Discrepancies between Laws in the Torah

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In this essay I examine the vexing question of the seeming discrepancies between law in Deuteronomy and law as it appears in the earlier books of the Torah.

I discuss the issue here with a particular methodological assumption: that to understand how the Torah coheres as a cohesive whole we must identify and shed the anachronistic assumptions that we bring to our reading of the Torah. Moreover, we must recapture the modes of thinking and writing that were prevalent in the ancient world. Only by reading the Torah in its ancient Near Eastern context, as its first audience understood it, can we hope to grasp its message.

A Signature Example of the Problem: The Law of the Firstborn Animal—The Approaches of the Sages

To illustrate the problem at hand, I will examine the mandate to dedicate and sanctify the firstborn animal. This mitzvah appears in two places in the Torah, and is one of the clearest examples of how irreconcilable two formulations of a mitzvah can be when read on the level of *peshat*.

In Numbers 18:14–18, God addresses Aaron and issues the following promise to him and his descendants, the *Kohanim*:

Everything that has been proscribed in Israel shall be yours. The first issue of the womb of every being, man or beast, that is offered to the Lord, shall be yours; but the firstborn of man redeemed, and you shall also have the firstling of unclean animals redeemed. Take as their redemption price, from the age of one month up, the money equivalent of five shekels by the

sanctuary weight, which is twenty gerahs. But the firstlings of cattle, sheep, or goats, may not be redeemed; they are consecrated. You shall dash their blood against the altar, and turn their fat into smoke as an offering by fire for a pleasing odor to the Lord. But their meat shall be yours: it shall be yours like the breast of elevation offering and like the right thigh.

Note that here, the flesh of the firstborn kosher animal is expressly given over to the *Kohen*, and is considered as much his as the other priestly entitlements (*matanot kehunah*) enumerated in the opening chapters of Leviticus (18). The *Kohen* is called upon to dash the blood on the altar (17). Because these animals are considered holy, it would be expressly forbidden for a *Yisra'el* to partake of them. Compare this, however, with what the Torah says on the subject in Deuteronomy 15:19–23:

You shall consecrate to the Lord your God all male firstlings that are born in your herd and in your flock: you must not work your firstling ox or shear your firstling sheep. You and your household shall eat it annually before the Lord your God in the place that the Lord will choose. But if it has a defect, lameness or blindness, any serious defect, you shall not sacrifice it to the Lord your God. Eat it in your settlements, the unclean among you no less than the clean, just like the gazelle and the deer. Only you must not partake of its blood; you shall pour it out on the ground like water.

Here it is clear that the firstborn animal is to be consumed by its owner, a *Yisra'el* (20). The sages were aware of the discrepancy between the two sources, and resolved it through a strategy of harmonization. Rashi, commenting on Deuteronomy 15:20, invokes the solution of the *Sifrei*. Indeed, the owner of the animal must bring it to the Temple, as is suggested by Deuteronomy 15:19. However, when 20 states “You . . . shall eat it,” that must refer to the *Kohen*, because Numbers 18 clearly states that the *Kohanim* alone may consume these animals. This reading, however, is difficult to maintain as a *peshat* reading of Deuteronomy 15. The same addressee (“you”) who consecrates the animal (19)—presumably the *Yisra'el* owner—and who must take it home to consume it if it is blemished (22) and must properly dispose of its blood (23), is the same addressee commanded, “you . . . shall eat it” in verse 20. In fact, verse 20 suggests the addressee here is someone who comes from afar to the Temple only periodically, and not someone who is there on a more regular basis. The implication is that this verse, too, is referring to a *Yisra'el* and not to a *Kohen*.

The Hypothesis of Competing Legal Traditions—A Critical Evaluation

Critical study of the Bible proposes a simple solution for the discrepancy: the laws of Deuteronomy and the laws of Numbers are from two separate law codes. They were not originally written to coexist in one text. The two codes are mutually exclusive. This source-critical approach maintains, in fact, that the Torah contains four distinct law codes: the Covenant Code, comprised essentially of Exodus 21–23; the Priestly Code, which includes the Torah's cultic laws; the Holiness Code, which is comprised of the laws governing life in the land, contained in Leviticus 17–26; and, finally, the Deuteronomistic Code, containing the laws found in Deuteronomy. These codes, it is said, were successively composed with the intent of replacing the law found in an earlier code. Thus, for example, Deuteronomy offers its own version of the law of manumission (*eved ivri*) in chapter 15, because its author rejected the formulation of the law found in Exodus 21:1–6.

The hypothesis of four codes of law is born out of the premise that no single agent would compose a work so fraught with legal contradiction. Advocates of the hypothesis must explain, however, how these disparate law corpora came together. The proposed solution essentially kicks the ball downfield. The bringing together of these materials is not the act of an author but of an editor, or what scholars call a redactor. Scholars, however, must then explain why an editor would bring together material in a way that an author would not. The standard explanation is that the redactor did so out of duress. With the pressures of the destruction and exile, there was a need for Israel's disparate subcommunities and traditions to unite together around a compromise document, and that document is the Torah.

This hypothesis of mutually exclusive codes brought together under duress in a compromise is subject to critique from a strictly academic perspective on six accounts.

