of child brides. Only two generations ago Jewish girls in Morocco were often engaged by the age of eight and married at the age of eleven. YEDIDA K. STILLMAN, ATTITUDES TOWARDS WOMEN IN NEAR EASTERN SOCIETY, STUDIES IN JUDAISM AND ISLAM 353-356 (1981). Not surprisingly men regarded these wives as being of defective intelligence. Although Jewish scholars in the Talmudic period reacted against Hellenistic culture, they were themselves more misogynist than their ancestors, perhaps because of the influence of Hellenism. It is interesting that Greek myths have many instances of adultery, but the Torah has very few.

69. A woman rises to her husband's station in marriage, but she does not descend to his station. He must bring her up to his standard of living (if it is higher) but may not reduce her to his standard (if it is lower). According to the Talmud, even if she came from humble surroundings, the husband had to cater to his wife in relation to his own wealth and prestige. Where she came from greater affluence, he had to maintain her in accordance with her accustomed standards. KESUBOS, THE TALMUD, TRACTATE KESUBOS, ARTSCROLL (R. Hersh Goldwurm ed. 1999) (hereinafter KESUBOS) 48a¹ & n.7-10; 70b¹ & n.7. The wealthy man must feed, clothe and provide for her in accordance with and as befits his wealth. *Id.* at 64b² & n.34. "In death, a woman reverts to her former status." Her husband need not afford her a more elaborate funeral than is customary in her own family. *Id.* at 48a¹ n.10. In the Indian caste system a woman rose to her husband's caste but also descended to his caste, which considerably restricted women's choices.

70. The Talmud (Kesubos) derives the rights of women in marriage from the rule of the Amah.

that the custom that men took conquered women as lovers resulted in the neglect and humiliation of their wives. The rule of the Amah came down to: when a man takes a woman as his mate, he assumes obligations to her that cannot be changed by his taking on future wives or lovers. The rights of the Amah to her husband trump, or at least are equal, to the rights of her warrior husband to his booty.

Rights of the Amah in marriage are to food, clothing and conditions of her abode⁷¹ which came to mean conjugal relations in order to have children and/or for her pleasure.⁷² From the rights of the Amah came the rights of women generally in marriage.⁷³ Diplomacy was frequently carried out by marriages between (particularly royal) families (with the exception of Egypt; women of Egypt were never sent out as diplomatic wives to foreigners). Often, royal wives in diplomatically arranged marriages were little better than political hostages.⁷⁴ It behooved the parents to negotiate that their daughter be well treated. It reflected badly upon the parents if their son-in-law mistreated or ignored their daughter.

Apparently, from the rule of the Amah comes the rule in Islam that a man, who has more than one wife, must treat each of his wives equally.⁷⁵ In a polygamous society such rights of a woman in marriage were vitally important. The difficulty, if not impossibility of treating wives equally, particularly in modern times, is a powerful argument used in Islam against polygamy.⁷⁶ On the other hand, polygamy had an important social role in absorbing widows into society by their marriage to men already married in the system of leverite marriage.

Thus, the rule of the Amah in Jewish law contains a major platform of women's rights that allowed it to succeed where Greek culture did not. A Jewish woman under the rule of the Amah had the right of conjugal

71. CASSUTO, EXODUS, at 269.

72. In the Talmud the purpose of conjugal relations is for her pleasure over which she was its "owner." KESUBOS, *supra* note 69, at 61b³ & n.26. The Talmud interprets the rule of the Amah in Exodus 21:10 to mean that a husband is obliged to satisfy the wife's conjugal needs. The frequency of the husband's conjugal duties varies in accordance with the strenuous of his work and the length of time it requires him to be away from home. A wife can object to a man changing professions that would reduce his conjugal obligations. Ordinarily, a husband has the right to leave home without his wife's permission only when special circumstances arise. In the normal course of events, he is prohibited to leave his wife for a week unless she grants him permission. Even the pious Torah scholar is not exempt. He must put aside his Torah study at least once a week on the night of the Sabbath, Friday night, and have conjugal relations with his wife. He may, however, leave home and study elsewhere for as long as thirty days, even without his wife's permission. All men who have the time and energy should cohabit every day. Indeed, in addition to the intervals listed, the husband is required to be intimate with this wife anytime that she signals a desire for intimacy. TALMUD, KESUBOS, *supra* note 69, at 61b³ & n. 26-37.

