

## From the Trial of Adam and Eve to the Judgments of Solomon and Daniel<sup>+</sup>

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[1] This article describes how the conduct of trials passed from God to humans and how this process is reflected in the stories of the Bible. The first two trials of the Bible occur in the mythological era.<sup>1</sup> The trials are conducted, from beginning to end, by God, who serves as the investigator, the prosecutor, and the judge. The first crime, the original sin, committed in the Garden of Eden, is discovered by God, who asks Adam: “Have you eaten from the tree of which I commanded you not to eat?”<sup>2</sup> The first transgression of humankind leads to the first interrogation of an accused person, conducted by God personally.<sup>3</sup> Adam blames Eve for the transgression, and Eve deflects the blame to the serpent.<sup>4</sup> After listening to Adam and Eve, God

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<sup>1</sup> See *Genesis 3* and *Genesis 4* (New Revised Standard Version).

<sup>2</sup> *Genesis 3:11* (New Revised Standard Version).

<sup>3</sup> *Genesis 3:11-13* (New Revised Standard Version).

<sup>4</sup> *Id.*

sentences them and the serpent each to a separate fate.<sup>5</sup> Though an omniscient God has no need to interrogate, God nonetheless plays the role of investigator, allowing the accused to state their arguments. God, as the judge, renders the verdicts and imposes the penalties.<sup>6</sup> The second trial of the Bible is concerned with the murder of Abel by his brother Cain.<sup>7</sup> The Almighty asks Cain: “Where is your brother Abel?”<sup>8</sup> Cain denies the murder, stating, “Am I my brother’s keeper?”<sup>9</sup> The Almighty, knowing all the facts, informs Cain that “your brother’s blood is crying out to me from the ground!”<sup>10</sup> God imposes punishment.<sup>11</sup>

[2] There are some differences between the first two trials. The case of Adam and Eve concerns a transgression against God, the non-fulfillment of a divine command; the case of Cain deals with the highest crime among humans: the willful ending of another’s life. Adam and Eve confess taking the fruit while assigning the blame to another, Adam by denouncing his wife and Eve by blaming the serpent. Cain, on the other hand, denies outright the murder of his brother. Humans have little role in these trials other than to stand as the accused and give their testimonies. The proceedings of the trials follow an inherent biblical logic; since there was no one around to investigate, prosecute, or judge Adam and Eve—they being the sole inhabitants of the garden of Eden—God must fill all these functions. The case of Cain and Abel is an

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<sup>5</sup> *Genesis* 3:14-19 (New Revised Standard Version).

<sup>6</sup> *Id.*

<sup>7</sup> *See Genesis* 4:9-15 (New Revised Standard Version).

<sup>8</sup> *Genesis* 4:9 (New Revised Standard Version).

<sup>9</sup> *Genesis* 4:9 (New Revised Standard Version).

<sup>10</sup> *Genesis* 4:10 (New Revised Standard Version).

<sup>11</sup> *Genesis* 4:11-15 (New Revised Standard Version).

interfamily crime, which the ancients had difficulties coping with, and it certainly would have been difficult for Adam and Eve to avenge one dead son by punishing the other; therefore God must conduct the trial. After these trials, the roles of investigator, prosecutor, and judge passed into human hands. However, in the beginning, human judicial process still involved divine assistance. Though God is not at the trial in person, humans often approach God for decisive answers. Humanity's function is to submit questions to God and to interpret the answers given.

[3] This stage of judicial process in the Bible is reflected in the story of Achan, son of Carmi, a story related in detail in chapter seven of the book of Joshua.<sup>12</sup> The chapter opens with a brief statement that the children of Israel had violated the interdiction on taking of the “forfeiture,” that is, the spoils of war set aside to be destroyed as an offering to the Lord.<sup>13</sup> The man who stole from the forfeiture is named as Achan, son of Carmi, and as a result of his actions “the anger of the LORD burned against the Israelites.”<sup>14</sup> The violation took place shortly after the conquest of Jericho.<sup>15</sup> The next step in settling the land was to be the capture of the Canaanite town Ai.<sup>16</sup> But the attempt to conquer the city, described as small and weak, ends in disaster. The campaign is thwarted, and the Israelites flee, defeated.<sup>17</sup> Joshua and the elders mourn, and God explains the reason for their defeat: “the Israelites are unable to stand before their enemies; they turn their backs to their enemies, because they have become a thing devoted for destruction

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<sup>12</sup> See *Joshua* 7:1-26 (New Revised Standard Version).

<sup>13</sup> *Joshua* 7:1 (New Revised Standard Version).

<sup>14</sup> *Id.*

<sup>15</sup> *Joshua* 7:2 (New Revised Standard Version).

<sup>16</sup> *Id.*

<sup>17</sup> *Joshua* 7:4-5 (New Revised Standard Version).

themselves. I will be with you no more, unless you destroy the devoted things from among you.”<sup>18</sup> The search for the transgressor takes place the following morning according to God’s explicit instructions:

In the morning therefore you shall come forward tribe by tribe. The tribe that the LORD takes shall come near by clans, the clan that the LORD takes shall come near by households, and the household that the LORD takes shall come near one by one. And the one who is taken as having the devoted things shall be burned with fire, together with all that he has.<sup>19</sup>

[4] Apparently the ceremony consisted of arranging the tribes and families in front of the ark and, by means of a certain signal or perhaps by lot or some other method, pointing out first the tribe of the transgressor, then the clan, and finally the transgressor himself.<sup>20</sup> The process took its course, and the tribe of Judah was pointed out or “taken,” followed by the clan and family of Zabdi, and finally Achan himself.<sup>21</sup> Achan confessed that he had taken from the spoils a “beautiful mantle from Shinar, and two hundred shekels of silver, and a bar of gold weighing fifty shekels” and that these items were hidden in his tent.<sup>22</sup> The punishment was severe. Achan, his family, and cattle were stoned to death: “They burned them with fire, cast stones on them, and raised over him a great heap of stones that remains to this day. Then the LORD turned from his burning anger.”<sup>23</sup> After God “turned from his burning anger,” Israel overcame its enemies,

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<sup>18</sup> *Joshua 7:12* (New Revised Standard Version).

<sup>19</sup> *Joshua 7:14-15* (New Revised Standard Version).

<sup>20</sup> *Joshua 7:16-18* (New Revised Standard Version).

<sup>21</sup> *Id.*

<sup>22</sup> *Joshua 7:21* (New Revised Standard Version).

<sup>23</sup> *Joshua 7:24-26* (New Revised Standard Version).

the town of Ai was conquered, its inhabitants put to the sword, and the town's cattle and spoils were plundered.<sup>24</sup>

[5] The story of Achan is thematically similar to many other stories found throughout the Bible and in various mythologies: a disaster occurs, the people approach a deity for assistance, and the deity reveals that the disaster has been inflicted as a punishment for a certain transgression. Once the misdeed is corrected, either by punishing the offender or by some other method, the divine anger is appeased and order is restored to the world. Thus we read in Genesis that when "the famine was severe in the land," Abraham (still called Abram) went to Egypt and chose to present his wife Sarah (Sarai) as his sister, because he felt she was so beautiful the Egyptians would kill him if he was known as her husband, but would treat him well if he were believed to be her brother.<sup>25</sup> Pharaoh indeed took Sarah to his harem when his officials sang of her praises, and "for her sake he dealt well with Abram; and he had sheep, oxen, male donkeys, male and female slaves, female donkeys, and camels."<sup>26</sup> But God was not appeased by such household arrangements, and the reaction against Pharaoh was swift: "But the LORD afflicted Pharaoh and his house . . . because of Sarai, Abram's wife."<sup>27</sup> At this point in the story Pharaoh summons Abraham to him and asks, "Why did you not tell me that she was your wife? Why did you say, 'She is my sister?'"<sup>28</sup> The narrative, however, leaves out the way in which Pharaoh

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<sup>24</sup> *Joshua* 7:24-28 (New Revised Standard Version).

<sup>25</sup> *Genesis* 12:10-13 (New Revised Standard Version).

<sup>26</sup> *Genesis* 12:16 (New Revised Standard Version).

<sup>27</sup> *Genesis* 12:17 (New Revised Standard Version).

<sup>28</sup> *Genesis* 12:18 (New Revised Standard Version).

came to know about the sin for which he was “afflicted . . . with great plagues.”<sup>29</sup> Presumably, a way was found for Pharaoh to receive God’s explanations. Pharaoh restores Sarah to Abraham, expels them from the land, and order returns to Pharaoh’s household.<sup>30</sup>

[6] The famous Greek myth of Oedipus demonstrates the same logic as these biblical stories: when Oedipus becomes king of Thebes, having unknowingly killed his father and married his mother, the Theban queen Jocasta, disaster does not come quickly to the city of Thebes.<sup>31</sup> Yet when the children of the incestuous king and queen reach maturity, pestilence and hunger overtake the city.<sup>32</sup> Consultation with the oracle at Delphi reveals the cause: Oedipus’s murder of his father and the marriage to his mother.<sup>33</sup> Jocasta commits suicide<sup>34</sup>, Oedipus blinds himself<sup>35</sup>, and their children remain accursed, but the tribulations of Thebes come to an end.<sup>36</sup>

[7] One may ask why God punishes a whole community because of the sin of a single individual. Why must all Thebes suffer because of the sins of Oedipus, sins he committed unwittingly? Why must Israelite warriors be killed and suffer defeat because of the sin of Achan? The Bible does not lack instances where God reacts directly to acts of which he

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<sup>29</sup> *Genesis* 12:19 (New Revised Standard Version).

<sup>30</sup> *Genesis* 12:19-20 (New Revised Standard Version).

<sup>31</sup> Sophocles, *Oedipus the King*, in 1 THE NORTON ANTHOLOGY OF WORLD MASTERPIECES 658 (Robert Fagles trans., 6th ed. 1992) (431-404 B.C.E.) [hereinafter *Oedipus the King*].

<sup>32</sup> *Id.* at 659.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 701.

<sup>36</sup> Sophocles, *Oedipus the King*, in 1 THE NORTON ANTHOLOGY OF WORLD MASTERPIECES 694 (Robert Fagles trans., 6th ed. 1992) (431-404 B.C.E.).

disapproves. In Genesis, for example, Er, son of Judah, died shortly after his marriage to Tamar.<sup>37</sup> According to the custom of levirate marriage, a childless widow is married to her husband's brother in order to maintain the dead man's name. Onan, Er's brother, should have impregnated Tamar, but he refused and "spilled his semen on the ground whenever he went in to his brother's wife, so that he would not give offspring to his brother."<sup>38</sup> In this case, God's reaction is swift and direct: God singles out the offender, Onan, and brings about his death.<sup>39</sup>

[8] The function of stories based on the model of Achan and Oedipus may have been to explain the calamities that endanger a community and to suggest a way to cope with such dangers. The stories offer the hope that a community may cleanse itself and escape the wrath of God's punishment, once they understand the reason for God's anger and eliminate the problem—for example, by banishing or executing a certain individual. This literary-mythological model constitutes an attempt to give logical explanations to the harms and dangers to which humans are exposed. The stories interpret reality according to the belief that there is a causal connection between human conduct and the events that happen to people and their surroundings. This worldview validates and strengthens the belief that the individual and the group have the power to control their destiny and if necessary to rectify wrongs. By this logic, if the community takes care that its members behave fittingly, the wrath of God will not be aroused. Furthermore, should a member stray from the standards of acceptable conduct, it is possible, through suitable action, to appease God's wrath and save the community.

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<sup>37</sup> *Genesis* 38:7 (New Revised Standard Version).

<sup>38</sup> *Genesis* 38:9 (New Revised Standard Version).

<sup>39</sup> *Genesis* 38:10 (New Revised Standard Version).

[9] Let us now return to the process by which Achan was caught and punished. God revealed to Joshua the cause of the Israelites' defeat but did not tell him who had taken from the forbidden spoils. The first verse of chapter seven informs the reader that Achan was the one who took of the forfeiture,<sup>40</sup> setting a literary form wherein the identity of the transgressor is known to the audience but not to Joshua or the Israelites, who are required to conduct the appropriate ceremony. The procedure God commands of Joshua and the people constitutes a *divine investigation*, characterized by the fact that at the outset there is no specific suspect. The only fact known to the participants in the ceremony is that a crime has been committed. This feature distinguishes the procedure from that of the *divine ordeal*, to which I refer later in this article, the purpose of which is to determine the guilt of a specific suspect. In the case of Achan, the people do not know whom to suspect. They carry out the process that activates divine power, but they do not determine the outcome of the procedure; humans conduct the process, but God determines the result.

[10] The technique of divine investigation is founded on the binary method, similar to the one on which computer language is based. The public is divided into groups, each of which is tested either by casting lots or by coming before the Urim and Thummim, which were probably stones or darts that served to cast lots or elicit some other kind of sign. The divine response evoked in this manner was either "yes" or "no," that is, guilty or innocent. The divine procedure fulfills the function of an investigation by detecting the group containing the delinquent one and finally the specific criminal. Since the procedure is governed by divine guidance, the guilt of the accused is obvious, and no further trial or scrutiny of the evidence is necessary. In this aspect the case of Achan is similar to those of Adam and Eve and of Cain and Abel. Though the Bible goes on to

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<sup>40</sup> *Joshua 7:1* (New Revised Standard Version).

tell us that Achan confessed his guilt and revealed the place where the forbidden loot had been hidden, the evidence was not required to prove guilt but rather to demonstrate to the people the glory and power of the divine investigation and the justice of its result.

