

# The Self-Understood In Legal History

David Daube

**B**Y SELF-UNDERSTOOD I mean something so much taken for granted that you do not bother to reflect on it or even refer to it. Now I am not going to discuss the assumptions of this kind which we legal historians make in our work; for instance, that men want to get on in life, that petty fraud is despicable, that a scholar can achieve a modicum of objectivity. To pursue this aspect of my theme would mean to construct a complete epistemology.

My business will be to say something about what the jurists of the past treat in this way. Even within this compass I shall further nar-

row down my subject by not inquiring into their general beliefs about the nature of the individual, society, the world. I shall restrict myself to actual rules of law which, because of their absolute familiarity, are passed over in silence when others are set forth; or to put it in roughly equivalent terms, rules which are not, when it might be expected, elevated, or demoted, from – custom to *ius scriptum* – and the latter, for my purpose, includes private collections or expositions as well as legislation.<sup>1</sup>

The sort of thing I have in mind is illustrated in fairly recent times at All Souls College (if I may advert to the law of a group

---

*David Daube was a Professor of Law at Boalt Hall Law School and Director of the Robbins Hebraic and Roman Law Collection at the University of California, Berkeley, at the time this piece was published. It is based on a lecture delivered before the Munich Faculty of Law on the occasion of the 500-years' jubilee of the University. The German version may be found in Zeitschrift der Savigny-Stiftung 98, 1973, Rom. Abt. Professor Daube thanked the editors of The Juridical Review for consenting to the original publication in English (see 85 J.R. 126 (1973)), and the Green Bag thanks the copyright holder and publisher of The Juridical Review, W. Green, The Scottish Law Publisher, 21 Alva Street, Edinburgh, EH2 4PS, for permission to republish the lecture here.*

<sup>1</sup> Cf. my remarks in *Zeitschrift der Savigny-Stiftung* 76, 1951, Rom. Abt., pp. 165 *et seq.* See also K. English, *Zeitschrift für die Gesamte Staatswissenschaft* 108, 1952, pp. 385 *et seq.* In *Tulane Law Review* 39, 1963, pp. 254 *et seq.*, I call attention to a linguistic evolution which has much in common with the legal one I am discussing in this lecture: "Basically, language gives an inverted reflection of reality; it is a linguistic mirror in which the small appears large and the large small."

within the state). The very first paragraph of its statutes runs: "The College shall consist of the Warden and such number of Fellows as is in these Statutes provided. No woman shall become a member of the College."<sup>2</sup> The clause about women, paradoxically, is among the latest additions to the statutes; it is not found in the pre-twentieth century versions. But not because women were then eligible. On the contrary: their rejection was so much a matter of course no one thought of formalising it. That was done when, at the beginning of this century, the danger of female dons first appeared on the horizon. One day, with further advance of molecular biology and brain transplants, yet another clause will be appended to keep out monkeys. At the moment, as their participation in academic life does not enter consciousness even to a minimal extent, they are contemplated by no rules express or tacit.<sup>3</sup>

Some legislators or recorders of law have no intention of covering the ground. Ancient ones in particular, not suffering from what Beseler called completomania are apt to communicate only the really needful: the settlement of doubts and reforms. Hence it may be precisely the most basic rules for which we look in vain.

Neither the XII Tables nor the Mishpatim – the archaic assembly of provisions in Exodus – set out the grounds of slavery: birth, capture in war. In both works, it is only incidentally, in the course of regulating theft – an offence which at the time called for a restatement – that the possibility of a thief becoming enslaved is noted.<sup>4</sup> For that matter,

the Mishpatim, where they *ex professo* go into theft, tackle only theft of a beast (and of a person, if we reckon 21.16 among them<sup>5</sup>), with its peculiar difficulties of proof.<sup>6</sup> Double restitution if an inanimate object is stolen comes up incidentally in their section on deposit.<sup>7</sup> But it is omitted from the *sedes materiae*: the author is not motivated to lay down what no one questions.

Another remarkable example occurs in the field of damage to property. Neither of the two collections contains a rule about direct damage by a *paterfamilias*, except that the XII Tables, at the same time as imposing a fine of 300 coins on breaking a free person's bone, impose one of 150 if the victim is a slave.<sup>8</sup> Yet the XII Tables do deal with a man's liability for damage done by his slaves or cattle, and the goring ox and *pastus pecoris* do appear in the Mishpatim.<sup>9</sup> It is sometimes held that the directions regarding the simple case happen to be lost. But the coincidence is too striking. We should have to assume a conspiracy between Rome and Palestine – and a whole series of other systems I am not here quoting – compared with which that alleged by Mr. Garrison would be mere child's play. Better to put up with the situation as it presents itself. The simple case is not considered: it goes without saying. Even the *lex Aquilia*, some hundred and fifty years after the XII Tables, though concerned with direct damage by a *paterfamilias*, treats only (if we discount later re-interpretations) of damage to animate objects, slaves and cattle, which involves

<sup>2</sup> See *Private Manual for All Souls College*, 1958, p.2.