73. See *supra* note 70.

74. Describing Marie Antoinette. Amanda Foreman, *Book Review of THE LAST QUEEN OF FRANCE* by Evelyn Lever, N. Y. TIMES, July 16, 2000 at 10.

75. See *infra* note 76.

76. ABEL RAHIM OMRAN, FAMILY PLANNING IN THE LEGACY OF ISLAM 20-21 (1992). "In addition, from the early period of Islam, jurists have allowed the inclusion in the marriage contract of a solemn promise that the husband would not take another wife." A standard term of Jewish marriage contracts in countries that permit polygamy is a covenant not to take more wives. *Id.* at 21.

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relations with her husband, as well as the right to clothing and food.⁷⁷ Her children's inheritance rights were not to be impaired.⁷⁸ The rights of a wife and her children were her liberation from slavery.

4. *The Eved's Choice*

In a final twist in the rule, if the male slave, the Eved, while in slavery had been given a Canaanite wife by his master, and he had children with her, and he left the master after his period of slavery was over, the Eved would forfeit his family, who would remain behind as slaves of the master.⁷⁹ The rights of the master in the Canaanite slave woman and her children trumped the Eved's attachments to his family.⁸⁰ If the Eved chose to stay in slavery with his family after his period of labor was up, the Eved would remain a slave of his master forever.⁸¹ The Talmud reiterated the distinction in that the Eved is only required to remain the slave of his master. The Hebrew slave may not be resold or passed by inheritance. Furthermore, sisters cannot be inherited by brothers.⁸² In the case of the Amah, marriage⁸³ trumped freedom; in the case of the Eved, freedom trumped marriage. On the other hand there was a strong incentive for the master to give the Eved a wife,⁸⁴ for the Eved married to a female slave might stay with her, albeit in slavery forever.⁸⁵ The rule also contains a strong incentive for a female slave to marry the master or his son, not a slave, who might leave her.

77. M. MIELZINER, *THE JEWISH LAW OF MARRIAGE AND DIVORCE IN ANCIENT AND MODERN TIMES* 99 (1884); CASSUTO, *COMMENTARY ON EXODUS* 268-69 (1997).

78. Per DEUTERONOMY 21, 15-17: if a man divorces his first wife, nonetheless her first child by him remains his first born over children by later wives, and is entitled to a double portion. JACOB J. RABINOWITZ, *JEWISH LAW* 40-41 (pointing out similarity of such clauses in Jewish and ancient Egyptian marriage contracts). See also LAW OF HAMMURABI ¶¶168-69 that require cause and repetition for disinheritance. MARTHA T. ROTH, *LAW COLLECTIONS FROM MESOPOTAMIA AND ASIA MINOR* 113 (2nd. ed., 1997).

79. EXODUS 21:4.

80. *Id.*

81. The rule obviously recalls the lengthy legalistic negotiations between Moses and Pharaoh concerning traveling into the wilderness without their women, and the legalistic negotiations between Laban and Jacob over Laban's daughters, Leah and Rachael. The ceremony surrounding the Eved's election to remain a slave forever—the Eved is nailed by the ear with an awl to the door post of the house of the master—suggests to importance of the Eved's decision. Also, the use of an awl, commonly used as a shoemakers' tool to punch holes is significant. The right of the man to a woman is portrayed ceremonially by the man putting on shoes. See *ENCYCLOPEDIA JUDAICA*, *Levirate Marriage and Halizah* 122 et seq. for descriptions, designs, pictures, and ceremonies involving such shoes. Had Pharaoh honored the rule of the Amah and Eved and allowed the Israelites their women and the right to have children, the Israelites could have remained Pharaoh's slaves like the Eved that stays with his wife and children. In their negotiations, Pharaoh offered Moses the right to leave as would an Eved, leaving the women and children behind, but Moses refused.

