

A NEW UNDERSTANDING OF THE DIVORCE AND REMARRIAGE LEGISLATION IN DEUTERONOMY 24:1-4

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INTRODUCTION

If a man engages a woman and becomes her husband, but he finds that she displeases him because he finds ervat davar about her, then he writes her a certificate of divorce [literally, 'severance'], hands it to her and dismisses her from his house; and if after she leaves his house she becomes the wife of another man, and her second husband dislikes her and writes her a certificate of divorce, hands it to her and dismisses her from his house, or if he dies, then her first husband, who dismissed [i.e., divorced] her, is not allowed to marry her again since she has been defiled, for that would be an abomination to the Lord; do not spread sin in the land which the Lord your God is giving you as an inheritance (Deut. 24:1-4).

Here everything is translated except the Hebrew *ervat davar*. The meaning of this legislation is plain, apart from this phrase (which will be discussed below). However, the reasoning behind it is less plain, despite the clue that the woman's return to her original husband is considered disgusting because, following her marriage to another man, she is "defiled." This legislation does not stop her from returning to the first husband if he has a change of heart before she marries another man; they can be reconciled, and the divorce certificate torn up by mutual agreement.

Ervat davar may be rendered word by word as "uncleanness of a thing" (the *smikhut* form denoting belonging), and more idiomatically as "uncleanness of some kind" or "something unclean."

Many reasons have been proposed for the prohibition of the woman's remarriage to her first husband. The intent of this legislation would have been obvious when it was written; the difficulty lies in recreating the mindset of the ancient Near East. Philo¹ argued that the woman in this case had committed adultery, for which the man divorced her; if subsequently he remarries

her then he becomes party to that adultery. But the penalty prescribed for adultery in Deuteronomy (22:22) is death, as many have pointed out. The preceding passage (Deut. 22:13-14; 22:20-21) also covers the case in which the husband discovers that his wife is not a virgin. It stands to reason that the case in Deuteronomy 24 should be something not discussed just a few passages earlier.

Nahmanides² suggested that the aim of the legislation is to prevent wife-swapping to and fro using a form of temporary marriage, but this ignores the *ervat davar* factor. Driver³ suggested that the aim is to deter the man from divorcing for minor matters, by making reunion impossible if the woman ever marries another man, however briefly; but the woman's second marriage is itself a far greater practical hindrance to reunion. Yaron⁴ proposed that the legislation exists to protect the woman's second marriage from all scheming by the first husband to get the woman back, whether by violence or blandishment; and from any scheming by the woman to return to him. However, the wording implies that a return to the first husband is an abomination (*to-evah*) regardless of motive. Wenham⁵ suggested that the familial relationship induced by the woman's first marriage survives her divorce and second marriage, and that her return to the first husband counts as a form of incest. But although a woman should not marry her brother-in-law (Lev. 20:21), it seems implausible that remarriage to her own former husband is incestuous. Westbrook⁶ proposed an explanation that takes into account the difference between her two marriages. He suggests that, because the first husband gives a culturally acceptable reason why the woman is unsatisfactory, he gets back (or keeps) the bride-price which is payable to the woman's father as part of the wedding contract, and he is perhaps able to keep the woman's dowry which she received from her own family. In her second marriage, however, the woman either ends up with an inheritance from her husband (if he dies), or she retains her dowry or wins compensation of equivalent size (if he divorces her without tangible grounds). In either case she becomes financially better off. If the first husband remarried her then he would benefit from that money; his apparent change of heart is for financial reasons, and by reversing his position he benefits twice. A principle in modern law known as estoppel prevents that. Even if estoppel was not a legal concept in the ancient Near East, this would be a repugnant motive. It is, however, unlikely that a finan-

cially independent woman would accept a man who had previously thrown her out. Also, this explanation does not fit the idea of defilement of the woman, which is the reason given for prohibiting the reunion. Her defilement might stem from the violation of her original marital vow in the bed of her second husband; but in that case why is it specifically the first husband who may not (re)marry her, and not any man?