[11] Another example of such procedure is related in Samuel.<sup>41</sup> Jonathan, the son of King Saul, had fought courageously in the battle against the Philistines, defeating the enemy, who turned and fled.<sup>42</sup> To ensure success in the pursuit of the enemy, Saul had adjured his people to refrain from eating until evening.<sup>43</sup> Jonathan did not hear his father's vow and "extended the staff that was in his hand, and dipped the tip of it in the honeycomb, and put his hand to his mouth; and his eyes brightened."<sup>44</sup> The oath having been broken, the story unfolds in the pattern previously described. In need of divine counsel regarding whether or not to continue the battle with the Philistines, Saul appeals to God: "Shall I go down after the Philistines? Will you give them into the hand of Israel? But he did not answer him that day."<sup>45</sup> God's refusal to advise Saul constituted an ill turn of fate that demanded clarification. This time, in contrast to the case of Achan, there were witnesses who had seen Jonathan taste of the honeycomb, and one of whom actually accused him of doing so.<sup>46</sup> Jonathan was not put on trial; instead, the process of divine investigation was launched to find the culprit.<sup>47</sup> Perhaps because Jonathan was already suspect,

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<sup>41</sup> See *1 Samuel* 14:38-46 (New Revised Standard Version).

<sup>42</sup> *Id.*

<sup>43</sup> *1 Samuel* 14:24 (New Revised Standard Version).

<sup>44</sup> *1 Samuel* 14:27 (New Revised Standard Version).

<sup>45</sup> *1 Samuel* 14:37 (New Revised Standard Version).

<sup>46</sup> *1 Samuel* 14:28 (New Revised Standard Version).

<sup>47</sup> *1 Samuel* 14:38-42 (New Revised Standard Version).

the procedure of divine investigation was carried out in a summary manner: the people gathered together and stood to one side, the king and his son on the other.<sup>48</sup> In the first stage Saul and Jonathan were taken.<sup>49</sup> In the second stage the two were separated and Jonathan was taken.<sup>50</sup> He confessed to having “tasted a little honey” and added, “here I am, I will die.”<sup>51</sup> However, the people refused to have him executed and presumably made a sacrifice in his place.<sup>52</sup> Traditional commentators later justified this step on the grounds that Jonathan had not heard his father’s interdiction, and under Jewish law as subsequently developed expiation is possible, if a person does not consciously break the law but unwittingly commits a transgression.<sup>53</sup>

[12] The technique of divine investigation to detect a culprit is also described in the familiar tale of Jonah and the large fish.<sup>54</sup> When Jonah flees from God by boarding a ship to Tarshish, God reacts to his flight by calling a mighty storm upon the sea, and when the ship is in danger of sinking, the sailors cast lots to find the man responsible for the catastrophe about to overtake them.<sup>55</sup> When Jonah is discovered, he confesses and by his own wish is thrown into the water.<sup>56</sup>

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<sup>48</sup> *1 Samuel* 14:40 (New Revised Standard Version).

<sup>49</sup> *1 Samuel* 14:41 (New Revised Standard Version).

<sup>50</sup> *1 Samuel* 14:42 (New Revised Standard Version).

<sup>51</sup> *1 Samuel* 14:43 (New Revised Standard Version).

<sup>52</sup> *1 Samuel* 14:45 (New Revised Standard Version).

<sup>53</sup> *See id.*

<sup>54</sup> *See Jonah* (New Revised Standard Version).

<sup>55</sup> *Jonah* 1:7 (New Revised Standard Version).

<sup>56</sup> *Jonah* 1:12 (New Revised Standard Version).

After this is done “the sea ceased from its raging.”<sup>57</sup> We are not told by which method the lots are cast, although the casting of lots would not have taken place by the Urim and Thummim since these were used exclusively by the priest in Israel.<sup>58</sup>

[13] This biblical detection procedure was used not only to discover criminals but also to reveal God’s choice of ruler over Israel. When God advised the prophet Samuel that Saul was the divine choice for king, Samuel anointed Saul, but, perhaps because the people demanded further evidence of Saul’s divine entitlement to the throne, the selection was repeated through the binary method.<sup>59</sup> The tribes presented themselves for the divine test, and the tribe of Benjamin was taken.<sup>60</sup> The tribe was divided into clans, the family of Matri was taken, and at the end of the process, Saul was selected to become king.<sup>61</sup> Here the binary method was not used to discover the perpetrator of a crime, so there was no risk that a factual mistake could occur. The selection of a wrong or unfit ruler might be unfortunate but would not represent a factual mistake, as in the case of a person wrongly accused and convicted.

[14] The binary method of eliciting responses from the deity also assisted in military and political decisions. Questions to God were formulated that enabled only one of two possible answers. In Samuel, David, through the priest Abiathar, consults the ephod—which apparently contained the Urim and Thummim—to ask: “Will Saul come down as your servant has heard? . . .

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<sup>57</sup> *Jonah* 1:15 (New Revised Standard Version).

<sup>58</sup> Originally they were carried by Aaron the priest (Exodus 28:30) and later by the high priest, see *Encyclopedia Biblica* (published by the Bialik Institute Jerusalem, 1972) vol 1, p. 179-180 (Urim and Thummim) (Hebrew).

<sup>59</sup> See *1 Samuel* 10:17-37; *1 Samuel* 10:20-21 (New Revised Standard Version).

<sup>60</sup> *1 Samuel* 10:20 (New Revised Standard Version).

<sup>61</sup> *1 Samuel* 10:20-23 (New Revised Standard Version).

. Will the men of Keilah surrender me and my men into the hand of Saul? . . . The LORD said, ‘he will come down. . . . They will surrender you.’”<sup>62</sup> The same method was used when making the decision to pursue the Amalekites: “David inquired of the LORD, ‘Shall I pursue this band? Shall I overtake them?’ He answered him, ‘Pursue; for you shall surely overtake and shall surely rescue.’”<sup>63</sup>

[15] Anthropological studies indicate that primitive tribes often employ sorcery and witchcraft in order to discover the perpetrator of a crime. Various methods are used, often in impressive ceremonies during which a tribal witch doctor enlists lots or other techniques in order to finger the culprit. Hugh Goitein describes one method used by an African tribe to discover a thief: several young men were given sticks, and after a ceremony in which they lost self-control (perhaps through hypnotism), they walked through the village holding the sticks until the sticks pointed to the hut of one of the chief’s wives.<sup>64</sup>

[16] Goitein links these methods of detecting a criminal to the belief that the body of a murdered person can single out the murderer.<sup>65</sup> In this context Goitein also mentions the tale of the murder of Siegfried, legendary hero of *The Nibelungen*,<sup>66</sup> the famous Germanic and

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<sup>62</sup> *1 Samuel* 23:11-13 (New Revised Standard Version).

<sup>63</sup> *1 Samuel* 30:8 (New Revised Standard Version).

<sup>64</sup> H. J. EYSENCK, *SENSE AND NONSENSE IN PSYCHOLOGY* 74 (Penguin Books, 1957); HUGH GOITEIN, *PRIMITIVE ORDEAL AND MODERN LAW* 69-70 (repr., Littleton, Colo.: F. B. Rothman & Co., 1980) (1923).

<sup>64</sup> HUGH GOITEIN, *PRIMITIVE ORDEAL AND MODERN LAW* 69-70 (repr., Littleton, Colo.: F. B. Rothman & Co., 1980) (1923). In this specific case, the suspect vigorously denied the charge, and a second ordeal proved her innocence. *Id.* at 70.

<sup>65</sup> *Id.* at 67.

<sup>66</sup> *Id.*

Scandinavian legend that Richard Wagner used for his operas. Siegfried, like the Greek hero Achilles, was impervious to injury.<sup>67</sup> Both, however, had a vulnerable spot where they could be hurt—for Achilles it was his heel,<sup>68</sup> for Siegfried it was between the shoulder blades.<sup>69</sup> As Siegfried knelt to drink from a spring, his archenemy Hagen thrust a spear through his vulnerable point and killed him.<sup>70</sup> During the burial ceremony, Siegfried's widow asked all the mourners to touch the body of her husband.<sup>71</sup> As soon as Hagen did so, the wounds of the corpse began to bleed, revealing the identity of the murderer.<sup>72</sup>

[17] There are other fables that employ the notion of using the body for detection, in various contexts. The great Hebrew poet H. N. Bialik wrote about a legendary trial held before the young King Solomon.<sup>73</sup> A rich merchant sent his son to Africa.<sup>74</sup> During his absence, the

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<sup>67</sup> See Homer, *The Illiad*, in 1 THE NORTON ANTHOLOGY OF WORLD MASTERPIECES 98, (Maynard Mack ed., Robert Fagels trans., 6<sup>th</sup> ed. 1992) [hereinafter *The Illiad*].

<sup>68</sup> *Id.* at 98.

<sup>69</sup> THE NIBELUNGENLIED 121 (Arthur Thomas Hatto, trans., Penguin Classics, rev ed. 1969).

<sup>70</sup> *Id.* at 130.

<sup>71</sup> *Id.* at 137.

<sup>72</sup> Goitein, noted above also refers at p. 67 to Shakespeare's play *Richard III*, act 1, scene 2, where it is mentioned that upon the approach of Richard blood flows afresh from the wounds of the dead Henry VI. Goitein also discusses an English case of 1688 in which a certain Philip Standsfield was accused of murdering his father. *Id.* at 68-69. Standsfield's conviction and death sentence were based mainly on the fact that when he lifted the corpse, blood welled from the wound onto his hand. *Id.* at 68-69. The charge against Standsfield mentions that God usually employs this method to uncover murderers. GOITEIN, *supra* note 64, at 69. A closer study of the case indicates that there was circumstantial evidence against the defendant, although Goitein believes that it was not decisive. *Id.* at 69; see 11 COBBETT'S COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE PRESENT TIME 1371, 1375-1377 (Thomas Bayly Howell, ed., London: R. Bagshaw, 1809-1826).

<sup>73</sup> See HAYYIM NAHMAN BIALIK, *The Inheritance Case*, in AND IT CAME TO PASS 69-74 (1938).

merchant died and his slave, the majordomo, seized the inheritance.<sup>75</sup> When the son returned, the slave continued to claim that he was the rightful son and heir.<sup>76</sup> Solomon commanded the slave to bring the dead man's arm; he then told each disputant to shed some of his blood into a bowl, and the dead man's arm was then dipped into each.<sup>77</sup> The arm emerged clean from the slave's bowl—the blood of the slave did not stick to it.<sup>78</sup> But when the arm was placed in the second bowl it reddened and absorbed the blood.<sup>79</sup> The son was recognized as the true heir, and the slave was punished.<sup>80</sup>

[18] Inevitably, these methods of discovering criminals began to lose their credibility. It is hard to believe that in reality they were ever useful; in many cases it must have been obvious that the method of divine investigation did not produce reliable results. One of the best known incidents discussed in the literature concerns the scholar Anselm, who, in 1100, proposed to employ the biblical method used to uncover Achan in order to find the thief of the sacred vessels from the church in Laon.<sup>81</sup> Anselm proposed to select one child from each city parish and

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<sup>74</sup> *Id.* at 69.

<sup>75</sup> *Id.* at 70.

<sup>76</sup> *Id.* at 71.

<sup>77</sup> *Id.* at 73-74.

<sup>78</sup> HAYYIM NAHMAN BIALIK, *The Inheritance Case*, in AND IT CAME TO PASS 74 (1938).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> JOHN H. WIGMORE, A KALEIDOSCOPE OF JUSTICE 15-16 (Washington Law Book Co. 1941)

subject the children to the cold-water ordeal.<sup>82</sup> In this ordeal, subjects are submerged in water: those who float are considered guilty, while those who sink are deemed innocent.<sup>83</sup> Having discovered the suspected parish, the ordeal was to be applied to a child from each of that parish's households, following which all the members of that household would undergo the cold-water ordeal, and so the thief would be discovered.<sup>84</sup> The town people agreed in principle to Anselm's proposal but demanded that before involving the whole town, the ordeal should first be administered to persons who had easy access to the church vessels—including Anselm himself.<sup>85</sup> Anselm was one of six people arrested and incarcerated to await trial, during which time he was terrified and asked to undergo a test ordeal while still in prison.<sup>86</sup> He was immersed in a tank of water and happily sank to the bottom.<sup>87</sup> Anselm was relieved, but at the real ordeal before the whole assembly, the results were different: three suspects sank and were declared innocent, but Anselm and two others floated and were found guilty.<sup>88</sup> Anselm's protestation of innocence was to no avail.<sup>89</sup>

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<sup>82</sup> *Id.* at 16.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> JOHN H. WIGMORE, *A KALEIDOSCOPE OF JUSTICE* 15-16 (Washington Law Book Co. 1941).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 16. Wigmore relies on HENRY C. LEA, *SUPERSTITION AND FORCE: ESSAYS ON THE WAGER OF LAW, THE WAGER OF BATTLE, THE ORDEAL, TORTURE* (Haskell House 1971)(1870). This story also impressed Goitein, who relies on Lea's work. Lea mentions the story in two additional contexts. First, in the context of judicial combat, relates how Anselm stole the vessels and sold them to a merchant, swearing him to silence. *Id.* at 159. The latter did not keep his

[19] The divine ordeal, unlike the divine investigation, does not single out a guilty party from a group or tribe. Before the divine ordeal can take place, there must be suspects. The case of Anselm has elements of the divine investigation as well as the divine ordeal—Anselm proposed to pick random children and subject them to the cold-water ordeal, for the purpose of pinpointing the specific parish and household of the guilty party. This is comparable to the casting of lots in the process of divine investigation of Achan. In general, however, the divine ordeal is employed after a suspect has been apprehended through a preliminary investigation, an accusation of some sort, or other suspicious circumstances. Thus there are two distinct and separate stages of the divine ordeal: the pretrial investigation, in which it is decided whether the accused should stand trial, and the trial itself by means of the ordeal. The pretrial investigation is wholly in human hands and is governed by human decision; the investigator enjoys no divine counsel. Only if the findings of the pretrial investigation justify a trial can the investigation proceed and divine assistance be called upon. The fact that human beings must compile incriminating evidence against an individual before delivering him or her as a suspect to be judged by God represents the cardinal stage between the divine investigation and the divine ordeal.

