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When the Mesopotamian Honeymoon Ends: The Code of Hammurabi's Assumptions About the Roles of Spouses and Problem-Solving Approach to Regulating Marriage, 46 J. Marshall L. Rev. 1005 (2013)

Lars Nelson

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THE JOHN MARSHALL LAW REVIEW

**When the Mesopotamian Honeymoon Ends:
The Code of Hammurabi's Assumptions About the
Roles of Spouses and Problem-Solving
Approach to Regulating Marriage**

Lars J. Nelson

WHEN THE MESOPOTAMIAN
HONEYMOON ENDS: THE CODE OF
HAMMURABI'S ASSUMPTIONS ABOUT THE
ROLES OF SPOUSES AND PROBLEM-
SOLVING APPROACH TO REGULATING
MARRIAGE

LARS J. NELSON*

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I. WHAT CAN A BABYLONIAN KING TEACH US ABOUT REGULATING MARRIAGE?

King Hammurabi of Babylon watches every argument before the United States Supreme Court. Overlooking the Justices, he stands in bas-relief along the South Wall Frieze between Menes (c. 3200 B.C.), “the First King of the first dynasty in Egypt” and Moses (c. 1300s B.C.), a spiritual leader and law-giver.¹ Also along the South Wall Frieze stand Solomon (c. 900s B.C.), Lycurgus (c. 800 B.C.), Solon (c. 638-558 B.C.), Draco (c. 600s B.C.), Confucius (551-478 B.C.), and Octavian (63 B.C.-14 A.D.).² Across the aisle, history moves forward with Justinian (c. 483-565), Muhammad (c. 570-632), Charlemagne (c. 742-814), King John (1166-1216), Louis IX (c. 1214-1270), Hugo Grotius (1583-1645), William Blackstone (1723-1780), John Marshall (1755-1835), and Napoleon (1769-1821).³ These bas-relief sculptures illustrate that the Supreme Court is merely one link in a chain of attempts to apply jurisprudence as a salve to societies’ maladies. That the Supreme Court adjudicates disputes according to the rule of law—just as many of the aforementioned figures did in their own time—is a testament to the law’s enduring utility.

Like the law, the institution of marriage also stands as an enduring solution to societies’ problems. For individuals, marriage fulfills biological, economic, and emotional needs. For society, marriage serves as a social unit upon which other institutions are built. The fact that for millennia people throughout the world have ordered their lives around marriage is a testament to its enduring utility, notwithstanding a lack of figureheads and a bas-relief memorial in a federal building.

The rule of law and the institution of marriage are like everything that people create: they are solutions to problems. Every enduring idea—from traditions to constitutions to technology—is a solution to a problem, lacking intrinsic significance outside of human experience and arising from novel origins. For example, the idea of “marriage” was a novelty before it became an enduring institution that cemented itself into human society.⁴ Likewise, the idea of “law” was once novel. As Eugen

1. Courtroom Friezes: North and South Walls 1 (Feb. 1, 2013), <http://www.slideshare.net/teddecorte/supreme-court-north-and-south-walls>.

2. *Id.*

3. *Id.*

4. “Marriage is a social invention, unique to humans.” STEPHANIE COONTZ, MARRIAGE, A HISTORY 34 (2005). Even if one ascribes a divine origin to the institution of marriage, one can accept that marriage was created to serve ends. *Id.* For example, *Genesis* offers two possible problems that marriage could solve. First, God made “male and female” and commands them to “[b]e fruitful and multiply”—implying a procreative dimension. *Genesis* 1:28. Second, God established marriage as a cure for a lack of companionship, stating: “It is not good that man should be alone; I will make him a helper as

Ehrlich explains:

The Legal Provision is thus dependent upon society both for its existence and for its content. It cannot come into existence until there are present in society the institutions to which it pertains, and it takes its content from the decision of conflicts of interests which come up in society and which for the most part have already found judicial solutions. Likewise a law is generally first promulgated after the conflicts of interests in society have become so sharp that state interference becomes inevitable. The Legal Provision is applicable, on the other hand, only so far and so long as its presuppositions endure in society. If the conditions for which it is relevant fall away, if the conflicts of interest to which it pertains do not repeat themselves, then the Legal Provision becomes a *dead letter* even if it is not expressly repealed.⁵

Thus, to consider a “dead letter” is to consider the presuppositions of the society that wrote the letter.⁶

This Article examines one such “dead letter.” Hammurabi earned his prominent place in the history of jurisprudence⁷ after he had a code of law—frequently referred to as the “Code of Hammurabi”—carved into stone steles that he displayed in the city-states that he conquered.⁸ The Code governs all manners of Mesopotamian life, including the institution of marriage. Thus, as

his partner.” Genesis 2:18. From a secular viewpoint, “[t]here is evidence that marriage . . . existed even in pre-literate societies, and was controlled by custom and ministered by the individual. *Id.* As custom grew into law, states gradually began to exert control over individual freedom to marry and divorce.” *Divorce: Living Apart Statutes as a Replacement for Fault*, 1959 WASH. U. L. Q. 189, 190-91 (1959) (citations omitted).

5. Eugen Ehrlich and Nathan Isaacs, *The Sociology of Law*, 36 HARV. L. REV. 130, 142 (1922-1923) (emphasis added); see also JOHN SASSOON, ANCIENT LAWS & MODERN PROBLEMS 26 (2005) (stating that “[m]ost laws probably started as court decisions and the ones that survived were those that worked. We can surmise that stone age laws and, indeed, government must have been appropriate to the conditions and problems of the societies they served.”).

6. See SASSOON, *supra* note 4, at 14 (describing that “[t]hese laws [of the ancient world] reveal how our predecessors coped with many situations that still baffle us . . . Their laws also throw a dim but fascinating light on prehistoric societies where most of their problems and some of their laws originated.”).

7. See Owen B. Jenkins, *The Code of Hammurabi, Compared with American Law*, 39 AM. L. REV. 330 (1905) (stating “[c]ompiled at a time regarded as the dawn of civilization but now seen to have been the successor of long ages of human endeavor, the code by its astonishing comprehensiveness, wisdom and equitable direction, is destined to rank its sponsor, hitherto unknown for the most part of recorded time, among the darlings of the world.”).

8. MARC VAN DE MIEROOP, KING HAMMURABI OF BABYLON 100, 122 (2005); JEAN BOTTÉRO, MESOPOTAMIA: WRITINGS, REASONING, AND THE GODS 165 (Zainab Bahrani & Marc Van De Mieroop trans., 1992). One of these steles is preserved in the Louvre museum in Paris, France. Erwin J. Urch, *The Law Code of Hammurabi*, 15 A.B.A. J. 437, 438 (1929).

an “artifact,”⁹ the Code of Hammurabi can be used to examine the presuppositions that Mesopotamians had about law and marriage, and their respective utility. Although the Code of Hammurabi’s marriage edicts are an elegant monument to a brilliant ruler’s problem solving, the edicts also reflect Hammurabi’s outmoded and sexist assumptions. The Code’s duality stems from the fact that, in order to use marriage and law to solve the problems of his day, Hammurabi was forced to make assumptions about the dynamics of the spousal relationship.

With all of the aforementioned in mind, Section II of this Article places the Code of Hammurabi within context by briefly discussing Mesopotamian history and culture, and more thoroughly discussing Mesopotamian jurisprudence and the Code of Hammurabi. Section III presents Hammurabi’s legal framework for governing marriage, organized around the problems that Hammurabi’s marriage edicts aimed to solve. Section III will also provide illustrations supporting this Article’s underlying contention: a law regulating marriage—whether it be in the Code of Hammurabi or the United States Code—should be judged on its ability to solve problems as well as its presuppositions concerning the spousal relationship.

II. MESOPOTAMIAN HISTORY AND JURISPRUDENCE

Understanding laws and the problems they were designed to solve requires understanding the context within which the laws were created. For a law to be a solution to a problem there must be an institution that empowers the law.¹⁰ A law is only a solution to the extent that it carries the persuasive authority (or rhetorical significance) of the political scheme that created and enforces it.¹¹ The political scheme in turn reflects the society it governs.¹²

Thus, prior to discussing the Code of Hammurabi, one must briefly consider the Code’s context—Hammurabi’s Mesopotamia, including its history, political structure, social structures, norms, and jurisprudence.

A. *Ancient Mesopotamian History*

“Mesopotamia” describes “the land between the rivers Tigris and Euphrates.”¹³ Today, Hammurabi’s Mesopotamia encompasses

9. See Martha T. Roth, *Mesopotamian Legal Traditions and the Laws of Hammurabi*, 71 CHI.-KENT L. REV. 13, 14 (1995-1996) (stating that “the Laws of Hammurabi, in particular, is a historical artifact, operating in and through time and space in distinctive and measured ways.”).

10. See SASSOON, *supra* note 4, at 26.

11. *Id.*

12. *Id.*

13. NICHOLAS POSTGATE, *EARLY MESOPOTAMIA: SOCIETY AND ECONOMY AT THE DAWN OF HISTORY* 3 (2004); ROLLIN CHAMBLIS, *SOCIAL THOUGHT: FROM*

Iran, Iraq, and Syria.¹⁴ Although the region was inhabited since 5000 B.C.,¹⁵ the Sumerians built the first cities in the region sometime before 3000 B.C.¹⁶

The transformation from nomadic settlements to Sumerian city-states was an experiment.¹⁷ This *new* form of organization, no doubt, solved problems of nomadic existence, but inexperience translated into frailty. Once city-states defined their boundaries and resources, war became a significant problem.¹⁸ Like most civilizations, the Sumerians are not known for their attempts to solve the problem of war.¹⁹ Rather, they addressed the problem-question: how do we win wars?

Victories needed architects. Therefore, the Sumerians ordained *temporary* kings or “big m[en]” to organize their conflicts.²⁰ “But as conflict bred conflict, and war bred war, kingship lost its transitory character and became hereditary [and] dynastic.”²¹ And, whether driven by ambition or seeking to assuage the fear of threatening city-states, these kings battled to dominate Mesopotamia. Around 1792 B.C., the Assyrians relinquished their reign to Hammurabi, King of the city-state of Babylon.²²

Hammurabi, his army, and his ambition crafted an empire in four years,²³ which he ruled for ten.²⁴ The empire stretched “from Nineveh to the Persian Gulf, and embraced a territory slightly

HAMMURABI TO COMTE 13 (1954).

14. *Geography*, MESOPOTAMIA, http://www.mesopotamia.co.uk/geography/explore/exp_set.html (last visited Jan. 18, 2007).

15. See J.N. POSTGATE, EARLY MESOPOTAMIA: SOCIETY AND ECONOMY AT THE DAWN OF HISTORY 23 (1992) (describing “first permanent agricultural settlements” as being established around 5000 B.C.).

16. See KAREN RHEA NEMET-NEJAT, DAILY LIFE IN ANCIENT MESOPOTAMIA 14 (1998) (stating the Sumerians arrived in Mesopotamia about 3100 B.C.).

17. MARC VAN DE MIEROOP, THE ANCIENT MESOPOTAMIAN CITY 23 (1999).

18. MIEROOP, *supra* note 8, at 2.

19. See NEMET-NEJAT, *supra* note 16, at 20 (explaining that “[e]arly Dynastic inscriptions were full of references to battles between city-states. The massive walls built by most Sumerian cities suggest a strong secular authority ready for military action.”).

20. SAMUEL NOAH KRAMER, FROM THE POETRY OF SUMER: CREATION, GLORIFICATION, ADORATION 57 (1979); see also BOTTÉRO, *supra* note 8, at 138 (describing a Mesopotamian ritual symbolizing a king’s victory in war). Hammurabi, however, actually ended the practice of kings being called “big men” and adopted a title closer to “farmer.” NEMET-NEJAT, *supra* note 16, at 217.