Below, I propose a scenario that fits every detail of Deuteronomy 24:1-4. This scenario is based on a re-evaluation of the reason for divorce cited by the first husband, *ervat davar*, according to the meaning of these words throughout the Pentateuch. It was inspired by the possibility of a relation between the *ervat davar* uncleanness in Deuteronomy 24:1, and the uncleanness implicit in the woman's defilement in 24:4.

ERVAT DAVAR

In application to humans, *ervah* (*ervat* is the possessive, *smikhut*, form of the word) refers to exposed genitals ('nakedness') and an associated shame – as is universal after the sin at Eden, when Adam and Eve covered themselves having previously been naked and not ashamed (Gen. 3:7 *cf.* 2:25). The Levitical prohibitions against incest read (for example): *Do not uncover the ervah of your sister* (Lev. 18:9), with sexual intent implied. Yet *ervah* is not simply an anatomical term; it has overtones of indecency, impurity or uncleanness. The word first appears when Noah lies naked after getting drunk (Gen. 9:22). The phrase *ervat davar* itself is written one other time, in a cleanliness regulation concerning defecation (Deut. 23:14), which involves uncovering. Apart from this, and regulations designed to prevent accidental exposure of the genitals when God's altar is approached (Ex. 20:26, 28:42), *ervah* appears in Mosaic legislation only in Leviticus (18:6-19, 20:11, 20:17-21), forbidding sex with close relatives and certain other categories of people. In the marital context of Deuteronomy 24:1, "sexual uncleanness" conveys the meaning of *ervah*.

Davar is a common word in scripture. It can mean 'thing,' as in Genesis 20:10 (*Why have you done this thing?*), but it can also mean 'word.' *Davar* first appears in Genesis 11:1, where *the whole earth had one language and one set-of-words* [*devarim*]. It is used in the phrase *When Esau heard his father's words* (Gen. 27:34). The word [*davar*] of God came to Abraham in

Genesis 15:1 and 15:4, giving him specific messages. The same phrase is used to describe prophetic inspiration (*e.g.*, Hos. 1:1, Joel 1:1). In fact *davar* can mean both 'word' and 'thing' at once, for word and deed are related (just as 'hear' and 'obey' are both translations of *shama*). Finally, a similar *smikhut* construction as in Deuteronomy 24:1 is found in I Samuel 16:18, where *davar* unambiguously means 'word.' David is described as 'prudent *of davar*'; the singular form *davar* rules out the meaning 'prudent in things/matters,' and the appropriate translation is 'prudent in speech.'

THE SCENARIO IN DEUTERONOMY 24:1-4

I propose that *davar* means primarily 'word' in Deuteronomy 24:1. The legislation in Deuteronomy 24:1-4 then applies to the following scenario. A man marries a virgin. However, her sexual awakening by her husband soon brings out a latent perversion. She tries to persuade her husband to engage in a perverted sexual practice. That is sexual uncleanness in words, *ervat davar*. It also reflects an inward uncleanness that seeks to manifest in an unclean action or deed ('thing'), consistent with both senses of *davar* set out above. Deuteronomy 24:1, which is written casuistically, permits the husband to divorce her for this. This legislation would be understood to be part of the marriage contract in ancient Israel. The regulation also calls for a certificate of divorce, which prevents the man from toying with her in the future: if she wishes, she is now free of him. Since in this case the husband refused to engage in the perverse activity, the *ervat davar* was never actualized and remained 'unclean words.'

A divorced woman in biblical times would need a man to support her. In the ancient Near East, any man who approached her would check her history and, learning of the divorce, find out the reason for it before committing himself to her in marriage. Her second husband is therefore unconcerned that she is sexually perverted, and he would presumably be willing to gratify her in those ways. Engaging in the perverse activity with her new husband causes her to become defiled, as Deuteronomy 24:4 states.

If, next, her second husband dies or divorces her, then under Deuteronomy 24:4 her first husband cannot remarry her. The word for defilement, *tameh*, denotes an uncleanness that is spiritually contagious. The first husband divorced her to avoid polluting himself; he refused to engage in perverse acts.