<sup>3</sup> At least psychologically, there is a considerable difference between a practice like the exclusion of women and one like the exclusion of animals; though it is probably arguable that, in strict logic, the latter just like the former implies a tacit, customary norm.

<sup>4</sup> Table 8.14, Exodus 22.2.

<sup>5</sup> The form of 21.12, 15, 16 and 17 differs from the usual one.

<sup>6</sup> See my *Studies in Biblical Law*, 1947 (repr. 1969), pp. 89 *et seq.*, B. Jackson, *Theft in Early Jewish Law*, 1972, pp. 41 *et seq.*

<sup>7</sup> Exodus 22.6. See B. Jackson, *Theft*, pp. 100 *et seq.*

<sup>8</sup> Table 8.3.

<sup>9</sup> Table 12.2, 8.6, 7; Exodus 21.28 *et seq.*, 22.4.

special complications<sup>10</sup>; just as the widest Biblical ordinance, in Leviticus,<sup>11</sup> treats only of the killing of cattle. Philo in his Special Laws<sup>12</sup> still does not break through to a plain demand of compensation in the simple case. By contrast, the Greek law respecting *blabe* was straightforward and comprehensive already by Plato's time.<sup>13</sup>

Still, the phenomenon is met not only in codes and surveys not aiming at exhaustiveness, but also, though in a less degree, where this objective is indeed pursued; be it that the thoroughly accustomed is overlooked, be it that it is felt to be just too platitudinous for mention. According to the Proculians, if I make a new thing – a chair, a vessel – with your raw material – your wood, your gold – I become owner. The non-application of this principle if I am a worker in your factory is so self-evident that Gaius does not trouble about it.<sup>14</sup> A slightly later work based on his, *Res Cottidianae*, does say that, to become owner, I must have made the new thing *meo nomine*, on my behalf.<sup>15</sup> The BGB, the German civil code, follows in Gaius's footsteps.<sup>16</sup> In the second commission a proposal to insert this requirement was rejected. It was declared *selbstverständlich*, manifest, that he who has the thing made is the true maker: *herstellen lassen* equals *herstellen*.<sup>17</sup> The authorised German version of

Pius XI's encyclical *Quadragesimo Anno*,<sup>18</sup> incidentally, contains a remarkable deviation from the Latin. The encyclical emphasises that production is a ground of acquisition only in well-defined circumstances; but only the German says that this restriction applies "naturally." Latin: *Industria vero quae ab homine proprio nomine exerceatur, cuiusque ope nova species aut augmentum rei accesserit, ea una est quae hos fructus laboranti addicit.* German: *Was sodann die Arbeit betrifft, so besitzt natürlich nur diejenige, die der Mensth im eigenen Namen ausübt und soweit sie eine Umgestaltung oder Wertsteigerung an ihrem Gegenstand hervorbringt, eigentumschaffende Kraft.* The adverb *natürlich* is represented neither in the Latin nor, for instance, in the English rendering<sup>19</sup>: "The only form of labour, however, which gives the workingman a title to its fruits is that which a man exercises as his own master, and by which some new form or new value is produced."

Unfortunately, a norm may be missing from a source for reasons other than its obviousness. The commonest one is indeed, as one would expect, that it does not exist.<sup>20</sup> This explains, for instance, why the XII Tables and the Mishpatim – and also Justinian and later Old Testament portions – include no penalty for verbal insults in private or air pollution. Again, the missing norm may not belong to

---

10 See my observations in *Studi Solazzi*, 1948, pp. 93 *et seq.*

11 24.21.

12 3.26 *et seq.* (144 *et seq.*), 4.5 *et seq.* (20 *et seq.*).

13 See J.H. Lipsius, *Das Attische Recht und Rechtsverfahren*, vol. 2, pt. 2, 1912, pp. 652 *et seq.*

14 G. 2.79.

15 D. 41.1.7.7, Gaius II *rerum cottidianarum*.

16 Para. 250.

17 See *Protokolle*, vol. 3, 1889, pp. 242 *et seq.*; J. Biermann, *Kommentar zum BGB*, Third Book, 3rd ed., 1914, p. 229. German jurisdiction has made use of the absence of an express reference to *meo nomine* and has established subtle differentiations, so that in some exceptional cases the requirement does in fact lapse.