21. KRAMER, *supra* note 20, at 57.

22. MIEROOP, *supra* note 8, at 1; MICHAEL ROAF, CULTURAL ATLAS OF MESOPOTAMIA AND THE ANCIENT NEAR EAST 121 (1990) (citing King Hammurabi’s reign as 1792 to 1750 B.C.); NEMET-NEJAT, *supra* note 16, at 30.

23. MIEROOP, *supra* note 8, at 79.

24. *Id.* at 12.

larger than Italy.”²⁵ Despite its vast expanse, Hammurabi’s empire had no name and most of his subjects ascribed their allegiance to the nearest city-state.²⁶ Although Hammurabi was an experienced leader—having ruled Babylon for over thirty years before beginning his empire-building campaign²⁷—his sustained unification of Mesopotamian city-states was only possible because generations of kings before him disseminated common seeds of culture throughout the region.²⁸

Written language was perhaps the most important seed of culture. The Sumerians invented writing between 3300 and 3000 B.C.²⁹ The capacity to record information solved many problems within Mesopotamian society.³⁰ Writing preserved transactions, accounts, contracts of business and *marriages*,³¹ and entertainment, such as the epic of *Gilgamesh*.³²

Although there was a common seed of religion in Mesopotamia, religion was unrelated to law and marriage. Most city-states “honored the same pantheon of gods,”³³ with each city-state having its own god to which it owed specific allegiance.³⁴ Like their later Greek and Roman counterparts, Mesopotamian deities engaged in melodrama and “had wives, concubines, and mistresses, and . . . used their sexual capacities generously and with great cheerfulness.”³⁵ But, “there was no credence whatsoever in an afterlife where accounts of behavior on earth were settled” and the religious precepts neither represented “moral ideal[s], nor even a simple hierarchy of values of behavior.”³⁶ Although there

25. CHILPERIC EDWARDS, *THE HAMMURABI CODE AND THE SINAITIC LEGISLATION* 87 (Watts & Co. 1904). Hammurabi’s reign can also be understood as encompassing all of the “Fertile Crescent.” Urch, *supra* note 8, at 437.

26. MIEROOP, *supra* note 8, at 79. These city-states were diverse. “There is no such thing as *the* Mesopotamian city, as each one of the hundreds that existed had its own peculiarities.” MIEROOP, *supra* note 18, at 5. Unfortunately, the confines of an article demand some generalizations.

27. MIEROOP, *supra* note 8, at 79.

28. See CHAMBLIS, *supra* note 13, at 15 (stating that “the art, science, literature, and legal traditions of ancient Sumeria provided the cultural heritage upon which Babylonian civilization developed.”).

29. *Id.* at 14; NEMET-NEJAT, *supra* note 16, at 47.

30. Frank L. Fetzter, *The Code of Hammurabi—The Oldest Known Legal Code*, 35 COM. L.J. 726, 727 (1930).

31. CHAMBLIS, *supra* note 13, at 27.

32. POSTGATE, *supra* note 15, at 66-70; see also NEMET-NEJAT, *supra* note 16, at 305 (stating that “[t]he people of ancient Mesopotamia were the first to develop writing, which was triggered by economic necessity.”).

33. MIEROOP, *supra* note 8, at 79. At the same time, there was religious diversity due to the distinction between the Sumerian’s religious practices and the Babylonians Semitic beliefs. CHAMBLIS, *supra* note 13, at 37.

34. MIEROOP, *supra* note 18, at 46.

35. BOTTÉRO, *supra* note 8, at 188.

36. *Id.*

was no divine moral code, the gods were thought to punish sacrilege. Mesopotamians superstitiously viewed “unexpected events, abnormal conjectures, and unusual encounters” as “warnings, ‘signs’ through which the gods, organizers of the world and directors of the way things evolve, let their decisions regarding the fate of mankind be foreseen.”³⁷

The complex economic endeavors in the city-states were another common seed. Mesopotamians were highly materialistic.³⁸ The professions at the time included merchants, herdsman, scribes, weavers, moneylenders, dyers, cobblers, smiths, veterinarians, stonecutters, vintners, and physicians.³⁹ The rivers and network of city-states created robust trade:

Boats laden with goods moved along the major canals; caravans passed in and out of the city gate . . . Marketplaces both within and without the city walls were maintained for the exchange or sale of goods; and the wine shop, presided over usually if not always by women, provided a place to visit with friends and perhaps to haggle over prices.⁴⁰

Prices and wages were centrally planned.⁴¹ Wealth could be accumulated and distributed to heirs.⁴²

Finally, Mesopotamia was a class-ordered society.⁴³ There were three classes: the wealthy, commoners, and slaves.⁴⁴ Unsurprisingly, an individual’s privileges and responsibilities varied according to his or her class.⁴⁵

B. Mesopotamia’s Marriage Norms

Written language, religion, economics, and class stratification are apparent in the cultural norms of marriage in Mesopotamia as well as in the Code of Hammurabi. To be sure, Hammurabi did not invent law, marriage, or the laws of marriage.⁴⁶ Mesopotamians coupled long before a Babylonian king memorialized his thoughts about matrimony in cuneiform script on a 2.25 meter phallic-shaped stele of diorite.⁴⁷ Like all Mesopotamians of his era, Hammurabi *likely* understood the institution of marriage as a

37. *Id.* at 141; *see e.g.*, NEMET-NEJAT, *supra* note 16, at 130 (describing how “[m]alformed babies were considered evil omens.”).

38. *Id.* at 27.

39. CHAMBLIS, *supra* note 13, at 28.

40. *Id.* at 28.

41. THE CODE OF HAMMURABI §§273-74 (L. W. King Trans., 1910).

42. *Id.* §165.

43. EDWARDS, *supra* note 25, at 88-89 (describing classes).

44. CHAMBLIS, *supra* note 13, at 29; Fetzer, *supra* note 30, at 727.

45. CHAMBLIS, *supra* note 13, at 29.

46. *See* COONTZ, *supra* note 4, 26 (noting that anthropologists believe that marriage is “universally subject to rules.”).

47. G.R. DRIVER & JOHN C. MILES, THE BABYLONIAN LAWS 28 (1952).

legal union, between a man and a woman, with a reproductive purpose.⁴⁸ But, this definition should not be confused with the definitions of marriage argued about today.

First, it does not appear that in Mesopotamia “homosexual relations were condemned in the least.”⁴⁹ Artifacts from the period refer to masters using their slaves as “catamites” and consensual homosexual relationships among individuals of the same social class.⁵⁰ Nonetheless, a Mesopotamian’s *sense of justice*—i.e., a person’s destiny within society and nature⁵¹—dictated that if a male did not marry and produce offspring then he was “inferior to himself, abnormal and devoted to an existence that was different from other men, more difficult and less magnificent.”⁵² Thus, *justice* dictated that marriage was a heterosexual endeavor.

Second, marriage was monogamous-ish.⁵³ Both the Code of Hammurabi “and court proceedings indicate that only under exceptional circumstances was a man permitted to have more than one wife at the same time.”⁵⁴ One exceptional circumstance was if you were a king. Hammurabi likely had several wives and a substantial harem even before his empire-building campaign.⁵⁵ He

48. See CHAMBLIS, *supra* note 13, at 32 (stating that “[t]here is little information about the intimate experiences of courtship, marriage, and family life.”).

49. See BOTTÉRO, *supra* note 8, at 190-191 (finding that “[t]here is nothing that allows us to think that these homosexual relations were condemned in the least, or even simply considered to be, as such, more ignominious than heterosexual relations, or that they would be discouraged.”); see *id.* at 190 (discussing female prostitutes engaged in the same activities); see also NEMET-NEJAT, *supra* note 16, at 139 (stating that “[m]ale homosexuality was described from the third millennium BCE onward in Mesopotamia. Texts referred to sodomy between men as well as between men and boys. The Babylonians did not condemn this practice. But male prostitutes were either despised or considered laughable.”).

50. BOTTÉRO, *supra* note 8, at 191.

51. See *infra* §II.C.1.

52. BOTTÉRO, *supra* note 8, at 196.

53. See POSTGATE, *supra* note 15, at 106 (finding that the predominant relationship was “one man, one wife.”); see also RUSS VERSTEEG, LAW IN THE ANCIENT WORLD 46-47 (2002) (stating that “one wife was the norm and economic reality throughout most of Mesopotamian history.”); Leon R. Yankwich, *The Cultural Background and Some of the Social Phases of the Code of Hammurabi*, 4 S. CAL. L. REV. 20, 31 (1930-1931); NEMET-NEJAT, *supra* note 16, at 132 (finding that “[g]enerally, marriage was monogamous, even among the gods.”); CHAMBLIS, *supra* note 13, at 33 (stating that “marriage was the custom, and monogamy the most common practice, but celibacy and polygamy were both permitted.”)

54. NEMET-NEJAT, *supra* note 16, at 136; see also CYRUS H. GORDON, HAMMURABI’S CODE: QUAINOT OR FORWARD-LOOKING 12 (1960) (finding that “a wife represented a valuable economic asset, for which a man had to make a financial investment. It is unlikely that the average man could afford to buy a second wife.”).

55. POSTGATE, *supra* note 15, at 148-49; see also NEMET-NEJAT, *supra* note

probably gained more wives with each conquered city-state, consistent with the custom of the period.⁵⁶ But, for men who were not kings, monogamy only applied to the marital relationship. Men were allowed concubines⁵⁷ and homosexual partners in addition to their wives.⁵⁸

Third, Mesopotamian marriages were formed by contract.⁵⁹ The parties to the contract were typically the bridegroom and the bride's father.⁶⁰ The contracts memorialized the parties to the marriage, the names of the fathers, and the fact that marriage oaths were taken.⁶¹

Finally, it is assumed that Mesopotamians viewed children as a blessing of marriage.⁶² A Mesopotamian woman's primary virtue was her reproductive capacity⁶³ and she likely believed that she

16, at 219 (discussing a king's multiple wives).

56. See MIEROOP, *supra* note 8, at 112 (finding that "a conqueror would take over the women attached to the palace of the king he defeated.").

57. See James Bronson Reynolds, *Sex Morals and the Law in Ancient Egypt and Babylon*, 5 J. AM. INST. CRIM. L. & CRIMINOLOGY 20, 27 (May 1914 to March 1915) (explaining that "a concubine was a woman who cohabited with a man without the legal or social standing of a wife.").

58. BOTTÉRO, *supra* note 8, at 187.

59. EDWARDS, *supra* note 25, at 99 (citing Code of Hammurabi §128); CHAMBLIS, *supra* note 13, at 34; Reynolds, *supra* note 57, at 25.

60. Examples of marriage contracts of the period are as follows: Judicial settlement: Ninmar, son of Lu-nannar, appeared and said, "In the name of the king, Lu-Dingirra, son of Guzani, is to marry Damgula, my daughter." Arad, son of Ur-lamma, and Ur-shid, son of Lu-nannar, take an oath to this. Lu-dingirra has been married to Damgula. Ninmar for a second time appeared and said: "Nin-azag-zu, daughter of Guzani, is to marry my son, Sibkini." It is attested that the name of the goddess Ninmar and the name of the king were invoked in an oath. Sibkini, the shepherd, has been married to Nin-azag-zu, Tile-e-makh-ta being the Mashkim, Lu and Ur-ka-silim judges. In the year following the destruction of Simanu. Hatton Lovejoy, *The Code of Hammurabi*, 1 GA. LAW. 32, 50 (1930-1931); see also DRIVER & MILES, *supra* note 47, at 253-57 (presenting three Babylonian marriage contracts); W.F. LEEMANS, LEGAL AND ADMINISTRATIVE DOCUMENTS OF THE TIME OF HAMMURABI AND SAMSUILUNA (Mainly from Lagaba) 76-77 (1960) (showing an example of Mesopotamian marriage contract).

61. See *supra* note 60 and accompanying text. There is dispute as to whether not Mesopotamians had marriage rituals beyond the contract and oaths. Compare CHAMBLIS, *supra* note 13, at 27 (stating "most evidence suggest that ancient Mesopotamians observed formalities, customs, ceremonies, and various legal requirements as antecedents to a valid marriage.") with VERSTEEG, *supra* note 53, at 47 (arguing that only an oral agreement was required).

