

**Reconstructing Rape for the “Olden Days”:
The Challenge of Biblical Rape Laws in Biblical Studies**

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Even though the influential thinker of postmodernity, Jacques Derrida, passed away on October 8, 2004, the postmodern era is here to stay.¹ “Master narratives” do not convince anymore, and so they have to be asserted over and over again since their authority and power are gone, as is the consensus about history, identity, and core cultural values.² We are living under a new configuration of politics, culture, and economics, which is sometimes called “late capitalism.”³ In this new configuration transnational economies, based on the global reach of capitalism, dominate human life and organization almost everywhere.

Thus ours is the early stage of a new period that subsumes, assumes, and extends the modern. This is the time *after* the modern age in which hybridity and the postcolonial flourish. We mix styles of different cultures and time periods, whether in the arts, literature, architecture, language, or food. We know there are many ways of doing things, an insight which fundamentalist movements resist worldwide, trying to suppress or ignore the drive toward multiplicity, diversity, and alternative ways of seeing and living life. Although most of humanity is excluded from the benefits of our era’s advances due to incredible levels of global poverty, Planet Earth has become a “global village” in which the nation-state is redefined, human networks of communication are mediated by technology, and ecological changes affect humans everywhere. We live in huge and complex networks of relations, interdependent from each other and this planet’s ecology. Accordingly, most earthlings know that they could go somewhere else if they had the money or the opportunity, and more people are refugees now than ever before.⁴ They leave home due to economic, political, or cultural devastation and hope to make a better living elsewhere. Little remains stable. Ours then is a time of remarkable tensions between the raw forces of social,

¹ For an extensive obituary, see “Jacques Derrida,” *The Times (London)* (October 11, 2004).

² See Jean-François Lyotard, *The Post-Modern Condition: A Report on Knowledge* (Minneapolis: University of Minnesota Press, 1984).

³ See Frederic Jameson, *Postmodernism, or The Cultural Logic of Late Capitalism* (Durham: Duke University Press, 1991).

⁴ The document on “Refugees By Numbers 2003” by the United Nations High Commissioner for Refugees states: “At the start of 2003 the number of people ‘of concern’ to UNHCR was 20.6 million—roughly one out of every 300 persons on earth—compared with 19.8 million a year earlier.” The document is available at http://www.irr.org.uk/pdf/unhcr_2003.pdf (visited January 6, 2005).

political, economic, and religious conservatism on the one hand and openness and the need, even sheer necessity, for change on the other hand.

In biblical studies the tension between conservatism and openness plays out primarily as an epistemological divide. We are in the midst of moving from an empiricist-positivist epistemology,⁵ characteristic of the modern western worldview, to a postmodern epistemology. The former assumes objectivity, value neutrality, and universality, and is primarily interested in the historical quest.⁶ The latter recognizes the contextualized, particularized, and localized nature of all exegetical work, and emphasizes the readers' responsibilities in the meaning-making process. The trouble is that biblical interpreters are not always conscious of this divide, which makes them claim as fact what is only an assertion of "truth" according to modern conventions.⁷

The drama of this divide is particularly visible in research on biblical and ancient Near Eastern rape laws because many exegetes interpret these legal texts within a modern paradigm. Interpretations based on this epistemology continue advancing not only androcentric understandings, but also the intentional fallacy.⁸ What is often missing are explanations that describe interpretive interests. As a result, postmodern readings of biblical and ancient Near Eastern rape laws are still rare.

⁵ The term "empiricist-positivist epistemology" was coined by Elisabeth Schüssler Fiorenza, *Rhetoric and Ethic: The Politics of Biblical Studies* (Minneapolis: Fortress Press, 1999), 41-42. She explains on p. 24: "The scientific ethos of value-free detached inquiry insists that the biblical critic needs to stand outside the common circumstances of collective life and stresses the alien character of biblical materials. What makes biblical interpretation possible is radical detachment and emotional, intellectual, and political distancing. Disinterested and dispassionate scholarship enables biblical critics to enter the minds and world of historical people, to step out of their time, and to study history on its own terms, unencumbered by contemporary questions, values, and interests. Apolitical detachment, objective literalism, and scientific value-neutrality are the rhetorical postures that seem to be dominant in the positivistic paradigm of biblical scholarship."

⁶ For a poignant critique of this approach, see Keith W. Whitelam, "Interested Parties: History and Ideology at the End of the Century," in *Reading from Right to Left: Essays on the Hebrew Bible in Honour of David J.A. Clines*, ed. J. Cheryl Exum and H.G.M. Williamson (Sheffield: Sheffield Academic Press, 2003), 402-422.

⁷ To most lay people, the entire discussion on the epistemological divide in biblical studies is completely lost. A recent editorial by Nicholas D. Kristof illustrates this lack of basic knowledge of biblical studies by lay people; see his "God And Sex," *The New York Times* (October 23, 2004): A17.

⁸ Intentional fallacy was dismantled years ago; see, e.g., Erich Auerbach, "The Intentional Fallacy," in *20th Century Literary Criticism: A Reader*, ed. David Lodge (London: Longman, 1972).

This paper examines the epistemological tensions that plague research on the ancient rape laws. A first section discusses how biblical interpreters argue from within an empiricist-positivist epistemology when they read Deuteronomy 21:10-14. A second section analyzes another well-known passage on biblical rape legislation, Deuteronomy 22:22-29. A third section examines ancient Near Eastern rape laws and the lack of scholarly attention to hermeneutical perspective in the interpretation of the legislative material. A conclusion acknowledges the current impasse between postmodern and modern epistemologies of reading and suggests that currently this divide cannot be bridged.

