Dylan R. Johnson. “The Biblical Rescript: The Convergence of Litigation and Legislation.” Paper Presented at the Annual Conference of the Society of Biblical Literature, Boston, Mass. 20 November, 2017.

The source of a society’s law is a foundational object of study in legal history. Jurists have long debated the questions of: what was considered a valid law? Where did this law come from? Who had the authority to create new laws? While these questions are juridical ones, the historian of law must take account of social, economic, religious, and political dimensions of a society in order to provide sufficient answers to them. Moreover, the answers to these questions are culturally relative, that is, each society understood the source of its law in very different ways. I address these questions in the context of biblical law and its relationship to the legal traditions of Israel, Judah, and neighboring Near Eastern cultures. However, I limit my analysis to a collection of five biblical texts (Lev 24:10-23; Num 9:6-14; Num 15:32-36; Num 27:1-11; Num 36:1-12), an assemblage recognized as a unique set since Philo. Based on an analysis of both the legal procedure described in these texts as well as the biblical view on the source of Israel’s law, I propose to identify these texts as biblical rescripts.

Law or legal language appears in almost every literary genre in the Bible, whether poetry or prose, if a scholar simply is willing to look for it. Within the Pentateuch, law appears in more restricted ways: in the form of a litany of statutes in distinct legal collections or in the form of prose narratives that draw on the largely oral world of customary law in ancient Israel and Judah. However, the five texts under analysis cannot be relegated to either of these categories alone, they represent something entirely different. Like legal narratives, they describe judicial proceedings in standard prose while employing technical legal language; yet, they also present general laws that are formulated in the legal style distinctive of law collections. Due to their formal peculiarity, they provide the greatest insight into how some biblical tradents understood the source of their law. Unlike other legal collections of the Pentateuch, these laws are not

enumerated as a long sequence of statutes, situated at key revelatory moments in the early history of Israel. Rather, they occur sporadically within the books of Leviticus and Numbers. Despite their narrative isolation, these texts exhibit unequivocal similarities in legal-literary form and vocabulary, necessitating a close comparison of their contents. These texts present the promulgation of divine law through a legal technique entirely distinct from the main legal collections of the Pentateuch. Despite the frequent comparison of these episodes with the Anglo-American tradition of case or common law, the procedural origins of these laws exhibit certain features that distinguish them from that system.

Three of these episodes describe distinct legal cases: a capital case against a man who blasphemed the name of Yahweh (Lev 24:10-23); a case concerning men who could not perform the Passover on its appropriate date (Num 9:6-14); and a capital case concerning a man who was discovered gathering wood on the Sabbath (Num 15:32-36). Two other texts (Num 27:1-11; 36:1-12) address a single legal matter: the inheritance claim of the daughters of Zelophehad to their deceased father’s estate (Num 27:1-11) and the impact this ruling has on the system of tribal land division (Num 36:1-12). Two cases—the case of the blasphemer (Lev 24:10-23) and the case of the wood-gatherer (Num 15:32-36)—are matters of public law, inasmuch as the individuals are accused of an offense, brought before a tribunal, condemned by Yahweh, and executed by the public collective as it manifests through the “entire congregation” (כל־העדה). The other three trials could be classified as private cases, that is to say, the proceedings are initiated by individuals seeking to defend their personal interests. Thus, despite the overarching formal coherence of the collection, these texts do exhibit certain idiosyncrasies.

What binds this group of texts together is the unique adjudicatory procedure they describe; the cases unfold according to a clear trial sequence that gives rise to a general, impersonal law. The most auspicious element of the trials themselves is the two distinct stages of litigation: the case is presented before one tribunal—always including Moses—that transmits it to Yahweh for adjudication for reasons not explicitly mentioned. It is Yahweh, rather than the first tribunal, who delivers the verdict for the case—although Moses does convey the details of the judgment to the litigants or the Israelites in general. The two-stage procedure has typically been understood as a theological necessity: the litigants could not have petitioned Yahweh directly, therefore, they brought their cases to Moses who could communicate with the deity. But, if Moses' role in these stories is reducible to his capacity to communicate with the deity, why are other authorities mentioned alongside him in the tribunals? The trial scenes begin with the expectation that these tribunals should—or at least could—resolve these disputes under their own aegis. The intervention of Yahweh is certainly related to his ultimate authority over the people of Israel, but why are his verdicts for the particular cases accompanied by or formulated as general casuistic statutes? It is true that these episodes are narratives, but they rely on a juridical logic tied to legal procedure and jurisgenesis.

