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Licence to kill?

by Jonathan Burnside

Summary
The Tony Martin case, in which an English farmer was convicted of murder for killing a nocturnal burglar, sparked a national, on-going debate about the extent to which householders may use force in self-defence. Exodus 22:2–3, which permits a householder to kill a burglar who breaks in at night, was favourably cited in the national press. This paper asks whether the householder should have a licence to kill the nocturnal burglar, and argues that one purpose of Exodus 22:2–3 is to provide a conclusive, objective test of when a householder may kill without incurring the vengeance of the 'avenger of blood'. In spite of its specific social and legal context, Exodus 22:2–3 highlights several important principles which should inform law-making in this area today.

The Tony Martin case
Tony Martin was a farmer from Norfolk, England. He lived in a remote and squalid Victorian farmhouse near the village of Emneth Hungate. The locals called his home 'Bleak House'. One summer night, three men went there intending to burgle it. They had 114 convictions between them. The house held bleak prospects for them: only two would return alive. In the car were the ringleader, the getaway driver and a young offender called Fred Barras. The ringleader said afterwards that he and his young friend were about 500 yards from the house when they were attacked by three Rottweilers. Climbing into Bleak House to escape, they hung around inside for about ten minutes. Suddenly, the house was lit up by a blast from a gun. Panicking, the ringleader ripped out a window in his desperation to escape, as the teenager shouted: 'He has got me. I am sorry. Please don't'. The shots came from an angry Martin who continued to fire until the gun was empty of bullets. The ringleader escaped with serious leg injuries. He staggered to a nearby house and raised the alarm. But his young accomplice was fatally wounded. He collapsed in undergrowth near the walls of the house and was dead within two minutes.

Martin claimed that he opened fire after being woken when the intruders smashed a window. But his claim that he had shot at them from halfway down the stairs was apparently disproved by scientific evidence that showed he must have fired his shotgun from the doorway of a downstairs room.[1] The prosecution accused him of lying in wait for the burglars and opening fire without warning from close range, in retribution for previous break-ins at his home. The jury convicted him (by a 10–2 majority) of murder.[2]

The case divided the nation. To many he was a 'have-a-go' hero who should not have been punished but congratulated on his marksmanship. To others he was a score-settling hothead who went too far. But whatever the rights and wrongs of Martin's specific action,[3] the case highlighted the occupiers' dilemma. What should I do if placed in a similar predicament? Should I wait for the police or hope the jury is in a good mood?

Martin's case is one instance of a wider concern. Earlier this year, a leading newspaper columnist declared that the implicit contract under which citizens practised restraint in return for State protection had broken down.[4] In March, an attack by the Metropolitan Police Commissioner, Sir John Stevens on what he described as an 'appalling' criminal justice process, met with wide popular support.[5]

1 Although this evidence was itself subsequently challenged.
2 His initial sentence of life imprisonment was subsequently reduced on appeal; *Martin* (2001), EWCA Crim 2245, 30 October 30 2001; *The Times*, 1 November 2001.
3 Of a record 270,000 readers who responded to a tabloid newspaper poll ('Should Martin be locked up for life?') only 10,800 supported the verdict.
4 S. Heffer, 'If the state fails us, we must defend ourselves', *Sunday Telegraph*, 24 February 2002.
5 Address to Leicester University, 7 March 2002.

Understanding Exodus 22:2–3

Against this background, Exodus 22:2–3 is of interest. These verses are sandwiched between two cases of 'animal-stealing' (Exodus 22:1, 4) and form a single unit (Exodus 22:1–4):[6]

> If a man steals an ox or a sheep, and kills it or sells it, he shall pay five oxen for an ox, and four sheep for a sheep. He shall make restitution; if he has nothing, then he shall be sold for his theft. (2) If a thief is found breaking in, and is struck so that he dies, there shall be no bloodguilt for him; (3) but if the sun has risen upon him, there shall be bloodguilt for him. (4) If the stolen beast is found alive in his possession, whether it is an ox or an ass or a sheep, he shall pay double.

The 'animal stealing' referred to in Exodus 22:1, 4 may suggest that the typical purpose of the 'breaking in' of Exodus 22:1 was to steal the householder's ox or sheep. (It was not unusual for an Israelite family to share their home, or at least their courtyard, with their most valuable animals.) If so, we are not simply dealing with the ancient equivalent of nicking the DVD player: the animals were the owner's livelihood. But does the householder have a 'licence to kill'? To answer this, we must consider how the original audience might have understood Exodus 22:2–3.