1. A Case for Marriage? The Law of the Enemy Woman (Deut. 21:10-14)

When scholars of an empiricist-positivist epistemology interpret the case of the enemy woman (Deut. 21:10-14), they present this law as a ruling about marriage during or after war. Accordingly, it is often characterized as a rule about “Marriage with a Woman Captured in War.”⁹ When the passage is discussed as part of the larger literary unit of chapter 21, exegetes sometimes classify it more generally as a text dealing with “Issues of Life and Death: Murder, Capital Offenses, and Inheritance”¹⁰ regulating the “treatment of a woman taken as a captive in war and subsequently married by her captor, or purchaser.”¹¹

Since commentators do not usually elaborate on their hermeneutical perspectives, except perhaps to say that they rely on historical and literary methodologies, interpretations take on an aura of objectivity and inevitability. They claim to present “the” meaning of the law as it was understood in its original context, a position that usually softens the soldierly claim for the “enemy woman” and emphasizes the need for marriage as the law’s noble intention. That the marriage is

⁹ Duane L. Christensen, *Deuteronomy 21:10-34:12*, World Biblical Commentary vol. 6B (Nashville: Thomas Nelson, 2002), 471; Jeffrey H. Tigay, *Deuteronomy: The JPS Torah Commentary* (Philadelphia: Jewish Publication Society, 1996), 194.

¹⁰ Ronald E. Clements, “The Book of Deuteronomy: Introduction, Commentary, and Reflections,” in *The New Interpreter’s Bible*, ed. Leander E. Keck a.o., vol. 2 (Nashville, TN: Abingdon Press, 1994), 443.

¹¹ *Ibid.*, 445. This law was probably never practiced. For instance, Washington acknowledges that “there is reason to doubt that this law was extensively applied;” see his “‘Lest He Die in the Battle and Another Man Take Her’: Violence and the Construction of Gender in the Laws of Deuteronomy 20-22,” in *Gender and Law in the Hebrew Bible and the Ancient Near East*, ed. Victor H. Matthews et al. (Sheffield: Sheffield Academic Press, 1998), 202.

coerced does not become a problem. For instance, one interpreter, Duane L. Christensen, recommends the law's lesson to his readers, which he describes as "the importance of a husband and wife sharing common spiritual values as the proper basis of a lasting union." Christensen suggests: "We would do well to follow the example here in deliberately delaying commitment in marriage for a period of time to assure that the decision to marry is not based primarily on physical lust."¹² By asserting this, the interpreter not only ignores the particularities of the law—a soldier "desiring" an enemy woman, but also that the woman has no choice but to convert to the soldier's habits and religion. Christensen understands the law as advice on abstinence in pre-marital consensual relationships.

Another exegete, too, minimizes the coercion when he writes: "Even when the marriage was to a woman who had been taken as a captive and turned into a slave, that marriage could never be reduced simply to a master/slave relationship."¹³ We do not learn why. To this interpreter, marriage rather than coercion is the important lesson without a discussion of the rationale for this claim. Writing from an empiricist-positivist epistemology, the commentator assumes the omniscient stance of the objective, universal, and value-neutral observer who does not disclose the reasons for his reading perspective. Since such interpreters do not require themselves to disclose hermeneutical assumptions, hermeneutical decisions remain unknown. They posit as scientific information what, in fact, favors a particular point of view, namely that of the soldier.

To some interpreters who read from a modern epistemology, vv. 10-14 regulate a specific situation of marriage. In this specific situation a soldier wants to marry an enemy woman after the war is over. This position is perhaps most extensively and comprehensively developed in Carolyn Pressler's study on women in Deuteronomic law.¹⁴ Pressler asserts that Deut. 21:10-14 does not regulate rape situations in war—a position she claims dominated earlier scholarly treatments.¹⁵

¹² Christensen, *Deuteronomy*, 475.

¹³ Clements, *Deuteronomy*, 448.

¹⁴ Carolyn Pressler, *The View of Women Found in the Deuteronomic Family Laws* (Berlin/New York: Walter de Gruyter, 1993), 10-15.

¹⁵ *Ibid.*, 11.

Rather, the law addresses a particular constellation of marriage in which a soldier wants to marry a foreign captive woman. Pressler supports this view by proposing that the law provided the legal means for marriage when “normal procedures for contracting marriage are impossible.”¹⁶ In her mind, therefore, the law depicts a ritual necessary for the “former captive”¹⁷ so that the soldier is legally qualified to marry her. Pressler stresses that the law regulates only this particular constellation and does not prohibit a “man from engaging in sexual relations with the woman without marrying her.”¹⁸ To her, it is a marriage legislation. She does not disclose her hermeneutical perspective and assumes to read from “nowhere,” masking her socio-historical location and interest.

Yet Pressler’s analysis also acknowledges textual ambiguity that challenges her reading of vv. 10-14. Pointing to the verb in v. 14, *innah*, she considers the verb “problematic” because it may indicate that the law’s drafters were aware of the marriage being an imposition on the woman. It “violated” the woman “in some way,” Pressler writes, a possibility that the original authors expressed by using the verb *innah*.¹⁹ Still, Pressler reads the text as a “window to historical reality”²⁰ even though her interpretation illuminates only the perspective of the soldier and the original lawyers. Her reading is grounded in the modern fallacy of objective literalism, scientific value-neutrality, and apolitical detachment.

