Aggadic Stories About Medieval Western Jurists?

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When I was first asked to offer some comparative remarks about the distinction between halakhah and aggadah, I was under the impression that the distinction might be compared to the distinction between law and morals in the western tradition. Having learned just a bit more about aggadah, thanks among other things to Jeffrey Rubenstein's wonderful book and to what was said at the conference, I am not at all sure that my impression was correct.[1] Trying to explain both my unease and the distinction between law and morals in the western tradition would take far more space than I have.

Instead I would like to explore a feature of many aggadic stories that is also found in stories about the western jurists of the twelfth and thirteenth centuries. Many aggadic stories feature the Sages as the chief characters in the story; the same is true of stories told about the twelfth- and thirteenth-century jurists.

Johannes Bassianus, the late twelfth-century expounder of Roman law, we are told, was an alcoholic and a compulsive gambler. When he died, his student Azo, the most distinguished Roman lawyer of the early thirteenth century, married his widow.[2] Such stories have been

1 Jeffrey L. Rubenstein, *Talmudic Stories: Narrative Art, Composition, and Culture* (Baltimore: Johns Hopkins University Press, 1999). For the conference, see the papers printed in this volume.

2 F. C. von Savigny, *Geschichte des römischen Rechts im Mittelalter* (Heidelberg, 1850), 4.292-3 (reporting Gullielmus de Pastrengo); U. Guallazini, 'Martino, Giovanni Bassiano, Azzone nella cronaca di Giovanni prete da Cremona (sec. XII)', *Revista di storia del diritto italiano* 29 (1993), 23-34.

used to ascertain biographical details about the medieval western jurists. I am skeptical that they can be so used. I would suggest rather that in the hot-house atmosphere of the academy stories about the teachers will circulate, and the number of possible twists of plot is not infinite. Surely, Johannes Bassianus, the distinguished jurist who was an alcoholic and compulsive gambler, is the rabbi who sinned, Elisha ben Abuya, and the student who married (or tried to marry) his teacher's widow is Rabbi Judah the Prince.

Let us take an example from an entirely different realm. George Lyman Kittredge, the Harvard Shakespeare scholar of the first half of the last century, was an impressive figure with a long white beard and flashing eyes. No one, it was said, was as distinguished as Kittredge looked. One stormy night Kittredge knocked on the door of John Finley, who was then the young master of Eliot House. Finley opened the door just as lightning struck. "My God!", Finley exclaimed. "No, sir," Kittredge replied, "one of his humble servants." As undergraduates we retailed such stories, and some years later I happened to tell this one to a friend from Oxford. "You've got it all wrong," he said. "It wasn't Kittredge who said that, it was Benjamin Jowett [a distinguished Oxford classicist of the late nineteenth century], and I know that's right because I got it from the master of the college to whom it happened." And so it goes, a memorable remark by who knows whom gets embedded in a story about the teachers.

So what shall we make of our stories?

Around the time of the Diet of Roncaglia in 1158, so the story goes, the emperor Frederick Barbarossa was riding with the jurists Martinus and Bulgarus, and he asked them: "Tell me, sirs, am I *dominus mundi*?"[3] The question is hard to translate. Normally, we would translate it "Am I lord of the world?" But *dominus* does not only mean

3 For the story, its sources, and some of the analysis that follows, see Kenneth Pennington, *The Prince and the Law, 1200-1600* (Berkeley: University of California Press, 1993), 15-37.

"lord," particularly if one is talking to a Roman lawyer. *Dominus* is also the standard word in Roman law for "owner," just as *dominium* is the standard word for "ownership," not lordship. That, of course, poses the problem. In the twelfth century lordship was important. What the distinction was between lordship and ownership was not at all clear. While we may argue whether men and women had a sense that ownership of private property and government were two different things, few, if any, could articulate that distinction as clearly as I just did.[4] Now Roman law made a sharp distinction between public and private law. This can be seen not only in the places where the distinction is made, but we can also see it in the way in which the Roman jurists operated. The two spheres were kept hermetically sealed. Indeed, the distinction is so operative that we might wonder whether the Roman jurists were maintaining it in order to carve out an area of expertise for themselves.

Thus if we attribute to Frederick Barbarossa a sophistication that he almost certainly did not have, the question that he is supposed to have posed becomes fundamental. "What happens when you apply Roman law to a world that does not make a sharp distinction between public and private law?" "Does this mean that I, who am *dominus mundi* in the sense of lord of the world, am also *dominus mundi* in the sense of owner of the world?"