[20] The element of physical risk also distinguishes the divine ordeal from the divine investigation. Divine investigation, or posing a question to a deity, involves techniques of lot casting or interpreting signs from a holy artifact. Since there is no particular suspect at the outset of the investigation, the application of anything entailing risk of corporal injury or death is out of the question at this stage. Divine ordeal that involves such risk can only be allowed if there is

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promise and accused Anselm, who then challenged the merchant to trial by combat. *Id.* Anselm won the duel and was thereby acquitted. *Id.* Anselm's victory was explained by the fact that the merchant, who had received the stolen goods, broke his oath of silence. *Id.* At 160. The second context in which Lea cites the story of Anselm concerns torture. *Id.* at 366. After Anselm was acquitted of stealing the vessels, he stole again, was convicted by the cold-water ordeal, and subsequently tortured until he revealed the hiding place of the stolen goods. *Id.*

sufficient evidence against a specific suspect to justify the process. The position regarding torture is in this respect similar.<sup>90</sup> Torture in the pretrial stage is only possible when the number of suspects is limited, and usually when there already is some sort of evidence against them.<sup>91</sup> In the Christian world, examination under torture was prevalent for many centuries.<sup>92</sup> Yet it was not allowed on the basis of mere suspicion.<sup>93</sup> There even existed sets of judicial regulations that specified the type of evidence required in order to allow the examination under torture for the purpose of extracting a confession.<sup>94</sup> Clearly, these rules were not always kept.

[21] A case involving the divine ordeal is described in the Bible in the book of Numbers, chapter five.<sup>95</sup> The issue concerns a married woman who lies with another man where there are no witnesses to the act.<sup>96</sup> The text does not specify whether some kind of evidence of adultery is required in order to administer the ordeal, or whether a jealous husband can demand the ordeal on mere suspicion. Some verses in this chapter state that the ordeal ought to take place if the husband is overcome by a “spirit of jealousy . . . and he is jealous of his wife.”<sup>97</sup> In these verses it appears as though the husband’s jealousy suffices in order for the bitter-water ritual to be applied to the wife. However, the description of the whole case begins in verses twelve to

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<sup>90</sup> JOHN H. LANGBEIN, *TORTURE AND THE LAW OF PROOF* 4, 14 (1977)

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 4-5, 12-16.

<sup>95</sup> *See Numbers* 5:1-31 (New Revised Standard Version).

<sup>96</sup> *Numbers* 5:11-13 (New Revised Standard Version).

<sup>97</sup> *Numbers* 5:14, 30 (New Revised Standard Version).

thirteen with the words: “If any man’s wife goes astray and is unfaithful to him, if a man has had intercourse with her. . . .”<sup>98</sup> This statement makes it seem as though one were dealing with a known and proven fact. Jewish scholars have rejected a broad interpretation of the husband’s right to demand that his wife undergo divine ordeal, presumably because they considered it dangerous and humiliating for the accused.<sup>99</sup> Consequently, Jewish law interprets the term “jealousy” as a warning of the husband to his wife, made in front of witnesses, not to be confined alone with a particular man.<sup>100</sup> If the wife then disobeys the warning, the husband is entitled to demand the ordeal.<sup>101</sup>

[22] Numbers chapter five provides a detailed description of the bitter-water ordeal.<sup>102</sup> The ritual begins with the husband bringing his wife and an offering of barley to the tabernacle.<sup>103</sup> The priest offers up the sacrificial barley, then takes holy water and mixes it with dust from the floor of the tabernacle.<sup>104</sup> He uncovers the woman’s hair and charges her with an “imprecatory oath,” effectively cursing her if she committed the sin.<sup>105</sup> The woman must then drink the “bitter water.”<sup>106</sup> If her belly swells, it is a sign she is guilty and “shall be cursed,” whereas if the water

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<sup>98</sup> *Numbers* 5:12-13 (New Revised Standard Version).

<sup>99</sup> Mishnah, *Sotah* 1:1–2.

<sup>100</sup> Mishnah, *Sotah* 1:1–2.

<sup>101</sup> *Id.*

<sup>102</sup> *See Numbers* 5:17-27 (New Revised Standard Version).

<sup>103</sup> *Numbers* 5:15 (New Revised Standard Version).

<sup>104</sup> *Numbers* 5:17-18 (New Revised Standard Version).

<sup>105</sup> *Numbers* 5:21 (New Revised Standard Version).

<sup>106</sup> *Numbers* 5:24 (New Revised Standard Version).

has no effect, she is considered pure.<sup>107</sup> The law prescribes no sanction against the husband if the wife withstands the ordeal so that the suspicion proves to be unfounded—another aspect of how the bitter-water ordeal was bitter for the woman in more ways than one.

[23] The bitter-water ordeal belongs to the relatively rare category of tests by poisonous concoctions and potions. Goitein mentions several examples of tribes that employ certain potions to ensure the truth of an oath.<sup>108</sup> Our interest here lies in the use of the ordeal in cases of insufficient evidence. In the biblical system, as elsewhere, a suspect must undergo an ordeal after swearing her innocence.<sup>109</sup> The Bible is not satisfied with a suspect's word alone and requires the ordeal in order to confirm the veracity of an oath. In the case of adultery, the Bible stipulates that there must be two witnesses in order for a suspect to be found guilty.<sup>110</sup> The assumption in the case of the ordeal described in Numbers chapter five is that two witnesses are not available.<sup>111</sup> There is an intermediary situation between complete lack of evidence, in which no judicial steps are taken, and sufficient proof for human judgment to settle the case. The matter is therefore submitted for divine adjudication.

[24] A major distinction between the biblical "bitter-water ordeal" and the divine ordeals elsewhere concerns the results of the ordeal. Exoneration of the accused was the standard result

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<sup>107</sup> *Numbers* 5:27-28 (New Revised Standard Version).

<sup>108</sup> GOITEIN, *supra* note 64, at 50. Lea also mentions tests with poisonous drinks. *See* LEA, *supra* note 89, at 286–87.

<sup>109</sup> GOITEIN, *supra* note 64, at 55-6.

<sup>110</sup> This is the general rule which obviously applies to the case of adultery, as well. Deuteronomy 17:6.

<sup>111</sup> *Numbers* 5:13 (New Revised Standard Version).

in a verdict of innocence.<sup>112</sup> The ways of dealing with a verdict of guilty, however, varied widely. The general rule was that if the divine ordeal indicated guilt, the finding was tantamount to conviction.<sup>113</sup> If the crime entailed a death penalty, the accused was sentenced accordingly. Yet this approach was not adopted in the “bitter-water ordeal.” According to biblical law, the penalty for adultery was death, but if a woman was found guilty by ordeal, she was not sentenced to die.<sup>114</sup> The usual formula was to say that her punishment was in the hands of God and that the mortal judges would not command her execution.<sup>115</sup> According to Jewish law, the woman was liable to civil sanctions: divorce or loss of property rights.<sup>116</sup>

[25] The use of the bitter-water ordeal ended at the order of Rabbi Yohanan Ben Zakkai, who lived in the first century C.E., at the time of the destruction of the second Temple.<sup>117</sup> The step was explained by the fact that “adulterers multiplied,” and the ordeal was ineffective if the

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<sup>112</sup> See e.g., Numbers 5:28; see also GOITEIN, *supra* note 64, 54-60.

<sup>113</sup> See e.g., GOITEIN, *supra* note 64, 60.

<sup>114</sup> Death penalty for adultery is prescribed in Leviticus 20:10. However no death penalty is prescribed if the woman fails the bitter water test. The text merely states that the woman be "a curse among her people." Numbers 5:27 and that she will "bear her iniquity." Numbers 5:31.

<sup>115</sup> Mishnah, *Sotah* 3:3 reflects the belief that the guilty woman will simply by drinking the bitter water. This belief is also reflected in the legend referred to below notes 163-166 and accompanying text. It was also believed that by drinking the water the guilty woman's paramour will suffer the same fate allotted to her, so that at "the very hour she dies, her paramour, on whose account she was made to drink, likewise died'" MOSES BEN MAIMON, THE CODE OF MAIMONIDES: TRANSLATION OF *MISHNEH TORAH* ("Repetition of the Law,") Book 4 The Book of Women, Laws Concerning The Wayward Woman 3:17 (Isaac Klein trans., Yale University Press). Yet it must have become clear that in many cases this result did not follow, and it was suggested that if the wayward woman studied the Torah death might be postponed by one two or three years. Mishnah, *Sota* 3:4, The Code of Maimonides, *Id.* at 3:20.

<sup>116</sup> Mishnah, *Sotah* 1:5

<sup>117</sup> Mishnah, *Sotah* 9:9.

husband was an adulterer himself and thus not above reproach.<sup>118</sup> The belief in the power of the ordeal to discover the truth had probably waned. Theoretically the ordeal remained valid, and Maimonides, who lived more than a thousand years after Rabbi Yohanan Ben Zakkai, dealt with it in his massive oeuvre *Mishneh Torah*.<sup>119</sup> Nevertheless, the rule was no longer applied. Thus ordeals were abolished in Jewish law rather early. In Christian Europe they continued to flourish for over a thousand years.

[26] A more commonly used ordeal than that of the “bitter water” was the submersion in cold water ordeal, already mentioned in various contexts in the Code of Hammurabi.<sup>120</sup> According to section two of the Code, if a person accuses another of practicing sorcery, but has no proof, the accused is “tested” in the holy river.<sup>121</sup> The accused is plunged into the river; if the river overcomes him, it is a sign of his guilt and the accuser gets all his property.<sup>122</sup> But if the river clears the accused and he survives, then the accuser is executed and his property given to the accused.<sup>123</sup> Here we see a feature built into the Code serving to discourage false accusations, unlike the husband in Numbers chapter five, who was to remain blameless regardless of the outcome of his wife’s ordeal. The submersion in cold water or the “divine river ordeal” was also

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<sup>118</sup> Mishnah, *Sotah* 9:9; Babylonian Talmud, *Sotah* 47b.

<sup>119</sup> MOSES BEN MAIMON, THE CODE OF MAIMONIDES: TRANSLATION OF *MISHNEH TORAH* (“Repetition of the Law,”) Book 4 The Book of Women, Laws Concerning The Wayward Woman (Translated by Isaac Klein, Yale University Press).

<sup>120</sup> The Code of Hammurabi: The Code of Laws, *available at* <http://www.wsu.edu/~dee/MESO/CODE.HTM> (last visited Jan. 15, 2004).

<sup>121</sup> *Id.* at § 2.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

used when a married woman was accused of adultery.<sup>124</sup> If a member of the general public accused the woman, the husband had the right to demand application of the holy-water ordeal.<sup>125</sup> On the other hand, if it is the husband who initially accuses his wife, without evidence that she committed adultery, the woman is not put to the test.<sup>126</sup> Rather, she must swear by the god that she is pure.<sup>127</sup> If she does so, she has the right to return to her husband.<sup>128</sup>

[27] The laws of Hammurabi thus ascribe different consequences to adultery, depending on the evidence brought against the accused. If there is definite proof of adultery, such as witnesses to the act, the woman and her partner in crime are sentenced to death.<sup>129</sup> There is, however, an exemption: the husband is free to forgive his wife, in which case both she and her partner are spared execution.<sup>130</sup> If there are no witnesses to a woman's adultery, yet a member of the public accuses her of betraying her husband, she must submit to the divine river ordeal.<sup>131</sup> If the woman floats in the holy-water ordeal and survives, it means she is innocent and is saved.<sup>132</sup> If

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<sup>124</sup> *Id.* at § 132.

<sup>125</sup> The Code of Hammurabi: The Code of Laws, *available at* <http://www.wsu.edu/~dee/MESO/CODE.HTM> (last visited Jan. 15, 2004).

<sup>126</sup> *Id.* at § 131.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at § 129.

<sup>130</sup> The Code of Hammurabi: The Code of Laws, *available at* <http://www.wsu.edu/~dee/MESO/CODE.HTM> (last visited Jan. 15, 2004).

<sup>131</sup> *Id.* at §132.

<sup>132</sup> This is not expressly stated in §132 but it follows from the nature of the ordeal, cf. §2.

she is guilty and sinks, she dies in the ordeal itself.<sup>133</sup> Because the Hammurabi Code places less trust in the accusation of a member of the public than in the testimony of witnesses to the event, the divine ordeal is administered and offers a chance for the suspect's acquittal. Public accusation, however, does command greater weight than the accusation of a husband, in the Code of Hammurabi.<sup>134</sup> In the latter case, the accused wife is merely forced to swear her innocence, a less dangerous method and one that provides a better chance of survival than the divine river ordeal.