One interpreter, however, who writes from a more tentatively argued empiricist-positivist framework, defines Deut. 21:10-14 as a rape law. In a study on violence in biblical narrative, Harold C. Washington explains the law’s purpose with these words: “The primary effect of the law is to assure a man’s prerogative to abduct a woman through violence, keep her indefinitely if he wishes, or discard her if she is deemed unsatisfactory...”²¹ Washington makes the woman’s plight central and is aware of the active role of readers in the meaning-making process when he

¹⁶ Ibid.

¹⁷ Ibid., 12.

¹⁸ Ibid., 14.

¹⁹ Ibid., 14-15.

²⁰ Schüssler Fiorenza, *Rhetoric and Ethic*, 43.

²¹ Washington, “Lest He Die in the Battle,” 207.

writes: “The fact that the man must wait for a month before penetrating the woman... does not make the sexual relationship something other than rape.... Only in the most masculinist of readings does the month-long waiting period give a satisfactory veneer of peaceful domesticity to a sequence of defeat, bereavement, and rape.”²² Washington reads the law from the woman’s perspective and identifies other readings as “masculinist,” charging them to favor the soldier’s perspective. To Washington, then, this law does not regulate a situation in which a couple is looking forward to marriage; it controls a situation of rape.

Washington’s explanations indicate that he knows that readings are always located “somewhere” even if they presume to read from “nowhere.” Although he does not include an explanation about his own hermeneutical perspective, he moves beyond the modern paradigm. Pointing to the androcentric bias of other readings, Washington describes the law from the woman’s perspective, and so illustrates multiplicity of meaning. Yet exactly this insight remains contested in the world of biblical studies.

2. The Death Penalty for Adultery? The Legislation in Deuteronomy 22:22-29

Found in a larger section on what some interpreters call “family and sex laws,”²³ Deut. 22:22-29 contains four rulings that the scholarly literature often characterizes as legislation about “Marital and Sexual Misconduct,”²⁴ “Miscellaneous Laws, relating chiefly to Civil and Domestic Life,”²⁵ or “a subset of the general law of adultery preceding them in Deut. 22:22.”²⁶ These laws illustrate the difficulties of modern-scientific epistemology in dealing with biblical rape legislation.

²² Ibid., 205.

²³ See, e.g., Alexander Rofé, ‘Family and Sex Laws in Deuteronomy and the Book of Covenant,’ *Henoah* 9 (1987): 131-159.

²⁴ Jeffrey H. Tigay, *Deuteronomy*, The JPS Torah Commentary (Philadelphia: Jewish Publication Society, 1996), 204. Similarly see also Duane L. Christensen, *Deuteronomy 21:10-34:12*, Word Biblical Commentary (Nashville: Thomas Nelson Publishers, 2002), 510: “Laws on Marriage and Sexual Misconduct.”

²⁵ S. R. Driver, *A Critical and Exegetical Commentary on Deuteronomy* (Edinburgh: T & T Clark, 1895, latest impression 1965), 244. Despite its age, the commentary is still considered a standard reference to the book of Deuteronomy.

²⁶ Harold C. Washington, “‘Lest He Die in the Battle and Another Man Take Her’: Violence and the Construction of Gender in the Laws of Deuteronomy 20-22,” in *Gender and Law in the Hebrew Bible and the Ancient Near East*, ed. Victor H. Matthews a. o. (Sheffield: Sheffield Academic Press, 1998), 208. (185-213).

The first case appears in v. 22 in which a man and a wife of another man are ordered to face the death penalty after they are found “lying” together. Scholars usually consider this case as a regulation against adultery. For instance, Jeffrey H. Tigay entitles this verse as “Adultery with a Married Woman”²⁷ and relates it to a ritual procedure mentioned in Num. 5:11-31. There a husband, suspecting his wife’s adultery, is authorized to bring her to a priest who gives her “the water of bitterness.” Tigay also mentions Lev. 20:10 which orders capital punishment for adulterous behavior. Similarly, Tikva Frymer Kensky characterizes Deut. 22:22 as a law against adultery.²⁸

The situation, however, is not so simple. The verse is terse and does not provide conclusive information on the precise relationship between the man and the woman. The man’s lying with her is not necessarily adulterous behavior. He could have threatened or forced her since the law does not specify the conditions of them lying together but only the consequences when he is found lying with her. The law is, however, clear on the penalty; both the woman and the man are to be killed. It could be argued that the penalty prescription is the result of androcentric jealousy which considers the woman guilty whether or not she consented.

Interestingly, some ancient Near Eastern laws mention similar cases but they always prescribe a wider range of penalties than the Deuteronomic law. For instance, Middle Assyrian Law 15 stipulates:

15. If a seignior has caught a(nother) seignior with his wife, when they have prosecuted him (and) convicted him, they shall put both of them to death, with no liability attaching to him. If, upon catching (him), he has brought him either into the presence of the king or into the presence of the judges, when they have prosecuted him (and) convicted him, if the woman’s husband puts his wife to death, he shall also put the seignior to death, but if he cuts off his wife’s nose, he shall turn the seignior into a eunuch and they shall mutilate his whole face. However, if he let his wife go free, they shall let the seignior go free.²⁹

²⁷ Tigay, *Deuteronomy*, 206.