The jurist Bulgarus had the right answer: "Not, my lord, so far as property is concerned." As Accursius and Odofredus explained this answer in the thirteenth century what it meant was that Frederick was *dominus mundi* only in so far as protection or governance or jurisdiction was concerned.[5] Martinus, on the other hand, out of fear or favor as the

4 For radical views on this topic, see Susan Reynolds, *Fiefs and Vassals*: *The Medieval Evidence Reinterpreted* (Oxford: Clarendon, 2001).

5 C.7.37.3 v° *omnia principis* (Lyon, 1604), col. 1669 (i.e., the Accursian gloss on the words *omnia principis* ("all thing belong to the prince [emperor]") in the Lyon edition of 1604 (*Corpus iuris civilis cum glossis*, vol. 5), columns 1669); Odofredus, *Lectura* in C.7.37.3 (Lyon, 1553; repr. Bologna, 1969), fol. 111vb.

later jurists tell us, responded simply, "My lord, you are *dominus mundi*." When they reached the place where they were going, the story continues, Frederick gave Martinus his horse, and Bulgarus got nothing. But the honors of day went to Bulgarus, because he used the occasion to come up with a triple pun: "Amisi equum, quia dixi equum, quod non fuit equum," roughly, "I lost an equine because I upheld equity, which was not equitable."[6]

The fact that this story circulated in at least three different versions, one of which did not involve Bulgarus and Martinus and another of which involved quite different juristic texts should make us cautious about believing that anything like this ever happened. Frederick Barbarossa was illiterate, and he was much better at hitting people over the head than he was at posing subtle questions of jurists. The story, however, was too good not to retail, and it leads in a number of interesting directions:

The phrase *dominus mundi* does appear in the *Digest*, and it is ascribed to the emperor (D.14.2.9). Here the phrase is concessive. The emperor says that although he is *dominus mundi*, the sea-law of the Rhodians applies to an issue that has been raised concerning a shipwreck. Here the question is not ownership but the limits of the power of the emperor in the face of contrary custom. Some jurists thought the text could be cited for the proposition that custom could derogate from the law of the emperor, but Accursius, reading the text more precisely, held that it meant that the custom would be applied only where it was not contrary to imperial law.[7]

A long rescript of Justinian's in the Code (C.7.37.3) contains the startling phrase, when taken out of context, "all things belong to the

6 Pennington, *Prince and the Law*, 16 and n. 34, quoting the continuator of Otto of Morena (c. 1220).

7 D.14.2.9 v° *nauticis praescripta est iudicetur* (Lyon, 1604), col. 1465-6. The original text is in Greek, and the reference is to the Latin translation that the medieval jurists were using, but the ambiguity exists in Greek, as well: *kyrios* means both 'lord' and 'owner'.

emperor." Though Justinian may have wished that to be true, the statement taken in context quite clearly means that all things, i.e., those things in the private possession of the emperor and those in the imperial fisc belong to the emperor. It was here that the jurists were at pains to point out that all private property does not belong to the emperor. The action to vindicate my book belongs to me, not to the emperor, though the mention of the action may indicate that some jurists were not too far from the modern notion that all private property is dependent on the support of the state.[8] Further, in Roman law, the action to vindicate belongs only to the owner. There cannot be two owners. Now this univocal notion of ownership caused considerable problems in the world of the twelfth and thirteenth centuries, because it was a characteristic of this world that many people frequently had ownership claims in property, particularly in land. The simple agricultural tenant might, in some sense, own the land, but he, of course, had a lord who claimed *dominium* over him and over the land, that lord, in turn, might have a lord, and that lord, in turn, another, until one reached the king or the emperor. At least by the end of the thirteenth century the jurists were beginning to divide ownership in a way quite far from the main thrust of the Roman law texts and to create a *dominium directum* in the lord and a *dominium utile* in the tenant.[9]

Hence, the story of the emperor and the horse is an opening into some fundamental problems with which the twelfth- and thirteenth-century jurists struggled.