[28] Though the form of the ordeal changed from time to time, the basic worldview underlying the ordeal system endured for thousands of years. To reiterate, the divine ordeal, both in the Hammurabi Code and the biblical "bitter water," served for cases of uncertainty in which a suspicion was considered reasonably founded yet there was no conclusive evidence to produce a conviction. The ordeal was supposedly not administered when suspicions were considered to be unfounded. The story of Anselm reveals his mistake: Anselm suggested that innocent children, against whom there was no evidence of wrongdoing, undergo an ordeal. The tables were turned, and Anselm himself became a victim of this procedure.

[29] Ordeal by submersion in water was widely used in various locations throughout Europe.<sup>135</sup> Its acceptance was based on the belief that water is a holy element; the Christian ritual of baptism served to strengthen this belief.<sup>136</sup> Being holy, water, it was believed, would

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<sup>133</sup> This is not expressly stated in §132 but it follows from the nature of the ordeal, cf. §2

<sup>134</sup> G. R. DRIVER & JOHN C. MILES, 1 THE BABYLONIAN LAWS 284 (2 vols.; London: Oxford University Press, 1952; repr., 1968).

<sup>135</sup> See WIGMORE, *supra* note 81, at 5.

<sup>136</sup> See GOITEIN, *supra* note 64, at 56.

refuse to “accept” criminals who had perjured themselves and sworn falsely to their innocence.<sup>137</sup> It was therefore believed that innocent persons would sink in water because the water would accept them, while guilty ones would float.<sup>138</sup> The catch, of course, is that if you are innocent and sink, you may drown. On the other hand, if you float, you will be considered guilty and executed. To get around this problem, the ordeal was conducted as follows: after a suitable ceremony, the accused was bound and immersed in a receptacle of water or a lake, held by a rope that served to pull him or her out.<sup>139</sup> If lucky, the suspect sank, was considered innocent, and pulled out in time.<sup>140</sup> In the other case, the suspect floated and was convicted.<sup>141</sup> This water ordeal is thus the exact opposite of Hammurabi’s divine river ordeal, in which the guilty sank and the innocent floated.<sup>142</sup>

[30] Other ordeals widely accepted in medieval Europe included combat, fire, boiling water, and hot iron.<sup>143</sup> In the fire ordeal, the accused walked through flames, placed according to certain rules and instructions; one who passed through without injury was considered innocent.<sup>144</sup> The boiling-water ordeal entailed immersing one’s hands in boiling water; in the

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<sup>137</sup> *Id.* at 58; *see also* WIGMORE, *supra* note 81, at 15.

<sup>138</sup> *See* GOITEIN, *supra* note 64, at 55, 56.

<sup>139</sup> *See* WIGMORE, *supra* note 81, at 15.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*; *see also* GOITEIN, *supra* note 64, at 55.

<sup>142</sup> *See* GOITEIN, *supra* note 64, at 55.

<sup>143</sup> *See* GOITEIN, *supra* note 64, at 7-14.

<sup>144</sup> SOPHOCLES, *Antigone*, lines 299-303 (Robert Fagles, trans.), in THE NORTON ANTHOLOGY OF WORLD MASTERPIECES 701,709 (Maynard Mack et al eds., 6th ed. 1992). *See* WIGMORE, *supra* note 81, at 12-14 (describing the fire ordeal); GOITEIN, *supra* note 64, at 58-60. An allusion to the hot iron and fire ordeals appears in Sophocles’ play *Antigone*, written in the fifth century

hot-iron ordeal the accused had to carry a hot iron for a certain distance.<sup>145</sup> After the boiling-water and hot-iron ordeals, the hands of the accused were bound and examined three days later.<sup>146</sup> If the wounds had healed, the accused was deemed innocent, but if the wounds were larger than a prescribed size, the accused was deemed guilty.<sup>147</sup>

[31] Trust in the power of ordeals to reveal the truth dwindled in the Middle Ages, and in 1215 the Lateran Church Council decided to abolish ordeals altogether, after which they declined, though were not eradicated from the European continent.<sup>148</sup> The need to find an alternative system of justice became the principal incentive for the development of the jury system.<sup>149</sup> The English adopted the jury system in preference to the ordeal but continued to employ trial by combat for several centuries more.<sup>150</sup>

[32] There is no need to elaborate on the shortcomings of trial by ordeal, and the question arises how this method could survive for so many years. The answer is, presumably, that the very belief in the power of the ordeal to attain just results had social significance that sufficed to sustain it. Social stability and order are affected by the trust in the reliability of the judicial

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B.C.E. In the play, a guard swears his and all the other guards' innocence, declaring their willingness to undergo the ordeal of fire and hot iron in order to prove it. *Id.* The ordeal was not employed in the time of Sophocles, but its mention indicates that it was used in the past. *See* JOHN WALTER JONES, *THE LAW AND LEGAL THEORY OF THE GREEKS* 136-37 (J. Walter Jones ed., Clarendon Press 1956).

<sup>145</sup> JONES, *supra* note 144, at 137.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> J.H. BAKER, *AN INTRODUCTION TO THE ENGLISH LEGAL SYSTEMS* 6, 87, 579 (3d ed. 1990).

<sup>149</sup> *Id.* at 6, 87, 579-580.

<sup>150</sup> *See* notes 320-346 and accompanying text.

system and the faith in its ability to punish the culprit and acquit the innocent. Such trust may prevail for some time despite the fact that it fails to measure up to reality. The belief in the effectiveness of the system is also important in individual cases—if criminals believe that their guilt will be exposed by the judicial process, there is a greater likelihood they will confess to their crimes and avoid going through the process itself. Herein also lies the importance of the precise and detailed ceremonies that accompanied the various ordeals—these strengthened the belief in the power of the ordeal and could lead, indirectly, to the revelation of the truth. When faith in the ordeal system declined, however, so necessarily did the power of the system itself, and its demise became inevitable. Several scholars maintain that in the period leading up to the church's decision to abolish the ordeal, relatively little danger existed of an innocent person being convicted, while at the same time a guilty person stood a fairly good chance of escaping condemnation.<sup>151</sup> The reason is that people were generally not put to ordeal unless there was some concrete evidence against them, and the accused could frequently succeed in manipulating the result of the ordeal in their favor.<sup>152</sup>

[33] Another interesting question is whether the ordeal system contained psychological factors that improved the chances of obtaining a correct judgment. It may well be that in certain cases this was so. We know there is a link between a person's mental and physical condition; thus the dread of the ordeal coupled with a feeling of guilt or a fear of lying could cause physical reactions over which the accused had no control. The psychologist H. J. Eysenck tells the following story, based on anthropological sources: a tribal chief is murdered, and suspicion falls

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<sup>151</sup> WIGMORE, *supra* note 81, at 6.

<sup>152</sup> *Id.*

on five people who had been injured by the victim.<sup>153</sup> The witch doctor gathers the suspects and, in front of the whole tribe, conducts an awe-inspiring ceremony during which the suspects are told repeatedly that they will have to eat a portion of rice; the innocent will be able to eat the rice easily, but the guilty will be unable to swallow.<sup>154</sup> When the rice is offered, the witch doctor's prophecy comes true, and the guilty party, unable to swallow, confesses his guilt and is thrown to the crocodiles.<sup>155</sup> The guilty party cannot swallow the rice because his fear of the ordeal causes his mouth to dry and prevents him from swallowing normally.<sup>156</sup> The involuntary nervous system, which governs heartbeat, perspiration, digestion, and the like, reacts to feelings of fear in a manner that cannot be consciously controlled.<sup>157</sup> The modern polygraph, or "lie detector," is based on similar processes.

[34] It should be reiterated that the efficacy of certain ordeals, such as the rice-swallowing one just described, varies, in part, according to the suspect's belief that it really works. The stronger the suspect's faith in the process, the more the body will react, involuntarily, to fear or other related emotions. The psychological aspect of the ordeal, as it influences the involuntary nervous system, is, of course, of little consequence in determining whether or not a suspect will

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<sup>153</sup> H. J. EYSENCK, *SENSE AND NONSENSE IN PSYCHOLOGY* 74 (Penguin Books, 1957).

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* In the report of the Cahn Committee (1981) concerning the polygraph, the rice-swallowing ordeal is mentioned as a Chinese custom. *Itzhak Cahn Book* (Hebrew) (ed. Menahem Elon et al.; Tel-Aviv, Papyrus Publishing House, 1989) [hereinafter *Itzhak Cahn*]. Also mentioned is the ordeal of licking a hot iron employed by bedouin tribes. *Id.*

<sup>156</sup> EYSENCK, *supra* note 153, at 74-75.

<sup>157</sup> *Id.* at 75.

float when immersed in a cold-water ordeal or whether a suspect's wounds will heal for better or worse after the fire or boiling-water ordeals.

[35] Let us return to the biblical ordeal of the bitter water. Jewish sources vividly describe the method of warning a woman about to undergo the ordeal.<sup>158</sup> She is told the water will not injure her if she is innocent.<sup>159</sup> She is cautioned not to drink if she is guilty and encouraged to drink it if she is pure.<sup>160</sup> There is also a legend of two identical sisters: the husband of one of them sought to make his wife drink the bitter water.<sup>161</sup> Being impure, she asked her sister to submit to the ordeal in her place.<sup>162</sup> The sister agreed and was found innocent.<sup>163</sup> On her way home from the ordeal, she met her sinful twin and the two kissed.<sup>164</sup> The adulteress smelled the bitter water on the lips of her sister and fell dead on the spot.<sup>165</sup> The legend has a clear purpose: to implant faith in the power of the bitter water, since the stronger the faith, the greater the probability that a guilty woman would not risk submitting to the ordeal and would rather confess. Another interesting aspect of this story is the use of disguise in order to manipulate the divine ordeal.

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<sup>158</sup> See *infra* note 162.

<sup>159</sup> See *infra* note 162.

<sup>160</sup> Mishnah, *Sotah* 1:4; Tosefta, *Sotah* 1:6; MIDRASH TANHUMA-YELAMMEDENU: AN ENGLISH TRANSLATION OF GENESIS AND EXODUS FROM THE PRINTED VERSION OF TANHUMA-YELAMMEDENU WITH AN INTRODUCTION, NOTES, AND INDEXES, (trans. 1996) [hereinafter MIDRASH TANHUMA], Parashat *Naso* 1; Sifre, *parashat Naso*. For a detailed description of this ordeal, see also Philo, *On the Special Laws* 3.52–62.

<sup>161</sup> MIDRASH TANHUMA- Parashat *Naso* 6.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

Although the impersonation of one sister by the other succeeded initially, in the end the power of the bitter water reached beyond the confines of the actual trial, when the two sisters met and the guilty party was smitten by the slightest taste of the bitter water. The description of this meeting between the two sisters emphasizes the power of God and the fact that eventually the ordeal did serve, albeit indirectly, to discover the truth and thus fulfilled its function as a deterrent to future offenses of similar nature.

[36] Let us look now at one of the most famous judicial cases, in which a wholly different method from the above ordeals was employed to decide a case in which there was no evidence other than the testimonies of the parties involved. The judgment of Solomon, described in the first book of Kings chapter three, was rendered in the case of two mothers, both prostitutes, involved in a stormy dispute.<sup>166</sup> One, the plaintiff, declared that the other woman's son had died and that in the middle of the night this woman had arisen and exchanged the dead baby for her own.<sup>167</sup> The other woman denied this, claiming that the living baby in her arms was her own and that the dead infant belonged to the plaintiff.<sup>168</sup> In response to these arguments, King Solomon ordered a sword to be brought and then commanded, "Divide the living boy in two; then give half to the one, and half to the other."<sup>169</sup> Then one of the women spoke, "because compassion for her son burned within her:"

"Please, my lord, give her the living boy; certainly do not kill him!" The other said, "It shall be neither mine nor yours; divide it." Then the king responded: "Give the first woman the living boy;

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<sup>166</sup> 1 *Kings* 3:16-17 (New Revised Standard Version).

<sup>167</sup> 1 *Kings* 3:18-22 (New Revised Standard Version).

<sup>168</sup> 1 *Kings* 3:22-23 (New Revised Standard Version).

<sup>169</sup> 1 *Kings* 3:25-26 (New Revised Standard Version).

do not kill him. She is his mother.” All Israel heard of the judgment that the king had rendered; and they stood in awe of the king, because they perceived that the wisdom of God was in him, to execute justice.<sup>170</sup>

[37] This story is one of a group of tales intended to exalt Solomon’s exceptional wisdom. It opens with two conflicting testimonies, neither of which is supported by any external evidence,<sup>171</sup> nor are there any circumstances to indicate that one version is more plausible than the other. The babies were born days apart.<sup>172</sup> The women were alone in the house when the alleged crime occurred.<sup>173</sup> Both women were prostitutes, so we may surmise that the fathers were unknown or that they felt no connection to the babies and had not seen them. Hence no one could state to whom the living child belonged, while each woman declared the child to be hers. How then to decide between these conflicting testimonies? Present-day justice also has difficulties in coping with such problems, though modern science can now assist in determining the maternity of a child. In ancient times this was a classic case for divine judgment.

[38] The taking of an oath was another method developed by ancient justice to deal with such problems.<sup>174</sup> In certain respects, oath taking resembles the divine ordeal, since the underlying assumption of a sacred oath is that God will punish the perjurer.<sup>175</sup> Some scholars regard the

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<sup>170</sup> 1 *Kings* 3:26-28 (New Revised Standard Version).