First, and foremost, it is difficult to see how the Torah in its present form could satisfactorily be termed a "compromise document." There may well have been subcommunities within Israel at the time of the destruction. And joining forces and reaching compromise may well be a wise strategy for survival. But the discrepancies within the Torah render it the antithesis of a compromise document. A document reflecting compromise between competing agendas is one where each side gives ground on its original positions, and a middle ground is found. Alternatively, one side will get its way on a given issue and the other side its way on another. Where draftsmen truly find no common ground, they

may employ creative ambiguity, or skirt the issue altogether. The *sine qua non* of a compromise document, however, is that it will iron out conflict and contradiction so that the community can proceed following one, authoritative voice. What compromise is there in the competing laws of the firstborn animal? If anything, the Torah would seem to guarantee a state of anarchy, with *Kohanim* insisting that the law should follow the formulation of Numbers 18, and land-owning *Yisra'el* pointing to the formulation in Deuteronomy 15 as the right way to go.

Second, the theory that the Torah is a compromise document has no external control to validate it. There were actually a number of law codes composed in the ancient Near East, *The Code of Hammurabi* being the most famous of them. Nonetheless, nowhere else in this vast region do we see that a culture faced with catastrophe suddenly merged its competing strands of thought and law into such a so-called “compromise document.” This is so even though in the annals of ancient Near Eastern history Israel hardly stood alone in experiencing dislocation and disaster. Nor is there any attestation to this process of assembling the Torah in this fashion either from extra-biblical sources, or from anywhere in the Tanakh itself. Moreover, there is no extra-biblical evidence or passage within the Tanakh itself that points to the composition of even one of these codes as an independent literary entity.

Third, the notion that the various law codes compete with one another and were not intended to be combined is challenged by evidence within the Torah itself. The book of Deuteronomy makes no claim to its own sufficiency as a source of law, and calls upon Israel to fulfill precepts “as I have instructed you” elsewhere (12:21; 18:2; 24:8; compare also 5:12; 5:16). This seemingly refers to passages contained in one of the other so-called codes.

The fourth complication for this hypothesis stems from the peculiar authority that the book of Deuteronomy ascribes to its laws. In the earlier books of the Torah, the laws are commanded to Moses by God Himself. In Deuteronomy, however, the laws seem to be *given*—not merely transmitted—by Moses himself. Abarbanel noted that nowhere in Deuteronomy does the Torah say that the laws contained in that book were dictated by God to Moses. In fact, at several junctures Moses explicitly states that these are the laws that he is giving to Israel (e.g. Deut. 4: 44–45; 5:1). This is what led Abarbanel to his theory that the laws in Deuteronomy represent corollaries (*toladot*) to the earlier laws. Moses, for Abarbanel, could not make new laws, but he could add stipulations that would buttress the earlier laws, and support their spirit. However, this theory breaks down when we come to

discrepancies like the ones exhibited in the various iterations of the law of the firstborn animal. The fact that Deuteronomy maintains that its laws emanate from Moses is problematic for the hypothesis of competing sources of law. Many scholars maintain that the law in Deuteronomy comes to replace the law in the Covenant Code of Exodus 21–23. Yet those laws are revealed in God’s name. Why would the later author of Deuteronomy compose laws designed to replace laws spoken by God in Exodus, and replace them with laws whose authority is only that of Moses?

Fifth, were these so-called schools truly inimical to each other, we would expect the warfare over the law to spread to many other books of the Bible. Indeed, scholarship routinely maintains that Deuteronomic, or Priestly, or Holiness editors were largely responsible for the redaction of many of the books of the Tanakh. The other books of Scripture touch upon literally dozens of areas of law. Yet nowhere in the Hebrew Bible do we find a prophet, priest, king, or narrator who argues in explicit fashion for the legitimacy of one version of a law over another. Nowhere in the Tanakh do we find a book or a prophet who can be classified as purely following Deuteronomy or the Holiness Code. In fact, quite the opposite is true. Nearly all the books of the Tanakh resonate with passages from all so-called sources of law. Often, biblical writers will weave together purportedly “competing” law sources. Nehemiah does this with the very laws we have taken as our case study—the laws of the firstborn animal in his discussion of practice in his day (Neh. 10:35–37).¹ Put succinctly, while the source critical approach sees the different law collections as mutually exclusive, all sections of the Tanakh, from the Torah and on into the other books, seem to put them together. In the Torah we find these laws all united under one cover as the Torah, and in the other books we see references to these law codes woven and cited, with no sense that affinity to one comes at the expense of the standing of the other.

Sixth, I take a page from the history of the critical study of the Torah. When we look at the early major figures of this movement, we see a curious trend. Until the mid-nineteenth century, scholars attended solely to contradictions within the narrative portion of the Torah. I’m speaking of figures like Spinoza, Astruc, Eichhorn, De Wette, and Ewald, for those familiar with the names. These figures read the *narratives* of the Torah with a keen eye, and looked for every slight indication of difference as evidence of independent sources. These are the figures that hypothesized a J source and an E source for the stories of the Torah. Yet, strangely, one finds no mention in their work of the contradictions within biblical law. That enterprise began in earnest only in the second half of

the nineteenth century. Why were earlier scholars oblivious to problems in the text that would be so obviously problematic to later scholars?