Bulgarus, so another story goes, and one of his students were riding near Bologna and found a trap with a boar caught in it. The student dismounted and told Bulgarus that he wanted to take the boar, so that he might have a good dinner with it. Bulgarus said to the student, "You

8 See texts referred to above, n. 5.

9 See Robert Feenstra, 'Dominium utile est chimaera: nouvelles réflexions sur le concept de propriété dans le droit savant', *Tijdschrift voor Rechtsgeschiedenis* 66 (1998) 381-97, with ample references to earlier literature.

are not speaking well." "But," the student replied, "did you not expound the law *In laqueum* [l. 55] this way, when you were reading *Digest* [41.1] the other day?" Bulgarus said, "I'm not changing my opinion, but I don't want you to take the boar, not because I fear the judgment to come, but scandal or words: The peasants will make a furor and will follow after us with weapons. Perhaps they will badly beat us up."[10]

The story, I would suggest, tells us, at a minimum, two things: First, the glossators were well aware that custom was not always in accord with the law that they were expounding. Second, something seems to be wrong about the result that the Roman texts pretty much require us to reach here. If property is based on possession and possession requires both a physical element and intent, the trapper cannot be said to possess the boar, because he is unaware that it is there. If the law of property will not help, maybe the law of wrongs will. That is certainly the result that Odofredus, who retails this story in the thirteenth century, reaches. The boar caught in the trap where the trapper is unaware of it may not belong to the trapper, but someone who springs the trap is liable to an action on the facts for having prevented the trapper from obtaining ownership. Odofredus says that Johannes Bassianus, a student of Bulgarus, and Azo, a student of Johannes, reached this result, as did Odofredus (who was a student of Jacobus Balduini who was a student of Azo's) himself.[11] We do not have enough material from either Johannes or Azo to know for sure, but what we do have makes it likely that Odofredus has correctly stated their views.[12] And thus the chain of masters and students gradually reached a consensus.

10 The story is retailed in a number of places. The quotations above are my translation of Odofredus, *Lectura* in D.41.1.55 (Lyon, 1552, repr. Bologna, 1968), fols. 49v-50r.

11 Ibid.

12 Various views of the jurists on the issue are reported, unfortunately somewhat inconsistently, in Gustav Haenel (ed.), *Dissensiones dominorum* (Leipzig: C. Hinrichsius, 1834), §§ 169, 427, pp. 246 and note r, 536.

I close with a remark and a puzzle. The remark is that both of these stories, and they are typical, lead us straight into what I think would be called halakhic problems. The stories are there, and their literary style is quite different from the style of a gloss or a comment, but they are not heading us, as are some of the aggadic stories, into a realm that is different from, perhaps more profound than, the law itself. The puzzle is this. The stories I have told are all about glossators and commentators on the Roman law. That is not by chance. Very few such stories survive about the canonists. I am sure that such stories were told about the canonists, but they do not seem to have been written down. The first biographical story that I know of about a canonist is about Johannes Andreae.[13] It may also not be by chance that he was the first major canonist who was a layman, and he does not appear until the beginning of the fourteenth century. Is it possible that we are to attribute the absence of stories about canonists to a reluctance to write down material that might reflect badly on a member of the clerical order? If that is the case, we have an important difference between the world of the twelfth- and thirteenth-century jurists and that of the Rabbis of the Talmud.

13 The story is quite charming. Johannes' youngest daughter was named Novella. She learned the law from her father. Indeed, she learned it well enough that when he was sick, she served as a substitute lecturer for him. She was so pretty, however, that she had to lecture from behind a screen, so as not to distract the students (all of whom, of course, were male). The source of this story is Christine de Pisan in what is, for the Middle Ages, a quite tendentiously feminist work, *The Book of the City of the Ladies*. I must confess that I do not believe the story, though Johann Friedrich von Schulte, *Die Geschichte der Quellen und Literatur des Canonischen Rechts*, vol. 2 (Stuttgart, 1877), 211, retails it as true, and points out that Christine was in a position to know. In this he is followed by Guido Rossi, 'Contributi alla biografia del canonista Giovanni d'Andrea', *Rivista trimestrale di diritto e procedura civile* 11 (1957), 1451-1502, at 1458-70, 1481-6 (with much additional detail). That Johannes had a daughter named Novella, I do not doubt; it probably was also his mother's name. Two of his major works, *Novella in Decretales* and *Novella in Sextum* seem to be named after them. See Stephan Kuttner, "Joannes Andreae and his *Novella* on the Decretals of Gregory IX," *The Jurist* 24 (1964), 393-408 (expressing skepticism about the story at 396 and n. 9).