

HEINONLINE

Citation: 7 S. Cal. Rev. L. & Women's Stud. 203 1997-1998

Provided by:

USC Law Library



Content downloaded/printed from
HeinOnline (<http://heinonline.org>)
Wed Jan 20 18:43:51 2016

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.
- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[https://www.copyright.com/ccc/basicSearch.do?
&operation=go&searchType=0
&lastSearch=simple&all=on&titleOrStdNo=1088-3525](https://www.copyright.com/ccc/basicSearch.do?&operation=go&searchType=0&lastSearch=simple&all=on&titleOrStdNo=1088-3525)

MARRIAGE AS A LEGAL METAPHOR: COMMENTARY ON RACHEL ADLER

NOMI MAYA STOLZENBERG*

My encounter with Rachel Adler's reading of the Prophets leaves me humbled and awed. Before reading Dr. Adler's revelatory essay,¹ I was—out of complete ignorance, I must confess—skeptical that theology had anything to say to me. As I try to analyze the basis of my uninformed assumption, I think I imagined theology to be an essentially Christian enterprise. As someone who thinks of herself as Jewish but not particularly religious, theology struck me as religious but not particularly Jewish. And if I was dubious of Jewish theology, I was doubly skeptical of feminist theology. I stand corrected, inspired by Dr. Adler's breathtaking reading of the Prophets, a reading that is at once nimble and trenchant, innovative yet utterly convincing as a reading rooted in the Biblical tradition.

I would like to consider some of the different layers of the marriage-covenant metaphor to which Dr. Adler draws our attention, paying special attention to the idea of the marriage-covenant as a *legal* metaphor. By this, I mean two things. First, the marriage-covenant appears as a metaphor *in* the law, whether we speak of the Biblical tradition of religious law, or the secular tradition of Anglo-American law, which is what I study, and which, of course, derives in part from the biblical traditions of Judaism and Christianity. Dr. Adler's analysis of the metaphor of the marriage-covenant in the Prophets sheds light on what Anglo-American lawyers mean when they call the doctrines that define marriage *legal fictions*. This is the first thing I have in mind when I refer to the marriage-covenant as a legal metaphor. But if marriage figures as a metaphor *in* law, it also serves as an interesting metaphor *for* law, and this is the second thing I have in mind when I refer to the marriage-covenant as a legal metaphor. My understanding of how marriage serves as a metaphor both *of* law and *in* law

* Professor of Law, University of Southern California Law School.

1. Rachel Adler, *The Battered Wife of God: The Feminist Critique of the Prophets and its Problems for Feminist Jewish Theology*, 7 S. CAL. REV. L. & WOMEN'S STUD. 171 (1997).

builds on the discussion of the marriage-covenant metaphor that Dr. Adler has offered.

In her reading of the Prophets, Dr. Adler argued that the marriage-covenant metaphor is not to be understood as a simple, unitary analogy between one static thing and another.² Instead, she stressed that "the" metaphor is really a complex of metaphors that interact with one another dynamically.³ The meaning of each of the terms bounces onto, then off of the other, and rebounds again. Thus, in the Prophets, the covenant is a metaphor for marriage just as much as a marriage is a metaphor for the covenant between Israel and God. Before the marriage-covenant can begin to function as a metaphor for the relationship between Israel and God, marriage must be likened to a species of covenant. For, as Dr. Adler reminds us, prior to the Prophets, marriage was not understood to be a species of covenant. Rather, marriage was viewed in Jewish law, as it later came to be regarded in the Anglo-American legal tradition, as a type of *contract*.⁴

It is difficult for us to appreciate the difference between the original understanding of marriage as a contract and the transformed conception of marriage as a covenant precisely because the metaphor between the marriage contract and the covenant has been drawn so successfully. In his great work, *Legal Fictions*, the American legal scholar, Lon Fuller, explained this process whereby the metaphorical extension of a concept becomes so naturalized, through repeated usage, that it ceases to be perceived as a metaphor at all.⁵ As Fuller elaborates, a metaphor ceases to function *as* a metaphor "when a compensatory change takes place in the meaning of the words or phrases involved, which operates to bridge the gap that previously existed between the fiction and reality."⁶ As the meaning of a word evolves, it ceases to refer to what it refers to metaphorically, and comes to function as the *literal* name of its new referent. So, for example, the Latin word *persona*, which originally carried the literal meaning of mask, was first used metaphorically to refer to the person behind the social mask, and only eventually came to literally denote the person, as we use the word today. This seems to be precisely what happened with the terms of contract and covenant, terms which bear no linguistic relationship to one another in the original Hebrew. The

