

The Historical and Evolving Perspective in Religion  
toward “An Eye for an Eye”

Asher Jacobson

A Thesis  
in  
The Department  
of  
Theological Studies

Presented in Partial Fulfillment of the Requirements  
for the Degree of Masters of Arts at  
Concordia University  
Montreal, Quebec, Canada

September 2006

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*ISBN: 978-0-494-20718-5*

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*ISBN: 978-0-494-20718-5*

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## ABSTRACT

### The Historical and Evolving Perspective in Religion toward “An Eye for an Eye”

Asher Jacobson

The law of talion, also known as the principle of retaliation is found in the Torah, the Hebrew Bible. In the past and also today, the meaning of this principle remains highly discussed. It is often interpreted as vindicating justice, whereas it is also considered as a harsh-barbaric maxim incompatible with a civilized society which has developed legal principles.

By investigating the purpose, function and morality of this law in the ancient world in Israel and in society today, I hope to demonstrate that this principle and its application is just as critical and relevant to our lives, particularly in today's society.

A major question through the centuries has been: Was there a literal dimension to "an eye for an eye" - the *lex talionis* - or was the Bible's original intention monetary compensation? By observing history, I will explore the consistencies, moral advances and declines and the practices of Judaism, Christianity and Islam –how they applied the principle through their social and cultural structure, and how each viewed the others religious beliefs in relation to this principle.

A principle teaching within Judaism states that G-d abides by all the commandments which he sets forth. Thus, the justice of talion also applies to Divine retribution. By reflecting on historical events (catastrophes and genocides) in relation to ‘eye for an eye’ and ‘life for a life’, in this paper I expect to shed some insight on the how and why which has plagued the human spirit for thousands of years in relation to true justice.

Dedicated to my loving and supportive wife, Lieba

Many thanks to Joan Lackman for her unwavering assistance.

*The sword comes into the world because of justice delayed and because of justice perverted.*

(Ethics of the Fathers. 5:8)

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1.

INTRODUCTION:

The challenge and premise that David Hollenbach and John Noonan present in Doctrinal Development<sup>1</sup> is to redescribe reality within the scriptural framework, rather than translating scripture into extra-scriptural categories. It is the text, so to speak that describes the world rather than the world the text. In Noonan's terms, we risk projecting contemporary needs and experience onto the mirror of which one claims to be seeing one's objective beliefs. Today, it is imperative to examine the text in a most objective manner, putting aside our preconceived notions, depicting, analyzing and broadly approaching the text.

The law of talion, also known as the principle of retaliation, "an eye for an eye..." is found in the Torah of the Hebrew Bible. The law of "an eye for an eye" is usually called the law of retribution, or "*lex talionis*" (Latin, *lex* [law] and *talio* [like]; the punishment is like the injury), or the law of equivalency.

In the past and also today, the meaning of this principle remains highly discussed. In particular, considering that international terrorism is on the forefront of the world agenda and is being used by extremist groups as a tool to vindicate punishment, in the form of retribution and justice all in the sanctified name of morality, justice, religion and faith. The law of talion is often interpreted in the sense of vindicating justice, whereas it is also considered as a harsh-barbaric maxim incompatible with a civilized society which has developed legal principles.

For reliance on mistranslation, projection of preconception, brutality of intent and ignorance of the Biblical context, probably no Biblical verses are more famous, or

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<sup>1</sup> Lafontaine, D. R. (2002). Special Questions in Ethics: Doctrinal Development and Moral Theology. Montreal, Eastman Systems, Inc., pp. 7-14, 163-173

infamous, than the verse "an eye for an eye, a tooth for a tooth, a hand for a hand, a foot for a foot, a burn for a burn, a wound for a wound, a bruise for a bruise" (Exodus 21:24-25).

A proper understanding of punishment requires that we distinguish between retaliation and retribution. Retribution or just punishment should be designated to make the victim whole again, to reinstate his or her condition and self-esteem as it existed prior to the crime. Retaliation is a conception *sui generis*, based on the necessary reestablishment of the legal order secured by inflicting harm on the offender.

My thesis aims to study the scriptural sources, its variations within the broader context accommodating and probing the various arguments and interpretations brought by ancient Hebrew and non-Hebrew text evaluating the textural differences, as well as the problems and issues of grammar and syntax of the text with emphasis on vocabulary and obscure languages. Through this discussion I shall also take note of the recurring themes and structure of the immediate and larger context to which the passages of "eye for an eye" belong.<sup>2</sup>

Some scholars have already pointed out that it is quite likely that the talion formula is mere theoretical and that it has nothing to do with the real practice. It is just a general principle or even proverbial saying to warn people against committing crimes. Others maintain that it was an actual practice to do justice to persons who had a socially inferior status. I shall carry out an in-depth investigation to decide on the question whether we are dealing with historical information (legal and literal character) or with an idealistic and figurative teaching.