<sup>171</sup> 1 *Kings* 3:19-20 (New Revised Standard Version).

<sup>172</sup> 1 *Kings* 3:18-19 (New Revised Standard Version).

<sup>173</sup> *Id.*

<sup>174</sup> GOITEIN, *supra* note 64, at 49.

<sup>175</sup> *Id.* at 49-50.

oath as an ordeal by tongue.<sup>176</sup> Like an ordeal, the efficacy of an oath depends, in part, on the suspect's belief that God knows the truth and will punish the culprit and exonerate the innocent.<sup>177</sup> Such a popular belief served as a deterrent to crime, and the ancients took great pains to encourage such belief by surrounding ordeals and oaths with impressive ceremonies.<sup>178</sup> For example, Abraham adjured his eldest servant who managed his property not to bring a Canaanite wife for his son Isaac but to go to Abraham's native land and to bring from there a wife to Isaac.<sup>179</sup> To reinforce the oath, Abraham asked his servant to put his hand under Abraham's thigh and then swear by the Lord, "the God of heaven and earth," to do as requested.<sup>180</sup> Another story relates how Jacob escaped from Laban's house and how Laban pursued Jacob and overtook him.<sup>181</sup> Eventually their reconciliation took the form of an oath that they swore to each other in a ceremony that included the erection of a memorial stone.<sup>182</sup> Such ceremonies were elaborated and improved upon throughout the ages and included swearing on the Bible or holy relics.<sup>183</sup> Oaths were often accompanied by the threat of a curse that would fall upon a perjurer.<sup>184</sup>

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<sup>176</sup> See *id.* at 49. Goitein also refers to the oath as a bridge between the ordeal and legal claim. *Id.*

<sup>177</sup> See *id.* at 50-51.

<sup>178</sup> See *id.* at 50.

<sup>179</sup> *Genesis* 24:3-5 (New Revised Standard Version).

<sup>180</sup> *Genesis* 24:2-4 (New Revised Standard Version).

<sup>181</sup> *Genesis* 31:18-26 (New Revised Standard Version).

<sup>182</sup> *Genesis* 31:44-54 (New Revised Standard Version).

<sup>183</sup> GOITEIN, *supra* note 64, 49-50; JAMES GEORGE FRAZER, *FOLK-LORE IN THE OLD TESTAMENT* (Tudor Publishing Co., abridged ed. 1923) 154-161, 247-250.

[39] The technique that developed in Jewish law and various other legal systems<sup>185</sup> involved selecting one of the disputants and imposing the oath on him or her.<sup>186</sup> For example, in the judgment of Solomon, one might say that the burden of proof lay on the woman who held the dead child, since it was she who sought to take the living baby from the arms of the other woman. The oath would therefore be imposed on the defendant—the woman holding the living child. Taking into account the prevailing belief of the time that God would punish a perjurer, it is conceivable that if the woman holding the living child was not its mother, she would abstain from swearing that the child was hers and the plaintiff would win her claim. However, if the defendant was prepared to swear that she was the true mother, the child would have remained with her.

[40] The distinguishing feature in Solomon’s judgment is that, despite the difficulty deriving from the absence of any evidence to support the two conflicting testimonies, the king did not take recourse to divine ordeal, not even in the moderate form of an oath. Instead, the king chose a psychological test. This is the singular greatness of the story, set against the background of the prevailing worldview of the time. Though some divine ordeals contained certain psychological elements, their general ideological foundation was different, being based on the belief that the

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<sup>184</sup> *Id.*

<sup>185</sup> The oath was recognized by the *Mejelle*, the Ottoman civil law legislation, which was based on Islamic law and was in force throughout the Ottoman Empire. According to the *Mejelle*, “in the case the plaintiff is unable to show his claim by proof, on his demand the oath is administered to the defendant.” *Mejelle* § 1742. If, following this request, the defendant swore to the truth of his own version, the claim was dismissed. *Id.* However, if the defendant refused to take the oath, the claim was allowed, even in the absence of other evidence. *Id.* This oath was named the “decisive oath” because it led to the conclusion of the case. *Id.* The *Mejelle* was in force in Israel during the British Mandate. It remained in force in the State of Israel until 1984.

<sup>186</sup> *Id.*

deity would intervene and assist in solving or clarifying the issue. Solomon's judgment employed only human device in order to reach a decision. The trial of Solomon signifies the passing of judgment into human hands—it is no longer God, but judges, who are to decide cases through their human wisdom.

[41] The story of Solomon's judgment raises the question regarding the efficiency of the king's stratagem. Though the king's method may seem preferable, or more sensible, than a divine ordeal, Solomon's psychological experiment constituted something of a gamble that could easily have failed and that could not be easily repeated. For instance, it is conceivable that both women would object to the king's proposal, or that both would be willing to give up the child, or that both would agree to have the child cut in half and his subsequent death. We presume that the chances the true mother would object to the gruesome cutting of the child were higher than those of the false mother, yet this is far from certain. Indeed, how do we know that the king reached the correct conclusion and that the true mother received the child? Though the Bible assumes that Solomon's judgment revealed the truth, there is no independent evidence indicating that this was the case. The tale of Solomon's judgment even lacks the usual idealistic ending of ordeal stories, in which the villain confesses to his or her evil deeds. The narrator probably assumed this to be obvious. Meir Sternberg notes another paradoxical point.<sup>187</sup> The Bible does not tell us which of the two women obtained the child: the one who held the live baby in her arms, or the one who held the dead one and claimed that her live baby had been stolen.<sup>188</sup> We

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<sup>187</sup> MEIR STERNBERG, *THE POETICS OF BIBLICAL NARRATIVE: IDEOLOGICAL LITERATURE AND THE DRAMA OF READING* 167-169 (Indiana University Press 1985).

<sup>188</sup> *Id.* at 169.

get the impression that the plaintiff won, but careful examination of the text shows that nothing is said about the matter.<sup>189</sup>

[42] Another legend concerning a psychological test of King Solomon is told by the poet H. N. Bialik in “Who Is the Thief?”<sup>190</sup> The story begins with three merchants, who set out on their travels with money in their bags.<sup>191</sup> During the night one of them robbed his two colleagues.<sup>192</sup> Their case was brought before King Solomon.<sup>193</sup> The king told them a tale about several imaginary characters: a wealthy girl; a poor youth whom the wealthy girl had sworn to marry; a wealthy young man, chosen by the girl’s father to be her bridegroom; and an old robber chief who captures the girl and her bridegroom.<sup>194</sup> As the story unfolds, all the characters behave very nobly and the old robber chief is persuaded to release the girl and the groom and to give back all their property.<sup>195</sup> At the end of the story the king asked the merchants who, in their opinion, had behaved in the most admirable and worthy fashion.<sup>196</sup> One chose the girl, the second the groom, and the third the old robber chief who gave up the girl and the booty.<sup>197</sup> King Solomon pointed

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<sup>189</sup> *Id.*

<sup>190</sup> HAYYIM NAHMAN BIALIK, *Which Was the Thief?* in *AND IT CAME TO PASS* 128 (Herbert Danby, trans. 1938).

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> *Id.* at 129.

<sup>194</sup> *Id.* at 129-131.

<sup>195</sup> HAYYIM NAHMAN BIALIK, *Which Was the Thief?* in *AND IT CAME TO PASS* 129-131 (Herbert Danby, trans. 1938).

<sup>196</sup> *Id.* at 132.

<sup>197</sup> *Id.*

to the third merchant and pronounced “That one is the thief.”<sup>198</sup> The man confessed his crime, revealed where he had hidden the stolen money, and was duly punished.<sup>199</sup>

[43] In this case, it is crucial to add that the culprit confessed to his crime. It is the confession that proves the power of the psychological test, which otherwise appears far from convincing.

[44] The inherent uncertainties of these two psychological tests ascribed to King Solomon reveal the difficulty of the method. Trials operate according to fixed patterns designed to deal with a variety of situations. The divine ordeal, whether it be the bitter water, the immersion in cold water, or the hot iron, can be used an infinite number of times under a variety of conditions and circumstances. This is not the case with a psychological test such as the one employed by King Solomon in the trial of the two mothers. It can be used only once and cannot be applied to other disputes, or even repeated in similar circumstances. A new test must be tailored for every case and adapted to its specific facts. The legendary ability of King Solomon to do so every time lies beyond the capacity of a normal legal system.

[45] After the responsibility for judgment passed from God to human hands—or perhaps seized by the human hands of Solomon—the next development in the history of Hebrew trials is reflected in the story of “Susanna and the Elders” told in the addition to the book of Daniel.<sup>200</sup> The tale gained great popularity in the Christian world and was a popular subject in Christian art. The tale also drifted into Islamic sources and appears in *A Thousand and One Nights* under the

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<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> Susanna appears in the Apocrypha and is not included in the canonized Jewish Bible.

title “Story of the Virtuous Israelite Woman and the Two Old Villains.”<sup>201</sup> The outline of the story is as follows: virtuous and beautiful Susanna was married to a wealthy man who had an orchard beside his house.<sup>202</sup> As Susanna walked in the orchard she was watched by two old men; according to one version, the old men observed her while she was bathing in the orchard’s pool.<sup>203</sup> The men lusted after her and demanded that she grant them her favors.<sup>204</sup> When she refused, they threatened her with terrible vengeance.<sup>205</sup> Susanna remained steadfast in her virtue, and the two men then falsely accused her of betraying her husband with a man who had fled from the orchard.<sup>206</sup> The two men satisfied the two-witness rule, required for conviction, and Susanna was sentenced to death for adultery.<sup>207</sup> However, before her execution, God heard her supplication and sent an angel to grant wisdom to Daniel, who at the time was still a youth.<sup>208</sup> Just before Susanna’s execution, Daniel rose and bade the crowd that had gathered to release the accused and permit him to question each of the witnesses separately.<sup>209</sup> In the interrogation, which became a kind of trial, Daniel asked each witness where the adulterous act had taken

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<sup>201</sup> The Book of the Thousand Nights and One Night, *The Devout Woman and the Two Wicked Elders* 236 (John Payne, trans. 1883).

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> The Book of the Thousand Nights and One Night, *The Devout Woman and the Two Wicked Elders* 236 (John Payne, trans. 1883).

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

place, under which tree, and so forth.<sup>210</sup> The testimonies conflicted, and Daniel decreed Susanna to be innocent.<sup>211</sup> The two villains were sentenced to death.<sup>212</sup> According to one version the men were arrested and the angel of God sent fire and killed them.<sup>213</sup> In another version Daniel himself sentenced the men to death, in accordance with the biblical law that decrees that false witnesses should suffer the same punishment that would have been imposed on the person whom they had falsely accused.<sup>214</sup>

[46] Daniel employed a method of investigation that derived from Jewish law developed during the period of the second Temple (sixth century B.C.E.–first century C.E.). The tractate *Sanhedrin* in the Mishnah<sup>215</sup> gives clear instructions how witnesses are to be cautioned and interrogated, not only on the main issue of the litigation, but also on the circumstances surrounding the event.<sup>216</sup> The book indicates that the more one questions, the better. When a witness declared that a certain act had taken place under a fig tree, Rabbi Yohanan Ben Zakkai is said to have examined the witnesses' recollection of the "thorns of figs,"<sup>217</sup> which means that he

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<sup>210</sup> *Id.*

<sup>211</sup> The Book of the Thousand Nights and One Night, *The Devout Woman and the Two Wicked Elders* 236 (John Payne, trans. 1883).

<sup>212</sup> *Id.*

<sup>213</sup> One version appears in the Apocrypha to the Septuagint. The other is included in the Greek translation of the Old Testament by Theodotian.

<sup>214</sup> *Deuteronomy* 19:18-19 (New Revised Standard Version).

<sup>215</sup> Mishnah, *Sanhedrin* 5:1.

<sup>216</sup> Mishnah, *Sanhedrin* 5:2.

<sup>217</sup> *Id.*

questioned the witnesses as to whether the thorns of the fig tree branch were thick or thin.<sup>218</sup> Of course, it is highly probable that true witnesses would not remember such minor details, and the fact that their testimonies conflict on several points as to the description of the crime scene does not necessarily indicate that their testimonies regarding the cardinal issue of the trial are false. Most significantly, Daniel's demand to examine and interrogate witnesses marks a turning point, where Jewish law shook off the bonds of the formal "two-witness rule." Under this rule the court was bound to accept the testimonies of two witnesses and give judgment accordingly: "On the evidence of two or three witnesses the death sentence shall be executed; a person must not be put to death on the evidence of only one witness."<sup>219</sup> Thereafter, the testimonies of two witnesses had to be examined and tested; contradictions in the testimonies could lead to their rejection.<sup>220</sup>

[47] There are certain common features between the judgments of Daniel and King Solomon. In both cases, the verdict derives from a human judge rather than a divine ruling. In both cases, the human judges are endowed by God with superior wisdom. But in each case the judicial process is conducted without divine intervention. Not even the oath, a central part of ancient law, plays a role in these trials. Yet the two trials differ in the nature of the human method employed by the judges. Solomon uses a psychological test in order to arrive at a verdict, while Daniel reaches his judgment through logic. Solomon tests the emotional reaction of the disputants to a drastic, dramatic proposal. Daniel examines the plausibility of the two witness statements; he interrogates each of them separately and compares their answers. The story of

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<sup>218</sup> *Id.*

<sup>219</sup> *Deuteronomy* 17:6 (New Revised Standard Version).

