LAW AND LITERATURE: GENESIS 38 AS A TEST CASE

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I. Introduction

Among the most haunting pieces of modern literature is <i>Billy Budd</i> by Herman Melville. Melville sets the tone of the book by starting with a description of the "handsome sailor," the fine physical and social specimen around whom other sailors congregate. Melville's hero, Billy Budd, a young sailor impressed onto a British man-of-war, is one of these. John Claggart, the petty officer in charge of security on the ship, is despised by the crew, and he takes a jealous dislike to the popular Billy Budd. He contrives to condemn him by using the fact that a serious mutiny has just occurred in the British navy and that the British Admiralty is wary of a recurrence, especially among impressed sailors. He manages to put Budd in suspicious circumstances and accuses Budd of mutiny before the commander of the vessel, Captain Vere. Vere summons Budd to confront his accuser in the captain's cabin. Budd, who suffers from a speech impediment, cannot respond. Vere reassures Budd, telling him to take his time in speaking. Budd explodes and strikes Claggart dead with a single blow. A stunned Vere exclaims, "Struck dead by an angel of God! Yet the angel must hang!" Vere convenes a drum head court-martial, whose members are unwilling to convict a morally innocent Budd until Vere, articulate and authoritative, in a torrent of half truths convinces them that striking one's superior in wartime is a capital offense and that any leniency might encourage mutiny. They unwillingly condemn Billy Budd to death. He is hanged from the
yardarm the following morning — his last words being, "God save Captain Vere." The crew, upon hearing Billy's last utterance, verges upon mutiny. Vere, fatally wounded in an encounter with a French ship shortly afterward, lingers for days murmuring "Billy Budd" before he expires.

While Billy Budd makes a memorable impression upon a reader, a legal historian would hesitate to use it to reconstruct legal practice. The accuracy of a literary account is questionable. Narrative is not a mirror of reality but a shaping of reality. Although Melville was himself a lawyer, there are many aspects of the law as portrayed in Billy Budd that are factually incorrect: any reconstruction based on Billy Budd would be faulty. A number of examples can suffice to illustrate this: 1) Captain Vere should have waited until his vessel rejoined the fleet before proceeding against Billy and should have asked the admiral commanding the fleet to convene a regular court-martial.\(^1\) 2) The maximum sentence a drum head court-martial was authorized to impose was flogging.\(^2\) 3) Captain Vere served as prosecutor, judge, and jury, an inappropriate combination of roles.\(^3\) In other words, the court-martial was illegal. Now, why did Melville make these errors? It is possible that Melville did so because, after all, he lived a century after these events and was not an expert on 18th century British naval law. It is more likely, however, that Melville erred for the sake of making the legal quandary more vivid. He reshaped legal procedure


to amplify the miscarriage of justice. He misapplied the law to make a masterpiece of legal agony and ambiguity.\textsuperscript{4} Art trumps due process.\textsuperscript{5}

While particular details of legal practice may be submerged, major issues of law and justice are brought to the surface in Melville's novella. First, the power and responsibility of the captain of a warship in the midst of a major war is unequalled in its scope: his predominance is unmitigated and irreversible, and he can influence, indeed control, the law on his vessel in ways unimaginable in a civilian setting. Second, life was cheap on an 18th century British warship. Third, a court can be swayed by extra-legal considerations — in this case, the authority of the captain and the possibility of leniency encouraging mutinies elsewhere in the fleet. These are critical issues of law and actual legal process that generally are not reflected in formal statutes, and this is where narrative is of the utmost use, in shedding light on extra-legal factors that affect legal process.

The example of a work of modern literature sheds light on the interpretation of a work of ancient literature. We would not propose that Melville is providing us with evidence that there was a difference in naval law between the time in which \textit{Billy Budd} was set and Melville's own time. Yet where there is a contradiction between a narrative text in the Bible that touches on law and a legal text in the Bible, often the natural assumption is that this contradiction reflects legal development.

In this essay, I wish to explore the narrative of Tamar and Judah in Genesis 38. Many scholars have posited that since halitzah is not used in Genesis 38, this indicates that it had not yet developed. I have written on narratives where law and narrative do not generally contradict


\textsuperscript{5} Indeed, in order to heighten the tragedy of Billy Budd's hanging, Melville portrayed him as a naive youth. In the original version, Budd was a mature sailor in charge of a gun crew. Cf. \textit{Billy Budd, Sailor (An Inside Narrative)}, ed. Hayford and Sealts, 5-6.
themselves⁶ and on narratives touching on law not mentioned in legal texts⁷. Here, I wish to focus on the case of a blatant contradiction between law and narrative. Does a contradiction between law and narrative necessarily reflect a historical difference? Is the omission of the possibility of halitzah an indication that there was a time where it did not exist? Perhaps halitzah did exist, but it is omitted in the narrative. The narrative illustrates how the law is at the mercy of powerful non-legal factors.