2. *Id.*

3. *Id.*

4. *Id.*

5. LON FULLER, *LEGAL FICTIONS* 15-57 (1967).

6. *Id.* at 14.

Hebrew word for covenant is *b'rit*.⁷ The Hebrew concept that comes closest to our notion of contract, *kinyan*, refers simply to commercial transactions whereby property is acquired.⁸ In this respect, the marriage contract was no different from a garden variety commercial contract.⁹ As Dr. Adler has explained, the marriage contract conveyed the woman, as the object of property, from the original owner, the father, to the new owner, the husband.¹⁰

Let us refer to this original legal and religious conception of marriage as *property-marriage* to distinguish it from the model of *covenant-marriage*, which, as Dr. Adler has demonstrated, represents a radically transformed and transformative redefinition of the original term.¹¹ The chief features of property-marriage, catalogued by Dr. Adler, are: (1) it is "a commercial acquisition of sexual chattel from a father-owner";¹² (2) the wife is the sexual chattel, the object of property, and the husband becomes the new owner; (3) the function of property-marriage is to eliminate the inherent uncertainty of paternity that "jeopardizes the transmission of tribal inheritance";¹³ and (4) in order to ensure that the inherent uncertainty of paternity is successfully overcome, mechanisms must be found to guarantee that only one man has sexual access to any given woman—otherwise there is no way of knowing for sure who the father of a given child is, given the innate biological differences between men and women (especially in an age before genetic testing, in vitro fertilization, egg-harvesting and the like).¹⁴ In the absence of effective sanctions against multiple sexual partners for a woman, the paternity of a child is subject to inherent uncertainty without parallel in the case of maternity, since in the usual case the child can be confidently linked to its mother by its very birth. From this standpoint, the asymmetry between the regulation of women's and men's sexual behavior, and the severity of the punishment against adultery (defined as sex with a married *woman*) make a kind of sense because, without effective sanctions, there could be no adequate certification of who a child's biological father was.

7. See *Covenant*, 5 ENCYCLOPEDIA JUDAICA 1012-22 (1971).

8. See *Acquisition*, 2 ENCYCLOPEDIA JUDAICA 216-21 (1971).

9. David Ellenson, *Samuel Holdheim on the Legal Character of Jewish Marriage: A Contemporary Comment on his Position*, in *OBSTACLES AND IMPEDIMENTS TO MARRIAGE IN JEWISH LAW* (Walter Jacobs & Moshe Zemer eds., 1998) (forthcoming publication on file with author).

10. See generally Adler, *supra* note 1.

11. *Id.*

12. *Id.* at 180.

13. *Id.* at 181.

14. See *id.* at 181.

This same model of property-marriage reappeared in English and American law in all its essentials. As recently summarized by Peter Goodrich the marriage contract in Anglo-American law was

a complicated form of property transaction between men. Its effect was that it transferred a woman into another family The contract defined the status of a woman and the legitimacy of her children; it transferred a woman from one position of subjection to another, and equally importantly passed other property (dowry or *maritagium*) between the families.¹⁵

Most importantly, "The legal effect of marriage . . . was to place the wife not simply within the power or under the control of the husband but . . . also to annex the woman to the husband such that husband and wife were in law one person."¹⁶ This was the legal state of the wife referred to technically as *coverture*.¹⁷ As treatise writers like Blackstone stated, the wife, or *feme covert*, was deemed to be "civilly" or "legally" dead; she had no legal persona of her own, that persona having been subsumed for all practical, legal purposes into the legal personality of her husband.¹⁸ It is this notion of a wife as being legally, though not organically, dead, which legal commentators refer to as a paradigmatic legal fiction, death being the vivid, not to say lurid, metaphor, whereby the wife's legal and contractual incapacity was expressed.¹⁹

15. Peter Goodrich, "Gender and Contracts," in *FEMINIST PERSPECTIVES ON THE FOUNDATIONAL SUBJECTS OF LAW 25* (Anne Bottomley ed., 1996).