All of this suggests that we should look for an alternative explanation. I conclude therefore, with a “prospectus” of what a satisfactory hypothesis would need to include to explain the discrepancies between the law in Deuteronomy and in the earlier books. This theory should explain what seems a Gordian knot: on the one hand, many laws in the Torah seem to be mutually exclusive—such as the laws of the firstborn animal. And yet, at the same time, the literature in which these laws are found—the Torah and the Tanakh generally—seems to relate to them as compatible. It should explain why Deuteronomy ascribes the laws to Moses when all the other books ascribe them to God Himself. It should explain why Deuteronomy seems to approve of prior law codes, beckoning Israel to follow certain laws “as I have instructed you,” and yet, at the same time, often gives a divergent formulation of the law. Finally, our solution should explain why scholars before the mid-nineteenth century rarely if ever saw contradiction within the laws of the Bible, whereas contradiction here has been obvious to scholars working in the last century and a half.

That solution, I maintain, is available. Its root lies in identifying our anachronistic understanding of the word “law,” and how legal texts are to be read. It lies in recovering how people thought about “law” and legal texts in premodern times.

The difficulties that many sense in the law collections of the Torah stem from anachronistic notions of how law functions and of what a legal text is. I will proceed by laying out the difference between modern and ancient notions of law. This will enable us to comprehend anew a host of questions concerning law in the Tanakh, and gain a greater appreciation of the relationship between *Torah she-bi-khetav* and *Torah she-be-al peh*, usually translated as “the Written Law” and “the Oral Law.” I begin by laying out the assumptions we hold when we speak about law today.

Common Law vs. Statutory Law

What do we mean when we use the word “law”? Consider the following common usages of the word *law*: “uphold the law,” “comply with the law,” “the letter of the law,” “pass a law,” “against the law.” These statements share a basic assumption: the “law” in question is a written formulation and is found in a law code. However, the intuitive notion that by “law” we mean written law

found in a law code is itself a relative newcomer in the history of legal thought. Once upon a time, the norms of society were not written. There were no codes. This is the story of the history of the word “law,” and how it came to take on the modern meaning of law written in a law code. More profoundly, this is the story of how our modern use of the term “law” has put us out of touch with the way law worked in the time of the Tanakh.

When most people today think of the word “law,” they have in mind what legal theorists call *statutory law*. Law, within this conception, is contained in a *codified* text. Only what is written in the code is the law. The law code supersedes all other sources of norms that preceded the formulation of the code. No other sources of authority have validity other than the code itself. Therefore, the courts must pay great attention to the wording of the text and cite the text in their decisions. Where the code lacks explicit legislation, judges must adjudicate with the code as their primary guide. For many of us today this *statutory* approach to law is intuitive and even unremarkable. Yet as recently as the early nineteenth century, the vast majority of Germans, Englishmen, and Americans thought about law in very different terms. The prevailing view for them was a *common law* approach to jurisprudence.

For common law theorists, the law is not found in a written code which serves as the judge's point of reference and which delimits what they may decide. A judge arrives at a judgment based on the mores and spirit of the community and its customs. Norms develop gradually through the distillation and continual restatement of legal doctrine through the decisions of courts. When a judge decides a particular case, he or she is empowered to reconstruct the general thrust of these norms in consultation with previous judicial formulations. Critically, the judicial decision itself does not create binding precedent. *No particular formulation of these norms is final. There is no authoritative text called “the law” or “the law code.”* As a system of legal thought, common law is consciously and inherently incomplete, fluid, and vague.

When decisions and precedents were collected and written down, these texts did not become the *source* of law, but rather a *resource* for later jurists to consult. Every decision became “a datum from which to reason,” in the words of the early nineteenth-century common law theorist John Joseph Park.² Within this conception, judges address new needs and circumstances by reworking old norms, decisions, and ideas. Although common law attached great importance to the venerated customs of the past, the key was not the unchanging identity of its components, but a steady continuity with the past.

By the end of the nineteenth century, legal codes were being drafted across the Western world, from Germany to America. The statutory approach had won the day. But why? What was it that led sensibilities about jurisprudence to shift so dramatically in the second half of the nineteenth century from a common law approach to a statutory approach? Why do we today think of law as *statutory law*?

Common law thinking flourishes in homogeneous communities where common values and cultural touchstones are nourished and maintained by all. Where cohesion breaks down, however, it is difficult to anchor law in a collective set of mores and values. Nineteenth-century Europe witnessed large-scale urbanization and the rise of the modern nation state. Great numbers of disparate individuals were coalescing in social and political entities of ever-larger scope. A clearly formulated set of rules could unite a heterogeneous populace around a single code of behavior. The earliest known instance of codification reflects the same political logic. The first written Greek laws date to the middle of the seventh century BCE, and proliferate at just the period when Greek city-states were in a process of state formation and developing more formal political systems.