II. Powerlessness By Chance

The distressful nature of the situation delineated in Gen 38 is heightened to an extreme. Tamar is portrayed as passive until she takes action against Judah. She is not depicted as taking initiative in her first marriage. She does not demonstrate any pro-active behavior in her levirate marriage to Onan -- it was his decision to avoid impregnating her, and no reaction from her is included in the narrative. When Judah makes the decision to delay her levirate marriage with his youngest son, a response from her is again omitted in the narrative. The portrayal of her passivity highlights the surprise of her actions. The passive woman will be portrayed as taking initiative, initiative that is unexpected and startling. Her extreme docility is made parallel to her radical assertiveness.

At the same time, the depth of Tamar’s plight is portrayed by lengthening of the time she must wait for the fulfillment of her levirate marriage. Retarding elements shape the narrative. Judah delays bringing her his third son, so much so that another child of his dies in the meantime. Judah attempts to pay the supposed prostitute but cannot find her -- again the narrative is prolonged. The denouement of this story is delayed until Tamar herself is showing signs of pregnancy. The lengthened duration compels a hitherto docile Tamar to take action. She is


powerless for a long, long time, and she must take extreme measures to coerce Judah into fulfilling the requirements of the levirate marriage. The rightness of her cause is matched by Judah’s speedy admission that she is in the right, an act surprising in its alacrity compared to the delays otherwise depicted in the text.  

The depth of loss is not Tamar’s alone. The rapid demise of both of Judah’s older sons, followed by the death of his daughter, not only depict Judah’s loss but amplify the magnitude of his loss. The only acts, as it were, that Judah’s sons undertake is their relationship to Tamar, and the daughter’s only appearance is the report of her death. Judah is one who has suffered a severe loss.

Both Judah and Tamar have suffered tragedy. The placement of the narrative of Judah and Tamar within the Joseph cycle emphasizes the commonality of loss -- Jacob has lost Joseph in the previous chapter, and not surprisingly Judah has his own severe losses. Life can be precarious and, therefore, both Judah’s inaction and Tamar’s actions are provided with justifications. Tamar has to take up an extremely risky move. Judah’s hesitancy is understandable, considering his fears as a father.

The narrative thereby provides a reason for Judah’s delay in providing a levir for Tamar, showing how odd circumstances distort the legal process. Although at first glance it is Judah’s wealth and power that allow him to control aspects of Tamar’s levirate marriage, that he himself has suffered loss provides a justification for his taking control of the situation. It is not simply

8 In 1 Chr 4:21, Shelah’s son is named Er: if this genealogy has a historical connection to the narrative and if the son is named after his grandfather, this may indicate that a tradition held that Judah did release him to Tamar in a levirate marriage.

9 The narrative of Tamar and Judah is independent of the Joseph novella, but it does have certain thematic and verbal connections. Both Jacob and Judah will lose two sons (at least Jacob thinks he has lost Joseph and Simon), and both Jacob and Judah hesitate to yield a younger child. Both Jacob and Judah are deceived by means of a goat kid. Both are asked to formally recognize evidence: Jacob is forced to recognize Joseph’s bloody tunic, and Judah is required to recognize his seal, cord and staff. Tamar and Joseph are both accused of adultery.
that Judah’s wealth and power allow him to manipulate the situation but that they allow him to
manipulate the situation for certain reasons.

III. Perils and Benefits in Going Against the Established Order

Other women in the patriarchal narratives have been childless, but the cause is not like
the others: their wombs had been closed, while she was a young wife who because a childless
widow.\(^{10}\) She is a childless wife not due to her fault, as it were. She is similar to other women of
Genesis who rebels against social constrictions. Notably, whose who rebel against the social
order in Genesis are all women.\(^{11}\)

Tamar enhances the extreme risk of her gambit by waiting to the point at which she was
taken out for execution to play her trump card.\(^{12}\) The birth of twins may be a reward. Perhaps it is
Tamar rewarding Judah for his truthfulness by giving birth to twins, or God who is rewarding her
for her deeds.

IV. The Power of the Pater Familias

Judah is depicted as the head of his family/lineage, operating independently of his
brothers and father.\(^{13}\) How much power did Judah have as the pater familias? He does obey the
law of levirate marriage, yet he delays sending a second son. Why was there no one to act on
Tamar’s behalf? Was her father dead? Did she lack a male relative that she had to act on her
own? Does the fact that she is portrayed as taking the initiative in the dispute with her father-in-


\(^{11}\) Westermann, *Genesis 37-50*, 56.

\(^{12}\) Gerhard von Rad, *Genesis* (The Old Testament Library; revised edition; Philadelphia:
Westminster, 1972), 361.

\(^{13}\) Judah is portrayed as living independently of his brothers so that they no longer constitute a
single estate.
law reflect how difficult it was to counteract the power of the pater familias/head of a lineage? In Roman law, a prime example of a legal system where the pater familias had extensive power, a son was emancipated from the power of his father if his father sold him three times. At the conclusion of the tale, Judah formally recognizes the validity of Tamar’s claim, and one wonders why this is so. Could a pater familias with more power have tried to cover it up? Would a pater familias with fewer scruples have denied the reason she had his seal, cord, and staff? The text implies that these items were well-known to be his and, therefore, public shame served as a restriction on the power of a pater familias to do as he wished. Tamar, therefore, has asked Judah for precisely those objects that would identify him without question.