We must begin by recognising that biblical law is a particular genre of biblical literature, like biblical apocalyptic, wisdom or narrative. This means that biblical law makes certain assumptions about how it should be read – which might be very different to *our* assumptions about how it should be read. We will not read biblical law aright unless we attend to this difference. In particular, we must be careful not to project onto biblical law our own assumptions about how rules and language (especially legal rules and legal language) function.[7]

Understanding biblical law

Modern scholarly assumptions on how to read biblical law are often based on the values of modern liberalism, particularly the 'rule of law' (the belief that adjudication should be governed by laws and not by people). The dominant paradigm of 'conventional meaning' today is 'literal meaning', which is closely tied (as its name suggests) to writing.[8] When we talk about literal meaning, we often ask what situations the words 'cover'. However, there is another way of thinking about language and about legal rules. Instead of asking, What situations do the words of this rule cover?, we may ask, What typical image(s) do the words of this rule evoke? What situations (within known social contexts) does it make you think of? It is a picture-oriented or 'imagistic' approach, rather than a literal one.[9] Bernard Jackson persuasively argues that this latter approach is more appropriate for understanding biblical law.[10]

This distinction between 'literal' and 'imagistic' approaches is an important one in practice. Rules that are read literally cover all cases that may be included under their language. By contrast, rules that are understood as 'pictures' apply only to the typical cases they make you think of. Take a simple example, such as the 'eye for eye, tooth for tooth' formula in Exodus 21:24–25. One of the classical arguments against this rule (posed by Plato and others) was, What happens if a one-eyed man puts out one of the eyes of a two-eyed man? This objection assumes a literal reading: namely that the rule applies whatever the circumstances of the parties. A literal application of the 'eye for an eye' rule would mean that the offender's eye must be taken, even though this means that he will be rendered completely blind, whereas his victim was left half-sighted.[11]

An alternative approach, preferred by Jackson, is to read Exodus 21:24–25 'imagistically'.[12] The typical offender is 'pictured' as a two-eyed man. This means that the case of the one-eyed offender is far removed from the typical case. Under this 'picture-oriented' approach, the further the real-life case is from the 'typical case' the less likely it is that the rule applies and the more room there is for negotiation between the parties.[13]

The question is no longer whether the dispute is 'covered' by the literal meaning of the words of the rule, but whether the dispute is sufficiently *similar* to the picture evoked by the rule to justify its use in order to resolve the problem. If it is sufficiently similar, it applies, even though it is not the literal meaning of the words. There is an example of this in the New Testament, where Paul argues that Deuteronomy 25:4 (the ban on muzzling oxen) is not solely concerned with oxen but 'applies' to those who proclaim the gospel (1 Corinthians 9:9, 14). For some, a 'picture-oriented' or 'imagistic' approach to biblical law might seem rather strange. But this is what historians are always discovering about the way people other than ourselves thought. In fact, resistance to this way of reading biblical law may simply show how ingrained literal meaning has become in our culture.

Significantly, questions of relative similarity evoke *intuitive* judgements of justice to a greater degree than literal interpretations. 'How similar…' questions are evaluative questions ('how justified is it to treat these cases as similar?'). This in itself suggests a more popular form of dispute resolution than we are used to.[14] It also means that biblical law demanded a great deal of private and creative reflection (see, for example, Deuteronomy 6:6–9). The role of the law in educating and instructing in wisdom is affirmed in the New Testament. In Galatians 3:24–25, for example, Paul compares the function of the law to that of a pedagogue who was responsible for a Greek boy's early discipline and education.

Terror at night

What, then, is the typical case of Exodus 22:2? The image is of someone breaking in at night. If you were to ask an ancient Israelite, What do you think of when you think of someone 'acting like a thief'?, part of the answer would have included 'someone who works under cover of darkness'.[15] Jackson notes that this is corroborated by Job 24:13–16, which refers to the thief 'digging through houses in the dark'. Job 24:16 even uses the same terminology as in Exodus 22:2 *(bamachteret)*.[16] Exodus 22:3 confirms this, stating explicitly that the killing is not legitimate if it takes place by day.