Today, we are citizens of large, polyglot political entities, far removed from the spirit that animated common law jurisprudence in the premodern period. But to appreciate the vitality of the common law system within a local, homogeneous environment, we need think no further than our own homes and the dynamics of the nuclear family. At home, we certainly do set the bar high in terms of expected behavior, but we do not typically run the house on the basis of “laws.” Children may be reminded not to jump or eat on the couch, but there are no “laws of the couch” posted on the side of the refrigerator. At home, proper behavior and attitudes are modeled by parents and neighbors. Cues suggesting how a child should behave, think, and feel are all interwoven in and inculcated through the gestalt of the environment created by the home. Here parental discipline is exercised in a fluid and changing manner. Parents may address a child’s misdeed one way on one day and in an entirely different way with another child at a different time. The broad set of goals and ideals remains the same. But their implementation and expression are in a constant state of flux.

This is a good model for understanding the dynamics of law in much of the premodern world. Villages were small and homogeneous. Families typically lived in the same village for generations and could assume that continuity for the future. Village members shared a common language,

religion, heritage, common enemies, and common economic opportunities. There was no need for societal norms to be legislated by a formal body, let alone written. What was expected of a person in attitude and behavior was part of the warp and woof of day-to-day life, much as is the case with family life for us today. When a member of the village violated those norms, the elders convened and decided the appropriate remedy. There were no “jurists” as a professional guild. Village elders possessed the wisdom of the ages and determined on an *ad hoc* basis the best redress for the situation at hand. When the continuity and homogeneity of small community are torn asunder, however, the statutory approach to jurisprudence serves to bridge the chasm that separates the behavioral and attitudinal differences of constituent citizens.

Lessons About “Law” From Hammurabi

The dichotomy between a statutory system of law and a common law system is essential for understanding the idea of law in the ancient world. In the ancient Near East there was no “law” in the sense of a statutory code. Moreover, as I will proceed to demonstrate, there was no such “law” in the Torah either. Indeed, there was no such law *anywhere* in the ancient world. I would like to demonstrate this by laying out a series of observations that scholars have made about what some call “history’s first law code”—*The Code of Hammurabi*. The “Code” of Hammurabi is an excellent place to begin our discussion of statutory law in the ancient world because the “Code” of Hammurabi, it turns out, is no code at all. Following how scholars reached this conclusion offers important context for understanding the nature of law in the Torah. A series of startling observations about this famous document speak volumes about the so-called “law codes” of the Torah.

French archeologists discovered the *Code* while digging in 1901 at Susa—ancient Shushan. They unearthed an imposing seven-foot-tall stele of black diorite inscribed with cuneiform writing on all sides, which today stands as the marquee holding of the Louvre in Paris. Scholars quickly translated the Akkadian, written ca. 1750 BCE, and saw that it contained provisions—282, to be exact—that read like this:

[55] If a seignior, upon opening his canal for irrigation, became so lazy that he has let the water ravage a field adjoining his, he shall measure out grain on the basis of those adjoining his.³

Or like this:

[229] If a builder constructed a house for a seignior, but did not make his work strong, with the result that the house which he built collapsed and so has caused the death of the owner of the house, that builder shall be put to death.⁴

As scholars sought to uncover the meaning of this text, however, the intellectual shovels at their disposal were not equal to the task. Recalling their lesson from the study of proverbial ducks, as it were, scholars concluded that if it looks like a law code, and reads like a law code, then—it must be a law code! This was, after all, the early twentieth century, and every civilized country in Europe was now incorporating jurisprudence that championed statutory law.

Scholars are always quick to identify evidence in support of their hypotheses, and, sure enough, evidence was quickly found supporting the understanding of this text as a statutory code. In time, more than fifty fragments of the “Code” of Hammurabi were found all across the Mesopotamian region. Moreover, these copies or fragments had been copied over a period that spanned more than 1500 years. Most remarkably, these fragments revealed virtually no editing of content over that time. For half a century, scholars considered it an assured result: *The Code of Hammurabi* (or CH, as scholars refer to it in shorthand) had canonical status throughout Mesopotamia and was unrivaled as the source of law.

Around mid-century, however, scholars started to identify cracks—not in the stele, but in the theory that CH was a statutory code. Scholars were puzzled: wild fluctuations of inflation and deflation were well-known throughout the ancient Near East. Nonetheless, the fines that *The Code of Hammurabi* mandates for various offenses remain unchanged across the 1500-year epigraphic record. Had CH served as a statutory code, those fines would surely have been adjusted over time. Scholars were further puzzled: Significant areas of day-to-day life receive no attention at all in CH. There are no stipulations relating to inheritance, for example. This is inexplicable if, indeed, CH was the binding law code of a culture. Puzzling even further was the evidence from the archaeological record. Archaeologists have discovered copies of *The Code of Hammurabi* in royal archives and in temples, but never at the sites of local courts, and never together with the literally thousands of court dockets that have come to light from Mesopotamia. Were CH statutory law, we would certainly expect to find it well-represented in court settings. But most puzzling to scholars was this: not

one of these thousands of court dockets ever refers to or cites CH as a source of law. In fact, *not a single court docket from anywhere in the ancient Near East ever refers to any ancient law collection as a source of law*. The practice of citation is strikingly absent from the record. Think of that in modern terms. Today a judge must cite sources when he or she delivers a decision. Finally, and most crucially, many court dockets from ancient Mesopotamia record proceedings of cases whose remedy CH directly addresses. Nonetheless, in many of these, the judge rules counter to the prescription offered in the CH. If this text was the “law code” of Mesopotamia, how could a judge rule contrary to it? These complications raised two enduring and interrelated questions: if seeming “law collections” such as CH did not contain the law, where could the law be found—where was it written? And secondly, if texts like CH were not statutory codes, then what were they?