To gauge the extent of power of the head of a lineage, we must examine other cases of a patriarch wielding absolute power within his own household. The patriarch as the head of the family dispenses blessings and curses, yet he is portrayed as helpless when one son steals the birthright from the other. He has the right or responsibility for offering his son as a sacrifice. He has the right/duty to commission a servant to seek out a wife for his son (but mothers also arrange for marriages). In Gen 16:1-6, authority over Hagar passes from Sarai to Abram when Sarai gives Hagar as a gift to Abram. When Hagar becomes pregnant by Abram and shows disdain for the barren Sarai, Sarai complains about Hagar’s attitude. She invokes a superior authority, the Deity, to adjudicate the dispute between Abram and herself. Abram answers her claim by returning Hagar to Sarai’s authority. The power of the patriarch was far short of absolute, and women, generally without formal power, could still wield influence in family matters, and perhaps even further.

14 This subsequently became a legal fiction when a father wished to emancipate his son from his authority.

15 No negative evaluation is given of Judah’s dalliance with a prostitute, although clearly it would have been shameful for Judah to have failed to pay the prostitute.
It may be that the summary execution of Tamar is not a reflection of Judah’s power as patriarch. Rather, Judah was the aggrieved party seeking a remedy on behalf of his son Shelah. Tamar was not his daughter and in fact was not even residing in his home. His right to order her execution is due to his responsibility as the father of Shelah to represent Shelah’s interests. There is no trial because her pregnancy cannot be denied and her family cannot deny it. Judah’s role is as litigant, not pater familias. Even so, this indicates that as a person of power, he could exercise his right to justice, yet Tamar could not. She must resort to extraordinary means to bring her case to its rightful resolution.

V. A Brother’s Concerns

Onan is portrayed as acceding to the levirate marriage because he does not refuse to marry her, yet his actions prevent him from producing an heir for his brother. His behavior is understandable in light of the effect that a child born to the name of his older brother would have on inheritance and his own resources. Onan would have to support a child who would supersede him in the disposal of Judah’s estate: the child would inherit the double share of the first born right. Otherwise, if Onan’s older brother died childless, Onan would have received the first-born’s share. The concerns of a brother, who had the obligation for levirate marriage, impelled him to utilize subterfuge to evade its consequences, result deleterious to his own affairs.

VI. The Statute on Levirate Marriage in Deuteronomy

Deuteronomy 25:5-10 prescribes that when a man dies childless, his brother must marry the widow, and if they have a child, the child is called by the deceased brother’s name (i.e. X the son/daughter of Y). If the brother refuses, the widow summons him to the local court and forces

him to undergo an apparently humiliating ceremony. One question is whether recourse to a court rather than the father of the deceased confers a more or less effective means of guaranteeing that the levirate marriage will take place. Should this be seen as a court only imperfectly replacing the authority of the father to command a living son to go through with a levirate marriage? The narrative depicts a reluctant father and a recalcitrant brother with the ability and interest in obstructing levirate marriage. To whom can, then, the widow seek recourse? A local court allows a widow more equitable treatment than relying on a father’s or brother’s willingness.

The Deuteronomic law places a qualification on the requirement of a brother to fulfill levirate marriage, the condition that the brothers must be dwelling together. It may be that this refers to the period after the father dies when the sons remain living in the estate that has not yet been divided among them.17 In Gen 13:6 and 36:7, that the parties were dwelling together only means that they were only close enough to be using the same pasture, and so the possibility exists that the estate had already been divided.18

Perhaps the existence of the halitzah ceremony indicates that there was opposition to levirate marriage, and it may be that Lev 20:21 prohibits it altogether.

VII. Conclusion

The narrative in Genesis 38 illustrates how the law is at the mercy of powerful non-legal factors. Analyzing a narrative that touches on law offers a view onto how law was perceived to operate in actuality, which flaws were inherent in a legal system, and when non-legal factors had an impact on legal matters.19 These must be taken in account when narrative and formal statutes

17 Westbrook and Wells, 63, 95.
18 Jeffrey H. Tigay, Deuteronomy (The JPS Torah Commentary; Philadelphia, 1996), 231.
19 For a more detailed analysis of other approaches to law and narrative, see my article “The Narrative Quandary”, Vetus Testamentum 54 (2004): 1-16. My article, “Law and Narrative in
conflict. While the contradiction may indicate that law changed, it may also be that law in narrative is shaped by extra-legal factors. A powerless Tamar can change her fate by extreme action. A powerful Judah is rendered feeble by circumstance. A brother can have interests that conflict with his obligations.

Genesis,” ZAR 16 (2010): 211-223, applies my methodology to other texts in Genesis, analyzing whether their setting in the patriarchal period erroneously allows us to assume that they reflect earlier law and how to address legal matters for which we have only narrative texts as evidence. This (current) essay addresses the issue of how to approach a narrative text that contradicts a legal text and whether we can presume that one text reflects earlier practice and another text reflects later practice.