'Night' is central to Exodus 22:2. In Job 24:13–17, 'night' is associated with terror and evil (understandable given the absence of artificial lighting). The association of the dark with murder (Job 24:14) suggests that the paradigm case of Exodus 22:2 is a nocturnal burglary where the householder is in fear of his life. He cannot tell, at night, whether the intruder has come to steal his property or to attack him. But as we move away from the typical

6 As signified by the Hebrew. Exodus 22:1–4 consists of a norm introduced by the Hebrew word *ki*, followed by three further norms each introduced by the Hebrew word *im*. Exodus 22:5 moves onto a different norm introduced by *ki*.

7 Bernard Jackson, *Studies in the Semiotics of Biblical Law*, Sheffield Academic Press, 2000, p.13.

8 *Ibid*., p.14.

9 Cf. Tom Wright's critical-realist theory of knowledge which emphasises the essentially 'storied' nature of human knowing, thinking and living. See N. T. Wright, *The New Testament and the People of God*, SPCK, 1992, *passim*.

10 Jackson, *op. cit., passim*. The claim relates to the Covenant Code and in particular the *Mishpatim* (Ex. 21:2–22:17).

11 *Ibid*., pp.284–286.

12 *Ibid*.,

13 *Ibid*., pp.75–82.

14 *Ibid*., pp.82–92.

15 Note that one of the important things about a 'paradigm case' is that all the details about time and place are already present. They do not need to be spelt out (as in a modern statute) because they are already part of the stereotype.

16 Jackson *op. cit.*, 75–77.

case, the less reason the householder has for killing the burglar. Accordingly, Exodus 22:3 states that the owner who kills during the day is guilty of bloodguilt.

This suggests that the paradigm case of Exodus 22:2–3 (as in Job 24) is about protecting life, and not simply about allowing the householder to take life to protect his property. This is consistent with the general tenor of biblical law that sets lesser penalties for property offences than comparable laws in other Ancient Near Eastern legal collections.[17]

Bloodguilt

We must also recognise that the key issue in Exodus 22:2–3 (and referred to twice) is 'bloodguilt'. Exodus 22:2–3 deals with the situation where a person, made in the image of God (Genesis 1:26), has been killed. Someone has to account for the death. In ancient Israel, when a person was killed, the next of kin of the deceased was sometimes allowed to 'avenge' this shed blood by killing the killer. This 'avenger' is referred to in the Bible as the 'avenger of blood' (or *go'el haddam*).[18]

The purpose of Exodus 22:2–3 is to provide a conclusive, objective test of when the 'avenger of blood' is justified in killing the householder. So far as the householder is concerned, it provides a test of when a householder may kill without incurring the vengeance of the 'avenger of blood'.[19] Exodus 22:2–3 is thus one of a number of texts in biblical law that restricts and regulates vengeance in ancient Israel.[20] If the killing takes place at night, there is no bloodguilt and the victim's family is not allowed to avenge the death. If the killing takes place during the day, there is bloodguilt and the 'avenger of blood' is allowed to kill the householder. Exodus 22:2–3 is a 'rule of thumb' (or what Jackson calls a 'self-help' rule) that allows people to apply the law themselves without the need for litigation or involving outside adjudicatory agencies.[21] The test is sufficiently clear for the victim's family. They can apply it themselves, even in the heat of the moment when they are angry.[22] The great advantage of a 'self-help' rule in this context is that homeowners and thieves know in advance exactly where they stand. There are clear rules of engagement. Such rules make sense in societies, such as ancient Israel, where people are empowered to apply the law among themselves. It presupposes the social value of avoiding having your disputes resolved by court adjudication, as classically expressed in Proverbs 25:7–10 (cf. Luke 12:57–59).

It is interesting that, following the Tony Martin case, Exodus 22:2–3 was cited with approval in the Letters pages of the Daily Telegraph. But the primary purpose of Exodus 22:2–3 is to guide the 'avenger of blood'. Now, it may be that the reason why the householder does not incur the wrath of the avenger of blood is because it is presumed from the time of day (i.e. night) that he acted in self-defence (or at least, that he is entitled to be in fear of his life). But self-defence is not the only possible justification for the law in Exodus 22:2–3. Other justifications may include difficulties of proof and subsequent law-enforcement. The historical context is the 'avenger of blood'. The primary addressee of Exodus 22:2–3 is the 'avenger of blood'; the householder is secondary.