Previous efforts to provide a schematic template for these texts have generally outlined the same literary framework as I do. However, they defined these not as adjudicatory stages of a unique legislative technique, but type-scenes sharing a common narrative trajectory. I believe that these episodes are shaped not by narrative sensibilities, but by certain legal principles. Therefore, I delineate my own schema for these texts according to a sequence of litigation limited not only to the biblical examples, but defined in a more general way. The sequence

outlined in your handouts on pages one through six involves the following stages of litigation: (i) the cause of action, (ii) the presentation of the case before a human tribunal, (iii) the transmission of the case to sovereign authority, (iv) a judgment for the particular case by the sovereign authority, (v) the promulgation of an abstract, general statute derived from the verdict, (vi) execution of the judgment for the particular case. Despite the general similarities between the five cases, each exhibits certain idiosyncrasies that distinguish it in various ways. For example, three of the texts (Lev 24:10-24; Num 9:6-14; Num 15:32-36) begin with the cause of action that elicits the need for legal proceedings, whereas the two cases concerning the inheritance of the daughters of Zelophehad (Num 27:1-11; 36:1-12) commence with presentation of the case before the tribunal. Moreover, the case of the impure men on Passover (Num 9:6-14) contains no judgment for the particular case, whereas the case of the man gathering wood on the Sabbath (Num 15:32-36) contains no abstract, general statute. Despite these idiosyncrasies, I argue that these biblical texts were composed according to a clear legal form, a fact that must inform any proposal for their redaction. In this way, I privilege a type of form criticism based on legal logic, even though the texts exhibit signs of literary growth.

Previous treatments of these texts have noted the peculiar way in which a law emerged from a particular case, but most identify the adjudicatory technique as a form of judge-made or case law (in the sense of the common law system), or a form of legal oracular inquiry. However, few have tried to contextualize this sequence in terms of ancient Near Eastern judicial procedure and jurisgenesis. Indeed, these texts present positive law emerging from particular cases, but the case law of the Anglo-American common law tradition is not the only precedent for this phenomenon, nor is it the most compelling parallel. Identifying these texts as “case law” and by

default identifying Yahweh as a judge, ignores the fact that he is the sole authority in the Pentateuch with the power to arbitrarily promulgate new laws—a very different role than that of the judge in the common law tradition. The same can be said for reducing these texts to examples of oracular judicial procedure. While supra-rational evidentiary techniques are well-known in Near Eastern trial procedure, consultation with the divine world through the use of the ordeal or the oath resolved the particular case, but did not produce general, impersonal statutes that would expand on the legal principle of the case as these biblical texts do.

I believe the best course of analysis to understand these texts is that of comparative law; but, in order to carry out effective comparisons, it is necessary to highlight the aspects of these texts that are productive typological analogues to other legal cultures—both Near Eastern and beyond. The details in the biblical texts that I consider essential for typological comparison are the following: (i) a case is presented before a judge or tribunal, meaning the text describes a trial in the full legal sense of the word; (ii) the initial judicial authorities do not decide the case, but rather, transmit it to another authority. This figure represents the ultimate source of law according to that particular legal tradition. (iii) This second authority determines an equitable verdict for the case, but in doing so promulgates a general, impersonal law that is presented as a binding decision for future cases. In contrast to previous treatments of these texts that concentrate on the role of Moses, I believe the crucial figure is Yahweh. He connects the trial scene beginning each case and the general statute that emerges from them on a conceptual level. The judicial role Yahweh plays in these texts, and his role in biblical legal tradition more generally, is perhaps the most important component of my typological comparison. In these

texts, I believe Yahweh should be understood as a legislative sovereign first, and while his divinity most certainly figures into these texts, it is a secondary consideration.