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<sup>2</sup> Hertz, H. H., Ed. (1996). The Pentateuch and Haftorahs, 2nd ed. London, Soncino Press. Exodus, 21, 23, Leviticus 19, 24, Numbers 25, 35, Deuteronomy 16, 19, 22, 25

Having studied Exodus 21:22-25 through the application of the synchronic and diachronic methods, I shall then explore the law of talion of Exodus 21: 23-25 by means of other biblical texts (Leviticus 24:17-22 and Deuteronomy 19:16-21) as well as by parallel ancient Near Eastern texts such as the Code of Hammurabi (§195ff.). I shall situate the theme of retaliation in the larger ancient Near Eastern context, e.g. against the cultural, social, religious and legal background. The main objective of this approach is to have a better understanding of the theory of equal retribution and of the origin of the talion formula.

I will explore the ancient Middle Eastern cities that have yielded documents through the work of archaeologists. (i.e., the Sumerian Code of Ur-Nammu, to the Code of Hammurabi., dating from the eighteenth century, B.C.E) These documents can shed some light in the methodologies and practices of this formula.

I will also journey through the history, investigating the consistencies, moral advances and declines and the applied principle in various religions and cultural structures, particularly the variances of approach between Judaism, Christianity and Islam.

In the times of the Talmudic rabbis, the verse "an eye for an eye" was interpreted to mean not cruel retribution or any form of retaliation, but rather pecuniary recompense for bodily harm for which the assailant must compensate the victim through giving the value of an eye for an eye which he exacted. Many claim that the rabbis were attempting to change the literalism of the text, a literalism that the Pharisees so often defended. The Talmud was rebuked for the uncomfortable apologies of the rabbis too intellectually dishonest to confess to the important contradictions of Biblical Law obtained by its



opponents.<sup>3</sup> I will investigate the retribution/compensation debate, which was the source of much controversy during the Babylonian academy of Talmudic times.

This thesis will also try to understand the dialectical discussion of the Talmud and its method of law formation, concerning the biblical principal of “eye for an eye”. I will incorporate the discussions and objections of the rabbis of the Babylonian era, which are discussed at length in the Babylonian tractate, Baba Kama and have, as I understand, been misunderstood or mistranslated by many throughout history. A careful reading of the context of “an eye for an eye” reveals the egregiousness of its popular misreading - the absence of any basis for its dubious status as a Biblical disfiguration - as well as the logic of its Talmudic exegesis.

The objective of this exercise is to gain a better understanding and, perhaps, shed some light on the theory of equal retribution and the origin of the talion formula, throughout our cultural, legal, social and religious history.

## **II. THE MORAL AND ETHICAL QUESTION**

Is the value of life undermined by the call for death of the offender? Does capital punishment serve as a deterrent or is it an inherent justice, based on a Divine retribution? Whoever sheds the blood of man shall his blood be shed; for in the image of G-d, has G-d made man.<sup>4</sup> Is it a civic responsibility or a Divine responsibility? The ramifications of these perceptions are widened when introducing the ongoing debate of the use of public funds and taxpayers money for either a life sentence or an execution.<sup>5</sup>

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<sup>3</sup> Neusner, J. Ed. (1993) A History of the Mishnaic Law of Damages. 1 Baba Qamma. Leiden, E.J. Brill

<sup>4</sup> Ibid, Genesis 9:6

<sup>5</sup> Bulletin, Nov. 24, 2003 “State spending More on Prisons than Higher Education”

Does the law of 'eye for eye' encourage more violence? And if its purpose is to implement equal justice, can there ever be an exact equivalence in the body parts of two individuals? Suppose, for example, the victim's eye was sharper than that of the perpetrator; or suppose the latter was blind. Or imagine that a lame person caused another to be lame. In cases like these and countless others, if the "eye for an eye" legislation is implemented in a literal sense would we not be frustrating the principle of true equivalent justice? Would the eye for an eye dictum result in a legal assault on the human dignity of the assailant as serious as the original assault on his or her victim?

People who like to argue about the Bible often use what are called, "proof texts" extracting various scriptures to prove their point of view. Those who argue that the Bible supports capital punishment often refer to Exodus 21:22-25.

What's intriguing about this use of "proof texting" is that those who eagerly use it to support capital punishment are reluctant to talk about texts, which prescribe death for other, lesser crimes. For example, one is to be put to death for contempt of parents,<sup>6</sup> bestiality, or sacrificing to foreign gods or profaning the Sabbath or adultery. All of these carry the death penalty in the Bible. This is why the study of the text to its most intrinsic detail becomes a vital and important tool to the ultimate application of the law.

The law of "eye for an eye" sounds barbaric and inhumane to many modern people. And until rather recently scholars tended to interpret it in terms of the practice reflecting a very early stage in the development of the Israelite legal system.

A major question through the centuries has been: Was there a literal dimension to "an eye for an eye" - the lex talionis - or was the Bible's original intention in this

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<sup>6</sup> