

OLD TESTAMENT STUDIES
IN HONOR OF
JACOB M. MYERS

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Exodus 23: 4-5: A Comparative Study

The Book of the Covenant, Ex 20: 22 through 23: 33, is not a polished legal document bringing together in careful and standardized language a variety of materials. Rather, the diversity within the Book of the Covenant is quite clear. The *mšp̄tym* (Ex 21: 1 through 22: 16) and Ex 23: 13-19 and 23: 20-33 are fairly cohesive, and may be separated out. The primary portion remaining—Ex 22: 17 through 23: 12—is usually regarded as somewhat of a potpourri, and the commentators remark on intrusive verses and redactional activity. In this last-mentioned portion, we find a collection of diverse materials, variously expressed, but centering on special concerns of a markedly religious and humane character. Concern for the poor is promoted, and justice is raised above special interests.

Among the humane laws, Ex 23: 4-5 in particular are very striking. They stand out in the humane laws because of their formulation as casuistic rules in the style of the *mšp̄tym*, being introduced by *ky* (cf Ex 21: 1, 7, 14, 18, 20, 22, 26, 28, 33-34, 35, 37; 22: 4, 5, 6, 9-10, 13, 15), in contrast with the casuistic rules introduced by *'m* (Ex 22: 24, 25-26; cf Ex 20: 25) outside Ex 21: 1 through 22: 16. Also, the language in Ex 23: 4-5 is rather special. The reference to the other party as "your enemy" (Ex 23: 4) or as "the one who hates you" (Ex 23: 5) immediately indicates that we are not dealing with a cautious, dispassionate legal draftsman. These terms for legal parties are far removed from the normal usage in the Old Testament or ancient Near Eastern legal collections. Such terminology is restricted to very special circumstances. It is no surprise that the analogous rules in Deut 22: 1, 4 describe the other party with the much less colorful term "your brother." Ex 23: 4-5 are provocative in their wording. They do not merely derive

from justice in the gate, but boldly and deliberately express in casuistic form a deep-going moral concern. The distinctive content of the two verses further indicates their special nature. Moreover, their contrast with the common-law tradition of England and America is rather intriguing.

ky tpg' šwr 'ybk 'w hmrw t'h hšb tšybnw lw

If you come across a straying ox or ass belonging to your enemy, you must return it to him. (Ex 23: 4)

There are a number of laws about straying stock animals. Frequently, as Ex 22: 4 probably indicates, the concern is about the damage that stray animals might do to the crops and the fields or vineyards. Since the finder of a stray animal would commonly discover it on his own land, recovery for any damage done might be expected to be the primary concern of the law. This is what we find in the Laws of Hammurapi, Nos. 57–58, and in the Hittite Laws, No. 107.¹ As for the common law, Roscoe Pound points out that “it is a general doctrine of the common law that the keeper of an animal of any kind which is likely to do harm to the land of others if it strays, is liable although not even negligent and although the animal may have been released by a trespassing stranger, for trespass on another’s land and for damage done to the land or to the person or property of the land-owner.”² Indeed, whereas Hittite custom (Hittite Laws, No. 79) permitted stray oxen to be worked for the remainder of the day, before being returned—a form of distraint—more drastic penalties were permitted in early English law. For example, in the laws of the Anglo-Saxon King Ine (late seventh century A.D.) we find that “if . . . any beast breaks hedges and wanders at large within, since its owner will not or cannot keep it under control, he who finds it on his cornland shall take it and kill it. The owner [of the beast] shall take its hide and flesh and suffer the loss of the remainder.”³ This early law permits vengeance against the stray animal. Subsequently, the emphasis is on liability for damage done.⁴

Where an instance of known ownership is stated, the concern of the law tends to be that of misappropriation or conversion of lost property. As in Deut 22: 1–3, a finder is normally not entitled to appropriate for himself a stray animal of known ownership.⁵ In Hittite law (Nos. 45, 71), a stray is handed over to the king, assigned to the finder, or returned to its owner if known, much as in older English law.⁶ Yet it is interesting to note that whereas stress may be placed on the duty to return, as in Deut 22: 3 and the Hittite Laws, the common law does not acknowledge a duty to find. The finder is entitled to ignore the goods that he discovers, and has no duty to return something of which he has taken no custody.⁷ When a rule clearly

states that the stray belongs to the finder's enemy, as in Ex 23: 4, it is easy to see that there would be a strong temptation to ignore the stray animal and thereby increase the injury to its owner. It is not every man who would pass up "coals of fire" to help his enemy.