61. VERSTEEG, *supra* note 53, at 18.

62. See Benton S. Oppenheimer, *Some Ancient Laws*, 9 U. CIN. L. REV. 101, 123 (1935) (arguing that numerous children were justification for allowing concubines).

63. See POSTGATE, *supra* note 15, at 92 (citation omitted) (stating that "to have a son and heir was of great importance: it gave you someone to support you in your old age, and to appease your spirit after your death.").

would offend *justice* (or her destiny) if she failed to produce offspring.⁶⁴

Although Mesopotamian marriage is discussed in greater detail later, it is important to understand at this juncture that, prior to the creation of the Code of Hammurabi, marriage was understood as a heterosexual, monogamous-ish, contractual relationship that had a tendency to yield children.

C. Mesopotamian Jurisprudence and the Code of Hammurabi

1. Mesopotamian Jurisprudence

Mesopotamians understood “justice to have been a gift from the gods.”⁶⁵ As eluded to earlier, the gift of justice was comprised of a balance of truth and destiny—a state in which each individual fulfills “that which comes to him [or her] by nature or by his [or her] place in society.”⁶⁶ Mesopotamian kings were duty bound to uphold justice.⁶⁷

Mesopotamian kings fulfilled their duty by acting in executive, legislative, and judicial capacities. A king’s executive capacity was obviously evident in the fact that he headed the army and protected his vassals from outside aggression. A king acted as a legislature by issuing *misharum*.

Misharum is the Akkadian word that denotes “the quality of ‘equity’ in human society, that which is achieved by the king’s attempt to bring human affairs into balance with *kittum*, ‘natural law.’” . . . At the beginning of a [conquering] king’s reign, he pronounced his *misharum*—an edict—which ordinarily comprised various temporary economic reforms intended to alleviate financial hardships created by the previous rulers.⁶⁸

For example, Hammurabi’s *misharum* consisted of “canceling outstanding debts” within the city-states he conquered so as to solve the problem of debt servitude (and, no doubt, curry favor with the freed).⁶⁹ Finally, Mesopotamian kings acted as judges and

64. See BOTTÉRO, *supra* note 8, at 196 (explaining that “the destiny of a woman, as a woman, was to bear and raise children according to the chosen model of marriage and the patriarchal family.”); but see NEMET-NEJAT, *supra* note 16, at 137 (noting that evidence suggests that couples used anal intercourse as birth control).

65. VERSTEEG, *supra* note 53, at 18.

66. *Id.* at 17-18.

67. See MIEROOP, *supra* note 8, at 82 (noting that “[t]he king had to be the ‘good shepherd’ of his land, he had to care for his people as if they were a defenseless flock.”).

68. VERSTEEG, *supra* note 53, at 19 (quoting NORMAN YOFEE, POLITICAL ANTHROPOLOGY 106 (1988)); see also BOTTÉRO, *supra* note 8, at 182 (explaining how *Kittu* (from which *kittum* is derived) and *mêsaru* are used together to describe justice in Mesopotamia).

69. MIEROOP, *supra* note 8, at 11-12.

dispensed justice by adjudicating civil cases.⁷⁰ Mesopotamian kings also had courts below them, presided over by assemblies and appointed judges.⁷¹

Mesopotamians likely understood the idea of written law. As stated earlier, Mesopotamians used writing to memorialize contracts. Furthermore, there were codes of law that predated the Code of Hammurabi, including the *Lipit-Ishtar Code*, the *Sumerian Code*, and *Laws of Eshnunna*.⁷² Nonetheless, most law in Mesopotamia was common law and unwritten.⁷³

2. *The Code of Hammurabi*

The Code of Hammurabi was carved in the thirty-eighth year of Hammurabi's reign.⁷⁴ The carved stele consisted of two parts: (1) a bas-relief illustration; and (2) the inscription, which contains the Code. The bas-relief illustrations depicted Hammurabi (presumably symbolically) receiving "justice" from the sun god Shamash.⁷⁵ "The [stela's]⁷⁶ inscription has three parts to it: the core is a long list of laws, which are framed by a prologue and an epilogue containing a praise of King Hammurabi in the first person."⁷⁷

The prologue began with a mythical account of powerful gods founding the Kingdom of Babylon and anointing Hammurabi

70. See BOTTÉRO, *supra* note 8, at 165 (stating that "[w]e know that in Mesopotamia the rendering of justice was a royal prerogative. . . . The ruler often delegated the duty to his representatives, even to professional judges, but it belonged to him in his own right. The procedural accounts, as well as the royal correspondence, that have survived, show more than once how lower authorities refer certain difficult or unusual cases to the royal tribunal."); see also POSTGATE, *supra* note 15, at 275 (explaining that the Mesopotamian judiciary was charged with four tasks, not the least of which was settling disputes between individuals).

71. See MIEROOP, *supra* note 18, at 127 (explaining that "[t]he assemblies, both of the entire city and of the city quarters, acted as courts of law, next to those staffed with judges appointed by the king.").

72. CHAMBLIS, *supra* note 13, at 20.

73. "Unwritten does not mean nonexistent or unknown, but potential: because it was constantly presented to the people in the form of positive or prohibitive customs, transmitted together with education, or even in the form of traditional solutions to particular problems." BOTTÉRO, *supra* note 8, at 181.

74. MIEROOP, *supra* note 8, at 100; BOTTÉRO, *supra* note 8, at 165.

75. See MIEROOP, *supra* note 8, at 122 (stating that "[t]he relief on the top was also understandable to non-literate people—that is most of the population—and it showed how the sun god Shamash, the protector of justice, gave a rod and a ring—probably emblems of justice—to Hammurabi."); see also EDWARDS, *supra* note 25, at 81-84 (describing bas-relief at the top of stele in detail); Oppenheimer, *supra* note 62, at 102 (describing Shamash bestowing laws unto Hammurabi).

76. Urch, *supra* note 8, at 438.

77. MIEROOP, *supra* note 8, at 101; Oppenheimer, *supra* note 62, at 102; DRIVER & MILES, *supra* note 47, at 36, 39.

King.⁷⁸ The prologue continued by describing Hammurabi's exploits as head of the state and a pious ruler.⁷⁹ The prologue concluded with a preface for the individual laws: "When [his god] sent [Hammurabi] to rule over men, to give the protection of right to the land, [he] did right . . . and brought about the well-being of the oppressed."⁸⁰

The laws follow the prologue. The Code consisted of two hundred eighty two laws or "articles"⁸¹ governing legal proceedings; offenses against property; real estate; financial arrangements; women, marriage, family property, and inheritance; assault; professional fees and responsibilities; agriculture; rates of hire; and slaves.⁸² The articles "beg[a]n . . . with a 'protasis,' introduced by a conjunction 'if,' and describing a concrete situation, a state of circumstantial elements, in the past or in the present tense."⁸³ "The 'apodosis' which follows, in the future tense, indicates what should be, on the judicial level so to say, the result of such situation."⁸⁴ An example of this structure is as follows:

If a man's wife be surprised (in *flagrante delicto*) with another man, both shall be tied and thrown into the water, but the husband may pardon his wife and the king his slaves.⁸⁵

The articles were secular in nature;⁸⁶ the articles only

78. THE CODE OF HAMMURABI, *Prologue*.

79. *Id.*

80. *Id.*

81. CHAMBLIS, *supra* note 13, at 19.

82. MIEROOP, *supra* note 8, at 103-04; Lovejoy, *supra* note 60, at 34-35.

The "articles" have been grouped according to different sectors of communal life. Thus we find the following sequences: five paragraphs devoted to *false testimony* (§§1-5); twenty devoted to *theft* (§§6-25); sixteen to *tenure of royal fiefs*, a common practice in Mesopotamia, especially in this period (§§26-41); approximately ten at least to *places of dwelling* (§§76- . . . the great lacuna due to the erasing of the seven last columns on the obverse prevents us from establishing exactly how many); at least twenty-four to *commerce* (§§. . . -111); fifteen to *deposits and debts* (§§112-26); sixty-seven to *wives and the family* (§§127-194); twenty to *assault and battery* (§§195-214); sixty-one to various *free professions* followed by *subordinate professions* (§§215-277); and finally five to *slaves* (§§278-82).

BOTTÉRO, *supra* note 8, at 159; DRIVER & MILES, *supra* note 47, at 43-45.

83. BOTTÉRO, *supra* note 8, at 158.

84. *Id.*

85. THE CODE OF HAMMURABI, §129; *see also* CHAMBLIS, *supra* note 13, at 24 (finding that "penalties for crimes against the person varied according to the class status both of the offender and of the injured party.").

86. CHAMBLIS, *supra* note 13, at 20; BOTTÉRO, *supra* note 8, at 187-88; Herbert J. Liebesny, *Religious Law and Westernization in the Moslem Near East*, 2 AM. J. COMP. L. 492, 492 (1953) (discussing secular nature of the Code of Hammurabi); Donald G. McNeil, *The Code of Hammurabi*, 53 A.B.A. J. 444, 444 (1967) (discussing secular nature of the Code of Hammurabi); *see also* Jenkins, *supra* note 7, at 335 (finding that "[i]t is purely a State document like

anticipated civil cases;⁸⁷ and many articles were based upon established customs.⁸⁸

The epilogue follows the articles. The epilogue celebrated Hammurabi, much like the prologue,⁸⁹ but the epilogue also

our own statute books . . . yet containing evident recognition of the church, in, *inter alia*, its reference to ‘votaries,’ who were religiouses.” (quoting THE CODE OF HAMMURABI, §182); DRIVER & MILES, *supra* note 47, at 39 (stating that “[t]heir general character, too, is completely secular, and in this respect they are strongly to be contrasted with the Hebrew laws; they are not a divine pronouncement nor in any sense a religious document.”). *Contra* GORDON, *supra* note 54, at 3 (finding that “it is significant that the authority of the law depends on its divine origin. This claim of divine origin made any infraction of the law an offense not only against the state or society but also against divine order itself.”).

87. See Urch, *supra* note 8, at 438 (stating that “[t]he [C]ode of Hammurabi is essentially a civil code. Compensation to the injured party paid by the accused party in cases which are now regarded as criminal, reveals the failure to look upon any act . . . as an offense against the State. The idea of an act being an offense against the community rather than against an individual and his family was of relatively late origin.”); see also McNeil, *supra* note 87, at 446 (finding that “[l]egal proceedings were commenced by the complaining party and it’s probable that written pleadings were employed. Witnesses testified under oath, and written as well as oral evidence was considered. Unlike modern trials, however, the parties presented their own cases without employing advocates. Decisions were embodied in written instruments prepared by a scribe and witnessed and sealed. Many disputes were settled rather than litigated and the settlements formalized in written, witnessed and sworn contracts.”); Reynolds, *supra* note 57, at 24.

88. CHAMBLIS, *supra* note 13, at 20; Urch, *supra* note 8, at 437; see also *id.* 441 (stating that “Hammurabi’s code, in a sense the product of this [i.e., Sumerian] culture, was not extensively original, though it was far-sightedly adapted to contemporary needs. How much of Sumerian customary law actually passed into the later Semitic law cannot be determined. But the older customs long attached to the land could not have been easily crowded out.”); Fetzer, *supra* note 30, at 726 (discussing that “[m]any of the laws in the code were taken directly from an older Sumerian code.”); Oppenheimer, *supra* note 62, at 106; ROAF, *supra* note 23, at 121 (stating that “[e]arlier codes of law following a very similar pattern were promulgated by Shulgi of Ur, Lipit-Ishtar of Isin, and Dadusha of Eshnunna.”); Reynolds, *supra* note 57, at 23; BOTTÉRO, *supra* note 8, at 159 (discussing in detail the other codes known within Mesopotamia); Lovejoy, *supra* note 60, at 34 (explaining that “[t]here were several influences evident in these laws [of Hammurabi]. One, the ancient law of wandering tribes; another that developed in settled communities as life became more complex; the third, the lessening of severity in punishment which time has always brought.”); DRIVER & MILES, *supra* note 47, at 6-8; VICTOR H. MATTHEWS & DON C. BENJAMIN, OLD TESTAMENT PARALLELS: LAWS AND STORIES FROM THE ANCIENT NEAR EAST 101, 103 (3d ed. 2006) (citing the Code of Shulgi (c. 2094-2047 B.C.) and the Sumerian Code (c. 1800 B.C.)); MIEROOP, *supra* note 8, at 109 (discussing that “[a]lready 300 years earlier, [before Hammurabi,] kings issued lists [of laws] of this type, and these earlier examples elucidate partly how Hammurabi’s code was composed.”).