To pollute himself with her now, after his rejection of her had set off the train of events that led to her defilement in her second husband's bed, would be an act that matches the strength of the word *toevah*, abomination. In particular, the command in Deuteronomy 24:4 not to bring sin upon the land through this reunion recalls the statement in Leviticus⁷ coming at the end of a set of sexual prohibitions: *Do not defile yourselves in any of these ways, for by these the nations that I am casting out before you became defiled. The land itself was defiled . . .* (Lev. 18:24-25).

Why might the first husband wish to remarry her, given that he threw her out? Having married and lived with the woman, he might still feel a connection to her. *A man will bond to his wife and they become one flesh* (Gen 2:24). She might have become pregnant by him after their wedding, and presented him with a child. Unless she enters the bed of another husband, who is presumably willing to act out her perversion, she has not committed any self-defiling sin. As long as she remained unmarried and thus in an undefiled state, the first husband is free to have a change of heart toward her. It is even possible that she wants to repent and change her ways, and asks her ex-husband for his help. After marrying another less fastidious man and engaging in perverse acts with him, however, she is defiled; and the first husband, who is presumed to be righteous, must keep clear of her if she becomes available again, to keep himself clean. Significantly, she is not forbidden to a third husband, who would (like the second) be aware of her history, and therefore be non-fastidious sexually. This legislation protects the original husband by preserving his spiritual and sexual purity.

COMMENTS AND CONCLUSION

A possible criticism of this scenario is that the phrase *ervat davar*, in which the two words appear together, is found in only one other place in scripture, a few verses before Deuteronomy 24:1. It might therefore be supposed that the meaning of the phrase is established at that point (Deut. 23:14), where it unambiguously means "something unclean"; and that the same meaning should be understood in Deuteronomy 24:1. However, the verb is different in the two passages. Deuteronomy 23:14 reads: *so that he does not see ervat davar among you*, while Deuteronomy 24:1 reads *he finds ervat davar about her*. This difference allows for a difference in meaning of the phrase *ervat davar*.

In the rabbinic era, *ervat davar* was held to mean "something unclean" in Deuteronomy 24:1.⁸ Why had the alternate meaning, "uncleanness of a word," become lost by that time, even though it was known that *davar* could mean 'word'? Perhaps too great a weight was later placed on similarity with the meaning of *ervat davar* in Deuteronomy 23:14. Moreover, this interpretation was adopted by the school of Hillel, which exploited the latitude in the meaning of "something unclean" to divorce unwanted wives for trivial reasons. The phrase was interpreted to mean that a woman may be divorced because of *ervah* and even simply because of *davar*, anything.¹⁰ Given this convenience, and because the legislation was not more explicit, the intended meaning was lost.

This work has presented a scenario – to my knowledge the first – that is consistent with every detail of Deuteronomy 24:1-4. Other scenarios might fit the details more finely yet; this legislation remains a matter for discussion.

ACKNOWLEDGEMENT

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NOTES

1. Philo, *Special Laws*, 3:30-31.
2. Nahmanides, *Commentary on the Torah*, Deuteronomy.
3. S. Driver, *Critical and Exegetical Commentary on Deuteronomy*, 2nd edition (Edinburgh: T. & T. Clark, 1896), p. 272.
4. R. Yaron, "The Restoration of Marriage" *Journal of Jewish Studies* 17 (1966) pp. 1-11.
5. G. Wenham, "The Restoration of Marriage Reconsidered" *Journal of Jewish Studies* 30 (1979) pp. 37-40.
6. R. Westbrook, "The Prohibition on Restoration of Marriage in Deuteronomy 24:1-4" *Studies in Bible* 31 (1986) pp. 387-405.
7. This parallel was noticed by Wenham; see Note 5.
8. Mishna Gittin 9:10. However the transposed term *davar ervah* is used in rabbinic literature to denote sexual offenses, see for example Mishna Ketubot 3:5, BT Bekhorot 57a.
9. The Torah was lost for long enough for its contents to be a revelation to King Josiah (II Kgs. 22, 23; II Chron. 34), so perhaps the tradition of interpretation was broken at that time.
10. TB Gittin 90a, see Rashi s.v. *ervat davar*.