82. KIDDUSHIN, *supra* note 21 at 166.

83. DAVID DAUBE, *HISTORICAL ASPECTS OF INFORMAL TALMUDIC LAW MARRIAGE*, *COLLECTED WORKS*, VOL. 1 at 153. The ancients were more protective of marriage than we. For these purposes marriage can constitute conjugal relations.

84. It is also interesting to that the rule of the Eved creates a powerful incentive for the Amah to marry the master or his son, and not the Eved.

85. EXODUS 21:6.

5. The Derived Right

The rule as to the Eved was not always so harsh as it may seem.⁸⁶ He could work for a bride (Jacob). Or he could go free and try to accumulate the funds to buy his family.⁸⁷ According to Rashi, the sin of the Eved, who chooses to remain a slave, is that he ignores the blessing of God in the liberation of slavery in Egypt.⁸⁸ It is better to be free and loose your family than be a slave.⁸⁹ For the Eved freedom from slavery is so precious that it is even worth the loss of his wife and children.⁹⁰ For the Amah marriage is so precious that it trumps freedom.

The rule of the Amah and Eved has its parallel in the story of Laban, Leah, Rachael⁹¹ and Jacob. The father-in-law, Laban, had a legal right to his daughters, Jacob's wives. Jacob made the legal argument that he was a "good shepherd," meaning that he was (like) an owner, not a mere lackey.⁹² But Jacob's status was dubious, which is why he absconded with his family, grandchildren. If Jacob left, he was legally obligated to leave alone. Laban argued that, by taking Laban's daughters, Jacob had acted as

86. It was traditional that the master owned the children of the slave and the freedom of a parent did not free the spouse or children. The ownership rights of the master were stronger than the marriage rights of the slave family, even in the case where a woman's slave slept with her husband (Abraham-Hagar). Among the Hurrians the husband of the barren wife could demand her maid servant to have children in the wife's place. Among the Jews, the wife could require her husband to give her children by her maid servant. (Sarah owned Haggar and her child by Abraham, Ishmal, and when she had Issac she cast Haggar and Ishmal out). Hebrew slavery had been circumscribed so that only thieves unable to pay for what then stole, who were sold by a court could be required to sire children for the master. The favorable treatment was only intra-national. Those who could, like the Romans, had foreign slaves as to whom national laws did not apply. See *supra* note 24 and accompanying text.

87. Indeed, a slave could redeem himself from slavery if he could earn or obtain the funds. See Cobin, *supra* note 40, at 1340.

88. KIDDUSHIN, *supra* note 21, at 22b¹, n.10. By choosing to stay in servitude beyond the mandatory term, a nirtza willfully subjects himself to the mastery of another human being. He thus violates the rule that Jews be servants of God, not of humans.

89. I am reminded of nineteenth century abolitionist and women's rights advocate Sojourner Truth, who fled slavery leaving her five children behind. When she discovered the master had sold her youngest, five years old, learning that it was against New York state laws to sell slaves across state lines, she took her boy's new owner to court and, amazingly, won. Linda Villarosa, *Serving No Master but the Truth*, N.Y. TIMES BOOK, Nov. 19, 2000, at 61. (reviewing biography of Sojourner Truth, *Only Passing Through* by Anne Rockwell). Sojourner Truth is perhaps best known for her response to the perception that women are physically and emotionally weak. Big and strong, six feet tall and an imposing speaker at a 1852 women's rights convention she famously demanded "Ain't I a women?" The sale of family members, particular children to foreign places was a major and perennial problem. From it comes the ancient rights and duty of redemption. William the Conqueror legislated against it. And until prohibited in the American South a large percentage of the slaves sold by the largest slave dealer in New Orleans were children under ten.