16. *Id.* at 24.

17.

A man and wife are one person in law; the wife loses all her rights as a single woman, and her existence is entirely absorbed in that of her husband. He is civilly responsible for her acts; she lives under his protection or cover, and her condition is called *coverture*. . . . A woman's body belongs to her husband; she is in his custody, and he can enforce his right by a writ of habeas corpus.

A Brief Summary in Plain Language of the Most Important Laws Concerning Women, in *ON THE PROPERTY OF MARRIED WOMEN AND THE LAW OF DIVORCE 6* (Monckton Miles ed., 1975).

18.

By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs everything; and is therefore called in our french-law a *feme-covert*, *foemina viro co-optera*; is said to be a *covert-baron*, or under the protection and influence of her husband, her *baron*, or lord; and her condition during her marriage is called her *coverture*.

Joseph Chitty, *Chapter XV - Husband and Wife*, in 1 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND. A NEW EDITION WITH PRACTICAL NOTES 442* (London 1826).

19.

The details of the relationship between husband and wife traditionally rested on the concept of *coverture*, the assumption that woman's identity became submerged, or covered, by that of her husband when she married. A married couple became a legal

Here, two points can be made. First, we see clear parallels between the original legal conception of marriage in the Bible and the historically prevailing conception of marriage in English and American law, both being forms of property-marriage. Second, up to this point in the analysis, the concept of covenant has not figured in at all; the marriage contract is simply not a covenant; *kinyan* is not a *b'rit*. One of the many illuminations of Dr. Adler's reading is to remind us that "if the prophets had not compared the covenant to marriage, we would be unlikely to characterize either biblical or rabbinic marriage as covenantal."²⁰ Before this alternative model of marriage could become available to serve as a metaphor for the covenant between Israel and God, it had to be elaborated itself.

The alternative to the commercial model of property-marriage is covenant-marriage, a relationship of mutuality between partners, of heightened vulnerability and reciprocal support. The nature of this essentially romantic model of marriage was beautifully elaborated in the visionary work of Roberto Unger, *Passion*, which Dr. Adler draws upon.²¹ In Unger's words,

The central sphere for the operation of the passions is the realm of face-to-face relationships. . . . The . . . more continuous and lasting a direct interpersonal encounter, the harder it will be for the encounter to assume a purely instrumental quality. . . . In the setting of our non-instrumental relations to one another, we come to terms with our unlimited mutual need and fear.²²

This is the basis for the non-hierarchical, non-patriarchal vision of marriage that Dr. Adler also unearths, the vision in which God, occupying the position of the paradigmatic husband, "is an erotic subject

fiction: like a corporation, the pair was a single person with a single will. The fictive volition of the pair was always taken to be the same as the real will of the husband. Political and economic implications were commingled in the notion of coverture. Because husband and wife shared a single will, they could not testify against each other. All property possessed by the wife was vested in the husband, "who might use and dispose of it without her consent." The definition of women's status embraced an illogical syllogism: A married pair might express only one will to the outside world—the husband's; therefore a married woman had no independent control of her property.

LINDA KERBER, *WOMEN OF THE REPUBLIC: INTELLECT AND IDEOLOGY IN REVOLUTIONARY AMERICA* 120 (1980); see also J.H. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 395-96 (2d ed. 1979); MARY LUNDON SHANLEY, *FEMINISM, MARRIAGE, AND THE LAW IN VICTORIAN ENGLAND, 1850-1895* at 8-48 (1989); RANSOM H. TYLER, *COMMENTARIES ON THE LAW OF INFANCY AND THE LAW OF COVERTURE, EMBRACING DOWER, MARRIAGE, AND DIVORCE AND THE STATUTORY POLICY OF THE SEVERAL STATES IN RESPECT TO HUSBAND AND WIFE* 312-14 (1968).