Where was the law written in Mesopotamia? The answer is: it wasn’t. A judge would render a decision at the moment of adjudication by drawing on an extensive reservoir of custom and accepted norms. It would continually vary from locale to locale. One could not point to an accepted text of the law—neither CH, nor any other text, for that matter—as the final word on what the law was or prescriptively should be. Philology here speaks volumes: in ancient Greece the word for written law was *thesmos*, and later, *nomos*. But that was Greece. Nowhere in the cultures of the ancient Near East is there a word for written law. The very concept does not exist.

If CH, though, wasn’t a collection of “laws,” what was it? These collections, instead, are anthologies of *judgments*—snapshots of decisions rendered by judges, or perhaps even by the king himself. The domain of these texts was the ivory tower of old, the palaces and the temples, the world of the court scribe. Collections like CH were a model of justice meant to inspire; a treatise, with examples of the exercise of judicial power. They were records of *precedent*, but not of *legislation*.

Scholars have long noted that the style—if not always the content—of law in the Torah resembles the legal writings of the ancient Near East, such as the so-called “Code” of Hammurabi. In what follows, I will show how the lessons scholars learned about CH as essentially common law, as opposed to statutory law, shed great light on law in the Torah and elsewhere in the Tanakh. From there, I will show how this understanding of the nature of legal texts in the ancient Near East can bring new light to the divergent formulations of law found in the Torah.

What can the distinction between statutory law and common law tell us about the nature of law in the Tanakh generally, and in the Torah specifically? To my mind, it can tell us a whole lot, especially when we see the same law presented in highly divergent ways. The conclusions that I will draw about how law functioned in the time of the Tanakh may surprise some. Following my main presentation, therefore, I will turn to remarks by Rabbi Naftali Zvi Yehuda Berlin (the Netsiv) about the development of *halakhah* that support these conclusions.

Law in the Tanakh: Common Law, not Statutory Law

Our earlier distinction between common law and statutory law throws great light upon what we call “law” in the Torah. Intuitively, we read the legal portions of the Torah through the lens of statutory law. Yet, law in the Tanakh follows a common law conception of how law and legal writing work, as does ancient Near Eastern law generally. This explains why nowhere does the Tanakh instruct judges to consult written sources.⁵ Narratives of adjudication, such as Solomon’s “split the baby” trial (1 Kings 3), likewise make no reference to written sources of law. No single collection of Torah “laws,” such as the Book of the Covenant in Exodus 21–23 or the “laws” of Deuteronomy (12–26), displays an attempt to provide a comprehensive set of rules to be applied in judicial cases. Here, as in *The Code of Hammurabi*, critical aspects of daily life receive no legal attention. The Torah clearly endorses and sanctifies the institution of marriage. Yet, if you want to marry a woman—just what do you have to do, ritually or contractually? The Torah nowhere says. That would be unthinkable in a work of statutory law. Biblical “law” is not “law” at all—in the sense of *statutory* law.

Let’s look at two examples of how law in the Bible is negotiated through a common law mentality. Recall the parable of the poor man’s ewe in 2 Samuel 12:1–4. David has slept with Bathsheba, the wife of Uriah, one of his soldiers on the battlefield. The prophet Nathan wishes to bring the errant king to an awareness of his misdoing. He brings a fictitious case to the king for adjudication in which a man blessed with large flocks steals and slaughters the ewe of his neighbor, a poor man who owned nothing but the ewe, which he loved very much. The king does not realize that the parable is a metaphor for his own lust for women. Significant for our purposes here is the punishment that David imposes upon the thief. What should be the ruling here? If Torah law is statutory law, then the answer is simple: David had no need to look farther than Exodus 21:37: “When a man steals an ox or a sheep, and slaughters it or sells it,

he shall pay five oxen for the ox and four sheep for the sheep.” David, however, deviates from this ostensible “statute.” He indeed obligates the thief to four-fold restitution—as per the “law” in Exodus—but, also sentences him to death (2 Sam. 12:5–6)! From a statutory perspective, David’s actions are out of line. A cardinal tenet of statutory law is the principle of strict construction—interpreting the law as literally as possible. If Exodus calls for four-fold restitution and no more, then no harsher sentence may be leveled.

Torah “law,” however, is not statutory law; it is common law, which is to say situational and *ad hoc*. When Exodus proposes that a thief who slaughters a stolen sheep should pay four-fold restitution, that is not a prescriptive, statutory law. It is, rather, an *example* of justice. In most instances, a man steals a sheep and slaughters it because he lacks means and wishes to provide for his family. It is relatively easy to pilfer a sheep from the pasture, and so the Torah prescribes a harsh financial penalty. David, clearly aware of the proposition in Exodus 21:37, applies that teaching to the specifics of the case at hand. In the case brought to him by the prophet, the thief’s actions are flagrant and contemptible in the extreme. The thief here was neither hungry nor desperate. The aggrieved—the poor man—was denied his only, beloved possession. The prescription of Exodus would simply not do here. The thief’s avarice and callousness warrant his death. From the anachronistic perspective of statutory jurisprudence, the law in Exodus is plain and literal. Going beyond the letter of the ostensible “statute,” David performs a miscarriage of justice, even as he cites the proposition. However, from the perspective of common law jurisprudence, David utilizes the case in Exodus as “a datum from which to reason,” and applies justice to the specifics at hand in front of him.