The use of the term "enemy" in the biblical law is especially interesting. This term, as far as legal statements—especially casuistic statements—go, is otherwise very restricted in use. It is not surprising to find it in the laws regulating warfare (Deut 20: 1, 3, 4, 14; 21: 10; 23: 10, 14). It may also be appropriate in the law of homicide (Num 35: 23), where intent is so important and, in the presumption of the law, "enemies" are not accidentally killed.⁸ But the term "enemy" does not seem to belong in a law concerning stray cattle. Its use in Ex 23: 4 is deliberate, however. Specifying the other party as "your enemy" is a means of giving a sharper moral and emotional focus while obscuring the strictly legislative focus. The provocative formulation of the rule emphasizes that the finder has strict duties to *all* members of the community—even his enemy, the man who is so at odds with him that serious bodily injury to the finder would be presumed not to be accidental.⁹ The stray stock animal cannot be ignored, but must be returned, whoever his owner may be.

As Cassuto emphasizes, the unusual formulation is a way of expressing "this, needless to say that"—that is, if you return your enemy's stray, it goes without saying that you would return your friend's or that of a mere acquaintance.¹⁰ Also, it goes without saying that you would return something of greater value. Realizing this point—that the rule is intended as a basis for generalization rather than as the statement of a particular case—it becomes obvious that Ex 23: 4 is actually very carefully formulated, a rule that may well convey the real intent of the law more dramatically and more effectively than the less colorful and more cautious formulation in Deut 22: 1.¹¹ Ex 23: 4 focuses on the weakest link in the system of justice, the instance when the temptation to do less than justice is at its strongest. Those who pass this test will not fail others.

The Book of the Covenant reflects a small, village-farming community, a community in which one might well be acquainted with the neighbor's animals, the oxen and the asses so important to him. In a small community it is "prudent and reasonable" to assume that personal feelings, rather than legal principles, will frequently affect one's relations with his neighbors. In Ex 23: 4 (and 5), that emotional quality is ably countered by using the emotional term "enemy." In this seemingly imprudent formulation, one may actually see a more effective approach to expressing and impressing certain legal rules. From some points of view, ancient Israel here surpassed the traditional legal draftsmanship of the ancient Near East.

ky-tr'h ḥmwur šn'k rbš lḥt mš'w wḥdlt m'zb lw 'zb l'zb 'mw

If you see an ass belonging to someone who hates you, lying down under its load, you shall desist from leaving (it) to him; you must arrange (it) together with him. (Ex 23: 5)

This verse presents a number of translation problems, as is well known. In view of the very common pattern, 'zb plus object plus *l* indicating an indirect object, it seems best to assume an ellipsis of the object in verse 5a.¹² In vs 5b, it seems best to retain the MT and to translate 'zb with the aid of Old South Arabic 'ḏb, "restore (in whole, to former condition),"¹³ and Ugaritic 'db (*'ḏb), "prepare, arrange," used for preparing or putting on the trappings of a jenny ass.¹⁴ Biblical Hebrew also offers some support for such a translation.¹⁵ Admittedly, one does not expect a play on words in a legal text, but it can be avoided only by a gratuitous emendation, such as, following Bochart, 'zr l'zr, "you must help." Perhaps also it should be stressed that *rbš* consistently refers to animals lying down at rest or at ease, and that the parallel with Balaam's ass, which "laid down beneath" him (Num 22: 27) because an angel of God was blocking the path, indicates that the animal may be on the ground voluntarily as well as involuntarily.

The incident of an ass lying down under its load must have been fairly common. If the animal is not kept moving, it is likely to just lie down; it may even roll around a bit, which usually means some repacking. The surefooted ass may even stumble at times and have difficulty getting back up. If the cinch rope is not tightened properly, if a hitch loosens, if the trail is steep and a breeching strap and/or breast collar is not used (properly), if the pack animal gets excited and starts running—if any of these accidents happen, the pack may be lost or the ass may be pulled down by a shifted load.¹⁶ Yet normally, pack animals are not left to meander along by themselves, but are accompanied by the driver or owner. If the animal should be down, the driver is presumably at hand, able to give assistance. Indeed, the assumption of Ex 23: 5—and the clear wording in Deut 22: 4—is that the owner is at hand.