90. KIDDUSHIN, *supra* note 21, at 23a¹.

91. Rachael in stealing the family idols from her father manages to break most of the Ten Commandments. She steals, lies, uses graven images, has gods other than Yahweh, and dishonors her father. Also, hiding the idols in the cushion on which she sat, claiming she had her period presents interesting allusions to adultery, desecration by uncleanness, disrespect for the idols and her appropriation of the family name, house and identity.

92. In the oldest laws, long before Jacob, David, or Jesus, the epithet "shepherd" or "good shepherd" related to the king, evoking the images of his responsibility for the population placed in his care by the deity. MARTHA T. ROTH, LAW COLLECTIONS FROM MESOPOTAMIA AND ASIA MINOR 10, 25, 77, 80 (2nd ed. 1997).

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though they were Jacob's by the law of war booty (as was the case in the Iliad). A father's right to redeem his daughter taken as war booty was clearly higher than the right of the warrior to his booty because the warrior could (absent the rule of the Amah) degrade his war booty slave by taking other wives or concubines. Thus, this rule about slavery contains a subtext (that all but drowns out the text) of the relations between husband and wife, parent and child.⁹³ When Laban agreed to let his children and grandchildren go with Jacob, he negotiated that, particularly if Jacob took additional wives beyond Laban's daughters, Leah and Rachael, Jacob would continue the good treatment of Leah and Rachael because they were Laban's daughters and because of Jacob's promise to do so. In the Bible the solemnity of this occasion was marked by Jacob and Laban building a stone monument to their agreement. Jacob's obligation of good treatment of Laban's daughter's/Jacob's wives was a condition of Laban allowing Jacob to take his daughters, who were Laban's property.⁹⁴

Out of a father's negotiations for his daughters well-being in marriage came perhaps one of the earliest notion of rights. Originally, there were actual negotiations by the father with the husband for the good treatment of his daughters.⁹⁵ The most obvious examples from ancient times are in the diplomatic correspondence involving princesses marrying foreign kings. But an indication of how far the law had come by the time of Hammurabi and the Bible is that the right of redemption in the rule of the Amah and Eved has become automatic. Even where there was no father or other redeeming relative, slaves were to be deemed redeemed and go free automatically, or in the case of the woman, were married and could not be diminished.⁹⁶

Even if the girl or boy had no father, or the father did not assist his child, the rule of Eved (that a slave be set free after a set number of years) was an implied term of the contract of slavery; all slaves were presumed enslaved for but a fixed period of years.⁹⁷ In the case of the Amah on puberty or six years, whichever came first, she was to be set free, or in the

93. The rule of the Eved underscores the marital relationship, for if the master gave him a slave wife and they have children, the Eved looses his wife and children if he chooses freedom after six years. And if he chooses to stay he becomes the master's slave forever. Although the slavery aspect of the rule disappeared the rules continued to be applied in marriage contracts and from those to civil rights.

94. The promise of the husband regarding the treatment of his wife, although exacted by the father, trumps the father. For even if the husband dies, the daughter does not revert to her status as daughter, she remains the wife. The rights of the wife (and her husband from the grave) trump the rights of her father. KIDDUSHIN, *supra* note 21, at 18b¹ - 18b³. A corollary is the rule of a pearl for a shard. The maid, a pearl, could not be sold—a shard being a document—more than once. Once the Amah was married, her father lost his right to dispose of her and her husband was bound by his promise to her father as to her good treatment. She inherited her husband's obligations to her if he died.

95. LEE, *supra* note 51, at 79. An Egyptian marriage contract might contain, for example, a provision for a penalty to be paid to the wife should her husband repudiate her. *Id.*