<sup>220</sup> Mishnah, *Sanhedrin* 5:2.

Daniel reflects a major landmark in the development of the law. Daniel's technique corresponds to the modern procedure of reviewing the content and plausibility of evidence and checking for possible inconsistencies.

[48] From the stories of Daniel and Solomon the function of the judge expands and grows in importance. From being a technician in charge of the quantitative examination of evidence the judge becomes responsible for the qualitative appraisal of that evidence. From the literary and dramatic point of view, Solomon's judgment may be more interesting and exciting than that of Daniel, but Daniel's method of arriving at the truth can be applied to a variety of cases and is more in line with modern techniques of judicial proceedings. The psychological elements uncovered by Solomon in the judicial process still play a role, as judges and juries take into account the demeanor and reactions of a witness, and not only the reasonableness and consistency of his or her answers. The witness is not, however, normally subjected to psychological tests but only to questions relating to the case.

### **Postscript: The Polygraph (The Lie Detector)**

[49] The ancients believed that God was ready to assist humankind to distinguish between truth and falsity. This belief waned, and responsibility for judgment passed into human hands. The difficulty of ascertaining the truth, however, remains—mortal judges and juries are often incapable of reaching unequivocal conclusions. Jewish tradition holds that “only with the coming of the Messiah will a judge never be confounded by false testimony.”<sup>221</sup> Courts often rely on scientific evidence for assistance; fingerprints are used for the identification of a person, ballistics for gun identity, and the question of parental identity, for which Solomon drew upon a

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<sup>221</sup> *Roytman v. Bank Mizrahi* 29(2) P.D. 57, 62 (Hebrew) (opinion by Judge Kister).

psychological test for his answer, can now be solved by means of DNA testing. Science has its limitations, however, and difficult questions concerning credibility, similar in some respects to those faced by Solomon, continue to arise in a great variety of situations. The difficulty often arises in cases where conflicting testimonies are submitted by opposite parties, and no other reliable evidence is available to support either version.

[50] The polygraph, dubbed “the lie detector,” reflects a human attempt to offer a modern scientific solution to the problem of telling truth from lies. The instrument itself cannot, of course, reveal truth or lie. The polygraph measures a person’s physical reactions to certain external stimuli.<sup>222</sup> The measurements record the results of some of the involuntary reactions of the human nervous system, such as those reflected in blood pressure, heartbeat, and perspiration.<sup>223</sup> It is thought that the nervous system evolved in response to the dangers with which primordial humans had to cope by either “fight or flight.”<sup>224</sup> Both fighting and fleeing required increased supply of blood and oxygen, the lowering of the pain threshold, and a temporary suspension of the digestive system.<sup>225</sup> It may be that these reactions, so useful to prehistoric humans, are of little use in the modern world, where the economic, social, and legal struggles of life require an unperturbed, cool state of mind.<sup>226</sup> The polygraph measures the physiological changes in breathing, pulse, blood pressure, and the skin’s electrical conductivity,

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<sup>222</sup> EYSENCK, *supra* note 153, at 79.

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

which occur in response to questions put to the person being tested.<sup>227</sup> The various reactions are recorded on graphs, hence the name polygraph. The underlying assumptions of the test are that false answers cause tension and excitement, which are manifested in the activities of the autonomous nervous system, and the differences in the graphs that record the answers can indicate whether the person is speaking the truth or is lying.<sup>228</sup> Just as a suspect's belief in the power of the swallowing-rice ordeal to determine innocence and guilt could affect the outcome of this ordeal, so the greater a person's belief in the efficacy of the polygraph, the greater the prospect of the examiner's reaching correct results. Since the suspect's belief in the polygraph will increase his or her agitation when lying and calm one when speaking the truth, the examiner will make every effort to persuade the examinee that the instrument is reliable and can tell truth from nontruth.<sup>229</sup> The tactics underlying such persuasion are not far removed from those of the priests and witch doctors who cautioned the suspects of divine ordeals regarding the efficacy of their tests.<sup>230</sup>

[51] During a polygraph test the person under examination is asked a number of questions on topics that have nothing to do with the critical issue for which the test is conducted.<sup>231</sup> Such questions are emotionally neutral, for example, "Where do you live?"<sup>232</sup> The person is also

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<sup>227</sup> EYSENCK, *supra* note 153, at 79.

<sup>228</sup> *Id.* at 81.

<sup>229</sup> *Id.* at 82. One of the methods of persuasion is the "card test." *Id.* at 83. The person under examination (connected to the polygraph) is asked to choose a card out of a pack. *Id.* The examiner then identifies the chosen card through the person's responses to questions. *Id.*

<sup>230</sup> *Id.* at 82.

<sup>231</sup> *Id.* at 83.

<sup>232</sup> EYSENCK, *supra* note 153, at 83.

questioned on matters that are emotionally charged but are not directly connected to the investigation, as well as direct questions such as “Did you steal the money?”<sup>233</sup> The purpose is to compare the different reactions to the various types of questions and to find out whether the reactions to incriminating questions differ from the reactions to other questions, indicating that a suspect may be lying.<sup>234</sup> The polygraph does not analyze these reactions to determine truth or falsity—that is left to the examiner, who reports his or her conclusions based on the deciphering of the results.<sup>235</sup>

[52] The polygraph is being used widely in police and other investigations. The central questions regarding this machine concern the degree of its reliability and whether the results are admissible in court. The decision rendered in the United States as early as 1923, in *Frye v. U.S.*,<sup>236</sup> had significant impact on the matter. It was stated that the courts would allow the introduction of expert testimony based on a scientific principle or on an invention that was generally recognized to be reliable and accurate.<sup>237</sup> However, it was stated that the “deception test has not yet gained such standing and scientific recognition . . . as would justify the courts in admitting expert testimony deduced from the discovery, development, and experiments thus far

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<sup>233</sup> *Id.* at 84.

<sup>234</sup> *Id.*

<sup>235</sup> *Id.* at 81-82.

<sup>236</sup> *Frye v. U.S.*, 293 F. 1013 (D.C. Cir. 1923). In this case it was the accused who asked to introduce the expert testimony of the “lie detector” test, which, according to his assertion, indicated he was telling the truth. *Id.* at 1013-14. His request was denied. *Id.* at 1014.

<sup>237</sup> *Id.*

made.”<sup>238</sup> Israeli courts adopted a similar approach. A committee chaired by the former president of the Supreme Court, Justice Itzhak Cahn, stated that, as far as it knew, polygraph tests were admitted as evidence in Japanese courts, but otherwise “there is almost no country in the world where polygraph results are admitted as evidence in court.”<sup>239</sup> The committee recommended that the situation should remain unchanged, that the polygraph results remain inadmissible in criminal cases, even if both the prosecution and the defense agree to have them introduced.<sup>240</sup> Furthermore, the court should not be informed if the accused had or had not agreed to undergo a polygraph test.<sup>241</sup> The results of the test are also inadmissible in civil cases, except when both parties agree to their introduction.<sup>242</sup>

[53] The recommendations of the Cahn Committee reflect the present state of law in Israel. The reservation about using polygraph results in court may in part be explained by the fear that too much weight will be attached to them. The court has no control over the evidence; such control is exercised by the investigator operating the machine and interpreting its results. There

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<sup>238</sup> *Id.*

<sup>239</sup> *Itzhak Cahn, supra* note 155, at 29-85.

<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

<sup>242</sup> *Id.* The general rule adopted by most American courts is that polygraph test results are inadmissible in either criminal or civil cases. CHARLES T. MCCORMICK, MCCORMICK ON EVIDENCE 912-917 (J.W. Strong Et. Al. eds., 4th ed. 1992). However, a substantial number of courts accept the results of such tests, both in criminal and in civil actions, if the parties stipulated to their admission prior to the testing and if certain conditions are satisfied. In addition, very few jurisdictions grant the trial judge discretion to admit polygraph evidence in special circumstances even in the absence of such stipulation. JACK B. WEINSTEIN ET AL., EVIDENCE: CASES AND MATERIALS 467-71 (9<sup>th</sup> ed., Foundation Press, 1997); CHARLES E. TORCIA, 3 WHARTON’S CRIMINAL EVIDENCE §535 (14th ed., Lawyers Co-operative Publishing, 1985).

is a fear that the findings of the investigator will prove decisive, an idea too reminiscent of the ordeals of ancient times.

### **David and Goliath: Trial by Combat**

[54] The duel of David and Goliath<sup>243</sup> is perhaps the most fascinating of biblical tales, one that has left a mark in history, literature, and art. The story opens with Israel's army, led by King Saul, massed on a mountain above the Elah Valley and the Philistines camped on another mountain, "with a valley between them."<sup>244</sup> Then a Philistine champion "named Goliath, of Gath, whose height was six cubits and a span," stepped forward.<sup>245</sup> The chapter goes on to describe this giant's terrible weapons and his challenge: "Choose a man for yourselves, and let him come down to me. If he is able to fight with me and kill me, then we will be your servants; but if I prevail against him and kill him, then you shall be our servants."<sup>246</sup> The Israelites balked at this contest: "When Saul and all Israel heard these words of the Philistine, they were dismayed and greatly afraid."<sup>247</sup>

[55] At this dramatic point the story moves to Bethlehem, where Jesse and his son David lived.<sup>248</sup> According to prevailing practice, men called to war had to bring their own supplies and equipment. Jesse dispatched David with food for his mobilized brothers and instructed the lad to

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<sup>243</sup> 1 *Samuel* 17:1 (New Revised Standard Version).

<sup>244</sup> 1 *Samuel* 17:3 (New Revised Standard Version).

<sup>245</sup> 1 *Samuel* 17:4 (New Revised Standard Version).

<sup>246</sup> 1 *Samuel* 17:8-9 (New Revised Standard Version).

<sup>247</sup> 1 *Samuel* 17:11 (New Revised Standard Version).

<sup>248</sup> 1 *Samuel* 17:12 (New Revised Standard Version).

give ten cheeses to the captain of his sons' unit—a gift that presumably conferred some advantages.<sup>249</sup>

[56] David arrived at King Saul's camp in time to witness Goliath's arrogant performance, which went on for forty days.<sup>250</sup> King Saul was offering great wealth and the hand of his daughter in marriage to any champion, but not one of the Israelite heroes stepped forward, only the young David remained undeterred.<sup>251</sup> He asked: "Who is this uncircumcised Philistine that he should defy the armies of the living God?"<sup>252</sup> David persuaded Saul to let him meet the challenger.<sup>253</sup> Saul offered him his own armor and sword, but the untrained youth could not move in them.<sup>254</sup> Taking five smooth stones, he went to face the Philistine.<sup>255</sup> Goliath mocked him, but David responded that he came "in the name of the LORD of hosts, the God of the armies of Israel, whom you have defied."<sup>256</sup> In the battle that ensued David slung a stone at Goliath's forehead, and the giant dropped to the ground.<sup>257</sup> Drawing Goliath's own sword, David hacked

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<sup>249</sup> 1 *Samuel* 17:18 (New Revised Standard Version).

<sup>250</sup> 1 *Samuel* 17:16 (New Revised Standard Version).

<sup>251</sup> 1 *Samuel* 17:23-35 (New Revised Standard Version).

<sup>252</sup> 1 *Samuel* 17:26 (New Revised Standard Version).

<sup>253</sup> 1 *Samuel* 17:37 (New Revised Standard Version).

<sup>254</sup> 1 *Samuel* 17:38-39 (New Revised Standard Version).

<sup>255</sup> 1 *Samuel* 17:40 (New Revised Standard Version).

<sup>256</sup> 1 *Samuel* 17:45 (New Revised Standard Version).

<sup>257</sup> 1 *Samuel* 17:49 (New Revised Standard Version).

his head off.<sup>258</sup> The story ends with the Philistines seeing “their champion was dead” and fleeing, chased by the Israelites.<sup>259</sup> Thereafter David remained at Saul’s court.<sup>260</sup>

[57] The story presents considerable difficulties. In the previous chapter,<sup>261</sup> Saul had called for “someone who can play well.”<sup>262</sup> A servant recommended David as “skillful in playing, a man of valor, a warrior . . . and the LORD is with him.”<sup>263</sup> Clearly the versions are inconsistent. According to chapter sixteen, David was not a youth incapable of moving with armor and sword but an experienced warrior who had come to Saul’s court before his duel with Goliath.<sup>264</sup>

[58] Furthermore, the second book of Samuel records that an Israelite named Elhanan killed Goliath.<sup>265</sup> To resolve the contradiction, Rashi suggested that Elhanan was David,<sup>266</sup> while Rabbi David Kimchi (Radak) considered that Elhanan was not David, nor was his protagonist Goliath, but rather the giant’s brother.<sup>267</sup> This latter version is supported by the first book of

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<sup>258</sup> 1 *Samuel* 17:51 (New Revised Standard Version).

<sup>259</sup> 1 *Samuel* 17:51-52 (New Revised Standard Version).

<sup>260</sup> 1 *Samuel* 18:2 (New Revised Standard Version).

<sup>261</sup> 1 *Samuel* 16 (New Revised Standard Version).

<sup>262</sup> 1 *Samuel* 16:17 (New Revised Standard Version).

<sup>263</sup> 1 *Samuel* 16:17-18 (New Revised Standard Version).

<sup>264</sup> 1 *Samuel* 16:17-22 (New Revised Standard Version).

<sup>265</sup> 2 *Samuel* 21:19 (New Revised Standard Version).