A further consideration is the kind of load than an ass might carry. One of the smaller asses, the burro, used as a pack animal in the American West, normally carries a pack or payload of between 75 and 100 pounds. The "black asses" used in the Old Assyrian caravan trade were stronger, and probably carried a payload of 150 to even 200 pounds.¹⁷ It is not clear whether the ass in Ex 23: 5 is like the burro or more like the "black ass." But even assuming the stronger animal, a 200-pound load is not particularly heavy, nothing like the 600 pounds that a pack camel can handle. One experienced man can load an ass by himself without too much difficulty, though it is much easier and faster with two people. If the pack

animal is down and unable to get up because of the pack, which may have shifted, it may well be a different situation. The owner could, without additional help, unload the animal and get it back up. Given time, he could also reload the pack. Another person would be a big help, however, if only in holding and calming the obviously frightened animal. With two people, it might be possible to avoid the tedium of unloading and reloading; and even if that were necessary, it could be done much more quickly. But the second person, except in unusual circumstances, would not be a matter of life or death for the ass, and he would rarely be unexpendable to the owner.¹⁸

The commentators differ as to the nature of the aid. First of all, they generally point to the owner of the beast as the beneficiary—that is, a concern for his property. Another view is that this rule is directed toward the prevention of cruelty to animals, the main goal being the release of the pack animal.¹⁹ Second, the issue is whether the animal is only helped to get back on its feet²⁰ or whether the load is also repacked or rearranged.²¹ It is important to bear in mind that, at least in most circumstances, one man could release the animal. Cassuto is surely right in arguing that the aid—primarily for the animal's owner—extends to seeing to it that the pack animal is not only back on its feet but also properly loaded.

Apart from maritime law, the Anglo-American common-law tradition does not acknowledge a general duty to rescue or render assistance. Pound states that “so long as one has not caused the peril and there is no relation, one who merely fails to come to the aid of another [person] who is even in extreme peril and even if it would involve no danger, incurs no liability.”²² As otherwise put by Gregory, “it is clear at common law that nobody has to lift a finger—let alone spend a dime and dial a phone number or actually render aid—to help a stranger in peril or distress.”²³ Gregory cites an interesting case that somewhat parallels the ass lying under its load:

Consider what happened when something called a safety guard non-negligently fell from the front of a trolley car onto a trespassing pedestrian drunkenly asleep on the right of way. This safety guard eventually crushed the life out of him. Had the car backed up, it would have relieved the deceased of this pressure. But the Alabama court said the trolley crew were no more required to remove this safety guard than a casual bystander would be. The only danger of liability would be if the crew, in moving the victim, *did* something negligently that caused him harm. Under this view it would behoove the company—financially, at least—to leave things exactly as they were until the victim expired.²⁴

Although various Continental codes know a duty to rescue or give assistance under various circumstances,²⁵ the common law does not.²⁶

In Ex 23: 5, the rule stipulates that one has a duty to render assistance to “the one who hates you.” Again, this is a curious way of formulating a

legal rule and one that has no parallel in Near Eastern "codes." "Hating" is an attitude of interest to the law in special circumstances, such as legal separation from wife,²⁷ family,²⁸ or political community,²⁹ and the law of homicide with its interest in intent. In Israel, the cities of refuge were not open to a person who had "hated" the person killed.³⁰ A killing that involved "hatred" (*sn'h*) or "enmity" (*'ybh*) was first-degree murder and permitted no leniency.³¹ That means that the duty to give assistance concerns assistance even to the person who might be led by his passion to kill you and, if so, could not gain the protection of a city of refuge.

Of course Ex 23: 5 is another example of "this, needless to say that."³² The principle is exemplified in a twofold way, however. First, if you are under a duty to assist "someone who hates you," you are certainly obligated to aid someone who is indifferent to you or who loves you. Second, if you are obligated to give assistance in a situation where there normally is no particular threat or peril to the pack animal—assuming that the driver or owner is at hand—let alone to the person "who hates you," you surely must give aid to someone—or some stock animal, presumably—who actually is in peril.

These two provocatively worded rules in Ex 23 are, from a certain point of view, masterpieces. Within a small community where people had some acquaintance with each other, these formulations which strike the jurist as oddities might well be more effective than the usual legal draftsmanship. At any rate, Ex 23: 4-5 is not inferior to Deut 22: 1-4, and it is not inferior to the common-law tradition of our own country. And in view of the didactic role that law admittedly plays,³³ the very careful draftsmanship of Ex 23: 4-5 is worthy of serious consideration.³⁴ These laws are aimed at the weakest link in the just society. In a similar way, Jesus exhorted his listeners to "love your enemies and pray for your pursuers," for even scoundrels look out for their friends. If you have regard for even your enemy's interests, that is nigh to perfection.