18 Pius XI. Rundschreiben über die gesellschaftliche Ordnung, Autorisierte Ausgabe, *Lateinischer und deutscher Text*, 1931, p. 43.

19 *Five Great Encyclicals*, ed. by The Missionary Society of St. Paul the Apostle in the State of New York, 1939, p. 139.

20 See below, p. 133, n. 42, as for a stand taken by Aristotle.

law proper in a certain culture, as when the chastisement of an adulteress is left to her family. At Rome, while she figures in criminal statutes only from Augustus, sanctions within the household or circle are far older – however lax the second half of the Republic may have become.<sup>21</sup> Similarly, as for Hebrew civilisation, narratives like that of Tamar in Genesis and Samson's wife in Judges show that she might be put to death by husband, father, father-in-law or clan long before Deuteronomy names this as the appropriate, official punishment.<sup>22</sup> Given these alternatives – and there are more – we must always weigh up a good many factors before coming to a decision; and now and then we may end up with a *non liquet*.

Let me present a small selection. There is no pronouncement in the XII Tables on repayment of an informal loan. (*Nexum* is a very different matter.) At one time I inclined to see this accounted for by *ça va sans dire*. But I have changed my mind. There is no pronouncement because the law in fact keeps out. In that epoch, *mutuum*, literally the mutual, here the mutual service<sup>23</sup> – I lend you money or seedcorn when you need it and you at an opportune moment return it or lend me what I need – belongs to the area of gift trade,<sup>24</sup> not brought before the courts. A modern parallel would be dinner parties: Professor and Mrs. X, having been entertained by Professor and Mrs. Y, are expected to invite them back to a similar evening. Social pressure will indeed be strong, but there is – as yet<sup>25</sup> – no legal claim. When, in the third century B.C., *mutuum* is

rendered actionable, this marks a breakdown in the gift trade. It is significant that the money loan becomes actionable first: it moves from the personal to the commercial before the loan of objects, just as in present-day Western law monetary tips and gratifications enter the legal, compulsory orbit before other presents. This sort of development is at the root, too, of the distinction in Roman law between an agreement to let somebody have an object for money, sale, which finds early legal recognition, and an agreement to let somebody have an object for an object, exchange (*permutatio*, from the same root as *mutuum*), without recognition as late as in the Corpus Juris. (Interestingly, in the nineteenth century, the idea of mutual – in mutualism, the mutual societies etc. – again attaches itself to a more spontaneous way of managing economic life, above all, the avoidance of monetary transactions. This is particularly so in France, but it extends much further.) It is in connection with the money loan that Biblical law has first to condemn interest<sup>26</sup>; for the loan of victuals, the condemnation becomes necessary at a later stage only.<sup>27</sup> The impossibility in mature Roman law of bringing interest under the contract of *mutuum* is a remnant of the gift trade period. The prominence of the verb *dare*, to give, to make a gift, in *condictio* – the action used for *mutuum* – and the fact that the action states no legal cause are largely attributable to this background. The upshot, then, is that, however plausible it may seem at first sight to explain the absence of *mutuum* from the XII Tables on the same ground as

21 See Th. Mommsen, *Römisches Strafrecht*, 1899, pp. 688 *et seq.*

22 Genesis 38.24, Judges 15.6, Deuteronomy 22.22.

23 See W. Kunkel, *Römisches Privatrecht auf Grund des Werkes von P. Jörs*, 3rd ed., 1949, p. 220.

24 On which see M. Mauss, *Essai sur le don*, 1925; C.S. Belshaw, *Traditional Exchange and Modern Markets*, 1965, pp. 11 *et seq.*

25 This is only half-jocular. Certain privileges in regard to expense accounts and taxation are signs of a progressive commercialisation of hospitality.

26 Exodus 22.24.

27 Leviticus 25.35 *et seq.*, Deuteronomy 23.20 *et seq.*

that of direct damage, this would be an error. Repayment is not enforceable.

A contrast is provided by the Biblical law of incest. The earliest list of punishments, in Leviticus 20, starts by prescribing the death penalty for intercourse with the step-mother.<sup>28</sup> It is totally silent on the mother, as also on the daughter. Moreover, the oldest section of this list is silent on the sister from the same mother, though she must have been prohibited from a remote age. She does emerge in a secondary section, in a paragraph the point of which is to interdict – on pain of *kareth*, commonly understood as obliteration of a family by God<sup>29</sup> – the sister from the same father; it opens, “And if a man take his sister, his father’s daughter or his mother’s daughter.”<sup>30</sup> Here there is no doubt that the cases in question are omitted because everybody knows. It might perhaps be argued that they are still the internal affair of the family; but this solution is unconvincing considering the paragraphs about step-mother and daughter-in-law.<sup>31</sup> Or that they are so terrible that the lawgiver feels they must not be put in words. But this would only add an extra feature to the situation – the rules would still be so anchored as to require no promulgation.