20. Adler, *supra* note 1, at 181.

21. ROBERTO MANGABEIRA UNGER, *PASSION* (1984).

22. *Id.* at 107.

who can be hurt, insulted, deceived";²³ who is no less "vulnerable to disappointment and abandonment"²⁴ than the wife; who avoids the manipulative strategies of seduction, punishment and control in favor of open-mindedness, open-heartedness, reaching out to his wife; a God/husband who relinquishes the title of master (*baal*) for the simplest of sobriquets: man or *ish*.²⁵ This most outrageous and inspiring anthropomorphism, the metaphor of man for God, is the axis around which all of the other metaphors—between contract and covenant, between covenant and marriage, between marriage-covenant and the covenant between God and Israel—revolve.

Here, I have two further observations. First, it is interesting to note that the concept of a legal metaphor seems to have originated in the joint endeavor of lawyers, historians and early biblical critics to deal with the embarrassment of anthropomorphisms in the Bible. In his book on *Theology and the Scientific Imagination from the Middle Ages to the Seventeenth Century*, the late historian of science and Jewish thought, Amos Funkenstein, described how sixteenth and seventeenth century historical thought emerged out of medieval Jewish and Christian methods of legal exegesis, which were designed to translate "the numerous anthropomorphic expressions of the Bible . . . into a less offensive idiom. . . ."²⁶ Two impulses animated this exegetical method—first, the felt need to reconcile the Bible with rational science; second, from a strictly theological standpoint, "the very original presence of prima facie anthropomorphism in the Bible was embarrassing and called for a justification."²⁷ The idea that Biblical expressions were metaphorical, not literal statements, was the ingenious solution to both the problem of science and the problems of theology—killing two birds with one philosopher's stone. According to this reasoning, the Bible spoke in terms of anthropomorphisms, and metaphors more generally, "to accommodate the lesser capacity for abstraction of the masses."²⁸ The Bible communicated scientific and theological truths, but *figuratively* or *allegorically*—in a word, *metaphorically*—in order to accommodate the limited "capacity of mankind to receive and perceive them."²⁹ Funkenstein further explained

23. Adler, *supra* note 1, at 192.

24. *Id.* at 192.

25. *See id.* at 193.

26. AMOS FUNKENSTEIN, *THEOLOGY AND THE SCIENTIFIC IMAGINATION FROM THE MIDDLE AGES TO THE SEVENTEENTH CENTURY* 214 (1986).

27. *Id.* at 214.

28. *Id.*

29. *Id.* at 213.

that this medieval hermeneutical principle of accommodation appeared first in Jewish sources, in a narrow legal context, where it functions as a device for refusing to endow certain biblical verbiage with legal significance.³⁰ Only later did “what to the ancients was primarily a *legal* hermeneutical principle become in the hands of medieval exegetes a general rule to justify or to limit the philosophical allegoresis.”³¹

In what sense, then, are the metaphors drawn in the Prophets—between God and husband, between marriage and covenant—*legal* metaphors? Dr. Adler’s own analysis makes law instrumental, but in a subtle and paradoxical way. The existence of the alternative model of marriage as a covenant *depends* upon the law, or more precisely, on what Dr. Adler, following the late legal scholar Robert Cover, terms “constructive violations of the law.”³² What is a *constructive* violation of the law? Dr. Adler’s example is the suspension of the misogynistic laws against adultery. Under the strict laws enunciated in Leviticus and Deuteronomy, the punishment for adultery (sex with a married woman), is death; and the husband is not allowed to forgive, or reconcile with the adulterous wife. But, Dr. Adler emphasizes, *God breaks the law*. “God pronounces a divorce formula . . . but the formula fails to dissolve the relationship.”³³ Instead, God sustains the relationship with Israel; and thus, the covenant survives the breach of contract that the law so jealously guards against.