With only a handful of notable exceptions, biblical tradition holds that positive law emanated from Yahweh alone. This stands in stark contrast to the ancient Near East more generally, where positive laws and normative legal acts were the products of human sovereigns—typically a king, but on occasion corporate judicial authorities. While the gods always had important connections to the realm of law in the ancient Near East, and Mesopotamian kings credit their legal acumen to various deities, as Jacob Finkelstein explained in his discussion of Old Babylonian law: "What the god 'gives' the king is not 'laws' but the gift of perception of *kittum*, by virtue of which the king, in distinction from any other individual, becomes capable of promulgating laws that are in accord or harmony with the cosmic principle of *kittum*." From the perspective of traditional legal positivism, the Mesopotamian kings were legislative sovereigns, and in my opinion the most appropriate typological analogues to Yahweh in these texts.

In her recent cross-cultural analysis of divine law in the ancient world, Christine Hayes remarks: "biblical tradition portrays Yahweh as a divine sovereign commanding and enacting laws for his covenant partner, Israel." The terms "sovereign" and "sovereignty" are concepts unique to western thought centered on the notion of a "sovereign state;" although the concept of "sovereignty" is a relatively recent one, there is no reason to doubt the existence of such a concept in the past, even if was never defined in abstract terms. The notion of sovereignty is a central tenet of the "positivist" school of legal thought, which understood "law" as that which a socially recognized authority (a sovereign) established. However, sovereignty was not merely a

monopoly of violence or coercion, but rather, the supreme authority in a given territory that validated norms issued by certain individuals to which others were obliged to observe. While a sovereign power had to represent the highest legal order in a given society, it need not be identified with an individual—although it certainly could be. Whether a law was customary (a generally observed course of conduct) or statutory (created through judicial or administrative legal acts), its legitimacy hinged on its connection to a normative order. Biblical law is a kind of divine positive law, one which implicitly presumes a sovereign authority in the figure of Yahweh. While biblical tradents did not employ a term translatable by "sovereignty," the manner in which they present the biblical corpus of laws reveals an implicit supposition of a similar concept. The question of the source of law is thus inextricably connected to the question of sovereign power. Unlike Mesopotamian tradition, Yahweh does not merely provide human leaders the ability to detect what is just and equitable so that they may create laws in accordance with these principles. He makes normative statements on juridical matters from homicide to inheritance, from debt slavery to divorce. Returning then to the issue of the comparative method in light of these facts, Yahweh cannot be equated with the typical role of ancient Near Eastern deities in the field of law. He alone occupies the position of a sovereign in the biblical imagination, and as such, the most appropriate typological comparison to his role in the five biblical texts under analysis are authorities performing the same function in other legal cultures.

A legal phenomenon fitting the typological criteria I have described is the "rescript," a term drawn from the realm of Roman law. While the term comes from the field of Roman jurisprudence, I am not introducing a foreign juridical concept onto biblical sources uncritically. The legislative technique the Romans would come to call the *rescriptum* has its antecedents in

the ancient Near East. In the Roman legal tradition, the term *rescriptum* refers to a physical source of written law, letters sent by the emperor to various tribunals that were later compiled to form a significant portion of the corpus of Roman law. At the same time however, the rescript was a legislative technique resulting from the emperor’s intervention into a particular legal case. The procedure was necessary in circumstances where judicial authorities, before whom a case had been presented, were unable to render a verdict, and thereby deferred the case to imperial decision—creating two distinct trial stages. The emperor’s decision is imposed on the judge who must render a verdict in accordance with this decision as a result of the authority from which it derives. While the judge still renders the final verdict, his freedom to interpret the case according to his sense of the law is limited; the rescript is not merely the emperor’s legal opinion on a case, but an utterance considered to be a legitimate source of positive law applicable in the future. What made such decisions normative acts capable of becoming positive laws was not the procedure itself, but rather, the fact that the decisions had emanated from the mouth of the emperor—the legislative sovereign. To quote the 2nd century jurisconsult Ulpian: “That which seems good to the emperor also has the force of law… therefore whatever the emperor ordains by *rescript*, or decides in adjudging a cause, or lays down by *edict*, is unquestionably law.” From a juridical point of view, the technique of the Roman *rescriptum* best defines the procedure encountered in the five biblical cases. While the categories of the Roman legal tradition cannot be simply superimposed upon those of ancient Israel and Judah, the self-reflective doctrine of Rome’s jurists provides contemporary scholars of legal history insight into various aspects of legal thought in the ancient world. While the procedural technique of the rescript is fundamentally Roman, it is legislative technique that is detectable as early as the Old Babylonian period.