How careful we have to be not to draw hasty analogies becomes clear when we go on to the grandmother, equally left unmentioned in this or indeed any other Old Testament catalogue of forbidden degrees. The reason is surely not that the taboo is taken for granted but that the liaison does not occur. Even in the

ancient Orient, by the time a man is fifteen, his grandmother will be around fifty; and while for a woman of today this means the beginning of a good, lively decade,<sup>32</sup> her counterpart then might pack up. (This would not be true, incidentally, of a man; and we do come across a warning against intercourse with the granddaughter, Leviticus 18.10.) Doubtless, as soon as the interpreters of Scripture set to work, building up a full system, the grandmother was included among the kin to be avoided; she is so included in the Tannaitic sources.<sup>33</sup> Epstein takes a different line. From her non-appearance in the Biblical texts he infers that she was permitted in that epoch. I cannot believe it. He has the greatest difficulty in explaining why the Zadokite sect (interest in which has been greatly revived by Qumran), while it charges the Pharisees with wrongfully allowing marriage with an uncle, does not reproach them for the more objectionable one with a grandmother; and he postulates a legislative act by the Pharisees making the grandmother ineligible, an act which just preceded the quarrel with the Zadokites. There is no trace of it – the whole construction is untenable.<sup>34</sup>

The pre-Augustan Roman material on relations debarred from intercourse is essentially not too different. It is very meagre, and Mommsen<sup>35</sup> must rely chiefly on reasonable speculation. It was superfluous to enunciate these rules. Plutarch contains a revealing passage. “Formerly,” he writes,<sup>36</sup> “men did not marry cognates” – meaning no one at all

---

28 20.11. See my *Studies*, pp. 77 *et seq.*

29 See my article in *Symbolae Friburgenses in honorem O. Lenel*, 1933, pp. 249 *et seq.*

30 20.17.

31 20.11, 12.

32 Or of three, as proved by that beautiful film *Harald and Maude*.

33 *Misnah Yebamoth* 2.4, *Babylonian Yebamoth* 21a.

34 See L.N. Epstein, *Marriage Laws in the Bible and Talmud*, 1942 pp. 232, 236, 254 *et seq.*; my criticism in the *Jewish Journal of Sociology*, vol. 3, 1961, pp. 3, 26.

35 See *Strafrecht*, pp. 682 *et seq.*

36 *Moralia* 265 D = Roman Questions 6.

identifiable as cognate, which included the sixth degree in the sideline – “just as even now they do not marry their aunts or nieces.” The abstention from mother, daughter and sister is too natural to illustrate his point; it cannot serve as a contemporary parallel to those rigid ancient barriers; he needs restrictions felt to be imposed by the laws, aunts and nieces. I accept S.A. Naber’s emendation of “sisters” into “nieces.”<sup>37</sup> Even without it, my argument stands: no reference to mother and daughter, the most settled taboos.

The more fundamental an institution – fundamental in the sense of embedded in the fabric of society – the more apt it is to be accepted without ado and to remain unformulated. This is a major cause (not, admittedly, the only one) of the resistance of constitutional law to codification, a characteristic by no means limited to antiquity: think of Britain. (Israel is in this as in many respects rather *sui generis*.) I have already remarked on there being no enumeration of the modes of enslavement in the XII Tables or the Mishpatim. Neither do they tell us that a child follows the status of the mother. Neither anything about the composition of or election to the governing bodies of the state. Eduard Fraenkel used to say – and he was only half-joking – that Mommsen’s *Römisches Staatsrecht* was the greatest work ever written on a non-existent subject. This is to proceed from an extremely narrow definition of law. It cannot, however, be denied that the bulk of Roman or Hebrew constitutional law is unwritten and must be deduced from its operation.