²⁸ Tikva Frymer-Kensky, “Deuteronomy,” in *Women’s Bible Commentary with Apocrypha*, ed. Carol A. Newsom and Sharon H. Ringe (Louisville, KY: Westminster John Knox Press, 1998), 63. Similarly, Anglika Engelmann, “Deuteronomium: Recht und Gerechtigkeit für Frauen im Gesetz,” in *Kompendium Feministische Bibelauslegung*, ed. Luise Schottroff und Marie-Theres Wacker, 2nd ed. (Gütersloh: Chr. Kaiser Verlagshaus, 1999), 73.

²⁹ For the text, see James B. Pritchard, ed., *Ancient Near Eastern Texts Relating to the Old Testament* (Princeton, NJ: Princeton University Press), 181. For another more recent translation, see Martha T. Roth, ed., *Law Collections from Mesopotamia and Asia Minor* (Atlanta: Scholars Press, 1995).

Here, too, the law depicts a husband who discovers his wife with another man. Yet unlike the Deuteronomic parallel, MAL 15 authorizes the husband to determine the form of penalty ranging from the death penalty for both, cutting off the woman's nose and the other man's testicles, or no penalty at all. The emphasis is on the post-discovery phase. As in the Deuteronomic law, the nature of the crime is not spelled out.

Another related case appears in §129 of the Code of Hammurabi which also mentions various penalty options that range from drowning to leniency. This case, too, is usually classified as dealing with adultery although the actual crime is not specified.

129. If the wife of a seignior has been caught while lying with another man, they shall bind them and throw them into the water. If the husband of the woman wishes to spare his wife, then the king in turn may spare his subject.³⁰

Again, the emphasis is on the penalties. In other words, ancient Near Eastern laws do not only prescribe the death penalty for cases that scholars usually consider to be cases of adultery. They offer several penalty options unlike Deut. 22:22. Consequently, the biblical law may or may not be comparable because it orders a harsher punishment than comparable laws.³¹ Possibly, the penalty of v. 22 indicates that this case is a rape case since, like in other rape laws, it prescribes the death penalty for the crime.

The second case in Deut. 22:23-24 supports the view of v. 22 as a rape case. In vv. 23-24, the law orders the death penalty for both an engaged young woman and the man. The law explains that he "met" her in town and both are guilty since nobody heard her cry for help.³² Many interpreters accept that this law assumes correctly her consent and consider this case as legislation on adultery. Tigay, for instance, entitles his interpretation of this and the next unit as "Adultery with an Engaged Virgin (vv. 23-27),"³³ Rofé elaborates on vv. 23-24 in a discussion on biblical and

³⁰ Ibid., 171.

³¹ According to some scholars, the harsh punishment is due to the fact that, different from ancient Near Eastern law, biblical law considers all crimes as transgressions against God, the lawgiver; see, e.g., Moshe Greenberg, "Some Postulates of Biblical Criminal Law," in *A Song of Power and the Power of Song*, ed. D. Christensen (Winona Lake, IN: Eisenbrauns, 1993), 283-300, esp. 288-289.

³² See also Middle Assyrian Law 55 and §197 of the Hittite Laws, and the discussion of these laws below.

³³ Tigay, "Deuteronomy," 207.

ancient Near Eastern legislation on adultery,³⁴ and Duane L. Christensen talks about “the law of the seduction of a betrothed woman.”³⁵ Only a few commentators characterize this law as rape legislation.³⁶ If the latter position is assumed, vv. 23-24 represent a rape case in which both the rapist and the woman receive the death penalty. It is therefore possible to argue that v. 22 is a rape case, too. As in vv. 23-24, it prescribes the death penalty for both the woman and the man because the androcentric legislation distrusts a woman’s word.

The third case in vv. 25-27 depicts a clear-cut situation of rape, even for androcentric law. Here the woman is raped “in the open country” and is innocent because nobody was able to help her. Only the rapist receives the death penalty. Interestingly, the vocabulary of this and the previous case includes verbs that depict sexual violation. The verb “to rape” (pi’el; *innah*) appears in v. 24, and in v. 25 the man “seizes” or “catches” the woman, verbs conveying her unwillingness and his active intervention to get her.³⁷ These verbs also appear in ancient Near Eastern rape legislation and signify the force of the attack there.³⁸

Clearly, androcentric bias is present in these laws. Most importantly, they assume that rape occurs only in the countryside and not in town. They require a woman’s screams as proof of her non-compliance, and if she is not heard, the law assumes her consent. They also consider only unmarried women as rape victims, and so Deuteronomic laws do not contain cases in which a mature woman is raped. In the case of a wife, the law remains vague at best (v. 22), and interpreters classify it as one on adultery. These difficulties demonstrate that it depends on the readers whether

³⁴ Rofé, “Family and Sex Laws,” 147.

³⁵ Christensen, *Deuteronomy 21:10-34:12*, 518.

³⁶ Engelmann, “Deuteronomium,” 74.

³⁷ Against the view of Tikvah Frymer-Kensky, “Law and Philosophy: The Case of Sex in the Bible,” *Semeia* 45 (1989): 93, who maintains that in this context the verb means “illicit sex”, sex with someone with whom one has no right to have sex.” Frymer-Kensky’s position is also supported by Mayer I. Gruber, “A Re-examination of the Charges against Shechem son of Hamor,” *Beit Mikra* 157 (1999): 119-127; Washington, “Lest He Die in the Battle,” 208-212. For a recent study of these and related verbs, see Sandie Gravett, “Reading ‘Rape’ in the Hebrew Bible: A Consideration of Language,” *JSOT* 28, no. 3 (March 2004): 279-299.