NOTES

¹ For a convenient translation of the Near Eastern "codes" cited in this study see *ANET*. References are by paragraph number. In the laws cited here, note that sheep are specifically mentioned. Sheep of course are particularly damaging.

² R. Pound, *Jurisprudence* (St. Paul, 1959), Vol. V, pp. 335-36.

³ Quoted in Glanville L. Williams, *Liability for Animals* (Cambridge, 1936), p. 9. Williams comments (p. 10) that "as late as 1387 it was said to be the custom of Canterbury that, if pigs were found wandering in it, their owner was on the first occasion bound over; the second and third times he was fined fourpence, and the fourth time the pigs were killed by the bailiffs and given to the hospice of the poor." Williams sees here the ancient rule of vengeance being watered down.

⁴ See Williams, *op. cit.*, pp. 9-10, 127.

⁵ This is true under both the Roman law and the common law; see W. W. Buckland and A. D. McNair, *Roman Law and Common Law: A Comparison in Outline*, 2d ed. rev. by F. H. Lawson (Cambridge, 1965, corrected reprint), pp. 357-58. The stray may be distrained until such time as payment is made for the damage done, but that is not conversion; see W. Blackstone, *Commentaries on the Laws of England*, vol. III, Chap. 1.

⁶ Blackstone, *op. cit.*, Vol. II, Chap. 26-27.

⁷ See W. E. Baldwin, ed., *Bowyer's Law Dictionary* (New York, 1928), p. 415a, s.v. "finder."

⁸ See below, on the titles of refuge.

⁹ H. Cazelles, *Études sur le code de l'alliance* (Paris, 1946), p. 88, specifies that the enemy is a private enemy, and takes that to mean a neighbor with whom one is having a (legal) dispute. Although the enemy presumably comes from within the Israelite community, he is not merely a person with whom the finder is having a dispute. Litigation does not normally lead to murder. E. Gerstenberger, *Wesen und Herkunft des "apodiktischen Rechts," WMANT 20* (1965), 30, recognizes the juristic peculiarity of the wording, but takes it to refer to the correct conduct toward one's personal enemy.

¹⁰ U. Cassuto, *A Commentary on the Book of Exodus*, trans. I. Abrahams (Jerusalem, 1967; Hebrew orig., 1951), p. 297. See also S. R. Driver on Ex 23: 4-5 (CBSC) for a similar observation. This is a principle of basic importance. The failure to appreciate this technique in the case of Ex 23: 3, e.g., even by S. R. Driver, leads to curious results; see Driver's commentary, *ad loc.* As has often been pointed out, legal reasoning is primarily reasoning by analogy, seeing the application of generalized rules. Holmes tells of "a Vermont justice of the peace before whom a suit was brought by one farmer against another for breaking a churn. The justice took time to consider, and then said that he had looked through the statutes and could find nothing about churns, and gave judgment for the defendant." O. W. Holmes, Jr., "The Path of the Law," in *The Holmes Reader*, ed. J. J. Marke (New York, 1955), p. 80. Biblical commentators are sometimes like the Vermont justice.

¹¹ It therefore is not correct to regard the terminology of "your brother" as widening or broadening the application of Ex 23: 4, as do, e.g., S. R. Driver (*ICC*) and G. E. Wright (*JB*) in their commentaries on Deuteronomy, *ad loc.*, and G. Beer (with K. Galling) in his Exodus commentary (*HAT*), *ad loc.* Cf. M. Noth, *Exodus (ATD)*, *ad loc.*, who finds the prescription directed against the extralegal relationship with an enemy or opponent. The point, however, is to bring even those relationships within the law, as Noth seems to acknowledge; see O. Procksch, *Theologie des AT* (Gütersloh, 1950), p. 115.

¹² See Carl Brockelmann, *Hebräische Syntax* (Neukirchen Kreis Moers, 1956), pp. 126, 136-37; R. J. Williams, *Hebrew Syntax: An Outline* (Toronto, 1967), sec. 584.

¹³ K. (C.) Conti Rossini, *Chrestomathia arabica meridionalis epigraphica* (Rome, 1931), pp. 202-3.

¹⁴ Herdner, No. 4 (II AB; Gordon, No. 51), iv. 7, 12; translation by H. L. Ginsberg in *ANET*, p. 133.