Two problems. One arises when a system, hitherto satisfied with a good deal of custom,

decides – generally or for a particular branch – to acknowledge solely rules expressly set forth as such: *nulla poena sine lege*, *nulla actio sine lege* or the like. At Rome, at that stage, the gaps were filled by legislation, such as the *leges Silia* and *Calpurnia* introducing *condictio* or the *lex Aquilia* about damage to property. To the Jews, this method was available only in a very limited degree since no later legislation could attain the status of the Biblical. They had to manage by means of an extensive interpretation – often very forced – of what the Pentateuch offered them. Thus the punishment of stoning for incest with the mother was arrived at by finding in the text of Leviticus a clause or two justifying a taking over of the punishment imposed on incest with the step-mother.<sup>38</sup> Direct damage by a *paterfamilias* was dealt with largely by interpreting in a suitable manner the provisions concerning the goring ox: a fantastically topsy-turvy procedure, the ox, the indirect case, furnishing the model for when I break a window.<sup>39</sup> The Samaritans, who – understandably – rejected most of the flexible Rabbinic modes of interpretation, found the going hard indeed, the old texts becoming less and less adequate. But I shall not here give details.<sup>40</sup>

The second problem I have in mind is this, that rules not spelled out inevitably, by definition, tend to escape scrutiny. This is a matter of great moment, especially if among them are many of the most ordinary everyday ones and many of the most far-reaching ones, both kinds profoundly affecting communal behaviour. The Pythagoreans taught that the revolving spheres produce a music which human ears are so accustomed to that they do not

37 Of *adelphas* into *adelphidas*; see F.C. Babbitt, *Plutarch's Moralia* (Loeb Classical Library), vol. 4, 1936, p. 16, n.2.

38 Babylonian Sanhedrin 53a *et seq.*


39 In Misnah Baba Qamma 1.4, 2.6, for instance, man is declared legally equivalent to an ox known to be dangerous.

40 See my paper in *Jewish Journal of Sociology*, pp. 21 *et seq.*

hear it.<sup>41</sup> It is a testimony to the ultimate optimism of this school that it believes that, if we could hear it (as Pythagoras himself did and also Scipio, though he only in a dream), the sound would be marvellous; *dulcis* Cicero calls it.<sup>42</sup> Unless you are an arch-conservative, however, like my friend John Barton, who affirms that all change is for the worse, you will wonder whether an unveiling of the hidden rules would cause nothing but joy and content.

Perhaps I may conclude by pointing out that there is a huge difference between what is self-understood and what a writer explicitly introduces as such. Actually, it is a sound working principle to prick up one's ears when coming upon an assurance like "obviously," "it is clear that". It is often assertiveness making up for lack of substance. This goes for classical literature as well as contemporary.

Gaius, who flourished under Hadrian, contrasts the statutory force of *senatuscon-*

sults and that of imperial decrees.<sup>43</sup> The former, he informs us, had at one time been questioned; the latter, never, *nec umquam dubitatum est*. "The lady doth protest too much, methinks."<sup>44</sup> Why? He is far too great an expert to be unfamiliar with the growth of the Emperor's legislative power. But he badly wants to raise it above any conceivable criticism. So he represents it as undisputed from the beginning, eager to drown lingering doubts, in himself as well as others. I do not concur with Professor Honoré's suggestion that the wording is chosen in a spirit of irony.<sup>45</sup> For one thing, that would have been far too dangerous. Motivation of the type I ascribe to Gaius is perennial. The Preamble to the 1960 Republican Constitution of Ghana opens<sup>46</sup>: "We the People of Ghana, by our Representatives gathered in this our Constituent Assembly, in exercise of our undoubted right to appoint for ourselves the means whereby we shall be governed ..." 

41 See W.K.C. Guthrie, *A History of Greek Philosophy*, vol. 1, 1967, pp. 295 *et seq.* Aristotle, *De Caelo* 2.9.290b, maintains that we do not hear it because it does not exist.

42 *De Re Publica* 6.18.18 = *Somnium Scipionis* 5. A little further on, however, in 6.18.19, he says it would overpower us, just as the sun is too much for our eyes if we look straight into it. Maybe we are here in touch with a variant of the tradition met in Plutarch, *Moralia* 745 E = *Table-Talk* 9.14.6 (see Guthrie, *Philosophy*, p. 297, n.3, with an interesting reference to Shakespeare's *Merchant of Venice* 5.1.64 *et seq.*), that our deafness to the spheres is due, not to familiarity, but to our earthly imperfection. In passing – while according to Aristotle the Pythagoreans compare the coppersmith who no longer notices the din around him, Cicero compares the inhabitants of Catadupa who pay no attention to the roaring cataracts of the Nile. Is there a little snobism behind this change?

43 G. 1.5.

44 *Hamlet* 3.2.242.

45 See A. Honoré, *Gaius*, 1962, pp. 118 *et seq.*

46 See A.J. Peaslee, *Constitutions of Nations*, vol. 1, 3rd ed., 1965, p. 213.