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Book Review: To Kill and Take Possession, Law, Morality, and Society in Biblical Stories

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Bodin and Grotius. This account of early modern political thought is sketchy, though. The meatier, and more exciting, effort comes when Fasolt compares Conring with the great fourteenth-century commentator Bartolus. Fasolt gives us an extremely stimulating account of Bartolus’ understanding of the authority of the Roman Empire. Non-specialists may find the chapter on Bartolus slightly heavy going, since Fasolt does not pause to explain who the commentators were and what their scholarly approach involved. Nevertheless, every lawyer who reads this account will be both impressed and charmed by Bartolus’ brilliant explanation of how the Roman Empire could continue to govern the world de jure while enjoying little or no power de facto. The contrast Fasolt draws between Bartolus and Conring will be memorable to any of us trying to grasp the roots of the Westphalian system. Fasolt makes it vividly clear how much the rise of modern sovereignty was a triumph of the de facto over the de jure, a triumph of reality over ideal. These sections of the book deserve to be read by anybody who wants a sophisticated appreciation of the international world we live in.

So much the sadder that this gifted scholar has decided to hide the light of his historical scholarship under a bushel of poorly worked-out philosophy. The problems with the philosophy, let me rush to say, are mostly in the execution. Fasolt writes in a phenomenological vein: The concept of “history,” he argues, presupposes a caesura between the present and the past. Yet there is no caesura that we can identify. In fact, our relationship to “history” is about our quest for “the satisfaction of temporal self-affirmation.” (15) This is a promising starting point. Yet Fasolt declines to do a thorough job. His footnotes include citations to the standard literature on the philosophy of history, but his text never directly engages that literature. There is a cryptic dismissive paragraph on Charles Taylor (38), while figures like Danto go undiscussed. Gadamer, who surely deserves a chapter if Fasolt is to make out his case, gets a couple of lines. Alfred Schutz, among many other relevant authors, is ignored. This is not the way to do serious philosophizing.

How can a scholar who does such good work suffer such a crisis of faith in what he does? Maybe the problem is that he is not a lawyer. Arnaldo Momigliano, Fasolt’s teacher and mine, once declared that “the only justification for the history of scholarship is the promotion of scholarship itself.” For lawyers currently engaged in the problems of this world, there is no caesura with the past, and no anguish. For Fasolt, the story is evidently different.

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It says a great deal about the cultural health of Israeli society that a scholarly work of the nature and quality of Daniel Friedmann’s became a national best seller. Even
without popular approbation, it would be worthwhile to examine Friedmann's fascinating and thorough study of the legal and moral principles embodied in the stories of the Old Testament; the fact that he has struck a nerve with scholars and educated laypeople alike makes understanding Friedmann's evaluation of the legal and political world view of the Hebrew Bible important to a sound understanding of the state of the Western cultural mind.

Friedmann articulates a seemingly modest purpose for his work. He states that his goal is "to infer from the biblical stories the legal and moral concepts they reflect and the system of laws underlying them" (vii). While Friedmann certainly does exhaustively mine the legal teachings of the Old Testament stories, his purpose is more ambitious than he admits. Rather than a straightforward interpretation of the Biblical text, the book instead consists of a series of discursive essays on fundamental problems of law and society. Friedmann examines problems as diverse as the collective guilt of a people for the crimes and sins of their leaders, the legitimacy of royal succession, and the proper legal regime regarding surrogate motherhood. On each of the topics he tackles, Friedmann begins, as promised, by explicating the legal rules and institutions both expressly and impliedly described in the relevant Bible stories. He then compares the Biblical legal and moral principles to, in addition to modern Israeli and other Western legal doctrine, those embodied in an astounding range of legal, philosophical, historical, and literary traditions, including the Code of Hammurabi, Icelandic sagas, Greek and Norse mythology, ancient Greek and Roman history, traditional folk and fairy tales, Arthurian legends, and English common law. The book, then, is truly a lively and wide-ranging discussion of varied answers to central human questions, a work really about Western civilization as much as the Old Testament.

From Friedmann's explication of the legal and moral principles of the Bible and comparisons to both later Jewish law and other traditions, three interrelated themes emerge. The first arises from Friedmann's repeated demonstration of how routinely, in the Biblical legal universe, someone who seems to be in the right under modern legal norms is the losing party under God's justice. Biblical justice is not based upon principles of personal moral responsibility; it instead is founded upon absolute obedience to God's commands and, as a corollary, absolute fidelity, no matter the circumstances or price, to oaths sworn to God. There is no excuse for failing to strictly obey God's commands or live up to one's promises to God—even if this means that wrongdoers are rewarded or the innocent suffer harm.

The second theme of the book is that movement away from Biblical law, both among the Jewish people and elsewhere, is, as one would expect, directly related to rejection of the idea that law comes directly from or is based on absolute fidelity to God. Law, in the post-Biblical view, instead is a human construct made of human materials for human needs. Friedmann illustrates this shift in his discussion of trials. Biblical trials involve either God's conduct of the trial, as in the case of Adam and Eve, or, in trials conducted by man, God's intervention to identify the guilty party. Both methods rely on divine judgment. The movement toward trials as we know them requires that humans believe that God will not directly become involved in human disputes. Humans must, using their reason and other capacities, construct their own legal institutions and do justice accordingly.
Lastly, Friedmann attempts to demonstrate how this shift from law as absolute obedience to divine command to human construct is reflected in the evolving text and teachings of the Bible itself. One example is how the evolution of the types of prophets depicted in the Bible parallels the development of the law. The early prophets of the Bible are largely “court” prophets who are servants of the kings that employ them, performing rituals to reveal the signs of God’s commands. These prophets are replaced by the “revolutionary” prophets exemplified by Elijah and Elisha. These prophets foster rebellion against corrupt leaders and help install kings more to God’s liking. Finally, the last kind of Biblical prophet, “prophets of the Book” such as Isaiah and Jeremiah, emphasize moral teachings, not political involvement. Put another way, as both the Bible and human beings evolve, there is an increasing emphasis on educating human beings on moral principle and judgment, and less emphasis on God’s direct role in human affairs. Friedmann’s ultimate judgment is that one cannot run a modern state based on the legal and moral principles embodied in the Bible. One must, as has the modern state of Israel, look elsewhere for guidance.

While it is difficult to disagree with both Friedmann’s positive description of the shift from reliance on divine command and control to that of human reason and institutions and the normative attractiveness of at least some of the legal regimes that are the product of that reason, one is still troubled by Friedmann’s somewhat abrupt dismissal of the Bible as a source of guidance for legal and political practice. Friedmann repeatedly rejects, and sometimes ridicules, the attempt of modern Biblical commentators to reconcile the different teachings of the Bible. One wishes he were more open to these arguments. On a less important note, some readers may find Friedmann’s erudition a bit pedantic and his discussion of the most important Biblical stories repetitive. All told, however, these are minor prices to pay for a work that is most useful and interesting for students not only of legal history, but of comparative law, religion and the law, and jurisprudence.

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In *Anne Orthwood’s Bastard*, John Ruston Pagan rivets our attention on the legalities surrounding a single instance of out-of-wedlock pregnancy in seventeenth-century Virginia. On the face of it, those legalities were typical: prosecutions for fornication, premarital, or out-of-wedlock pregnancy were routine matters in early modern courts in Virginia, British North America, and England. In Pagan’s hands, however, this seemingly routine case gains significance for early American legal history. The event, its principal players, and the legal suits it generated, he argues, reveal that by the last half of the seventeenth century, Virginians had shaped a distinctive legal culture on the Eastern Shore.