The idea that divine law can be as malleable as human law is counterintuitive to some. It is one thing to posit that laws of human origin evolve in a common law fashion. Humans are fallible and limited in their perspective. But surely divine law is different. God’s wisdom is infinite and thus His laws cannot be altered. This intuition, however, misunderstands common law thinking. The fluid nature of common law stems only partially from the limitations of the human jurist. Common law insists on fluidity because society itself is in constant flux as well. Even divine law requires adaptation to the changing needs of society.

This view of biblical law as common law is substantiated when we examine how law is approached broadly across the Tanakh. Laws in the Tanakh do not assume a single, immutable form. Rather, the basic institution undergoes restatement and receives new expression across the ages. This is seen with

regard to the laws of Shabbat, Passover, *yibbum* (levirate marriage), and many other commandments. Just consider a well-known example—*yibbum* in the book of Ruth. The prescription in Deuteronomy 25:5–12 speaks solely of the obligation of a brother-in-law to his deceased brother’s widow. Ruth, however, insists that Boaz has an obligation to marry her (3:9), even though Boaz was but a distant cousin of her deceased husband. Boaz, in turn, reveals that there is an obligation to redeem the land of the deceased, when a man performs *yibbum* (4:5–6). This is nowhere hinted at in the laws of land redemption in Leviticus 25, nor in the laws of *yibbum* in Deuteronomy 25. What Ruth shows us is a common law reapplication of the institutions of *yibbum* and land redemption, as they were practiced in Boaz’s time. The manifestations of these mitzvot in his time were different from what the Torah had originally specified, and differed also from the *halakhah* that the sages would spell out on these matters.

The prophets of Israel censured Israel for many failings: theft, murder, idolatry. Nowhere do the prophets “throw the book” at the people with the claim that they were performing the law, but doing so in the wrong fashion, by failing to adhere to a strict reading of a passage. Modern statutory jurisprudence mandates that judges adhere to the exact words of the code because the code, by definition, is autonomous and exhaustive. As we have seen, however, the ancient Near East knew no notion of statutory law. Hence, when Boaz performed a form of *yibbum* that varies from a strict reading of Deuteronomy 25:5–10, no one thought that he was contravening that passage. That passage was an example of proper practice, reapplied anew in every generation. I have presented here a fluid notion of legal practice—certainly more fluid than we find in Talmudic writings, and much more fluid than we find in normative *halakhah* today. Yet, some of the greatest rabbinic figures envisioned that, once upon a time, law did evolve much more fluidly than it does today. I conclude with an example of one such voice—the Netziv.

The Changing Nature of Halakhah in the thought of the Netziv

In his important work *How Do We Know This?* Jay Harris reveals that the rabbinic tradition had always been of two voices concerning the continuity of the *halakhah*.⁶ One voice is more familiar to most Orthodox Jews today, and claims continuity of tradition: little has changed, and much of the tradition can be traced all the way back to Sinai. A flagship source for this opinion in the tradition is the statement in the Babylonian Talmud that “*Mikra*, *Mishnah*, and *Talmud*” were all given to Moses at Sinai.⁷ At the opposite end

of the spectrum, Harris notes, one can cite the *aggadah* that when Moses sat and witnessed Rabbi Akiva teaching a *halakhah* to his students he was dismayed that he did not recognize the law that Rabbi Akiva was teaching, and was heartened only when Rabbi Akiva explained that this law was, in fact, *halakhah le-Moshe mi-Sinai*.⁸ The suggestion is that even Moses himself might not have been familiar with the laws later granted status of *halakhah le-Moshe Mi-Sinai*. The issue here is not which approach to *halakhah* is historically correct, or even which is theologically correct. It is certainly the case that the former position has wider currency in our day. But the latter position is well represented in the sources.

In particular, I would like to bring attention to comments of the Netziv about the changing nature of *halakhah* and the Oral Law. Consider his comments on Deuteronomy 5:1:

“Hear, O Israel, the laws (*hukkim*) and rules (*mishpatim*) that I proclaim to you this day”—*Hukkim*: these are the rules of rules of interpretation, such as the thirteen rules [of Rabbi Yishmael], through which the Torah is interpreted, down to each and every letter. *Mishpatim*: these are the actual laws derived from the rules of interpretation, thereby generating new laws. . . . Moses our Teacher taught Israel several *hukkim* and *mishpatim* which he had derived from his powers of induction, with the intent that they, too, should do the same in each and every generation.