89. See MIEROOP, *supra* note 8, at 109 (stating that “[t]he first sentence of the epilogue, which states that the preceding cases were just verdicts by the

includes two messages for different audiences.⁹⁰ First, Hammurabi spoke to “the oppressed, who ha[d] a lawsuit,”⁹¹ and described how such individuals could take comfort in the fact that Hammurabi brought justice to Mesopotamia. Second, Hammurabi counseled future monarchs to emulate his wisdom and promised the gods’ graces if the monarch paid homage to Hammurabi.⁹² Nevertheless, Hammurabi threatened any monarch who struck any of Hammurabi’s laws, corrupted any of his words, or in any way changed his monument.⁹³ Hammurabi vowed that the gods would destroy such as heedless monarch.⁹⁴

Calling the Code of Hammurabi a “code of law” is an imposition of modern concepts onto an ancient creation that does not neatly fulfill the definition of either “code” or “law.”⁹⁵ To call it a “code” ignores the “disturbing lacunae in legislative matters” within the Code,⁹⁶ the lack of universal application to all situations,⁹⁷ and the inconsistencies in the resolution of cases.⁹⁸ To call the articles “laws” ignores the absence of evidence that the Code was used. Despite the large volume of administrative and legal literature to which historians have access,⁹⁹ only one correspondence records Hammurabi as having instructed liaisons to enforce his Code.¹⁰⁰ Moreover, “in the extensive documentation

king, advises the reader that these were at the basis of the laws.”); *see also* W.W. DAVIES, THE CODES OF HAMMURABI AND MOSES WITH COPIOUS COMMENTS, INDEX, AND BIBLE REFERENCES 107 (1905) (stating that “[t]he just laws, which Hammurabi, the wise king, established.”); ROBERT FRANCIS HARPER, THE CODE OF HAMMURABI KING OF BABYLON 99 (U. of Chi. Press 1904) (explaining that “[t]he righteous laws, which Hammurabi, the wise king, established and (by which) he gave the land stable support and pure government.”).

90. MIEROOP, *supra* note 8, at 110.

91. DAVIES, *supra* note 80, at 108.

92. THE CODE OF HAMMURABI, *Epilogue*.

93. *Id.*

94. *Id.*

95. SASSOON, *SUPRA* NOTE 4, at 168-74; BOTTÉRO, *supra* note 8, at 162-63.

96. *See* BOTTÉRO, *supra* note 8, at 161 (noting that “we find no trace of the organization of justice itself, nor the repression of delicts and of crimes. There is no trace of criminal law properly speaking; there is no trace of a codification of the social hierarchy, or political obligations, of administration, or of fiscal policy.”).

97. *See id.* at 162 (arguing by example that §1 only addresses false testimony regarding murder and not all testimonial matters).

98. *Id.* at 162-63.

99. *Id.* 163.

100. *See* MIEROOP, *supra* note 8, at 94 (explaining that Hammurabi wrote to Sin-iddinam, “investigate the matter [of deserting soldiers], take care of their case, and rend justice according to the laws that are now in force in Yamutbal.”). *See also* ROAF, *supra* note 23, at 121. (stating that “[a]ll this is very clear: in the eyes of its author the ‘Code’ was not at all intended to exercise by itself a univocal normative value of legislative order. But it did

of court cases judged in Hammurabi's reign and afterwards, there is no reference to a collection of laws that was the basis for a decision."¹⁰¹

Jean Bottéro argues that the Code "should not be considered more than a type of anthology at best."¹⁰² Bottéro contends that "[w]hat Hammurabi wanted to collect in his 'Code,' . . . was a selection of the principal decisions of law, the most just decisions, the wisest, the most sagacious, the most worthy of an experienced ruler."¹⁰³ Thus, the Code of Hammurabi could be more akin to a Westlaw Reporter than a Code. In contrast, G.R. Miles and John C. Driver argue that "[t]he Laws must not be regarded as a code or digest, but as a series of amendments to the common law of Babylon."¹⁰⁴ Thus, the Code of Hammurabi could be akin to an executive order dictating the application of statutes. Viewed in this way, the impetus for the Code's creation may stem from the Hammurabi's "profound sense of justice,"¹⁰⁵ which compelled Hammurabi to make "uniform all the various and sometimes conflicting laws and customs of the land."¹⁰⁶

In truth, the Code of Hammurabi does not—and did not—need to be a singular solution to a singular problem. The Code of Hammurabi could have been a guide for dispensing justice or a memorial of excellent decisions at the same time that it was a rhetorical monument to convey the political legitimacy of Hammurabi's rule via *ethos* (i.e., the first-person nature of the Code as well as the description of Hammurabi's deeds), *pathos*

have value as a model; it was instructive and educative in the judicial order."). BOTTÉRO, *supra* note 8, at 167.

101. MIEROOP, *supra* note 8, at 107; *see also* ROAF, *supra* note 23, at 121 (finding that "there is little evidence to suggest that the Law Code was used to redress injustice, except for the occasional mention in legal documents of a stele that might have been Hammurabi's."); *see also* BOTTÉRO, *supra* note 8, at 163 (stating that "no verdict was given, no official decision was taken, nor any agreement signed that made a reference to any article of the so-called 'Code.'). *Contra* Fetzer, *supra* note 30, at 729 (alleging that "[t]he judges were strictly supervised. Appeal to the king was allowed, but if the code gave the rule in the case, the action was remanded with instructions to enter judgment according to the code.")

102. BOTTÉRO, *supra* note 8, at 161.

103. *Id.* 165 (citing the Code of Hammurabi's epilogue).

104. DRIVER & MILES, *supra* note 47, at 41; *see also* POSTGATE, *supra* note 15, at 289 (making a similar case and arguing that the "[articles] may be considered laws, in that they are fixing principles or practices to be applied in the administration of law."). "[T]hey are not collections of individual cases, 'case law' [In the case of A vs B at Larsa on day x the king judged as follows]."
Id.

105. *See* DRIVER & MILES, *supra* note 47, at 52 (explaining that "Hammurabi's letters show his deep interest in law and justice, and it may be assumed that his part in the preparation of the Laws [or Code] was no less than that of Napoleon in the drafting of the Civil Code.").

106. Fetzer, *supra* note 30, at 726.

(i.e., the appeal to the divine and the offer of a solution to the aggrieved), and *logos* (i.e., the just reasoning inherent in the articles). Regardless of its purpose at the time, it has always been viewed as a source of wisdom. “Students . . . copied out parts of the text on clay tablets”¹⁰⁷ long after Hammurabi’s reign and “[s]cholars of the first millennium wrote interpretations of the laws.”¹⁰⁸ This Article continues in that tradition.

III. THE CODE OF HAMMURABI’S GOVERNANCE OF MARRIAGE

Early civilization was fragile.¹⁰⁹ Hammurabi likely recognized his world’s frailty more than anyone else. It is evident that Hammurabi actively sought to ward off the destruction of his empire from both internal and external sources. Within his conquered city-states, Hammurabi was adept at “making riches and increase”¹¹⁰ through the building of walls,¹¹¹ temples, and canals.¹¹² But, as all ruins attest, a stable society is not built on infrastructure alone. Thus, Hammurabi also used his Code as a tool for mollifying his empire.

As stated earlier, Hammurabi did not invent marriage, but through his Code he worked to ensure the institution strengthened his society.¹¹³ Hammurabi drafted a web of marital mandates that shaped the institution of marriage into a solution for the problem-questions:

1. How does society promote procreation?
2. How does society nurture children into successful adulthood?
3. How does society minimize particular causes of poverty?

The laws in reference to marriage¹¹⁴ solve (or address) the problem-questions in four ways. First, the Code defines marriage. Second, the Code protects marital fidelity. Third, the Code

107. MIEROOP, *supra* note 8, at 129.

108. *Id.* at 130.

109. *See e.g.*, SASSOON, SUPRA NOTE 4, at 107 (discussing the frailty of ancient society).

110. THE CODE OF HAMMURABI, *Prologue*.

111. MIEROOP, *supra* note 8, at 82-83.

112. *Id.*

113. *See* Lovejoy, *supra* note 60, at 35 (stating that “[t]he laws in reference to marriage and related subjects constitute about one-fifth of the [C]ode and are comprehensive.”).

114. This Article is concerned with marriage—a subset of family law. Attempting to distinguish the marital provisions of family law from the other provisions of family as well as criminal law and estates can be difficult at best and foolhardy at worst. This Article will attempt to segregate these topics by including statutes that discuss spouses from other provisions. This is a general proposition and exceptions will be made.

allocates responsibilities among spouses. Fourth, the Code uses the marital relationship to preserve economic resources within families.

A. Defining Marriage as a Contract Between Gentlemen

The Code echoed custom and dictated that daughters became wives via contract. Although “no [connection] . . . between the law of sale and the law of marriage has been shown,”¹¹⁵ the Code of Hammurabi applied a transactional vocabulary and process to marriage formation.

The parties to the contract were typically the groom and the bride’s father.¹¹⁶ Nevertheless, a groom’s father or older brother might act for him and the Code mandates that the bride’s brothers act for her in the event of her father’s absence. The male acting for the bride chose the groom,¹¹⁷ and could even marry the bride off to a slave.¹¹⁸

Consistent with contractual principles, the marriage contract required consideration. The bride entered the marriage with a dowry that was typically greater than the “bride-price.”¹¹⁹ In

115. DRIVER & MILES, *supra* note 47, at 261, 263-65.

116. *Id.* at 249.

117. See CHAMBLIS, *supra* note 13, at 34 (explaining that “[a] man might negotiate for himself, but apparently a girl’s first husband was selected by some member of her family. Once married, however, she was no longer under parental control.”); see also THE CODE OF HAMMURABI §184 (stating that “[i]f a man do[es] not give a dowry to his daughter by a concubine, and no husband [is present]; if then her father die, her brother shall give her a dowry according to her father’s wealth and secure a husband for her.”); POSTGATE, *supra* note 15, at 97 (citation omitted); THE CODE OF HAMMURABI §183 (discussing that “[h]owever, [i]f a man give his daughter by a concubine a dowry, and a husband, and a deed; if then her father die, she shall receive no portion from the paternal estate.”).

118. D. Oswald Dykes, *The Code of Hammurabi*, 16 JURID. REV. 72, 79 (1904); see also THE CODE OF HAMMURABI §175 (stating that “[i]f a State slave or the slave of a freed man marry the daughter of a free man, and children are born, the master of the slave shall have no right to enslave the children of the free.”).