96. This is the explicit rule in Exodus 21.

97. EXODUS 21:2.

case of puberty, if not set free, married to the master or his son.⁹⁸ The Biblical amendment to the rule in the case of the Amah makes what had been an implied term in contracts of slavery, likewise an implied term in contract of marriage. There is an implied negotiation between the woman's father and the husband securing for the woman certain rights in marriage.⁹⁹ The rule of the Amah and Eved is so important because at an early time a right is seen as the right of the Amah, not the paterfamilias. In other words, originally a paterfamilias had rights of many kinds, first party rights, including in his wives and children. The father's right to redeem his daughter from her husband became an implied term of the marriage relationship even where the girl had no father. The rights of a father to his daughter became the rights of a daughter in her marriage. Perhaps for the first time a right existed outside the paterfamilial framework, a right reposed in a third party, the wife/daughter. She was, historically speaking, the beneficiary of a fictional negotiation between her father and her master. The rights of the Amah may be the earliest bill of rights in existence. The female slave, the Amah, had the right not to be diminished, discarded, cast aside. She was not to be humiliated like Clytemnestra in Aeschylus' Agamemnon.¹⁰⁰

Not only is the rule that the Amah had rights in marriage perhaps the earliest third party right, it is perhaps the origin of all legal civil rights. The earlier rule, that all slaves are released after a fixed time, could be interpreted as a property right of the paterfamilias that sold the Amah or Eved into slavery in the first place redeeming him or her back. But with respect to a daughter who, perhaps loosely speaking,¹⁰¹ was married to a master, the notion of redemption out of marriage is inapposite. Rather the rule was an injunction upon the husband/master to enforce the Amah's rights in marriage. Since the marriage was separate from the rights owing the father, the right traveled with the daughter.

It is important to note as well the difference between the rights of the Amah and the lofty status and prerogative of Egyptian women. The Egyptian women had an independent legal status.¹⁰² The status of the Amah was conceptually derivative of the patrifamilial system. In her rights, the Amah had a super powerful "Daddy" or "Big Brother." Even though he might be fictitious, "he" could be invoked to reclaim, redeem

98. KIDDUSHIN, *supra* note 21, at 16a⁴.

99. The extent to which the rule is implied is shown by the Iliad in which the rights of the father to redeem his daughter captured as war booty stem from implied fictional negotiation between father and her consort, Agamemnon.

100. The most powerful image in all Greek drama is of Clytemnestra, Helen's sister and Agamemnon's wife, confronting the silently defiant Cassandra, the daughter of king Priam of Troy, reduced to Agamemnon's war trophy concubine, in the opening of the play Agamemnon by Aeschylus.

101. DAVID DAUBE, HISTORICAL ASPECTS OF INFORMAL MARRIAGE, *supra* note 83, at 153.

102. See, e.g., Bryan, *supra* note 59, at 71, 81 (explaining that there was a fundamental difference between the meaning of marriage in Egypt and elsewhere. The Egyptian woman had independent wealth).

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and demand justice for her, a form of extraterritorial power,¹⁰³ a guardian.

It was also the case that women were often protected in documents. They derived the rights through contracts through male relatives. Indeed, a woman's documents were her most precious possession.¹⁰⁴

Thus, it is ironic. In Egypt, the woman had a higher status and greater rights than elsewhere. But the Egyptian model was based upon the matriarchal passing of property in the female line and other peculiarities of Egyptian culture and beliefs. The Egyptian system also gave rise to negative practices, particularly marriages between brothers and sisters, to keep wealth within the family. On the other hand, the derived right provided a model that could be employed more widely. Indeed, contracts between family members were the basis of an enormous amount of ancient law. In particular, the ancients made great use of derived rights and obligations through "adoptions" or, more accurately, pseudo-adoptions.

The happiness of the dead in ancient Mesopotamia was directly proportional to the quality and quantity of funerary offerings made to them by the decedent's relatives whom they had left behind in the underworld. It was therefore necessary to provide the dead with a continuous series of funeral offerings. The eldest son of the deceased held primary responsibility for performing this duty, which is presumably why he also customarily required an extra share of the inheritance.¹⁰⁵

Accordingly, it was vitally important to have a son in order to provide continuance of family funerary rights. If a person died without providing for the continuance of family rites, he or she was disgraced, not so much because they would not be commemorated, but because they did not provide for the commemoration of their deceased ancestors. The obligation to continue family rites could be provided by contract. Not surprisingly, these contracts were contracts of "adoption." The adopted "son" agreed that he and his offspring would be the children of the

103. This extraterritoriality is found in Antigone's rebuff to Creon based upon "the immutable unwritten law." See HUNTINGTON CAIRNS, *LEGAL PHILOSOPHY FROM PLATO TO HEGEL* 45 (1949).