³⁸ This is an argument in Sophie Lafont, *Femmes, Droit et Justice dans l’Antiquité orientale: Contribution à l’étude du droit pénal au Proche-Orient ancien* (Göttingen: Vandenhoeck Ruprecht, 1999), 138. For an opposing view, see Anthony Phillips, “Another Look at Adultery,” *JSOT* 20 (1981): 13.

these cases emerge as rape legislation in androcentric disguise, or whether they are viewed as consensual but socially unacceptable acts of sexual intimacy.

The androcentric perspective, mostly taken for granted in the scholarly literature, is at its most horrendous in the last part of the Deuteronomic rape legislation (vv. 28-29). This case describes the rape of a single young woman and stipulates that her father has to receive financial compensation, a solution that is also found in the Code of Hammurabi §156 and MAL 55. The biblical law also orders that the rapist marry the young woman “because he raped her” (v. 29). Deuteronomic law is thus considerably harsher than §156 of the Code of Hammurabi which allows the raped woman to marry whomever she wants. The biblical law is also more restrictive than MAL 55 which gives the father of the raped woman several options, only one of which is to marry his daughter to the rapist. In biblical law codes a reference to a father’s options is mentioned only in Ex. 22:16, a case of pre-marital consensual sex between a young woman and her lover. There, the father is authorized to order or to refuse marriage between the two and to demand financial compensation instead.³⁹

Again, biblical legislation is unquestionably androcentric with its primary focus on the interests of the father, and interpreters of a modern-scientific mindset follow this concern for which the woman’s situation matters little. As Harold C. Washington remarks correctly: “The laws do not interdict sexual violence; rather they stipulate the terms under which a man may commit rape...”⁴⁰ The problem is that interpreters, in effect, follow this stipulation and accept the legal bias that promotes male heterosexism. Due to the unquestioned acceptance of the empiricist-positivist epistemology, many interpretations perpetuate as objective, value neutral, and universal a concern that represents only one possible reading. They do not analyze as rhetorical constructs what may never have regulated ancient people’s “real” lives. After all, these laws were possibly never used

³⁹ Against Frymer-Kensky who considers Ex. 22:16 as a “comparable law” to Deut. 22:28-29; see her article “Law and Philosophy,” 93-94. Her arguments stand in a long tradition of premishnaic readers, see Robert J. V. Hiebert, “Deuteronomy 22:28-29 and Its Premishnaic Interpretations,” *Catholic Biblical Quarterly* 56 (1994): 203-220.

⁴⁰ Washington, “Lest He Die in the Battle,” 211.

for legal practice in ancient Israel and the Near East.⁴¹ Whether these regulations are therefore discussed in the context of adultery or rape rests on the readers, and it is a limitation of the modern-scientific mindset to drop other explanations for these cases of sexual violence.

3. “If a man...”: Rape Laws in Ancient Near Eastern Codes

Scholars of ancient Near Eastern rape laws do not show much, if any, appreciation for the notion that all exegetical work is contextualized, particularized, and localized, and that readers are central in the process of “meaning-making.” Instead, they, too, assume the objectivity, value neutrality, and universality of all exegetical work. They classify as sex offenses, adultery, or laws about marriage what are rape laws according to a perspective that explores the rhetoric of ancient rape legislation. Interestingly, older studies are sometimes more open towards the characterization of these laws as rape laws than more recent publications. Yet the earlier studies, too, do not consistently define the laws as rape legislation.⁴² For instance, written in 1966, the influential article by J.J. Finkelstein on “Sex Offenses in Sumerian Laws”⁴³ differentiates between “coercive” and “consentive” Sumerian laws, and only a chart defines “coercive” laws as rape laws. Mostly, however, Finkelstein prefers the term “adultery” for these laws. Finkelstein provides only indirectly a rationale for his terminological preference in a comment on the meaning of a text called “A Trial at Nippur (3N-T403+T340).” The first line of this Sumerian law reads:

Lugalmelam, son of Nanna’aramugi seized Ku(?)-Ninšubur, slave-girl of Kuguzana, brought her into the KI-LAM building, and deflowered [*sic*] her.⁴⁴

⁴¹ See the comment by Henry McKeating, “Sanctions Against Adultery in Ancient Israelite Society, With Some Reflections on Methodology in the Study of Old Testament Ethics,” *JSOT* 11 (1979): 70: “What I am suggesting, to put it in another way, is that the ethics of the Old Testament and the ethics of ancient Israelite society do not necessarily coincide, and the latter may not be represented altogether accurately by the former. Old Testament ethics is a theological construction, a set of rules, ideals and principles theologically motivated throughout and in large part religiously sanctioned. Were the principles by which real Israelites actually lived quite so closely determined by religious faith? It may be that they were, but we cannot without further ado assume so.” See also footnote 62 of this paper.

⁴² For an early study that classifies some of these laws as rape legislation, see, for instance, E. Neufeld, *The Hittite Laws* (London: Luzac, 1951), 194.

⁴³ J. J. Finkelstein, “Sex Offenses in Sumerian Laws,” *Journal of the American Oriental Society* 86 (1966): 366.

⁴⁴ *Ibid.*, 359. The choice of translating the Sumerian verb into English as “to deflower” reflects an inherently androcentric perspective.