<sup>266</sup> Rashi's interpretation to 2 *Samuel* 21:19 (New Revised Standard Version). This interpretation is based on *Targum Pseudo-Jonathan* of the same verse.

<sup>267</sup> Radak's interpretation to 2 *Samuel* 21:19.

Chronicles, which says that Elhanan “killed Lahmi the brother of Goliath the Gittite,”<sup>268</sup> though it is possible that Chronicles was using this version to solve the problem.

[59] The attribution of personal heroism to David is also exceptional. He was a leader with sharp political instincts; he charmed his men, who were willing to sacrifice everything for him. On one occasion, when he was thirsty, three of his warriors stole into the Philistine camp, drew water, and brought it back to him.<sup>269</sup> But he won their hearts by refusing to drink water obtained with “the blood of the men who went at the risk of their lives.”<sup>270</sup> There were better warriors than David, and he eventually withdrew from martial matters, entrusting them to his officers and soldiers.<sup>271</sup> Indeed, in one battle with the Philistines, David was almost slain by a giant, and only saved by Abishai.<sup>272</sup> As a result, he was told by his men, “You shall not go out with us to battle any longer, so that you do not quench the lamp of Israel.”<sup>273</sup>

[60] The idea that David’s life was too precious to risk in war recurs during Absalom’s rebellion, when the king wanted to join his soldiers.<sup>274</sup> The idea was rejected by “the men.”<sup>275</sup> David had already abstained from leading the army during the war against the Ammonites,

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<sup>268</sup> 1 *Chronicles* 20:5 (New Revised Standard Version).

<sup>269</sup> 2 *Samuel* 23:15-16 (New Revised Standard Version).

<sup>270</sup> 2 *Samuel* 23:17 (New Revised Standard Version).

<sup>271</sup> 2 *Samuel* 23:15-21 (New Revised Standard Version).

<sup>272</sup> 2 *Samuel* 23:17 (New Revised Standard Version).

<sup>273</sup> *Id.*

<sup>274</sup> 2 *Samuel* 18:2-4 (New Revised Standard Version).

<sup>275</sup> 2 *Samuel* 18:3 (New Revised Standard Version).

which was led by Joab while David remained in Jerusalem.<sup>276</sup> Then came the Bathsheba interlude, which resulted in the murder of Uriah.<sup>277</sup> In this David differed from many other kings, such as Saul, Ahab, and Josiah, who led their armies and who sometimes fell in battle.

[61] By itself this does not suggest a personal failing in David. The talents required to lead a nation are not necessarily those of a warrior and general. David's ability to appoint superior generals, and his pool of first-rate warriors willing to risk all for him, indicate his greatness as a leader. The story of his clash with Goliath is, therefore, an exception in David's record, but whether or not it is correctly described, it does present a message: not only can the weaker prevail over the stronger by virtue of faith, but, more importantly, Goliath had provoked more than Saul and the Israelites. David, in confronting the giant, was representing "the LORD of hosts, the God of the armies of Israel,"<sup>278</sup> implying that God intervenes on the side of the righteous. In passing, we may note that this battle was not presented as fought between warring gods, as, for example, is the Trojan War described in the *Iliad*, where some gods support the Greeks while others act on the Trojan side.<sup>279</sup> There gods descend to the battlefield to give assistance each to his favorite side.<sup>280</sup> In David versus Goliath, only one god is found in the background.<sup>281</sup> Goliath certainly had his own gods (elsewhere, the Bible tells of Philistines

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<sup>276</sup> 2 *Samuel* 11:1 (New Revised Standard Version).

<sup>277</sup> 2 *Samuel* 11:2-27 (New Revised Standard Version).

<sup>278</sup> 1 *Samuel* 17:45 (New Revised Standard Version).

<sup>279</sup> The *Iliad*, *supra* note 67, at 98.

<sup>280</sup> *Id.*

<sup>281</sup> 1 *Samuel* 17:45-47.

worshiping Dagon)<sup>282</sup>, but they are not relevant. David, with the help of the Almighty in whose name he comes, overcomes only Goliath—not his gods.<sup>283</sup> The one God is the only power that controls the battlefield and determines the outcome.<sup>284</sup>

[62] The notion that God intervenes in struggle and resolves it in favor of the righteous is akin to another idea that the Bible emphasizes: reward for keeping God’s commandment and punishment for failing to do so. The injunction to honor one’s father and mother is supplemented with the promise “so that your days may be long in the land.”<sup>285</sup> More generalized language promises prolongation of life to whoever observes God’s “statutes and his commandments,”<sup>286</sup> and what applies to the individual also applies to the community. If the people followed alien gods, the Almighty would impose strong sanctions, but if they remained loyal to their own God, they could “go in and occupy the good land” and repel all their enemies.<sup>287</sup> In common with all the instructions regarding reward and punishment, the focus is on one side, whether an individual among the Israelites or the entire nation. The one who acts appropriately will benefit. The sinner will be punished. There are occasional references to other parties—for example, in the promise that enemies would be overcome—but this is a side effect. Conversely, God’s intervention in conflict does focus on both sides and their dispute that needs resolution. The narrative does not then refer to one side only, but deals with both.

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<sup>282</sup> 1 *Samuel* 5:2-5.

<sup>283</sup> In the description of the battle (1 *Samuel* 17:40-55) there is no reference to Dagon taking part in it or trying to assist Goliath.

<sup>284</sup> See *supra* note 285.

<sup>285</sup> *Exodus* 20:12 (New Revised Standard Version).

<sup>286</sup> *Deuteronomy* 4:40 (New Revised Standard Version).

<sup>287</sup> *Deuteronomy* 6:18-19 (New Revised Standard Version).

[63] The belief that the Almighty decides the outcome of battles or conflicts according to the degree of righteousness of each side is very close to the concept of “divine ordeal,” which determines innocence or guilt. The ordeal differs from combat in that it is directed at one side (though the results may have implications for others). Combat is a dual test, involving two sides. Another possible difference is that the ordeal, usually, determines only the question of guilt, whereas the punishment is likely to be set by humans. If, on the other hand, God resolves the outcome of battle, the decision will both identify the righteous side and determine the results for the loser. However, this distinction has no bearing on the legal battle, if combat is waged not by the parties themselves but by their representatives. Moreover, the outcome of such a battle could resolve a civil conflict, in which case the civil result would be added to the damage inflicted by the combat.

[64] Combat by champions is exceptional in the Bible.<sup>288</sup> It was known among other nations, though it is not clear whether there was always agreement that the results would resolve the conflict. The Trojan War, in Homer’s *Iliad*,<sup>289</sup> contains a few descriptions of duels between individuals from each camp. One such duel was fought by Paris, whose elopement with Helen had caused the war, and Menelaus, her wronged husband.<sup>290</sup> The contest ended to Menelaus’s

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<sup>288</sup> In *2 Samuel 2* we read of a battle between the men of David’s general, Joab, and of Saul’s commander, Abner. *2 Samuel 2:12-32* (New Revised Standard Version). It began with a clash of twelve representatives from each side, all of whom were killed. *2 Samuel 2:14-16* (New Revised Standard Version). It seems that the contest was not designed to resolve the conflict but as a prelude to the main battle that immediately ensued. *2 Samuel 2:17*(New Revised Standard Version).

<sup>289</sup> The *Iliad*, *supra* note 67.

<sup>290</sup> *Id.* at 62.

advantage, but Paris was saved by the intervention of the goddess Aphrodite.<sup>291</sup> Agamemnon, leader of the Greeks, relied on the results to demand the return of Helen, thereby ending the affair.<sup>292</sup> The Trojans might have agreed, but for the intervention of the goddesses Athena and Hera, and the war went on.<sup>293</sup> Another famous duel from the same war took place between the Greek hero Achilles and Hector, the son of the king of Troy.<sup>294</sup> Achilles won and Hector died, but this did not end the war.<sup>295</sup>

[65] Roman legend also provides a well-known story of combat between champions. In the war between Rome and the nearby town of Alba Longa, during the reign of Tullus Hostilius, a duel took place between the three Horatii brothers, representing Rome, and the three Curiatii brothers.<sup>296</sup> Two of the Roman Horatii were killed, but the surviving brother slew all three adversaries.<sup>297</sup>

[66] There are other examples of a champion stepping forward from one army and challenging an adversary to sole combat. But it was mostly an introduction to the main act rather than an agreement to let the duel decide the larger encounter.<sup>298</sup>

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<sup>291</sup> *Id.* at 70.

<sup>292</sup> *Id.* at 72.

<sup>293</sup> *Id.* at 73-76.; see EDITH HAMILTON, MYTHOLOGY 256-66 (1940).

<sup>294</sup> The *Illiad*, *supra* note 67, at 395-402.

<sup>295</sup> *Id.*

<sup>296</sup> Livy, *The Early History of Rome* 1.24-1.26.

<sup>297</sup> *Id.*

<sup>298</sup> See GEORGE NEILSON, TRIAL BY COMBAT 211-212 (McMillan & Co. 1891) (describing a duel between a Scot and an Englishman that preceded a battle in 1333).

[67] No biblical examples can be found of representative contests between nations other than David and Goliath, nor is there support for a legal resolution of conflict by a duel between individuals. It seems that this way of resolving judicial arguments was not part of the ancient Near East. It is not mentioned in the Hammurabi legal texts, nor in any other regional laws that have come down to us—and certainly not in the laws of the Torah. Conversely, trial by ordeal was customary in certain cases, both in Hammurabi and Torah laws.

[68] Post biblical Jewish law did selectively adopt resolution of conflict by a physical struggle between the parties. The Babylonian Talmud<sup>299</sup> records a dispute between two men over the ownership of a riverboat.<sup>300</sup> One of them petitioned the Beth Din (religious court), which ordered seizure of the craft until he produced witnesses to his ownership.<sup>301</sup> There were no witnesses; so the court began to debate whether to impound the boat or release it and allow decision by physical contest.<sup>302</sup> Rabbi Papa was in favor of this solution, while Rabbi Judah saw no cause either to seize or to release the craft.<sup>303</sup> The issue was analogous to that which arose in a dispute over property in which Rabbi Nahman ruled in favor of contest so that the one who was stronger would take possession.<sup>304</sup> That was the solution adopted by Maimonides, who discussed two persons contesting the ownership of a field, “the one says it is mine and the other

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<sup>299</sup> Babylonia Talmud, *Bava Batra* 34b.

<sup>300</sup> *Id.*

<sup>301</sup> *Id.*

<sup>302</sup> *Id.*

<sup>303</sup> *Id.*

<sup>304</sup> Babylonia Talmud, *Bava Batra* 34b.

says it is mine.”<sup>305</sup> If neither has witnesses, or both have witnesses to support their versions, the field should be left to them and “the one who overpowers the other takes possession of the field.”<sup>306</sup> This seems to be a situation in which neither party is in possession and neither can produce evidence supporting his case.<sup>307</sup> The court is therefore unable to reach a decision, and for want of another solution, the choice fell on private contest.<sup>308</sup> It is in fact a case in which the law eludes the issue. The court recognizes that it does not have the means to resolve the conflict, and in view of the helplessness of the law and the absence of a judicial avenue, the parties are free to resolve the problem through a physical contest.<sup>309</sup> Many questions remain unanswered: How is the struggle to be waged? Must the protagonists themselves wrestle, or may they be helped by others? Are they free to use weapons? If the case is beyond the law, then everything may be open.<sup>310</sup> I could not find any material concerning the scope of the method or to how it

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<sup>305</sup> MOSES BEN MAIMON, *The Book of Civil Laws: Laws Concerning Pleasing*, in 13 THE CODE OF MAIMONIDES: TRANSLATION OF MISHNEH TORAH 15:4 (Jacob J. Rabinowitz trans., Leon Nemoy ed., Yale University Press 1963)(1949).

<sup>306</sup> *Id.*

<sup>307</sup> *Id.* If one party is in possession, then the other party must produce evidence of entitlement. *Id.* at 250. If both parties hold the property (as in the case of two holding a prayer shawl), then it seems that in the absence of other evidence, the two must share it. *Id.* at 299-30.

<sup>308</sup> *Id.* at 251.

<sup>309</sup> *Id.*; see also SAMUEL ATLAS, *INDIVIDUAL CONTEST: PATHWAYS IN HEBREW JURISPRUDENCE* 76 (Hebrew) (1978) (offering an alternative explanation, that the parties are given the opportunity to resolve the matter in accordance with natural law, under which ownership can be acquired by conquest in war while noting that the idea of contest is based on the inability of the court to decide).

<sup>310</sup> Another question relates to the time frame in which the contest must be concluded and whether the loser may return yet again in the hope of succeeding the second time. Jewish law is divided on this point, but it seems that preference is given to non renewal of the contest. The loser can only gain the asset if he can produce witnesses to his claim. *Id.*

was applied in practice. Nor did I find any hint at the faith that a just result was achieved or that God took the side of the righteous party. Clearly the approach was entirely different from that of the European trial by combat, which is discussed below. Jewish law speaks of combat away from the supervisory eyes of the judges, an apparently “extralegal” process. The European trial by combat was itself a judicial process, conducted according to rules, and the outcome was for all intents and purposes a legal resolution.

[69] This method of judicial decision by combat was adopted by Scandinavian and German tribes in early times<sup>311</sup> and remained in use for many centuries. The duel between David and Goliath was occasionally cited to justify this means of judicial resolution. This reasoning was considered very seriously by Pope Nicholas I in 867 C.E., though he finally decided that it was not convincing.<sup>312</sup> In any event, it seems that the source for trial by combat, as applied in Europe, was not the Bible, but rather the traditions of Scandinavian and German tribes.