119. See EDWARDS, *supra* note 25, at 100 (stating that the bride’s father gave her a “dowry” . . . which usually, but not necessarily, included the “bride-price.”); Dykes, *supra* note 118, at 76 (explaining that “[a] bride-price is still paid to the father of the bride, but by the time of the Code it was usual for him to settle upon his daughter a dowry which often exceeded the amount of the bride-price, and thus made the purchase of the bride a mere form and survival.”); *contra* NEMET-NEJAT, *supra* note 16, at 133 (explaining that “[t]he bride-price was equal in value to the dowry provided by the bride’s family. The dowry consisted of household utensils, silver rings (a form of ancient coinage), slaves, and even fields. In addition to these items, the dowry in later periods included other household goods such as furniture, textiles, and jewelry. The bride brought her dowry with her. A husband could use his wife’s property and manage it with his own assets.”); *id.* at 135 (stating that “[a] bed, included in dowry lists, was used to consummate the marriage.”). In addition to the bride

return, “[t]he suitor or his family pa[id] a certain sum as ‘bride-price.’”¹²⁰ Although the bride-price was consideration, it was not a purchase price.¹²¹ Wives were not for sale. Rather, the Code mandated an exchange of consideration because the consideration served as insurance.¹²² For example, the bride-price protected the father of a would-be bride from a philandering suitor. The Code states:

If any one, who has brought chattels into his father-in-law’s house, and has paid the purchase-money, looks for another wife, and says to his father-in-law: “I do not want your daughter,” the girl’s father may keep all that he had brought.¹²³

The Code, likewise, protected the suitor from a fickle father-in-law and scheming, competing suitors:

If a man bring[s] chattels into the house of his father-in-law, and pay the “purchase price” (for his wife): if then the father of the girl say: “I will not give you my daughter,” he shall give him back all that he brought with him.¹²⁴

If a man bring chattels into his father-in-law’s house and pay the “purchase price,” if then his friend slander him, and his father-in-law say to the young husband: “You shall not marry my daughter,” then he shall give back to him undiminished all that he had brought with him; but his wife shall not be married to the friend.¹²⁵

Assuming nobody changed *his* mind, nobody was slandered, and the consideration was exchanged, the Code mandated that the

price, tradition suggests there may have been a mandatory meal. POSTGATE, *supra* note 15, at 284; DRIVER & MILES, *supra* note 47, at 249; *see also* S. Greengus, *Old Babylonian Marriage Ceremonies and Rites*, 20 JOURNAL OF CUNEIFORM STUDIES 55-72 (1966) (describing a list of expenses for the father of the bride). Dowries were also given to daughters and sisters who were not brides. THE CODE OF HAMMURABI §§178-82.

120. EDWARDS, *supra* note 25, at 100.

121. *See* CHAMBLIS, *supra* note 13, at 34 (finding that the bride price “was apparently merely a part of the marriage ritual and did not imply wife purchase, since the bride seems generally to have claimed for herself the token payment.”); *see also* DRIVER & MILES, *supra* note 47, at 259-65 (explaining that “the Babylonian scribes and lawyers certainly did not regard marriage as a form of marriage by purchase.”).

122. *See* Fetzer, *supra* note 30, at 728 (explaining that “[t]he contract usually stated the consequences to which each party was liable for repudiating the other.”); *see also* SASSOON, SUPRA NOTE 4, at 68 (noting that “[t]he bride price was paid by the man, so when he was at fault he lost what he had paid, a single cost and a single penalty; but the girl had received a bride price, so if she was at fault to pay it back would leave her where she started, in fact, paying nothing and with no penalty; while to pay it back double would actually have cost her one bride price only, the same cost or penalty for changing her mind as was incurred by the man for the same offence.”).

123. THE CODE OF HAMMURABI §159.

124. *Id.* at §160.

125. *Id.* at §161.

marriage be sealed through sexual intercourse.¹²⁶ The Code specifically dictated that “[i]f a man take a woman to wife, but have no intercourse with her, this woman is no wife to him.”¹²⁷ After intercourse, a marriage was recognized and the bride joined the groom’s family.¹²⁸ Nevertheless, sometimes consummation (or finalization) of the marriage would occur years after the marriage contract was created because a spouse—typically the bride—was too young.¹²⁹

Once a marital contract was completed and the marital bed christened, it is likely that most Mesopotamian couples lived their lives without the intrusion from the Code’s marital mandates. Presumptively, amicable Mesopotamian marriages solved all of the problems within their sphere of influence.¹³⁰ The next time the Code’s marriage edicts were applicable to their lives was during the division of property upon the death of a spouse. Nevertheless, some marriages of the time—as now—were burdened with discord and crossed paths with the Code.

B. *Protecting Marriage’s Procreative Purpose*

The procreative purpose of Mesopotamian marriage was evident at a marriage’s formation and endured until the marriage ended.¹³¹ The Code promoted this primary purpose by preserving husbands’ exclusive sexual access to their wives and protecting the marital relationship and procreation even against the threat of

126. See DRIVER & MILES, *supra* note 47, at 249 (stating that the contract proves “that a lawful marriage has taken place, while the bringing and accepting of the various gifts by the parties concerned effect an inchoate marriage which the *copula carnalis* completes.”).

127. THE CODE OF HAMMURABI §128; see also DRIVER & MILES, *supra* note 47, at 245-47, 263 (disagreeing in the interpretation of §128 to actually mean an executed contract is required, not intercourse; later affirming that intercourse is necessary); VERSTEEG, *supra* note 53, at 47 (quoting DRIVERS & MILES, *supra* note 47).

128. POSTGATE, *supra* note 15, at 103; NEMET-NEJAT, *supra* note 16, at 135; DRIVER & MILES, *supra* note 47, at 249-51; see also BOTTÉRO, *supra* note 8, at 186 (finding that “[i]n this very patriarchal society it was the woman who abandoned her own family in order to live and to die in the family of her husband.”).

129. POSTGATE, *supra* note 15, at 103; DRIVER & MILES, *supra* note 47, at 249-51, 262-63; see also NEMET-NEJAT, *supra* note 16, at 135 (noting that although a groom could have theoretically married an older woman, this was uncommon and “[t]he groom was usually ten years older than his bride.”).

130. “So long as a marriage proceeds harmoniously laws do not matter: laws for the conduct of a happy marriage did not exist in the ancient world any more than they do now.” SASSOON, SUPRA NOTE 4, at 71.

131. See Lovejoy, *supra* note 60, at 35 (stating that “[c]hildren were a prime factor in all marriages.”); see also NEMET-NEJAT, *supra* note 16, at 152 (explaining that “[i]n ancient Mesopotamia the most important role of a woman in marriage was to bear children, particularly sons, who were preferred as heirs.”).

sterility.¹³²

Society's survival requires reproduction. Mesopotamian society chose marriage—with its cooperating biological parents—as the best organization for nurturing the community's future members. But, cooperating biological parents are often more of an ideal than a reality. Notwithstanding the fact that Mesopotamian mothers and fathers, no doubt universally, desired the survival of their progeny, Mesopotamian mothers and fathers engaged in fundamentally different parental-investment calculi. A Mesopotamian mother could always recognize her child because hers was the infant that moments before was inside of her. Thus, she risked almost nothing by nursing and nurturing that infant into adulthood. Not only could a Mesopotamian father not nurse, but the possibility that he might waste his resources ensuring the survival of another man's child was a constant threat.¹³³

In the wild, a new alpha male lion—fresh from his victory against the outgoing alpha (now beta) male—resolves paternal uncertainty by killing all of the cubs within a pride and then defending his exclusive sexual access to the lionesses.¹³⁴ Hammurabi resolved the paternal-uncertainty dilemma for the Mesopotamian male by dictating that husbands had exclusive sexual access to their wives.¹³⁵ From the husband's perspective, the Code protected a right.¹³⁶ From the wife's prospective, the

132. See CHAMBLIS, *supra* note 13, at 22 (finding that “[t]he laws of a people are not merely a statement of rights but also a declaration of principles. They define both what may be expected and what is just.”).

133. Studies relating to evolutionary psychology affirm that this is a concern for males even today. See Robert Ervin Cramer, William Todd Abraham, Lesley M. Johnson, & Barbara Manning-Ryan, *Gender Differences in Subjective Distress to Emotional and Sexual Infidelity: Evolutionary and Logical Explanation*, in *Love, Romance, and Sexual Interaction: Research Perspectives* in CURRENT PSYCHOLOGY 198 (Nathaniel J. Pallone ed., Transaction Publishers 2003) (explaining that “[s]exual infidelity, on the other hand, is predicted to be more distressing for men than for women because men have evolved a mate selection strategy that places a premium on sexual exclusivity and the resultant increase in paternity certainty.”); CRAIG STANFORD, SIGNIFICANT OTHERS: THE APE-HUMAN CONTINUUM AND THE QUEST FOR HUMAN NATURE 25 (Basic Books 2001). Conversely, in exchange for their sexual fidelity, Hammurabi ensures that husbands provide the resources necessary to raise their children.

134. Glen Hausfater, *Infanticide: Comparative and Evolutionary Perspectives*, 25 CURRENT ANTHROPOLOGY 500 (Aug.–Oct. 1984).

135. See Duran Bell, *Defining Marriage and Legitimacy*, 38 CURRENT ANTHROPOLOGY 237, 237 (April 1997) (ensuring paternity or the reproduction of “legitimate” children has been the foundation to most traditional academic definitions of marriage).

136. See DRIVER & MILES, *supra* note 47, at 288-89 (finding that “adultery in Babylonia and Assyria, as also amongst the Hebrews, was not the same offence as adultery in English law, since it could only be committed with a married woman. It was an offence against a husband but not against a wife. A wife could take no proceedings against her husband for adultery committed

Code dictated a responsibility.¹³⁷

This responsibility (or obligation to fidelity) preceded marriage. A new bride—which excludes a remarrying widow or divorcee—was expected to be a virgin.¹³⁸ “[I]n a case where a bride’s virginity was disputed the courts were prepared if necessary to call on the expertise of female witnesses to give testimony on such matter.”¹³⁹

Once married, the penalties for the wife who strayed from her responsibilities could be severe.¹⁴⁰ For example, adulterers, who were caught in the act, were pitched into the river.¹⁴¹ Nevertheless, Hammurabi was a merciful judge. Hammurabi believed that the threat of death served as a strong deterrent,¹⁴² but he also recognized that evidence of extramarital affairs was suspect. When a wife was caught “in *flagrante delicto*,” there was certainty that she strayed from her responsibility. Therefore, she deserved the ultimate punishment. But when the husband did not witness the affair,¹⁴³ Hammurabi did not sentence the wife to death.¹⁴⁴

For example, the Code stated: “If a man bring a charge against one’s wife, but she is not surprised with another man, she must take an oath and then may return to her house.”¹⁴⁵ This edict—like all edicts within the Code—must be considered from the perspective of Hammurabi hearing the case. Hammurabi was

whether with a married or with an unmarried woman. It may be then that a man who cohabits with a woman not living with her husband is not regarded as an adulterer; he does not break up the home.”).

137. *Id.*

138. See EDWARDS, *supra* note 25, at 99 (finding that “[m]any contract tablets deal with . . . [marriage], and the virginity of the bride is frequently guaranteed.”).

139. See POSTGATE, *supra* note 15, at 104 (citation omitted) (explaining that “[t]his can also be attributed to the paramount desire of the family to ensure that it is its own male line which will be perpetuated, and is of course matched by the expectation that the wife, or the living-in bride, will behave respectably and remain within the family vision.”); see also NEMET-NEJAT, *supra* note 16, at 135 (explaining that “[a]fter the wedding night, they [(i.e., friends of the bride)] displayed ‘the bloody sheet.’”).

140. See POSTGATE, *supra* note 15, at 278 (explaining that in addition to punishment for sexual infidelity, a wife was punished if she and her paramour had her husband killed, THE CODE OF HAMMURABI §153, or if she was not culpable in the murder but failed to report it).

141. THE CODE OF HAMMURABI §129; MATTHEWS & BENJAMIN, *supra* note 88, at 109 (edict can also be found in Deuteronomy 22:22).

142. *But see* SASSOON, *supra* note 4, at 29 (arguing that ancient laws should not be criticized for their harsh penalties).

143. DRIVER & MILES, *supra* note 47, at 281.

144. See generally CHAMBLIS, *supra* note 13, at 24 (describing all of the laws within the Code of Hammurabi that require the death penalty).