¹⁵ For discussion see Cassuto, *Or*, NS 7 (1938), 282, and *Exodus*, p. 297; C. H. Gordon, *Or*, NS 21 (1952), 123; E. Vogt, *Bibl* 33 (1952), 160; and M. Held, in *Studies and Essays in Honor of A. A. Neuman*, ed. M. Ben-Horin, B. D. Weinryb, and S. Zeitlin (Leiden, 1962), p. 283, n. 8, who points to other possible examples in Hebrew.

¹⁶ The parallel law in Deut 22: 4 involves a somewhat different situation. Unless the ass and the ox are improperly joined here, the picture is that of a draft animal fallen down in the roadway, not of a pack animal which is lying down, fallen or otherwise. Whether or not a prudent man would join in an attempt to raise or lift up an ox is another matter.

Cazelles (*op. cit.*, p. 88) is doubtless right in suggesting that the Deuteronomic redactor no longer understood Ex 23: 5.

¹⁷ See the discussion by H. Lewy in *RSO* 39 (1964), 186, 192, and in *CAH*, rev. ed., vol. I, Chap. xxiv, secs. vii-x (Fasc. 40; Cambridge, 1965), p. 21.

¹⁸ For a discussion of the burro as a pack animal, see David R. Brower, ed., *Going Light: With Backpack or Burro* (San Francisco, 1951), pp. 108-41. I owe this reference to N. Q. Hamilton.

¹⁹ S. R. Driver emphasizes that the beast is preserved from harm (*CBSC*, *ad loc.*), a point that is generally admitted for Deut 22: 4.

²⁰ See the commentaries by A. Dillmann (*KeH*, 1897³), H. Holzinger (*KHK*), C. F. Keil (*Biblical Commentary on the OT*, ed. C. F. Keil and F. Deltzsch, trans. J. Martin), *inter alia*.

²¹ Cassuto, *Exodus*, p. 297. This is also the understanding in the Mishnah (*Baba Metzia*, 2.10), with certain restrictions.

²² Pound, *op. cit.* (n. 2), Vol. I, p. 215.

²³ Charles O. Gregory, "The Good Samaritan and the Bad: The Anglo-American Law," in *The Good Samaritan and the Law*, ed. J. R. Ratcliffe (Garden City, 1966), p. 24. The relationships that create a duty to help are restricted in number.

²⁴ Gregory, *op. cit.*, p. 26. Cf the remarks in the same volume by J. P. Dawson (p. 63).

²⁵ A number of contributions in the volume edited by Ratcliffe (n. 23) survey the situation.

²⁶ Maritime law, even in common-law countries, differs. Perhaps this is because of the obvious dangers of the sea and the clear knowledge that all who venture on it may face similar predicaments; perhaps also because of the influence of different legal traditions. The United States Code provides that "the master or person in charge of a vessel shall, so far as he can do so without serious danger to his own vessel, crew, or passengers, render assistance to every person who is found at sea in danger of being lost; and if he fails to do so, he shall, upon conviction, be liable [for fine and imprisonment]," as cited by Gregory, *op. cit.*, p. 40, n. 50. Note also the provision in the "International Convention for the Safety of Life at Sea" (1948), which states that "the master of a ship at sea, on receiving a signal from any source that a ship or aircraft or survival craft thereof is in distress, is bound to proceed with all speed to the assistance of the persons in distress, informing them if possible that he is doing so." See L. Waller, in the Ratcliffe volume (n. 23), p. 153, n. 32.

²⁷ In the law of divorce, see Deut 21: 15-17; 22: 13 ff; 24: 1-4; see also the Laws of Hammurapi, No. 142 (n. 1, above).

²⁸ See the Laws of Hammurapi, No. 193.

²⁹ See the Laws of Eshnunna, No. 30, and the Laws of Hammurapi, No. 136. This separation brings with it a loss of rights.

³⁰ Deut 4: 42; 19: 4, 6, 11; Josh 20: 5.

³¹ Num 35: 20 ff. Note that the language of Ex 21: 12-14 is more satisfactory to the jurist, who is more interested in actions than in emotions.

³² Cassuto, *Exodus*, p. 297. See n. 10, above.

³³ See the comment by Louis Waller in the Ratcliffe volume (n. 23): "There is general agreement today that the criminal law has a strong didactic purpose. It serves to teach, in its own terrible fashion, the canons of right and wrong to the community" (p. 141).

³⁴ It is clear that the formulation of these rules is designed more to educate the public than to inform the learned legal community. But one must recognize the difficulties involved in expressing positive duties in casuistic forms. Note the close resemblance to the formulations for maritime law cited above (n. 26), especially the "International Convention." The Exodus rules in question may well have had their locus in priestly instruction.