[70] The method was adopted in medieval Europe and was used for a long time not only in personal disputes but also in matters of state.<sup>313</sup> In the course of time it found its way into the literature of romance and chivalry. Both in literature and reality, judicial duels were used for many purposes, including proof of a queen’s faithfulness to her husband the king, criminal accusations, inheritance, and other ownership matters. It is not always easy to differentiate between fact and legend. Legend has it that King Arthur won his kingdom in a duel, but since

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<sup>311</sup> See LEA, *supra* note 89, at 91-99 (discussing sources which indicate use of the method in early times)

<sup>312</sup> WILLIAM BLACKSTONE, 3 COMMENTARIES ON THE LAWS OF ENGLAND 338 (University of Chicago Press Facimile of 1st Edition 1979) (1768); See NEILSON, *supra* note 298, at 2.  

<sup>313</sup> See generally NEILSON, *supra* note 298.

the king himself is a legendary figure, the historicity of the story is doubtful.<sup>314</sup> However, it is clear that the use of this method was not confined to personal matters. According to one source, even in diplomatic negotiations over a conflict between nations, each side was ready to produce a champion as a means of reaching resolution.<sup>315</sup>

[71] The Catholic Church took a clear stand against the practice, though there were exceptional cases where individual Catholics sided with resolution by combat. Eventually the opposition of the Church caused the practice to fade away, though some cases of duels to resolve legal conflicts can be found in the fifteenth and sixteenth centuries.<sup>316</sup>

[72] This legal institution arrived in England with the Norman invaders in 1066 c.e.<sup>317</sup> The literature contains legends of judicial duels in England before the eleventh century, due to the presence of Scandinavian and German tribes, but there does not seem to be any convincing proof prior to the Norman conquest.<sup>318</sup> However, the method known as “wager of battle” did take hold thereafter with some strange consequences.<sup>319</sup> The accepted usage of the institution was in

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<sup>314</sup> Neilson mentions other stories of decision by combat in gaining control of a kingdom. *Id.* at 25-29. The romantic side of this legal process is reflected in coronation ceremonies where a knight appears on horseback and declares that he is ready to prove with his own body that the new king is the true monarch. *Id.* at 194.

<sup>315</sup> WILLIAM HOLDSWORTH, 1 A HISTORY OF ENGLISH LAW 308-09 (A. L. Goodhart & H.G. Hanbury eds., Methren & Co. Ltd., London 7<sup>th</sup> ed. 1956)(1903); *see also* LEA, *supra* note 89, at 153-56 (describing the use of this method to resolve international disputes).

<sup>316</sup> NEILSON, *supra* note 298, at 16–17.

<sup>317</sup> *Id.* at 31.

<sup>318</sup> *Id.* at 19-30.

<sup>319</sup> *Id.* at 37.

“appeal of felony,” which was a criminal accusation brought by a private individual.<sup>320</sup>

Sometimes the accuser was the actual victim or a relative, but in many cases he was a criminal who could obtain clemency in return for his help in removing from this world some of his partners in crime (these accusers were known as “approvers”).<sup>321</sup> In this process, the accused had the option of judicial duel.<sup>322</sup> The method was also applied in military courts and in certain civil actions.<sup>323</sup> The initial principle in criminal cases was that the parties themselves must fight.<sup>324</sup> In civil cases they were entitled to hire champions to fight for them, and it seems that hiring professionals eventually found its way into criminal cases.<sup>325</sup> Some people maintained a fighter, or fighters, whom they were prepared to hire out to others in need.<sup>326</sup>

[73] Trial by ordeal was prohibited in England following a decision of the Church in 1215.<sup>327</sup>

But, surprisingly, there was no ban on judicial duel, which continued for many years.<sup>328</sup> The Church was not sympathetic to the idea, and there were judges who tried to prevent it, with the

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<sup>320</sup> *Id.* at 36-37.

<sup>321</sup> NEILSON, *supra* note 298, at 42-43.

<sup>322</sup> *Id.* at 31-32.

<sup>323</sup> *Id.* at 32-33.

<sup>324</sup> *Id.* at 48-49.

<sup>325</sup> *Id.*

<sup>326</sup> FREDERICK POLLOCK AND FREDERICK WILLIAM MAITLAND, 2 HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 633 (2d. ed. 1923)(1898).

<sup>327</sup> *Supra* note 150 and accompanying text.

<sup>328</sup> *See infra* note 332-346 and accompanying text.

result that the practice was rarely used in the ensuing centuries—but it did remain part of English law.<sup>329</sup>

[74] The English jurist William Blackstone, in his famous book on the *Laws of England*,<sup>330</sup> written in the mid-eighteenth century, described the practice in considerable detail.<sup>331</sup> Referring to a plea regarding the land rights of a tenant, he noted that the battleground was a fenced-in area of sixty square feet.<sup>332</sup> The judges, “in their scarlet robes,” sat on one side of the enclosure “and also a bar is prepared for the learned serjeants at law.”<sup>333</sup> Action began at dawn as the parties’ champions took their places, equipped with batons (in military courts these would be replaced by swords).<sup>334</sup> Each would make an oath that the right in issue belonged to the party he represented and would also swear that he did not use “any enchantment, sorcery or witchcraft by which the law of God may be abased, or the law of the devil exalted.”<sup>335</sup> Battle would then commence, and it could continue till the stars came out.<sup>336</sup>

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<sup>329</sup> BAKER, *supra* notes 148.

<sup>330</sup> See BLACKSTONE, *supra* note 312.

<sup>331</sup> *Id.* at 339-41.

<sup>332</sup> *Id.* at 339.

<sup>333</sup> *Id.*

<sup>334</sup> *Id.*

<sup>335</sup> See BLACKSTONE, *supra* note 312, at 340.

<sup>336</sup> *Id.*

[75] This legal institution continued to exist in England, at least in theory, until it was put to practical use in 1818, in the case of *Ashford v. Thornton*.<sup>337</sup> Thornton was accused of murdering a young woman named Mary Ashford.<sup>338</sup> He was acquitted in a trial by jury, but the suspicion of guilt remained and the victim's brother submitted an "appeal of murder" against Thornton (a process that was possible at the time).<sup>339</sup> Asked how he pleaded, Thornton replied, "Not guilty, and I am prepared to defend that with my body," whereupon he threw down a gauntlet on the floor of the court.<sup>340</sup> By doing so he was fulfilling the ceremonial requirement of asking for decision by duel.<sup>341</sup> The court ruled that there was no avoiding the conclusion that he was entitled to such a process.<sup>342</sup> The accuser was not prepared to take up the challenge, and Thornton was released.<sup>343</sup> Following this case a law was enacted in 1819 ending the method of judicial duel.<sup>344</sup>

[76] In legal writings on this subject, it is generally assumed that judicial duel was not based solely on faith in the physical prowess of the protagonists but also on the belief that Divine

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<sup>337</sup> 106 Eng. Rep. 149 (K.B. 1818). In this case the exceptions to the right of the accused to trial by combat were discussed, and found that none of them applied. *Id.* at 167-69. Accordingly, the senior judge, Lord Ellenborough, noted that the procedure should be decision by combat, unless the accuser refused to fight. *Id.* at 168.

<sup>338</sup> *Id.* at 149-50.

<sup>339</sup> *Id.*

<sup>340</sup> *Id.* at 150.

<sup>341</sup> 106 Eng. Rep. 149 (K.B. 1818).

<sup>342</sup> *Id.* at 169.

<sup>343</sup> *Id.*; See also NEILSON, *supra* note 298, at 330 (mentioning an Irish case from 1815, N.&Q. 2s.ii.241, with a similar outcome).

<sup>344</sup> HOLDSWORTH, *supra* note 315, at 310.

Providence would give victory to the righteous side.<sup>345</sup> At first this was a belief in the gods, but Christianity replaced that with the intervention of the Supreme Divinity.<sup>346</sup> But there are literary examples of an attitude that did not pin hopes on justice and suggest that God sides with the stronger.<sup>347</sup>

[77] The Icelandic *Njal's Saga*<sup>348</sup> contains a good deal of legal material, including stories of judicial duels. This saga, perhaps the finest in Icelandic literature, was written by an anonymous author in the late thirteenth century. It narrates events beginning in the tenth century, not long after the exile of Norwegians to Iceland. The plot is complex with many characters, among them a man named Hrut who was betrothed to Unn.<sup>349</sup> He then went to Norway, was accepted at the royal court, and had a romantic relationship with the king's mother.<sup>350</sup> When he wanted to return to Iceland, his royal lover put a spell on him to prevent him from making love to his betrothed.<sup>351</sup> He married Unn, but the spell worked and she divorced him.<sup>352</sup>

[78] Mord Fiddle, Unn's father, demanded the return of his daughter's dowry, warning Hrut that if he did not comply he would have to pay a heavy fine.<sup>353</sup> Hrut responded that Mord was

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<sup>345</sup> *Id.* at 308.

<sup>346</sup> *Id.*

<sup>347</sup> *Id.* at 308-09.

<sup>348</sup> *NJAL'S SAGA* (Magnus Magnusson & Hermann Pálsson trans. 1960).

<sup>349</sup> *Id.* at 42.

<sup>350</sup> *Id.* at 45.

<sup>351</sup> *Id.* at 49.

<sup>352</sup> *Id.* at 49-53.

<sup>353</sup> *Njal's Saga* 53-54 (Magnus Mangusson & Herman Pálsson trans. 1960).

acting aggressively out of greed and demanded trial by combat.<sup>354</sup> Mord, an old man, stood no chance in an encounter in which he would lose both the dowry and his life.<sup>355</sup> He preferred not to fight, and the claim was dismissed.<sup>356</sup> Sometime later Mord died, and Unn turned to a relative, Gunnar Hamundarson, one of Iceland's most accomplished warriors, to help her recover her dowry.<sup>357</sup> Gunnar agreed, and Unn assigned to him the dowry claim.<sup>358</sup> Gunnar consulted his friend Njal about the way to renew the action.<sup>359</sup> Following Njal's advice, Gunnar disguised himself as a man named Hedin and presented himself at Hrut's house, accompanied by two friends.<sup>360</sup> Gunnar guided the conversation to the question of divorce and the dowry claim.<sup>361</sup> When Hrut bragged about the way the claim had been dismissed, the disguised Gunnar asked casually if the claim could be reinstated.<sup>362</sup> Suspecting nothing, Hrut said that it could be done by someone addressing him in a particular form of summons at his residence.<sup>363</sup> What, then, would be the form, Gunnar asked. Hrut told him, and Gunnar repeated it word for word, and

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<sup>354</sup> *Id.* at 54.

<sup>355</sup> *Id.* at 54-55.

<sup>356</sup> *Id.* at 55.

<sup>357</sup> *Id.* at 72-75.

<sup>358</sup> Njal's Saga 75 (Magnus Mangusson & Herman Pálsson trans. 1960).

<sup>359</sup> *Id.* at 75-78.

<sup>360</sup> *Id.* at 79.

<sup>361</sup> *Id.*

<sup>362</sup> *Id.*

<sup>363</sup> Njal's Saga 79 (Magnus Mangusson & Herman Pálsson trans. 1960).

whispered to his two companions that he was making this summons in the dowry claim assigned to him by Unn, daughter of Mord.<sup>364</sup> That night Gunnar and his friends sneaked out of Hrut's house.<sup>365</sup> Their next meeting, after Gunnar had taken off his disguise, was at the Althing, which the Icelanders consider to be the oldest parliament in the world.<sup>366</sup> Gunnar summoned Hrut to court, where he announced that he was offering the same option that Hrut had offered Mord.<sup>367</sup> He was inviting him to a duel, the winner of which would be victorious in the case—and if Hrut refused, he had to repay the dowry.<sup>368</sup> Hrut understood that it was a lost cause.<sup>369</sup> He gave in and paid. Gunnar returned the dowry to Unn.<sup>370</sup>

[79] Here are two elements worthy of note: first, Gunnar used a disguise and deception, but these did not detract from the validity of the legal process. The use of the appropriate formality was decisive, and it acted to the advantage of the man behind the mask, even though the other party was mistaken as to his identity.<sup>371</sup> The second element relates to the challenge to a duel that occurred twice. Evidently, the winner in both cases was the stronger and better fighter. Nowhere in the story is there any suggestion of divine intervention on behalf of the righteous

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<sup>364</sup> *Id.*

<sup>365</sup> *Id.*

<sup>366</sup> *Id.* at 80.

<sup>367</sup> *Id.*

<sup>368</sup> Njal's Saga 80-81 (Magnus Mangusson & Herman Pálsson trans. 1960).

<sup>369</sup> *Id.*

<sup>370</sup> *Id.* at 82.

<sup>371</sup> This point is further examined in my book *To Kill and Take Possession: Law, Morality, and Society in biblical Stories*, referred to at the beginning of these footnotes, chapter 4 entitled "Stories of Disguise" (pp. 42-61).

side, though paradoxically the two episodes cancelled each other and the final result could be seen as fair and just. Yet from the story itself it is clear that the protagonist stood alone. He could make use of any means acquired in this world but could not expect divine intervention to support a just cause.

[80] This is also the obvious explanation for the end of trial by ordeal and judicial combat. The belief of earlier generations that God was available to solve day-to-day problems, and it was only necessary to know how to address God, had passed from this world. Humans have to confront their difficulties and doubts by themselves with the tools that they have created.