104. Tal Ilan, *How Women Differed*, *BIBLICAL ARCHAEOLOGY REV.*, Mar.-Apr. 1998, at 83; *ANCHOR BIBLE DICTIONARY*, *Nuzi*, Vol. IV at 1156 (male relatives could be real or contractual). The Hurrians of Nuzi (who had many laws and customs similar to those of the Bible) had an interesting custom of husbands elevating the status of wives by adopting them as sisters. *ANCHOR BIBLE DICTIONARY*, *Nuzi*, *ENCYCLOPEDIA JUDAICA*, *Nuzi*. In antiquity a brother-sister bond was very precious. Children belonged to the paterfamilias. A woman's husband might be slain, as was the custom for the defeated in war, and the women given to or taking another husband. The paterfamilias was a dictator (hopefully benevolent) but the brother was obliged to consult his sister's wishes and protect her. Also, the ties of brother-sister could not so easily be severed, except in death. Sophocles' Antigone says: "If my husband were dead I might find another, and another child from him if I lost a son. But with my mother and father hidden in the grave, no other brother could ever bloom for me." Note also that representational property rights through legally recognized documents are crucial to economic expansion. See HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL; WHY CAPITALISM TRIUMPHS ON THE WEST AND FAILS EVERYWHERE ELSE* (1999); See also Hernando de Soto, *Why Capitalism Works in the West but not Elsewhere*, *Int. Herald Tribune*, 1/5/2001, p. 6, cl.3.

105. JO ANN SCURLOCK, *DEATH AND THE AFTERLIFE IN ANCIENT MESOPOTAMIAN THOUGHT in CIVILIZATIONS OF THE ANCIENT NEAR EAST VOL. 111, 1883, 1888* (Jack M. Sasson, et al., eds., 1995).

contracting father or mother.¹⁰⁶

In the ancient Near East, there was an enormous variation in pseudo-adoption. A daughter could be adopted as a "son."¹⁰⁷ Testators could make their daughters both male and females for a daughter to inherit as a "male."¹⁰⁸ Additionally, a husband could elevate a wife's status by adopting her as his sister.¹⁰⁹ Women, whose rights were derived from male relatives, could contract with a male to be their "father" or "brother."¹¹⁰ Husbands could adopt wives as daughters in order to enable them to inherit the share of the marital property normally reserved for the children.¹¹¹

But the most extensive type of pseudo-adoption was for debts or property transfers. The debtor or seller adopted the creditor or buyer as his or her "son." Rich landlords or creditors might have had a host of adopted "fathers" who were his or her tenants.¹¹²

Given the prevalence of derived rights through pseudo-adoptions it is not surprising that the rights of Amah would come from a fictitious "Daddy" or "Big Brother." What is surprising is the strength of such fictions that look back to largely or entirely imagined ancestors. One can see the fundamental derived right model at work in the English and American traditions that look back to the laws of good King Edward the Confessor, the Magna Carta or indeed the intent of the "founding fathers" of the United States.¹¹³

6. The Narratives

The strength of the women's right to conjugal relations provided for in the rule of Amah is attested to in the narratives. If a woman's husband died, her brother-in-law had to father her a child, who would legally be considered the child of the dead husband (Onan's deceased brother).¹¹⁴ This was a heavy obligation because, if the widow remained childless, her dead husband's property would go to his brothers. If she had a child by her dead husband's brother, her child would inherit through and in the name

106. GUY CARLETON LEE, HISTORICAL JURISPRUDENCE 80-83 (1900).

107. See HECTOR AVALOS, LEGAL AND SOCIAL INSTITUTIONS IN CANAAN AND ANCIENT ISRAEL 625 in CIVILIZATION OF THE ANCIENT NEAR EAST (Jack M. Sasson, et al., eds., 1995).