Elsewhere (Lev. 25:18), the Netziv underscores that the ongoing process of deducing rules of interpretation, and deriving through them actual laws throughout history. He notes that Hillel the Elder had his seven rules in his generation,⁹ and later Rabbi Ishmael derived his thirteen. For the Netziv, interpretation of the Torah law changed with some degree of frequency in the pre-rabbinic period. Because the principles of interpretation—the *hukkim*—changed, perforce the actual practice of law changed in this time as well. Rules of interpretation in one generation likely produced a practice that was at odds with the practice determined by a different rule of interpretation in a different age. Presented with this historical development, there was no place to see in all this “contradiction.” The system as a whole was meant to be fluid and changing.¹⁰

The Netziv nowhere uses the language of common law versus statutory law, as I have here. Yet his notion of the changing nature of the rules of interpretation suggests that the Torah, in his opinion, was not a statutory code. From

here we move to address our primary question: Why do laws in the Torah seem to contradict each other?

Because my conclusions may seem radical to some, I would like to create a theological space for my analysis by opening with remarks by a seminal rabbinic thinker, Rabbi Zadok Ha-Cohen Rabinowitz of Lublin (1823–1900).

Legal Discrepancy in the Torah Within the Thought of Rabbi Zadok of Lublin

In the following passage, Rabbi Zadok takes up the age-old question of the discrepancies between the version of the Decalogue found in Exodus 20 and that found in Deuteronomy 5:

The latter version of the Decalogue, that in Deuteronomy, was said by Moses, on his own account. Nonetheless, it is part of the Written Law. In addition to the mitzvot themselves that Moses had already received at Sinai, by the word of God, these words as well [in Deuteronomy], which were said on his own account, which are not prefaced with the statement, “And God said . . .”, these, too, are part of the Written Law. For all of his (i.e., Moses’) are also a complete “Torah,” just like the dialogues of the Patriarchs and other similar passages are considered part of the Written Law. But the material that begins “And these are the things” (i.e., the first verse of Deuteronomy and the rest of the book that follows), material that was said on his own account, represents the root of the Oral Law, the things that the sages of Israel say of their own account.¹¹

For Rabbi Zadok, the Torah contains material that is divine in origin, such as the mitzvot given to Moses at Sinai. The Torah, however, also contains material that is human in origin. This is what he refers to as “the dialogues of the Patriarchs.” That is, the words spoken by the Patriarchs that are preserved in Genesis are actual, human utterances that the Torah chose to preserve. Their origin is human, and nonetheless they have the same status as God’s utterances at Sinai and are on equal footing as part of the Written Law. Rabbi Zadok applies this same logic to everything found in Deuteronomy. When Deuteronomy opens with the statement, “these are the things that Moses spoke,” Rabbi Zadok takes that quite literally: God may have given His imprimatur for this book, but its content originates with Moses, not God. Numerous statements throughout Deuteronomy, such as 4:44–45 and 5:1, support this

understanding. Nowhere in Deuteronomy do we find the typical introduction to a mitzvah found in the earlier books of the Torah: “The Lord spoke to Moses saying: ‘Speak to the Israelite people thus . . .’” Rabbi Zadok’s position is unique because he employs this principle to explain the discrepancies between the version of the Ten Commandments found in Exodus 20 and the version found in Deuteronomy 5.

For Rabbi Zadok, God spoke only the version found in Exodus 20. The version found in Deuteronomy 5 is Moses’ words. But how could this be? After all, in Deuteronomy 5:4, Moses himself says that *God* spoke the words of the Decalogue that follow (5:6–18). Here we see Rabbi Zadok’s revolutionary leap. For Rabbi Zadok, the words that Moses speaks throughout Deuteronomy are an exercise in *Torah she-be-al peh*—exegesis and reinterpretation of God’s law. In fact, says Rabbi Zadok, Moses’ own exercise in such reinterpretation constitutes the paradigm—the “root” to use his term—for all subsequent such activity by the sages of Israel across the ages. The version of the Decalogue in Deuteronomy diverges from the version told in Exodus 20 because it is a *Torah she-be-al peh* retelling of the earlier version. For Rabbi Zadok, Moses’ statement in Deuteronomy 5:4, that God spoke “these words,” is not a statement that what follows is the *ipsissima verba*—a word-for-word transcript of divine speech. Rather it is a faithful interpretation and reapplication of those words. No mitzvah, then, in Deuteronomy will be identical to its precursor in the other books. The entire purpose of Deuteronomy is to present an updated version and application of God’s commands on the eve of the entry into the land.

Common Law Development within The Torah Itself

Rabbi Zadok’s approach to law in the Torah dovetails well with the conceptual framework developed in the previous essays of this series. For Rabbi Zadok, the mitzvot contained in Exodus, Leviticus, and Numbers cannot be read as divine statutory law. Were that the case, there would be no room to stray from a strict and close reading of the formulations of those laws. There would be no license for Moses to reinterpret those mitzvot; indeed, there would be no license for later rabbis to interpret the language of those mitzvot either. The entire enterprise of *Torah she-be-al peh* would be invalidated. We would be bound to strictly follow the literal meaning of those prescriptions.

Instead, Rabbi Zadok advocates a way of looking at those legal statements as binding, yet as fluid in their application. Put differently, Rabbi Zadok looks at those prescriptions as common law, not statutory law. For common

law thinking, determination of the law is situational: the law is not found in an immutable text, but adapts with an awareness of the changing historical situation.¹² Deuteronomy presents a record of Moses' common law application of earlier teachings. God had spoken at Sinai to a people just released from bondage. With the people poised to enter the land, Moses reinterprets God's earlier words and applies the laws to an array of challenges posed by life in the Land of Israel.