On pages seven and eight of the handout I have prepared a composite text of an Old Babylonian letter sent by the eighteenth century Babylonian king Samsu-iluna to various cultic and judicial officials at Sippar. This composite text is based on four separate tablets recovered at the site of Sippar, which had been copied decades after Samsu-iluna had made his decision, which Assyriologists have largely taken as evidence for the ongoing use of this decision in adjudication at the temple of Šamaš. The letter was a response to two legal inquires sent by the judicial officials of Sippar to the Babylonian court. Much like the Roman *rescriptum* and the five biblical texts, there are two distinct adjudicatory stages in this procedural technique, the letter representing the second stage. The content of the initial inquires can be reconstructed based on their summaries in Samsu-iluna’s letter: two separate incidents involving the *nadiātum* at the cloister of Sippar had been brought before local tribunals. In the first case, the inhabitants of Sippar had been encloistering their *nadiātum* without appropriate provisions, for which Samsu-iluna renders a judgment. However, it is the second case that is of particular importance for this study. The second case involves a single incident: a man named Mār-Šamaš had an outstanding debt of silver to a judge named Awīl-Sîn. Apparently, Mār-Šamaš failed to repay this debt and as a result Awīl-Sîn filed suit against him. Awīl-Sîn accuses Mār-Šamaš of concealing his possessions to protect them from seizure, so Awīl-Sîn threatens to seize the slave of Mār-Šamaš’ daughter—a *nadītum*—as compensation or in distraint for the debt. Awīl-Sîn’s final action prompted the judges of Sippar to defer the case to Babylon for adjudication. Without a doubt, these judicial authorities were expected to resolve this case, yet they were unable to do so, for reasons not explicitly stated but perhaps related to the unwillingness or inability of the Sippar officials’ to render a verdict on the matter on the basis of their own judicial authority alone.

What has attracted the greatest attention among Assyriologists to this letter, and earned it's classification as a rescript, is the manner in which Samsu-iluna's judgment was formulated. It is a prescriptive ruling, designed not only to resolve the dispute between Awīl-Sîn and Mār-Šamaš, but a law designed to cover similar cases in the future, cast in the distinctive participial style of the famous law collections. The trial summary included many details of the particular case that was sent to Babylon, including the personal names of the litigants. The ruling however, makes no reference to the claimants' names or to the particular situation where a slave was taken in distraint or as compensation; instead, it prohibits a creditor from initiating a lawsuit against a *nadītum* for her family's debts. Moreover, the law extrapolates on the principle of the case, introducing several details not present in the initial claim: *nadītum*s are excused from liability not only of their fathers' debts, but those of their brothers as well; the question of *ilkum*-obligations is added to a petition that concerned only private debt; and the entire law is predicated on the stipulation that the male guardians of these *nadiātum* had provisioned them and given them a tablet—clearly drawing on details presented in the first case.

The verdict of Samsu-iluna represents a general, impersonal rule that is promulgated in response to a particular case. It emanates from the king who wields the authority to create normative rules; this prerogative is evinced not only by the self-presentation of some of the Mesopotamian law collections of the Old Babylonian period, but also from practical legal documents that speak of normative royal acts carrying both retroactive and prescriptive force—the *mīšarum*-edicts and the *ṣimdātum-šarrim* "royal enactments" respectively. This corresponds to the juridical definition of a legal statute or legislative act, which evaluates the "legal" nature of a rule based on its institutional origin. This explains the unique manner in which Samsu-iluna

responds to the particular case of Awīl-Sîn and Mār-Šamaš; as the sovereign power of his kingdom, any judicial act of the king was normative and had the potential to become a positive law.