The key question here is: what happened between the man called Lugal-melam and the enslaved young woman called Ku(?)-Ninšubur? Finkelstein allows for the possibility that the woman was raped but then dismisses it as socially “immaterial” for Mesopotamian law. He also suggests that rape, seduction, and consensual sex be interchangeable offenses against the slave owner. Here is his comment:

From the juridical point of view it may be worth mentioning that the trial does not discuss the question of whether the slave-girl was raped or was a willing partner in the offense. This is unquestionably [*sic*] to be explained by the fact that in the eyes of Mesopotamian law, consent in such cases is immaterial. Hence, her sexual violation, whether by rape, seduction, or even by her own solicitation, is exclusively considered as a tortuous invasion against her owner, for which he may seek redress...⁴⁵

In other words, Finkelstein claims to read from the perspective of the presumed original writers (“the eyes of Mesopotamian law”) when he characterizes the slave owner as the violated person who “may seek redress.” Identifying with the ancient lawgivers, he takes his choice for granted and considers it irrelevant whether the woman was raped, seduced, or participating in consensual sex. To him, the law protects the slave owner, and from this perspective Finkelstein develops the law’s meaning. He does not acknowledge that this is what he is doing, which enables him to mention the possibility of rape but then to dismiss it as an interpretative option. He reads from the perceived status quo of Mesopotamian society that favors the male owner or husband. As a result, it does not occur to Finkelstein to understand this law from another perspective. Hence, most of his article examines legal cases of “adultery” as perceived by the supposed status quo of ancient society even though the title promises a study on “sex offenses.”

The influence of Finkelstein’s analysis should not be underestimated for it continues to inform current work. For instance, in an article on “Adultery in Ancient Law,” Raymond Westbrook refers to Middle Assyrian Law 12 as an illustration for vocabulary that is sometimes used to make a point about the rights of a husband when his adulterous wife is discovered “*in flagranti delicto*.”⁴⁶ To make his point, Westbrook quotes the law only to explain the legality of

⁴⁵ Ibid., 360.

⁴⁶ Raymond Westbrook, “Adultery in Ancient Law,” *Revue biblique* (1990): 562.

punishing an adulterous woman. Yet a connection between MAL 12 and vocabulary on adultery is awkward because this law is a recognized rape law. Perhaps, to Westbrook, the difference between rape and adultery is irrelevant since he asserts that according to ancient law “adultery forms part of a complex of interrelated scholarly problems discussing social offenses such as seduction and rape.”⁴⁷ Assuming an empiricist-positivist epistemology, Westbrook does not disclose his hermeneutical perspective, which makes his study appear to be an objective treatment of ancient law. He posits as fact that adultery and rape are linked and fails to discuss the rationale for this relationship. His study seems to suggest that “in the olden days” rape and adultery were the same.⁴⁸

Yet unquestionably, ancient Near Eastern law codes address rape as a distinct problem. They are part of a long history of ancient rape legislation which is “abundantly documented in the legal codes from the Sumerian to the Roman period.”⁴⁹ However, during the past century, not a single scholarly article examined ancient Near Eastern rape laws in depth. For instance, the multi-volume *Reallexikon der Assyriologie und Vorderasiatischen Archäologie* has yet to publish a single entry on rape.⁵⁰ A couple of examples shall illustrate the abundance of these laws.

The Laws of Eshnunna

Paragraphs 26 and 31 of the laws of Eshnunna, which either preceded the Code of Hammurabi by 200 years, or, as sometimes suggested, were its “near contemporary,”⁵¹ describe

⁴⁷ Ibid., 548. In this very context, Westbrook refers to the study of Finkelstein in his footnote 26 on p. 548.

⁴⁸ The 1995-translation of ancient Near Eastern rape laws, edited by Marth Roth, exhibits a similar reliance on Finkelstein’s work. The index of “Selected Legal Topics and Key Words” lists the category “sexual offenses” under which the following terms appear: “adultery and fornication, consent, defloration, flirtatious behavior, incest, procuring, promiscuity, rape and sexual assault, seduction, sodomy.” Why these terms are part of the category “sexual offenses” is clear only when one studies the history of scholarship. Still, it is hard to believe that adultery, consent, or flirtatious behavior appear as “sexual offenses” in the index of a 1995-publication. See Roth, *Law Collections from Mesopotamia and Asia Minor*, 282.

⁴⁹ Lafont, *Femmes*, 133. My translation from the French.

⁵⁰ See *Reallexikon der Assyriologie und Vorderasiatischen Archäologie* (Berlin/New York: Walter de Gruyter, 1928ff) which was begun by Erich Ebeling and Bruno Meissner in 1928 and, after a publishing lapse of about a decade, was continued by Ernst Weidner und Wolfram von Soden. An entry for “Vergewaltigung” is promised to appear in the next decade.

⁵¹ For a brief discussion on the difficulties of dating the laws of Eshnunna in relation to the Code of Hammurabi, see Reuven Yaron, *The Laws of Eshnunna*, 2nd Revised Edition (Jerusalem, Leiden: The Magnes Press, E.J. Brill,

two cases that are similar to other ancient laws, such as §§6 and 8 of the Codex of Ur-Nammu.

Paragraph 26 and 31 of the laws of Eshnunna read as follows:

26. If a man gives bride-money for a(nother) man's daughter, but another man seizes her forcibly without asking the permission of her father and her mother and deprives her of her virginity, it is a capital offence and he shall die.