This well explains the case studies of legal divergence that we examined earlier. We noted that the institution of manumission (*eved ivri*), first stated in Exodus 21, is restated in Deuteronomy 15 with the prominent addition of the mitzvah of severance pay for the released servant. This is a good example of how Deuteronomy openly reworks the mitzvot of the Covenant Code (Exod. 21–23), yet without negating it. The laws of Deuteronomy address Israel as it is poised to assume the new condition of a landed people with a central temple and a more developed government. This is why the law of manumission (*eved ivri*) in Deuteronomy 15:12–18 addresses the master and his feelings and experiences as he derives benefit from the debt-servant. This focus is far less noticeable in the Covenant Code, which appears at the beginning of the trek in the wilderness. This way of viewing Deuteronomy's revision of the Covenant Code reflects a common law approach to jurisprudence whereby changed historical circumstance leads to the evolution of the law, yet without the need of jettisoning earlier, revered texts. Revision of an earlier law did not entail a rejection of the text bearing that earlier law. We may invoke the words we cited earlier of John Joseph Park, the nineteenth-century common law theorist, who noted that texts within the common law tradition always remain “a datum from which to reason.” Even as Deuteronomy interprets and reapplies the teachings of the Covenant Code, the Covenant Code remains on the books for later consultation, “as a datum from which to reason.” Neither the Covenant Code nor Deuteronomy are statutory codes. They are sets of teachings. Deuteronomy borrows from the language of the Covenant Code because, in legal terms, it is a restatement and a new application of the older teaching.

This also explains the explicit contradiction between the law of the first-born found in Numbers 18 and the version of the law found in Deuteronomy 15. When the laws of the priestly gifts are first presented (Lev. 2), firstborn animals are not listed. The law in Numbers 18 itself is an *ad hoc* exigency. The Korah rebellion necessitated legislation that would buttress the standing of the priesthood of Aaron and his descendants. One measure that God orders

is that the firstborn now be consecrated for the benefit of the priests alone. The law in Deuteronomy 15:19–23 restores the status of the firstborn animal to that it had before the Korah crisis—as the property of the owner. As with many laws in Deuteronomy, the law of the firstborn seeks to ensure that cultic activity only occur at the place that God chooses (eventually, Jerusalem and the Temple), and thus he must bring it to the central sanctuary where he may consume it.

To be sure, this is not the *halakhah* as we have it today, based on the harmonization of the passages in the *Sifrei*, as we noted earlier. However, this should not provide any theological concern. As we saw, Ruth exhibits forms of levirate marriage and land redemption that are at variance both with the provisions in the Torah and with the *halakhah* as later determined by the rabbis. The comments of the Netziv that we saw, and the approach of Rabbi Zadok of Lublin discussed above provide us a theological basis with which to comprehend the fluidity of practice during the biblical period. These luminaries did not state their opinions apologetically as some sort of concession to the findings of critical study. They stated their opinions as a celebration of the evolving human process of *Torah she-be-al peh*, a process which for both of them began with Moses himself. As we saw, the tradition empowers the sages to develop the Torah and derive biblical (*de-oraita*) obligations, limitations, and conditions. The writings of Rabbi Zadok of Lublin and the Netziv suggest that Moses, too, was invested with these powers.

Endnotes

1. See *Da'at Mikra* on these verses for references to the various Torah laws woven together here.
2. John Joseph Park, *A Contre-Projet to the Humphresian Code* (London: 1827), 21, 25 quoted in Michael Lobban, *The Common Law and English Jurisprudence 1760–1850* (Oxford: Oxford University Press, 1991), 220–21.
3. Translation by Theophile J. Meek, in James Pritchard, ed. *Ancient Near Eastern Texts* (Princeton: Princeton University Press, 1969), 168.
4. *Ibid.*, 176.
5. Compare Exod. 18:13–26; Deut. 1:16–17; 16:19–20; 2 Chron. 19:4–7.
6. Jay Harris, *How Do We Know This? Midrash and the Fragmentation of Modern Jewry* (Albany: SUNY Press, 1995).
7. Babylonian Talmud, tractate *Berakhot* 5a.
8. Babylonian Talmud, tractate *Menahot* 29b.
9. Tosefta, *Sanhedrin* 7:5.
10. This, of course, raises the question of when and why the halakhic system endorsed codification, as found in Maimonides' *Mishneh Torah* or in the *Shulhan Arukh*. I trace the history of the transition from common law to statutory law within *halakhah* in my essay, "What is This

Thing Called Law?," *Mosaic Magazine*, December 1, 2013, <http://mosaicmagazine.com/essay/2013/12/what-is-this-thing-called-law/>.

11. Zadok HaCohen of Lublin, *Sefer Pri Tzadik* (Jerusalem: Mesamchei Lev, 1999), 55–97.
12. This is a cardinal tenet in Rabbi Zadok's writings. See his arguments about the need for growth and change within *halakhah* in Zadok HaCohen of Lublin, *Sefer Tzidkatha-Tzaddik* (Har Berachah: Machon Har Berachah, 1997), 35 and in his *Resisei Laylah* (Har Berachah: Machon Har Berachah, 2003), 177–89.