I believe the rescript of Samsu-iluna is but one example of a far larger phenomenon in the ancient Near East. The Code of Hammurabi is presented as a compilation of royal judicial acts (*dīnāt mīšarim ša Ḫammurabi*) and there is good reason to suppose that some of these decisions were made through the legislative procedure of the rescript. While the biblical rescripts represent narrativized versions of this procedure, they too demonstrate the relationship between the rescript techinique and the law collections: the case of the blasphemer is incorporated into the Holiness Code. In his analysis of the five biblical texts I am calling rescripts, Raymond Westbrook anticipated much of what I am arguing here to a certain extent. He surmised that these five texts reveal “some steps in the creation of a code:” The initial decision, the first stage of generalization (anonymity), the second stage of anonymity (casuistic form), and the creation of a code including academic variations. While some or even many of the laws known in the various Near Eastern law collections may have formed this way, the rescript of Samsu-iluna demonstrates another method. Westbrook attributed the general nature of the biblical rescripts to the jurisprudential activity of scribes, but the rescript of Samsu-iluna provides at least one clear case demonstrating that such juridical generalization was also characteristic of the judicial activity of legislative sovereigns more broadly.

Based on the typological criteria I have laid out, the legislative technique of the rescript best describes the legal procedure recounted in these five biblical texts. Roman, Mesopotamian, and now biblical legal traditions all attest to the phenomenon of a sovereign power intervening in

a practical legal case, which gives rise to the promulgation of a new law. Indeed, it was only the Romans who created a technical legal term for this phenomenon, but it clearly has antecedents in the ancient Near East. Such a procedure was distinguished from cases brought directly before these sovereigns by the two distinct adjudicatory stages. Whereas the procedural disjuncture seen in the rescript of Samsu-iluna was the result of the physical distance between the judicial officials at Sippar and the royal court in Babylon, the obstacle portrayed in the biblical rescript is the inapproachability of the deity. The rescript procedure not only reflected a means through which law could emerge in the ancient world, but also fit into the broader priestly ideology that focused on limiting human access to the earthly presence of the deity. While Moses was a conceptual necessity for the biblical rescript—for he alone could communicate between the litigants and their sovereign—his judicial role is not diminished by this fact. In contrast to sociological approaches to these texts that focus on the agency of Moses and his "oracular" communication with a deity, I propose a juridical reading that aims to delineate the legal roles of the various characters for the sake of an effective legal comparison to other cultures. By recognizing Yahweh as the legislative sovereign of Israel, we are able to not merely describe the peculiar form of these cases but explain why they appear the way they do.

Conclusion

By way of conclusion, I would like to briefly address the historical context of these five biblical texts. Scholars unanimously agree that these texts belong to one of the latest stages in the priestly tradition, with recent studies classifying them as products of the so-called Holiness School. I address this concern in my dissertation, though I am not driven to attribute these texts to a particular scribal tradition *per se*. Instead, I ask: what communities did they, and

Pentateuchal law more generally, serve? While the legal traditions of Israel and Judah most certainly informed biblical authors, there is a distinct possibility that these texts were composed after the destruction of both kingdoms. In that case, the texts were not written to serve any monarchy; they operated outside those legal traditions. Nor did they serve the immediate legal needs of the larger polities (Babylon or Persia) under which the survivors of these kingdoms continued to live. These texts presume a community defined not along political or geographic lines, but rather, one defined in terms of legal authority. The loss of political coherence may have caused a massive reorientation detectable in law, whereby the recognition of Yahweh as the supreme source of law was the only criteria for membership in this new community. While it can largely be said of Pentateuchal law in general, the five texts show no interest in kings or their judicial prerogatives. What is not clear is whether the diminishment of traditional royal prerogatives is related to circumstances in the political history of Israel and Judah or the result of the particular interests of a scribal community and their unique take on law and legal authority.