108. *Id.* at 619.

109. See *supra* note 104.

110. See *id.*

111. DAVID LORTON, LEGAL AND SOCIAL INSTITUTIONS OF PHARAONIC EGYPT 345, 372 in CIVILIZATION OF THE ANCIENT NEAR EAST (Jack M. Sasson, et al., eds., 1995).

112. MAYNARD PAUL MAIDMAN, NUZI: PORTRAIT OF AN ANCIENT MESOPOTAMIAN PROVINCIAL TOWN 931, 943 in CIVILIZATION OF THE ANCIENT NEAR EAST VOL. II (Jack M. Sasson, et al. eds., 1995); GERNOT WILHELM, THE HURRIANS 47 (1989) (explaining the "son" would give is father a present of the fields worth somewhere between one and three times its harvest).

113. See Part II, *infra*, regarding the origins of the Common Law.

114. See generally, Richard H. Hiers, *Transfer of Property by Inheritance and Bequest in Biblical Law and Tradition*, 10 J.L. & RELIGION 121 (1994).

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of her dead husband.¹¹⁵ A woman's right to conjugal relations went so far that she could have sexual relations with her father (Lot). She could dress as a temple prostitute of Baal, and seduce her father-in-law (Judah, Onan's father).¹¹⁶ Even lie to her own father and steal the family idols! (Rachel to her father Laban).¹¹⁷ Women could trade conjugal appointments (Leah's purchase from Rachael for the mandrakes). A woman would often receive as part of her dowry a female servant or slave to care for her (Leah and Rachael). They remained her property throughout the marriage. If, for example, due to her inability to have children, she wished, she could require that her husband sire offspring with her maid (as did Rachael and Leah), and the maid and children of the marriage between the maid and the husband belonged to the wife. Her right of ownership over the slave mother and child trumped the relationship of marriage between her husband and his slave wife (Sarah and Hagar).¹¹⁸

The theme of female redemption is also found in the very ancient legend of Ruth, a widow (Moabite by birth), who was rewarded for her devotion to her widowed mother-in-law, Naomi. Her goodness was universally noted and she landed a rich husband among her mother-in-law's kinsmen and bore, three generations hence, David. Naomi, the mother-in-law, was to sell her dead husband's land. But Naomi and (as her designee and surrogate) Ruth in marriage went with the land. The closest relative would not take the land with Ruth, for ownership would pass to their children as if her dead husband had been the father under the law of redemption. Boaz was pleased that the closer relation turned her down so he could take her. His choice was prescient for from his seed and her loins came King David's house. Generosity and obligation towards one's relations was a very important precept for God's redemptive intervention closely followed those customs. The people are said to have become His subjects in consequence of their deliverance, which is an application of the ancient practice that a person redeemed becomes the bondsperson of the redeemer.¹¹⁹ In good years when there was plenty the harvest was picked

115. See Westbrook, *supra* note 26, at 73-77.

116. According to Daube this story of Tamar seducing her father-in-law Judah is significant in the history of women's rights in the ancient Hebrew family. Technically Tamar commits an extremely deviant action, but she did so convinced that she had a right to insist on being given a child and all the privileges that this motherhood implied. It was indeed from this child (or rather, from one of the twins she bore) that in the course of time Joseph, husband of Jesus' mother, descended. DAVID DAUBE, *CIVIL DISOBEDIENCE IN ANTIQUITY* 13-14 (1972).

117. Akin to stealing the family tree or heritage. Many family idols or teraphim still exist. Most of them are of women. Hershal Shanks, *Idol Pleasures*, 26:5 *BIBLICAL ARCHAEOLOGY* REV. 23 (Sept./Oct. 2000) (Reviewing recent exhibition of teraphim in Jerusalem). According to Hurrian custom the daughter and son-in-law were heirs to the family line if they possessed the family idols. Where there were no male heirs, daughters inherited in the manner of sons. *ENCYCLOPEDIA JUDAICA, Hurrian*, at 116. Hurrians adopted their wives to make them sisters to elevate their status.