145. THE CODE OF HAMMURABI §131; MATTHEWS & BENJAMIN, *supra* note 88, at 110 (edict can also be found in Numbers 5:12-22).

concerned with policy and evidence. He needed to protect a husband's exclusive sexual access to his wife. However, he could not provide a husband—who was perhaps interested in ending his marriage and keeping his wife's dowry—with an exit based on an unfounded accusation. Otherwise, divorces would cease and drowned wives would make the Tigris and the Euphrates impassible. Therefore, by allowing a wife to return home after taking an oath, Hammurabi effectively announced that a husband's accusation without proof was not actionable.

In addition to accusations of adultery by husbands, Hammurabi also had to adjudicate accusations from third parties. The Code states:

If any one "point the finger (slander) at . . . the wife of any one, and can not prove it, this man shall be taken before the judges and his brow shall be marked.¹⁴⁶

If the "finger is pointed" at a man's wife about another man, but she is not caught sleeping with the other man, she shall jump into the river for her husband.¹⁴⁷

These edicts are not meant to communicate that for every third-party accusation, a woman jumps into the river and the accuser gets his face cut up. Rather, these situations probably speak to a burden of proof.¹⁴⁸ As stated above, Hammurabi was concerned with policy and evidence. In the first scenario, there was likely an accusation that did not rise to reasonable suspicion or probable cause. In the second scenario, there was likely probable cause. The distinction is important because under the second scenario if Hammurabi found the wife blameless and ordered her to take an oath and return to her home (as before), her husband may become a lion: he may kill his children because of their questionable paternity. Nevertheless, Hammurabi may be unjustly putting a woman to death, if he found the wife at fault. As both of these options were imprudent given the state of the evidence, Hammurabi relied on the omniscience of the gods and the superstition of his time to settle a difficult case. Given his options, the river ordeal was likely the most *just* response.

In Mesopotamia, adultery was a matter of consent.¹⁴⁹ Where a bride or wife did not consent to intercourse and was raped, she was blameless and her attacker was put to death.¹⁵⁰ Moreover, it

146. THE CODE OF HAMMURABI §127.

147. *Id.* §132.

148. For one thing, the sections were not placed beside one another in the actual Code, which would suggest relationship. Compare *id.* §§127, 132, with *id.* §§142-43.

149. See SASSOON, *supra* note 4, at 116 (stating that "[i]n every case the woman must have consented to intercourse, because if she had not consented it would not have been adultery but rape.").

150. See THE CODE OF HAMMURABI §130 (stating, "[i]f a man violate the wife

was presumed that a bride or wife could never consent to incest.¹⁵¹ In the case of the bride, if the incest involved her soon-to-be father-in-law, she was released from the marriage contract and allowed to marry the man “of her heart.”¹⁵²

If infidelity did not threaten marriage, sterility might. The Code of Hammurabi anticipated this problem and offered three solutions: divorce, a surrogate mother, or adoption.¹⁵³ Although the Code has numerous provisions concerning adoption, this Article does not concern those provisions.¹⁵⁴

Divorce was allowed in Mesopotamian society, but Hammurabi was likely concerned about the public policy

(betrothed or child-wife) of another man, who has never known a man, and still lives in her father’s house, and sleep with her and be surprised, this man shall be put to death, but the wife is blameless.”); MATTHEWS & BENJAMIN, *supra* note 88, at 109 (edict can also be found in Deuteronomy 22:23-27); *see also id.* at 102 (citing similar edict within Code of Shugli). In contrast, “[u]nder Athenian law, a man’s seduction of another’s wife was punishable by death, but rape . . . merited only a monetary fine . . . [because] the rapist did not pose a threat to the husband’s household property because the woman could be counted on to dislike the rapist.” COONTZ, *supra* note 4, at 66. Moreover, the rape of an unmarried and un-engaged woman carried almost no penalty within the Sumerian Code. MATTHEWS & BENJAMIN, *supra* note 88, at 104 (edict can also be found in Genesis 34, Exodus 22:16, and Deuteronomy 22:23-24).

151. *See* THE CODE OF HAMMURABI §154 (stating “[i]f a man be guilty of incest with his daughter, he shall be driven from the place (exiled.)”); MATTHEWS & BENJAMIN, *supra* note 88, at 111 (edict can also be found in Leviticus 18:6-18; 20:10-21 and Deuteronomy 27:20, 22-23); *see also* THE CODE OF HAMMURABI §155 (stating “[i]f a man betroth a girl to his son, and his son have intercourse with her, but he (the father) afterward defile her, and be surprised, then he shall be bound and cast into the water (drowned.)”); THE CODE OF HAMMURABI §156 (explaining that “[i]f a man betroth a girl to his son, but his son has not known her, and if then he defile her, he shall pay her half a gold mina, and compensate her for all that she brought out of her father’s house. She may marry the man of her heart.”); POSTGATE, *supra* note 15, at 104 (stating that “if a father-in-law ‘knew’ a bride brought to his house for one of his sons, the law requires a fine of half a mina of silver and the girl is released. If, on the other hand, his son had already co-habitated with her, incest had been committed and the father is sentenced to drowning.”); THE CODE OF HAMMURABI §157 (discussing that “[i]f any one be guilty of incest with his mother after his father, both shall be burned.”); MATTHEWS & BENJAMIN, *supra* note 88, at 111 (edict can also be found in Leviticus 18:8, 20:11 and Deuteronomy 27:20); THE CODE OF HAMMURABI §158 (explaining that “[i]f any one be surprised after his father with his chief wife, who has borne children, he shall be driven out of his father’s house.”); MATTHEWS & BENJAMIN, *supra* note 88, at 111 (edict can also be found in Leviticus 19:20-22).

152. THE CODE OF HAMMURABI §156.

153. POSTGATE, *supra* note 15, at 92 (citation omitted).

154. *See* THE CODE OF Hammurabi §§185-93 (regarding more information on Mesopotamian adoption law); *see also* POSTGATE, *supra* note 15, at 93 (citing Mesopotamian adoption contract); NEMET-NEJAT, *supra* note 16, at 131-32.

associated with repudiating a wife for her *perceived* sterility. The best case scenario for such a divorcee would be a return to her father or brother's care and a life of spinsterhood. The worst-case scenario was prostitution or poverty. Thus, the Code anticipated that before divorce, a marriage's procreative purpose would be fulfilled with a surrogate: a second wife, concubine, or slave.¹⁵⁵ If a wife provided a husband with a surrogate who provided him with children, then the sterile wife would not be cast off.¹⁵⁶ If this was not incentive enough to provide her husband with a surrogate, the Code also held that the surrogate would not be of equal status with the wife.¹⁵⁷ Despite her secondary status, the surrogate was also protected. For example, a husband could not sell a slave-surrogate who yields children.¹⁵⁸

The Code of Hammurabi did not restrict a man's sexual freedom,¹⁵⁹ except by forbidding rape, incest, and affairs with

155. See BOTTÉRO, *supra* note 8, at 186 (stating “[t]he procreating purpose of this union was so essential that the sterility of the woman constituted sufficient reason for the husband to repudiate her, at least if she did not provide him with a replacement who would put into the world children that she would consider her own, without changing her position towards her husband in the least.”); see also COONTZ, *supra* note 4, at 20 (arguing that the practice of a woman bringing “extra-wives” into the marital relationship has occurred frequently throughout history).

156. See THE CODE OF HAMMURABI §144 (stating “[i]f a man take a wife and this woman give her husband a maid-servant, and she bear him children, but this man wishes to take another wife, this shall not be permitted to him; he shall not take a second wife.”).

157. See THE CODE OF HAMMURABI §145 (stating “[i]f a man take a wife, and she bear him no children, and he intend to take another wife: if he take this second wife, and bring her into the house, this second wife shall not be allowed equality with his wife.”); see, e.g., COONTZ, *supra* note 4, at 56 (citing BARBARA WATTERSON, *WOMEN IN EGYPT* [page no] (Alan Sutton Publishing 1991)) (finding that “[o]ne Babylonian marriage contract specified that the second wife had to prepare the first wife's daily meal and carry her chair to the temple.”).

158. See THE CODE OF HAMMURABI §146 (stating “[i]f a man take a wife and she give this man a maid-servant as wife and she bear him children, and then this maid assume equality with the wife: because she has borne him children her master shall not sell her for money, but he may keep her as a slave, reckoning her among the maid-servants.”); see also THE CODE OF HAMMURABI §147 (explaining “[i]f [a maid-servant] have not borne him children, then her mistress may sell her for money.”).

159. See Oppenheimer, *supra* note 62, at 122 (stating “[w]e should not, at such an early stage in civilization, expect to find a high degree of refinement in sexual matters. Indeed, there seems to be a pretty well-defined opinion that the primitive Semites were especially given over to unregulated indulgence . . . Therefore we are not surprised to find that the Hammurabic Code contains relatively few provisions regulative of sexual relations.”). Cf. NEMET-NEJAT, *supra* note 16, at 137 (finding that “[e]rotic art was found in temples, tombs, and houses and may have reflected a genre somewhere between official and popular art.”).

married women.¹⁶⁰ Even if his wife was prodigious in her reproductive capacities, a husband was free to take a concubine.¹⁶¹ Moreover, prostitution was unregulated.¹⁶² Thus, by requiring a husband to take a surrogate second wife, concubine, or slave, Hammurabi protected the rights of a wife¹⁶³ while honoring the cultural norms of the time.

Having discussed bride prices, the death penalty for adultery, and the robust use of concubines and prostitutes, the Code of Hammurabi appears biased. Since the Fifth Century B.C., the Code's treatment of women has been viewed as misogynistic (and likely seemed unfair to at least one Mesopotamian woman).¹⁶⁴ Modern scholars argue, "the Code of Hammurabi . . . [was] used to

160. See BOTTÉRO, *supra* note 8, at 187 (stating "[t]he law . . . sought only to preserve the essential conditions of the institution of matrimony. . . . [I]t left the man almost entirely free to exercise his amorous capabilities elsewhere if he felt like it, stipulating only that he support his legal family and that he not violate anybody's rights.").

161. See EDWARDS, *supra* note 25, at 100. (finding that "[l]ike the chief wife, [the concubine] also carried bride-price and dowry, and we may assume that she possessed the same rights as the chief wife in regard to maintenance and participation in the husband's estate."). Just as with surrogates, the Code anticipated that man would support his offspring by a concubine or prostitute. See also THE CODE OF HAMMURABI §183 (stating that "[i]f a man give his daughter by a concubine a dowry, and a husband, and a deed; if then her father die, she shall receive no portion from the paternal estate."); *id.* §184 ("If a man do not give a dowry to his daughter by a concubine, and no husband; if then her father die, her brother shall give her a dowry according to her father's wealth and secure a husband for her.").

162. See Reynolds, *supra* note 57, at 28 (explaining that "neither prostitution itself nor commercialized vice in any form was penalized in the Code of Hammurabi. The prostitute was literally an abandoned woman, ignored by law."). Although their profession was unregulated, prostitutes were not respected. "Prostitutes were [viewed] at a lesser level because the paternity of their children could not be assured and thus they had "missed . . . [their] destiny." BOTTÉRO, *supra* note 8, at 196. The Code of Hammurabi suggests that prostitute's children were commonly given up for adoption. THE CODE OF HAMMURABI §192 (stating "[i]f a son of a paramour or a prostitute say to his adoptive father or mother: 'You are not my father, or my mother,' his tongue shall be cut off."); THE CODE OF HAMMURABI §193 (explaining that "[i]f the son of a paramour or a prostitute desire his father's house, and desert his adoptive father and adoptive mother, and goes to his father's house, then shall his eye be put out.").

163. Cf. DRIVER & MILES, *supra* note 47, at 245-49 (describing that ownership of the marital contract belongs to the wife).