31. If a man deprives another man's slave-girl of her virginity, he shall pay one-third of a mina of silver; the slave-girl remains the property of her owner.⁵²

In the first case a man rapes a woman soon-to-be-married and in the second case he rapes an enslaved woman. In the first situation he receives the death penalty for the "capital offense" and in the second situation he is asked to make a payment to the owner of the enslaved woman. Class discrimination leads to discrimination in the extent of the penalty.

The Code of Hammurabi

Another rape law is found in §130 of the Code of Hammurabi that reads:

130. If a seignior bound the (betrothed) wife of a(nother) seignior, who had no intercourse with a male and was still living in her father's house, and he has lain in her bosom and they have caught him, that seignior shall be put to death, while that woman shall go free.⁵³

Here a betrothed woman, who still lives with her parents, is attacked and raped. This law is similar to other ancient rape laws such as §6 of the Codex of Ur-Nammu from Sippar and §26 of the Laws of Eshnunna, but §130 of the Code of Hammurabi makes two additional points. First, the woman is still living with her parents, and second, the law emphasizes that she is not penalized. Only the rapist receives the death penalty. This is a clear rape law, which is recognized as such by Finkelstein: "This case too is an act of rape..."⁵⁴

Sometimes, however, scholars avoid the term "rape," especially when they speculate about the rationale of ancient Near Eastern marriage laws. For instance, in 1988, Raymond Westbrook refers to §130 of the Code of Hammurabi as being similar to §26 of the Laws of Eshnunna. To

1988), 21. For the view that the laws of Eshnunna are contemporary to the Code of Hammurabi, see Raymond Westbrook, *Old Babylonian Marriage Law* (Horn: Verlag Ferdinand Berger & Söhne, 1988), 4. The Laws of Eshnunna are often dated around 1770 and the Code of Hammurabi around 1750.

⁵² For the text, see James B. Pritchard, ed., *Ancient Near Eastern Texts Relating to the Old Testament*, Third Edition with Supplement (Princeton, NJ: Princeton University Press, 1969), 162.

⁵³ The English translation appears in Pritchard, *Ancient Near Eastern Texts*, 171.

⁵⁴ See, e.g., Finkelstein, "Sex Offenses in Sumerian Laws," 356.

Westbrook, both laws explain what happens under the conditions of an “inchoate marriage,”⁵⁵ which is defined by “a lapse of time between conclusion of the marriage contract and the act of marriage.”⁵⁶ To Westbrook, §130 of the Code of Hammurabi is thus part of the marriage laws, and in his book on “Old Babylonian Marriage Law” rape is not an issue although he refers to this and other rape laws.

Westbrook is not alone in this treatment of ancient Near Eastern rape legislation because much of the scholarly literature has not been forthcoming in identifying rape as an issue. In fact, scholars often treat ancient Near Eastern rape laws as cases on marriage and adultery. For instance, Eckart Otto supports the view that §130 of the Code of Hammurabi describes marital procedures.⁵⁷ Also Walter Kornfeld’s examination of adultery mentions “the case of a rape of a young engaged girl” but refrains from further comments.⁵⁸ Similarly, Benno Landsberger relies on the category of “virginity” in a discussion that includes ancient rape laws. His translation and commentary mentions the relevant rape terminology, but, to Landsberger, all of these laws illuminate various attitudes toward virginity only.⁵⁹ Androcentric bias and modern-scientific epistemology merge to a potent combination that eliminates the possibility for interpretative alternatives.

The Middle Assyrian Laws

⁵⁵ Raymond Westbrook, *Old Babylonian Marriage Law* (Horn, Austria: F. Berger, 1988), 30. The terminology of “inchoate marriage” appeared initially in the early decades of the twentieth century, see Benno Landsberger, “Jungfräulichkeit: Ein Beitrag zum Thema ‘Beilager und Eheschliessung,’” in *Symbolae Iuridicae et Historicae: Martiono David Dedicatae*, ed. J. A. Ankum, R. Feenstra, and W. F. Leemans, vol. 2 (Leiden: E. J. Brill, 1968), 40-41.

⁵⁶ *Ibid.*, 32.

⁵⁷ See, e.g., Eckart Otto, “Rechtssystematik im altbabylonischen Codex Ešnunna und im altisraelitischen Bundesbuch,” *Ugarit-Forschungen* 19 (1987): 184, 185. For a discussion on Egyptian texts about adultery, see C. J. Eyre, “Crime and Adultery in Ancient Egypt,” *Journal of Egyptian Archaeology* 17 (1984): 92-105.

⁵⁸ Walter Kornfeld, “L’adultère dans l’orient antique,” *Revue biblique* 57 (Ja. 1950): 98. My translation from the French original. Other examples are R. Yaron, “The Rejected Bridegroom (LE 25),” *Orientalis* 34 (1965): 29. The article on adultery (“Ehebruch”) in the German *Reallexikon der Assyriologie*, vol. 2 (1938) refers to more information about rape (“Notzucht”). Yet the word “Notzucht” in volume 10 refers readers to an article on “Vergewaltigung,” the contemporary German term for rape. A volume on terms beginning with “v” has, however, not been published yet. See also footnote 50 of this paper.

⁵⁹ Landsberger, “Jungfräulichkeit,” 53, 56, 63-64, where he uses the German verbs “vergewaltigen” and the old-fashioned “notzüchtigen,” as well as the nouns “Notzucht” and “Vergewaltiger.”