The modern relevance of Exodus 22:2–3

Yet despite this historical context, Exodus 22:2–3 has had an impact on English common law. The famous eighteenth-century jurist Blackstone wrote: 'If any person attempts … to break open a house *in the night-time*, [italics original] … and shall be killed in such attempt, the slayer shall be acquitted and discharged.'[23] Blackstone explicitly cites Exodus 22:2 by way of support.[24] Later law went beyond Blackstone to allow the killing of burglars even if it did not take place at night. A nineteenth-century legal textbook records that in 1811 a certain septuagenarian (Mr. Purcell of Co. Cork) was knighted for killing four burglars with a carving knife. As late as 1924, in the case of *Hussey*, the Lord Chief Justice approved the view that, 'in defence of a man's house, the owner or his family may kill a trespasser who would forcibly dispossess him of it'.[25] Here, the householder could kill during the day to defend his property – the very opposite of Exodus 22:3.

In recent years, however, there has been greater tendency to define what degree of force defenders can legitimately use. The Court of Appeal in *Owino* (1996) held that in determining whether a defendant acted in self-defence the jury must decide two things. First, whether the defendant honestly believed that the circumstances required him to use force to defend himself from an attack or threatened attack and, second, whether the force used was reasonable in the circumstances as he believed them to be.[26] But what constitutes 'reasonable force' is for the jury to decide.

Given these developments, is Exodus 22:2–3 of continuing relevance? There are three points of convergence between ancient Israel and modern society.

Steering the current debate

First, we argued that Exodus 22:2–3 is concerned with limiting vengeance. This remains a legitimate concern (for example, the murder in 2001 of a retired sea captain who was wrongly suspected of being a paedophile). Civilised society rejects the use of unnecessary and undue force. Accordingly, we should resist any movement towards a trigger-happy 'make my day' culture built on first furies and an *ad hoc* death penalty. It did not help Tony Martin's case that, in 1994, he apparently shot towards a man whom he thought was stealing apples from his orchard. The problem is how to set limits upon vengeance in a way that is fair to householders as well as to burglars. In Exodus 22:2–3 the risk is placed on the burglar. Today the risk is on the owner. Some rebalance is required.

Second, we argued that the paradigm case of Exodus 22:2 takes place at night. We claimed that one of the functions of the 'dark' was to show that the householder was in fear of his life and that the further one departs from this paradigm, the less permission there is for the killing. This remains a key issue. The Court of Appeal in *Owino* affirmed that the state of mind of the person who acts in self-defence is important. For these reasons, Exodus 22:2 is still relevant today, in spite of modern artificial lighting. The key issue is whether the householder is in fear of his life, not

17 Cf., for example, Ex. 22:1 with Laws of Hammurabi 9–10; M. Roth, *Law Collections from Mesopotamia and Asia Minor*, Atlanta: Scholars Press, 1997, pp.82–83.

18 Although 'avengers of blood' are not unknown in many parts of the world today, the role of the *go'el haddam* in our society is taken by the police and the Crown Prosecution Service.

19 Jackson *op. cit*.

20 Cf. the instructions regarding the cities of refuge (Num. 35:6, 9–15; Deut. 19:8–13). Other texts, such as the *lex talionis* ('an eye for an eye and a tooth for a tooth') are also best understood as setting limits to vengeance.

21 Jackson *op. cit.* Jackson notes that the laws on either side of Ex. 22:2–3 also contain 'arbitrary' rules. In Ex. 22:1 theft is proved only if there is evidence of sale or slaughter of a stolen animal by the accused, whilst in Ex. 22:4 it is proved by 'hot possession'. If the thief does not possess the stolen property, no payments are due. The tests are arbitrary in several respects. First, no other evidence seems to count in the absence either of hot possession or disposal by way of slaughter or sale. Second, the evidence appears to create conclusive presumptions of guilt.

22 Deut. 19:6 refers to the 'avenger of blood' pursuing the fugitive 'in a rage'.

23 Blackstone, Sir William, *Commentaries on the Laws of England*, Vol. IV (10th edn.), London: Strahan and Cadell, 1787, p.180. It was settled by the 1450s that burglary was a nocturnal crime; see J. H. Baker, *An Introduction to English Legal History* (3rd edn.), London: Butterworths, 1990, pp.604–605. Cf. also Fitzjames Stephen, Sir James, *A History of the Criminal Law of England*, Vol. 3, London: Macmillan, 1883, p.150.

24 Blackstone, *op. cit.*, p.181.

25 *Hussey* (1924) 18 Cr.App.R. 160.

26 *Owino* (1996) 2 Cr.App.R. 128.

whether the lights are on or off. Even with all the lights on, nocturnal burglary is still a frightening experience. People feel more vulnerable at night than during the day and there are fewer people to call on for help. Tony Martin claimed that he had been in fear of his life (which may well have been true) but the scientific evidence presented the jury with the stereotype of a person who was 'lying in wait' rather than a 'frightened householder acting in self-defence'.