164. For example, the historian Herodotus described the marriage as slave-market type sale. See HERODOTUS, THE HISTORIES, 120 (Betty Radice, ed., Aubrey de Sélincourt, trans. 1972). In every village once a year all the girls of marriageable age used to be collected together in one place, while the men stood round them in a circle; an auctioneer then called each one in turn to stand up and offered her for sale, beginning with the best-looking and going on to the second best as soon as the first had been sold for a good price. Herodotus' assertions are unsupported by other records from the period. REYNOLDS, *supra* note 57, at 30.

legitimize the . . . cultural ideology of female subordination and male dominance.”¹⁶⁵

Although Hammurabi was certainly no feminist and one should be critical of the Code’s treatment of women, there are mitigating considerations. First, Hammurabi did not invent marriage or its norms. Throughout time, there have always been gender norms and cultural expectations about how spouses would treat one another. Specifically, Mesopotamian women and men presumably wanted to couple and have children. Second, the Code was not wantonly cruel. Hammurabi’s edicts always reflected a balance of interests. For example, whenever Hammurabi imposed a responsibility, he usually awarded a corresponding right. Third, a Mesopotamian woman had more freedoms than many of her historical counterparts. She “could operate an independent business, own slaves, control an estate, buy and sell property in her name, make a will, carry her grievances to court, retain possession of her legacy, [and] adopt a son or a daughter.”¹⁶⁶ Thus, being married in Mesopotamia did not equate to slavery. Finally, as John Sassoon argues, “[n]either the city nor family could survive if the wife tried to exercise the same priorities as her husband or the husband the same priorities as his wife.”¹⁶⁷ Thus, freedoms restricted by the Code were likely codified responses to perceived threats.¹⁶⁸

C. Allocating Responsibilities Amongst Spouses

Although society’s survival requires reproduction, procreation alone is useless if children are not fed, nurtured, protected, taught a trade, prepared for membership within the community,¹⁶⁹ and

165. Ricki Lewis Tannen, *Setting the Agenda for the 1990s: The Historical Foundations of Gender Bias in the Law: A Context for Reconstruction*, 42 FLA. L. REV. 163, 166 (1990); see also Oppenheimer, *supra* note 62, at 118 (explaining “[t]he primary purpose of matrimony was perpetuation of the husband’s name and estate; and in the establishment of the family the woman was not a free agent. Her husband was chosen for her, and she was handed over to him in exchange for a monetary or property payment.”).

166. CHAMBLIS, *supra* note 13, at 35.

167. SASSOON, *supra* note 4, at 79; CHAMBLIS, *supra* note 13, at 35; see also FETZER, *supra* note 30, at 726 (stating that “the position of women in this early Babylonian world, as in Egypt, was high, free and dignified.”); Oppenheimer, *supra* note 62, at 118.

168. Admittedly, these mitigating circumstances would be a cold comfort to a Mesopotamian wife who found herself in a polygamous marriage because she could not have children or who found herself swimming for her life based upon an unjust accusation of infidelity. However, the reader can take comfort in knowing that the edicts concerning procreation, allocating resources among spouses, and divorce—in other words, the majority of the edicts discussed in this Article—only applied to an unfortunate subset of all marriages during Hammurabi’s reign.

169. See BOTTÉRO, *supra* note 8, at 186 (finding that “[m]arriage was first of

given resources – such as dowry or land – that are necessary for their adult life.¹⁷⁰ Thus, in addition to defining marriage and protecting the procreative relationship, Hammurabi's Code allocated rights and responsibilities among spouses in order to provide for the needs of each spouse and, in turn, the needs of children.

For Mesopotamian spouses, the Code of Hammurabi reflects corresponding rights and responsibilities. Rights were claims to resources.¹⁷¹ Responsibilities were duties that corresponded with rights. These corresponding rights and responsibilities reflected the reality that a human being in Mesopotamia could not survive alone,¹⁷² because spouses needed each other.¹⁷³

In exchange for mandating their fidelity, the Code gave wives the right to their husband's resources.¹⁷⁴ For example, the Code

all a type of contract of association with the aim to procreate and to educate the descendants of the family.”).

170. See POSTGATE, *supra* note 15, at 92 (noting that “[s]ons and daughters lived in the father's house until they left for another household, either founding their own or marrying into another.”).

171. See BELL, *supra* note 134, at 238 (finding that “[r]egardless of the form of society, the existence of a right implies a socially supported claim on scarce resources for some category of person—such as the claim of child for essential consumption goods from its parents or the claims of a young man for bridewealth cattle.”).

172. See SASSOON, *supra* note 4, at 106 (noting that “[t]he [family] relationship is not hierarchical or patronizing; it is reciprocal ownership, and it is the product of the normal working of nature. The concept of family gives to each the identity of the whole, it enlarges life and is creative in two senses; it replaces loneliness with self-confidence and is the foundation of the future.”).

173. COONTZ, *supra* note 4, at 30, 67; see *id.* at 38 (discussing the organization of early human groups and the necessity of divisions of labor); see also SASSOON, *supra* note 4, at 176 (stating that “[i]n evolutionary terms the family or clan, which were essential for physical survival, may have been the primary unit by which early man identified himself.”).

174. See Reynolds, *supra* note 57, at 26 (arguing that “it appears that the contract of marriage imposed upon the husband the obligation to provide for his wife in order to retain his right to her fidelity.”); see also CHAMBLIS, *supra* note 13, at 35 (1954) (stating that Hammurabi provided a man with “a helpmate and not a household drudge; although [a husband] was the nominal head of the family [the wife] was protected against abuse and given rights.”). Just as biology served as the basis for the principles preserving paternal certainty so too does biological evidence buttress the edicts dictating that husbands provide for wives. Biological evidence suggests that where males are concerned with fidelity and paternal certainty, females are most concerned with ensuring that they have a mate who will provide resources to support their offspring. Cramer, *et al.*, *supra* note 133, at 197 (citations omitted). In studies designed to measure desirable qualities in mates, females consistently prescribe “more points to the item describing a mate with high *resource potential*—motivated and intelligent, loyal and honest, and good earning capacity and college educated.” *Id.* at 68.

barred a husband from casting out a sick wife,¹⁷⁵ but permitted a sick wife to leave her husband's house and take her dowry with her.¹⁷⁶ Moreover, the Code expected that a husband would provide for his wife in his absence. In fact, if he did not provide for her when he was away, she was "held blameless" for seeking support from the man next door.¹⁷⁷ Nevertheless, if a husband provided for his wife in his absence and she moved in with his neighbor, then she was put to death.¹⁷⁸ This edict reflects the policy that a husband's right to sexual access is protected so long as he does not shirk his corresponding responsibilities. Additionally, it also gave solace to the army of men that marched around with Hammurabi and helped him build his empire.¹⁷⁹ Therefore, the Code also dictated that:

[i]f a man be taken prisoner in war and there be no sustenance in his house and his wife go to another house and bear children; and if later her husband return and come to his home: then this wife shall return to her husband, but the children follow their father.¹⁸⁰

As this provision illustrates, the Code "shows the practical economic approach to a realistic situation[.] . . . the [Code] is devoid of sentimentality or moralizing, in the face of stern

175. See THE CODE OF HAMMURABI §148 (stating "[i]f a man take a wife, and she be seized by disease, if he then desire to take a second wife he shall not put away his wife, who has been attacked by disease, but he shall keep her in the house which he has built and support her so long as she lives."); see also DRIVER & MILES, *supra* note 47, at 310-11 (arguing this disease is probably malaria fever or ague because lepers were excluded from the city, lunatics would not have been able to control their dowry, and a sterile wife could be outright divorced).

176. See THE CODE OF HAMMURABI §149 (stating "[i]f this woman does not wish to remain in her husband's house, then he shall compensate her for the dowry that she brought with her from her father's house, and she may go.").

177. See THE CODE OF HAMMURABI §134 (stating "[i]f any one be captured in war and there is not sustenance in his house, if then his wife go to another house this woman shall be held blameless."); see also Shamma Friedman, *The Case of the Woman with Two Husbands in Talmudic and Ancient Near Eastern Law* 15 *ISR. L. REV.* 530, 541 (1980) (arguing that "[i]n the Mesopotamian Laws permission for remarriage depends upon considerations of a utilitarian-economic nature, i.e. whether the woman can support herself in her husband's house, and not upon his presumed death; on the contrary, it would seem that the Mesopotamian Laws take into account of the possibility that the husband may still be alive, for in a case where the woman does not suffer economic hardship, she remarries on pain of death.").

178. See THE CODE OF HAMMURABI §133 (stating "[i]f a man is taken prisoner in war, and there is sustenance in his house, but his wife leave house and court, and go to another house: because this wife did not keep her court, and went to another house, she shall be judicially condemned and thrown into the water.").

179. See Reynolds, *supra* note 57, at 25-6.

180. THE CODE OF HAMMURABI §135.

necessity.”¹⁸¹

Corresponding with a husband’s responsibility to provide for his family was the right to control his family.¹⁸² This control was not as extensive as the *pater familias* of the later Roman era, in which a father’s control extended to whether his family members lived or died.¹⁸³ Nevertheless, a Mesopotamian man’s power over his family was extensive: a father often could dictate the terms of his children’s marriages; he could corporally punish his children;¹⁸⁴ and he could manage his wife’s dowry throughout her life.¹⁸⁵ A husband could even sell his wife and children into temporary slavery to answer a debt.¹⁸⁶ Hammurabi recognized the nuances of debt, however, and the Code stated:

If a woman who lived in a man’s house made an agreement with her husband, that no creditor can arrest her, and has given a document therefor: if that man, before he married that woman, had a debt, the creditor can not hold the woman for it. But if the woman, before she entered the man’s house, had contracted a debt, her creditor can not arrest her husband therefor.¹⁸⁷

[But,] [i]f after the woman had entered the man’s house, both

181. See GORDON, *supra* note 54, at 12 (discussing THE CODE OF HAMMURABI §134).

182. See SASSOON, *supra* note 6, at 66 (stating that The Code of Hammurabi’s treatment of “the family as property was both image and law. The law codified the fact of dependence and made it part of the fabric of society.”); *but see* MIEROOP, *supra* note 18, at 119-20 (arguing that a Mesopotamian king’s relationship with his people is akin to *pater familias* role).

183. See Dykes, *supra* note 118, at 78 (stating that “[t]he Code knows nothing of a *patria potestas* in the husband. There is no trace of his having at any time the extensive powers, extending even to life and death, of the Roman father over his wife and children. Indeed the severance of a wife from her own family, and her incorporation in that of her husband is never complete and irrevocable, for in certain cases she returns to her father’s house.”).

184. See *e.g.*, THE CODE OF HAMMURABI §195 (stating “[i]f a son strike his father, his hands shall be hewn off.”).

185. DRIVER & MILES, *supra* note 47, at 272.

186. See THE CODE OF HAMMURABI §117 (stating “[i]f any one fail to meet a claim for debt, and sell himself, his wife, his son, and daughter for money or give them away to forced labor: they shall work for three years in the house of the man who bought them, or the proprietor, and in the fourth year they shall be set free.”); MATTHEWS & BENJAMIN, *supra* note 88, at 109 (edict can also be found in Exodus 21:2-11 and Deuteronomy 15:12-18).

187. THE CODE OF HAMMURABI §151. This section has been discussed in the context of community property within marriage. Charles Sumner Lobingier, *The Marital Community: Its Origin and Diffusion: A Problem of Comparative Law*, 14 A.B.A. J. 211, 211 (1928). This law stands in contrast to English law, under which “the husband was bound ‘afterwards to pay the debt [his wife brings into the marriage], for he had adopted her and her circumstances.’” Jenkins, *supra* note 7, at 336 (citing Blackstone, Bk. 1. Chap. 15. 111).

contracted a debt, both must pay the merchant.¹⁸⁸

Thus, the only scenario where wives and children were sold into slavery was where an established household went into debt.

Finally, it is important to note that the Code only stepped in when problems arose. Mesopotamian society would not have been a going concern if dad kicked mom out of the house whenever she caught a cold or sold her into slavery because the tip he got on that horse did not pan out. Most Mesopotamians would not need a Code to tell them these things. Moreover, if a wife chaffed at her husband's brand of patriarchic control or had second thoughts about her marriage after a sojourn in debt servitude, she could pursue the uphill course to divorce.