Another set of ancient Near Eastern legislation addresses cases of rape. The Middle Assyrian laws describe four such scenarios, all of which refer to explicit situations of a man raping a woman. In §§12, 16, and 23, the woman is married, and in §55 she is young, single, and still lives in the parental home. Here is only a brief discussion of §16.

12. If, as a seignior's wife passed along the street, a(nother) seignior has seized her, saying to her, "Let me lie with you," since she would not consent (and) kept defending herself, but he has taken her by force (and) lain with her, whether they found him on the seignior's wife or witnesses have charged him that he lay with the woman, they shall put the seignior to death, with no blame attaching to the woman.⁶⁰

This law presents an undisputable rape scene. A married woman is attacked by a man in the street. She resists but he succeeds in raping her. This is a classic rape scenario, and the Akkadian terminology is unambiguous. The phrase, *emûqa sabâtu*, is usually translated with "to take by force."⁶¹

The punishment for the rapist is the same as in other ancient Near Eastern laws. He receives the death penalty only if—and this is the androcentric limitation of this particular law—other people or witnesses charge the rapist with the crime. The woman is not recognized as a possible accuser because the charge depends on others. Still, the very existence of the law demonstrates that rape was perceived as a problem even if this law was never legislatively practiced and served the Middle Assyrian Empire for other purposes.⁶²

In short, scholarship on ancient Near Eastern rape law would greatly benefit from the epistemological insights of postmodern theory. If all interpretations are always "located somewhere," the study of biblical and ancient Near Eastern laws reveals more about the hermeneutical interests of readers than the authorial meaning of ancient lawgivers. Yet, ancient Near Eastern scholars seem undeterred by the epistemological advances of the last decades, and much

⁶⁰ Pritchard, *Ancient Near Eastern Texts*, 181. Roth, *Law Collections from Mesopotamia and Asia Minor*, 282, lists MAL 9 as a rape law in the index but this law seems too unclear to be included in the discussion here.

⁶¹ See Lafont, *Femmes*, 137.

⁶² For a discussion on the function of ancient Near Eastern law codes, see Raymond Westbrook, "Biblical and Cuneiform Law Codes," *Revue biblique* 92, no. 2 (1985): 247-264. An early publication claims the opposite; see G. R. Driver and John C. Miles, *The Assyrian Laws* (Oxford: Clarendon, 1935), 37: "If it is true that so many laws argue so many sins, this offense [adultery] must have been rife in Babylonia and Assyria; for a large number of sections in the Babylonian code and in these laws are concerned with it."⁶²

work remains to be done. Clearly, the epistemological divide is enormous and a bridging conversation not yet in sight.

4. Toward a Conclusion, Not a Resolution

The purpose of this paper has been threefold. (1) It has brought attention to the current epistemological divide in biblical studies, especially as it relates to the interpretation of rape laws. (2) It has invited us to view epistemological differences as the reason for interpretative differences, and (3) it has asserted that authorial meaning, too, is coming from “somewhere.” Yet the scholarly opposition to this threefold purpose is strong. As we have seen, many scholars continue reading from “nowhere,” which makes their explanations vulnerable to androcentric bias and alienating to contemporary readers. Empiricist-positivist interpreters insist on placing the meaning of biblical and ancient Near Eastern texts into the safe distance of ancient history, and so they avoid the debate about the ongoing cultural, historical, political, or religious meaning of these laws. They also disregard the question of why the next generation should devote their scholarly lives to this kind of work if they can only reproduce historically fixed meaning that is entirely disconnected from contemporary views and experiences about human life on earth.

We face, then, a “real” dilemma that has material, political, and cultural implications for the academic study and teaching of biblical law in particular and the Bible in general. If the position of positivist-empiricist scholars is that “in the olden days” rape was mostly understood as adulterous or desirous behavior by men who could legally do whatever they wanted, it is ethically, historically, and culturally irresponsible to transmit such history to the next generation without critical commentary. Yet the pedagogical impetus is entirely absent from research on ancient rape laws. The postmodern notion of the contextualized nature of all exegetical work would easily solve these problems by disclosing hermeneutical interest and rationale. What is required, then, is a vibrant and engaged discussion on these matters, especially in the areas in which the conversation is absent.

In my mind, if such a discussion does not take place, the terrain will be left to the increasingly dominant discourse of the Christian right that insists on the literal historicity of the Bible, a notion that is closely aligned with scientific objectivist hermeneutics.⁶³ Hence, the “olden” rape laws represent an ideal opportunity to reason about the hermeneutical uncertainties and complexities of reading sacred texts such as the Bible. Ancient rape laws also enable us to relate the epistemological divide in biblical studies to the larger arena in which we live and to communicate the urgent need for dialogue across the hermeneutical, religious, cultural, and political divide, in biblical scholarship and beyond.⁶⁴

⁶³ Other scholars also see this connection between the Christian right and the modern worldview; see, e.g., Schüssler, *Rhetoric and Ethic*, p. 42: “In spite of their critical posture, academic biblical studies are thus akin to fundamentalism insofar as they insist that scholars are able to produce a single scientific, true, reliable, and nonideological reading of the Bible. Scholars can achieve scientific certainty as long as they silence their own interests and abstract from their own sociopolitical situation.”

⁶⁴ I owe the idea of connecting the epistemological divide in biblical studies to the current US-American socio-political and religious divide to Charles Nelson, professor emeritus of German at Tufts University, during a conversation on November 6, 2004.