It is easy to grasp how God’s forgiveness and reconciliation with Israel constitute violations of the law. But what does it mean to call these violations of law *constructive*? If constructive was just a label for instances of law-breaking that we favor because we don’t approve of the moral content of a legal system, then we would have found our way to a relatively uninteresting standpoint outside the biblical legal tradition from which to condemn it. We would not have found a way of situating ourselves within the tradition in a way that makes *either* law *or* theology remain meaningful. But for Dr. Adler, as for Robert Cover,³⁴ the idea of a constructive violation of the law has a much less trivial, more interesting and potent meaning. To be constructive, a violation of the law must not just flatter some assumed moral position

30. *Id.* at 214.

31. *Id.*

32. See Adler, *supra* note 1, at note 102 and accompanying text.

33. *Id.* at 195.

34. See ROBERT COVER, *The Folktales of Justice: Tales of Jurisdiction*, in NARRATIVE, VIOLENCE, AND THE LAW 173 (1992).

external to the law; the violation must *construct (or re-construct) law*. What is left after a constructive act of law-breaking is not no law but, rather, new law, or more precisely, renewed law.

I can think of no more straightforward statement of this essential paradox of commitment and law than the text of *Kol Nidrei*, the formal legal formula of dispensation, which is intoned at the commencement of the Jewish day of atonement, Yom Kippur. Together, in the setting of a formal court, the congregation affirms that "All vows and oaths we take, all promises and obligations we make to God between this Yom Kippur and the next we hereby publicly retract in the event that we should forget them, and hereby declare our intention to be absolved of them."³⁵ Legal philosophers in the Anglo-American tradition have long pondered the mystery of how a person can freely enter into self-binding commitments, while neglecting the puzzle of how it is that we can create binding commitments at all while acknowledging—as we must—that all commitments are liable to be broken. In what sense have I bound myself to a commitment if I have already publicly retracted it in recognition of the fragility of all human vows?

Paradoxes like this are much easier to state than to live with. The Prophets may well offer us a transformed institution of marriage, a mutual covenant which survives breaches of fidelity, lapses of commitment, and violations of trust by way of atonement and forgiveness. But the strict contractual model persists, leaving us to wonder how to reconcile the two without simply ignoring commitment and law. It is tempting indeed to say that the apparent destruction of law is the construction of new, better law—but who gets to say which is which? How can commitment and the authority of law be maintained if we embrace the paradoxical notion that breaking laws and commitments is constructive, and productive of true commitments—a formula that has excused monstrous human activities in the past?

I have no answer, except to suggest that we may become a bit more discerning if we think of marriage not just as a metaphor *in* law, but also as a metaphor *for* law. Of course, I would build on the covenant model of marriage, rather than the contract-for-property one. Cover's notion of constructive violations of law was based upon the metaphor of law as a *bridge* between what he called the unredeemed "world-that-is" and "our projections of alternative 'worlds-that-might-

35. MAHZOR FOR ROSH HASHANAH AND YOM KIPPUR: A PRAYER BOOK FOR THE DAYS OF AWE 352-53 (Rabbi Jules Harlow ed., 2d ed. 1978) (on file with author).

be.”³⁶ Like the marriage covenant—but quite unlike property-marriage, in which one of the two personalities is simply obliterated—the law bridges two alternate ways of being, even as it acknowledges and enacts the differences between them. Indeed, from this perspective the best metaphor for law may be *metaphor*, which, as Dr. Adler depicts it, “successfully conjoins [two] dissimilar parts”³⁷—as does a bridge (in Cover’s conception of law), and as does covenant-marriage itself. Just as Cover insisted that one of the functions of the law is to prevent utopian visions of a better world from being completely realized,³⁸ so, too, Rachel Adler stresses that “the gap between [the] two dissimilar terms” is essential to metaphor and must be maintained.³⁹ So, too, must the gap between the two partners in marriage be maintained, lest one be devoured by the fiction of coverture, the fiction that the two are one. Just as “a completely adequate metaphor would not be a metaphor,”⁴⁰ a completely adequate marriage would not be a marriage, and a completely adequate law would not be law. We need the gaps and breaches and even the violations to sustain and reform these most precious institutions.

36. COVER, *supra* note 34, at 176.

37. Adler, *supra* note 1, at 178.

38. COVER, *supra* note 34, at 194.

39. Adler, *supra* note 1, at 178.

40. *Id.*