Third, we argued that Exodus 22:2–3 functioned as a 'rule of thumb'. This contrasts with the position in modern law that holds that 'reasonable force' is a matter for the jury to decide. The stated policy of the Crown Prosecution Service offers no guidance. Following the Tony Martin case, the Director of Public Prosecutions stated that 'If in the agony of the moment they [householders] do something which on reflection is an overreaction then we wouldn't prosecute, *unless we thought there was a realistic prospect of conviction.*.. Even in cases of quite extreme violence, if it is sudden and in the agony of the moment, *we would probably not prosecute*…'[27] The problem with this is that householders and burglars do not know in advance exactly where they stand. There are no clear rules of engagement. Imagine you are lying at home in your bed at night and you are disturbed by the sounds of an intruder. You do not know who threatens you. It might be a mindless thug, a drug-crazed youth or a professional burglar. Nor do you know whether he is armed or has one or more accomplices. In that situation, how do you determine the action that will deal with the threat; protect yourself, your family and your property and, at the same time, satisfy the niceties of your legal obligation to use no more force than is 'reasonably necessary' in the circumstances?

Together these three aspects (limiting vengeance, the morality of the householder's intention and 'rules of thumb') provide a steer to the current debate.

Using a 'rule of thumb'

For some, the 'rule of thumb' in Exodus 22:2–3 simply reflects an early stage of legal development. It may indicate the low institutionalisation of ancient Israel at that time, rather than a positive value choice. Either way, there are advantages and disadvantages to having a 'rule of thumb'. The obvious advantage is that the householder knows *in advance* what force he is permitted to use. Burglars also know that they are putting themselves in danger. Neither they nor their families can complain if they are shot. The disadvantage is that there are cases where having a simple rule is a harsh rule. Ultimately there is a trade-off between the potential injustice of giving someone a raw deal because it is simple, or giving a lot of people a raw deal because the law is unclear and people do not know where they stand in advance.

Some might object to this 'rule of thumb' on the ground that it is either too harsh on the burglar or, at the other extreme, that it is too soft. First, one might object that killing the burglar is too harsh a response, even if you are in fear of either your own or your family's life. But the fact that the owner is *permitted* to act in this way does not mean that he *must* do so. We should recall Jesus' observation that at least one of the laws in the Bible was given 'because your hearts were hard' (Matthew 19:8). Just because there is a law permitting self-defence – even a clear law – does not mean that one personally has to take advantage of it. Christians are called to turn the other cheek, but not to turn other people's cheeks for them.

Alternatively, some might object that the rule in Exodus 22:2–3 is too soft on the burglar. What was the Israelite householder to do with a thief who breaks in during the day? Was he obliged to surrender his property to housebreakers, or to assist them in finding what they want to steal? No. Presumably, the householder was allowed to take whatever action he felt necessary, provided it fell short of homicide.

A launchpad for public concerns?

In addition to providing a relevant steer to the current debate, Exodus 22:2–3 goes beyond the question of a 'licence to kill', suggesting several other issues. It challenges the modern trend to 'hand over' public responsibilities to a growing number of criminal justice professionals and agencies. The State has assumed a monolithic and paternalistic approach to the public in regard to crime control and prevention. The result is an 'outsourcing' approach to crime in which victims and other affected parties have been progressively disabled from handling their own conflicts. This trend – of increasing professionalisation at the expense of lay involvement – is gathering momentum. The central practices of participatory democracy at the heart of traditional criminal justice have been the institutions of the jury system and the lay magistracy, both of which share the notion of 'judgement by one's peers'. Yet both are currently under threat. It is probably fair to say that there are *no* restraining influences on the professionalisation of agencies, except perhaps the Treasury and the *vox populi*. This makes Exodus 22:2–3 something of a touchstone for public concerns about a criminal justice process that appears 'out of touch' and which does not protect their interests when needed. Related to this, Exodus 22.2–3 raises questions about what we mean by 'active citizenship'. Citizenship will be part of the National Curriculum later this year. Shouldn't this include education about legal obligations? Shouldn't school-leavers be taught how to make a lawful citizen's arrest? When even educated people don't know the limits of the law, the legacy of Exodus 22:2–3 may be a vision of society where citizens are allowed to take on the role that Government has increasingly taken from them.

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27 *Daily Telegraph* 10 May 2000.

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