D. Providing for the Family in the Event of Divorce or Death

Marriages can be a source of more problems than they solve. Moreover, one spouse typically dies before the other. The Code of Hammurabi recognized these timeless truths and allowed for divorce and, in the event of a spouse's death, provided for the surviving spouse.

The Code dictated that husbands and wives were unequal in their ability to divorce.¹⁸⁹ Notwithstanding the stigma associated with divorce,¹⁹⁰ a husband could generally divorce his wife at will so long as he provided for her in their separation.¹⁹¹ The amount he provided depended upon whether he was a freed man or slave,¹⁹² whether there was a purchase price, and whether she had children.¹⁹³ The Code stated:

If a man wish to separate from a woman who has borne him children, or from his wife who has borne him children: then he shall give that wife her dowry, and a part of the usufruct or field, garden, and property, so that she can rear her children. When she has brought up her children, a portion of all that is given to the children, equal as that of one son, shall be given to her. She may then marry the man of her heart.¹⁹⁴

188. THE CODE OF HAMMURABI §152; Lobingier, *supra* note 187, at 211.

189. See Jenkins, *supra* note 7, at 336-37 (discussing conditions under which men and women could obtain divorces within the Code of Hammurabi); Dykes, *supra* note 118, at 78.

190. See NEMET-NEJAT, *supra* note 16, at 140 (arguing “[s]ocial stigma was attached to divorce, therefore, it was not undertaken without grave cause, such as adultery by the wife or a childless marriage.”).

191. As discussed, a husband could not divorce his wife if she were sick or if she was sterile and provided him with a surrogate.

192. See THE CODE OF HAMMURABI §140 (stating “[i]f he be a freed man he shall give her one-third of a mina of gold.”).

193. See *id.* §139 (stating “[i]f there was no purchase price he shall give her one mina of gold as a gift of release.”).

194. *Id.* §137.

If a man wishes to separate from his wife who has borne him no children, he shall give her the amount of her purchase money and the dowry which she brought from her father's house, and let her go.¹⁹⁵

A husband could start a divorce simply with the words, "Though art not my wife."¹⁹⁶ The Code also recognized constructive divorce in the form of abandonment.¹⁹⁷

A Mesopotamian wife faced a different burden to leave her husband. A Mesopotamian woman "could obtain a divorce only when she could prove to the judges that she had been careful and was not at fault."¹⁹⁸ The Code stated:

If a man's wife, who lives in his house, wishes to leave it, plunges into debt, tries to ruin her house, neglects her husband, and is judicially convicted: if her husband offer her release, she may go on her way, and he gives her nothing as a gift of release. If her husband does not wish to release her, and if he take another wife, she shall remain as servant in her husband's house.¹⁹⁹

The Code also stated:

If a woman quarrel with her husband, and say: "You are not congenial to me," the reasons for her prejudice must be presented. If she is guiltless, and there is no fault on her part, but he leaves and neglects her, then no guilt attaches to this woman, she shall take her dowry and go back to her father's house.²⁰⁰

If she is not innocent, but leaves her husband, and ruins her house, neglecting her husband, this woman shall be cast into the water.²⁰¹

Thus, a woman could divorce and receive support only if she had succumbed to her husband's sexual demands,²⁰² was fastidious

195. *Id.* §138.

196. Urch, *supra* note 8, at 440; *see* Reynolds, *supra* note 57, at 25. (explaining that these words almost directly contrasted their vows at marriage. *See also* POSTGATE, *supra* note 15, at 103 (finding "[o]ne form of the words connected with marriage can be reconstructed fairly confidently: legalizing a divorce requires the spoken formulae 'You are not my husband', 'You are not my wife'—and these form the annulment of words quoted in a wedding scene[:]. . . 'I will fill your lap with silver and gold: You are my wife, I am your husband.');" Yankwich, *supra* note 53, at 31-32 n. 65; NEMET-NEJAT, *supra* note 16, at 135.

197. *See* THE CODE OF HAMMURABI §136 (stating "[i]f any one leave his house, run away, and then his wife go to another house, if then he return, and wishes to take his wife back: because he fled from his home and ran away, the wife of this runaway shall not return to her husband.").

198. CHAMBLIS, *supra* note 13, at 36.

199. THE CODE OF HAMMURABI §141.

200. *Id.* §142.

201. *Id.* §143.

202. G.R. Driver and John C. Miles argue The Code of Hammurabi §§142 and 143 refer to a wife who is guilty of denying her husband's conjugal rights. *See* DRIVER & MILES, *supra* note 47, at 299 (stating §§142-43 means that the

with finances, was an impeccable homemaker, and proved her virtues in court.

Presumably, a man could divorce his wife without cause because he had the ability to work. As a result, he was unlikely to fall into poverty and could support his ex-wife. Therefore, neither spouse would burden the city-state. In contrast, a wife could only divorce her husband for cause because a Mesopotamian woman would likely be unable to support herself. Therefore, she would likely fall into poverty and burden the city-state.²⁰³ Only if a woman proved cause did Hammurabi give her the *right* to her ex-husband's support without any corresponding responsibility. Moreover, a divorced woman was required to wait until her children were grown before remarrying. Additionally, she was required to return to her father's house because Hammurabi did not want a clever woman subverting her mandated responsibility to fidelity by divorcing her husband for cause and marry another man.

There were two economic resources within marriage: the wife's dowry and the husband's estate. These resources were security against life's calamities, such as divorce or the death of a spouse.²⁰⁴ The dowry was not a wedding gift for the husband. Although a husband "managed" his wife's dowry, he was bound by a duty to preserve it.²⁰⁵ It served as security for whole family. If there was a divorce, the woman received her dowry back as support. If a wife died, the dowry supported the couple's children.²⁰⁶ If a wife died and there were no children, her widower returned the dowry to his father-in-law, who would return the bride price.²⁰⁷ Likewise, a husband's estate was not just for his

wife has refused her husband conjugal rights). Thus, these two sections anticipate a wife who did not provide her husband with a surrogate sexual partner and neglected her sexual responsibilities because she was the victim of abuse. It is unclear whether this situation arose when a husband or a wife attempted to secure a divorce, or if it was its own claim.

203. See Jenkins, *supra* note 7, at 337 (arguing that The Code of Hammurabi required husbands to provide for their ex-wives so that those wives would not become a burden for the state).

204. See THE CODE OF HAMMURABI §171 (stating "[the] wife shall take her dowry (from her father), and the gift that her husband gave her and deeded to her (separate from dowry, or the purchase-money paid her father), and live in the home of her husband: so long as she lives she shall use it, it shall not be sold for money. Whatever she leaves shall belong to her children.>").

205. DRIVER & MILES, *supra* note 47, at 272.

206. See THE CODE OF HAMMURABI §173 (stating "[i]f [a] woman bear sons to her second husband, in the place to which she went, and then die, her earlier and later sons shall divide the dowry between them."); see *id.* §174 (stating "[i]f she bear no sons to her second husband, the sons of her first husband shall have the dowry.>").

207. Compare *id.* §162 (stating "[i]f a man marry a woman, and she bear sons to him; if then this woman die, then shall her father have no claim on her dowry; this belongs to her sons.") with *id.* §163 (stating "[i]f a man marry a

widow. Rather, the estate was for the widow *and* their children. The Code mandated that widows would manage their deceased husbands' estates to support their children.²⁰⁸ Thus, the Code of Hammurabi assigned rights and responsibilities among spouses even after they were parted by death.²⁰⁹

IV. CONCLUSION

Hammurabi confronted problems concerning marriage and issued edicts calculated to address those problems. The edicts reflected a keen balancing of rights and responsibilities. Nevertheless, the edicts also reflected assumptions about the roles of spouses and purpose of marriage. The edicts do not make sense unless one assumes that marriage is a sexual relationship with the goal of producing children and providing for their needs. Likewise,

woman and she bear him no sons; if then this woman die, if the 'purchase price' which he had paid into the house of his father-in-law is repaid to him, her husband shall have no claim upon the dowry of this woman; it belongs to her father's house.") *with id.* §164 (stating "[i]f his father-in-law do[es] not pay back to him the amount of the 'purchase price' he may subtract the amount of the 'Purchase price' from the dowry, and then pay the remainder to her father's house."). See DRIVER & MILES, *supra* note 47, at 253 (suggesting that the husband receives the "bride-price back" because he "has had the expense of keeping a woman who has not done her part by providing him with sons.").

208. See, e.g., THE CODE OF HAMMURABI §172 (stating "[i]f her husband made her no gift, she shall be compensated for her gift, and she shall receive a portion from the estate of her husband, equal to that of one child. If her sons oppress her, to force her out of the house, the judge shall examine into the matter, and if the sons are at fault the woman shall not leave her husband's house. If the woman desire to leave the house, she must leave to her sons the gift which her husband gave her, but she may take the dowry of her father's house. Then she may marry the man of her heart."); *see id.* §177 (stating "[i]f a widow, whose children are not grown, wishes to enter another house (remarry), she shall not enter it without the knowledge of the judge. If she enter another house the judge shall examine the state of the house of her first husband. Then the house of her first husband shall be entrusted to the second husband and the woman herself as managers. And a record must be made thereof. She shall keep the house in order, bring up the children, and not sell the house-hold utensils."); *see also* Jenkins, *supra* note 7, at 338 (arguing "[a] widow became the trustee of the property of her deceased husband's minor children. She could not remarry without giving the judge an inventory and a bond that the trust fund would be forthcoming at the proper time.").

209. Although the Code's jurisdiction extended to all of society, the dowries and estates of commoners were not likely sufficient to support the absence of an income. For example, the Code addressed the situation of a freed woman marrying a slave. See THE CODE OF HAMMURABI §176 (stating "[i]f . . . a State slave or the slave of a freed man marry a man's daughter, and after he marries her she bring a dowry from a father's house, if then they both enjoy it and found a household, and accumulate means, if then the slave die, then she who was free born may take her dowry, and all that her husband and she had earned; she shall divide them into two parts, one-half the master for the slave shall take, and the other half shall the free-born woman take for her children.").

the edicts do not make sense unless one assumes that spouses are unequal in their abilities to access and manage resources. Although his regulations were calibrated to address the problems of his day, his assumptions reflect obsolete generalizations about people and society. The lesson for policy makers is simple: history judges equally decisions and presuppositions.

We are not burdened by many of the problems that weighed on Hammurabi. Science displaced sexual fidelity as the sole means for ensuring paternity and economic opportunities for women destroyed the *de facto* need for a husband's support. Nevertheless, we are plagued by some of the problems that Hammurabi addressed with marriage edicts.²¹⁰ For example, children always need to be nourished, nurtured, and educated. Hammurabi dictated that parents, acting as a cooperating unit, fulfilled these needs; whereas, policy makers today create laws for parental and spousal support, welfare, and public education. Despite all of these *modern* solutions, in 2010, 695,000 children in the United States were maltreated.²¹¹

In 1905, Owen B. Jenkins lamented that the existence of the Code of Hammurabi was a “revelation [that] humiliates one at the slow progress of the race,”²¹² but “progress” presumes a destination. In contrast to a source of humiliation, the Code of Hammurabi provides solace. It demonstrates that some solutions—like the rule of law and institution of marriage—are dynamic and durable. For millennia, these solutions have prevailed over other options because of their utility. Admittedly, they are imperfect solutions. Part of their imperfection lies in their temporal nature. Presuppositions change. Laws are amended or become “dead letters.” The institution of marriage evolves. Although the Code of Hammurabi is a “dead letter” and the marriage norms of Mesopotamia are thankfully behind us, both remind us that we are intimately linked with our predecessors and progeny in a timeless march to apply our creative capacity to the problems we face.

210. This is not to suggest that Hammurabi actually solved any problems with his marriage edicts.

211. *Child Maltreatment*, CENTER FOR DISEASE CONTROL (CDC), (2012), http://www.cdc.gov/violenceprevention/pdf/cm_datasheet2012-a.pdf.

212. Jenkins, *supra* note 7, at 330.