118. WESTBROOK, *PROPERTY AND THE FAMILY IN BIBLICAL LAW*, at 144.

119. See generally DAVID DAUBE, *INTERNAL SOURCES*. In few places in modern times has debt servitude been more widespread and pronounced than in northwestern India. There the time for repayment of debts was when the crop was on the threshing room floor. This was the time for the division of the crop. DAVID HARDIMAN, *FEEDING THE BANIYA* 1, 134 (1996). The

lightly so that pursuant to custom the poor could pick what was left. A woman picking alone might be molested. For protection Boaz allowed Ruth to pick from his field where she would be safe. When the harvest was in and threshed, at Naomi's instructions Ruth went to Boaz in the evening in the threshing room, waited until he was well fed and drunk, and lay at and uncovered her drunken Boaz, her soon-to-be husband's, feet on the threshing room floor.¹²⁰ The relative who did not want Naomi's land with Ruth attached (because of her rights to pass the land on to offspring of the union) removed his shoe in front of witnesses and gave the shoe to Boaz her redeemer.¹²¹

In sum, a woman had a right to be redeemed by having children with her husband or master. And, in the Babylonian tradition children could not be disinherited, nor wives discarded.¹²²

B. FAMILY MEMBERS' RIGHTS UNDER THEIR PATERFAMILIAS, THE GORING OX RULE

Very significantly, in Exodus God does not set his people free. They go from being slaves of Pharaoh to being slaves of God.¹²³ God orders: "Let me people go—that they serve me."¹²⁴ There is no difference for these purposes in the relationship of husband and wife or father and son and that of master and slave. Israel is the first-born son of God and the slave of God¹²⁵ and the bride of God.¹²⁶ The notion of individual liberty was not pertinent. Rights existed with respect to families, embodied or represented by the paterfamilias. The rights of the family members were rights of inclusion, not rights of exclusion (to be free of interference by

peasant debtor often spoke of their Baniya creditor as their "parent" and to his face they addressed him as "uncle." *Id.* at 2. The exploitation of peasants by perpetual debt carrying over from generation to generation was made worse in the colonial period when the British used the creditor caste to collect the taxes. *Id.* At 43-47.

120. The soles of the feet, and palms of the hands and shoes are symbolic of the male and female organs respectively. See Calum M. Carcichael, *Desexing*, 17 RECHTSHISTORISCHES J. 266, 276 (1998).

121. *Id.* at 275; Chalitzah is the release from liverite bonds, KIDDUSHIN, *supra* note 21, Glossary. In Kerala in south India, a matriarchal society, a woman divorces a husband by putting his shoes out of the house. In ancient times, a man who refused to accept his brother's widow in levirate marriage was disgraced in a public ceremony. The woman would loosen his shoe and spit in his face and he would henceforth be known as the man who had his shoe loosened. Over time the practice of levirate marriage died out, but not the ceremony. The ceremony persisted into modern times but its meaning changed. The man who did not insist the widow marry him was honored. Shoes were specifically designed for the widow to loosen on his feet, and she spat to the side, not in his face. See ENCYCLOPEDIA JUDAICA VOL. XI 122-29 (1971).

122. Hiersw, *Transfers of Property by Inheritance and Bequest in Biblical Law and Tradition*, 10 J.L. RELIGION 121 (1994).

123. DAVID DAUBE, *THE NEW TESTAMENT AND RABBINIC JUDAISM* 272, 276-278 (1998). The earliest of the cuneiform codes that of Urukagina of Lagash (Ca. 2350) uses the Sumerian word for freedom, which literally means "return to the mother." Jacob Klein, *The Birth of Kingship*, ODYSSEY, at 25 (Jan./Feb. 2001).

124. DAUBE, *EXODUS PATTERN*, *supra* note 9 at 42.

125. *Id.* at 273, 276-78.

126. In a common metaphor, the people love God as a bride loves the husband of her youth. CASUTO, *EXODUS*.

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132. *Id.*

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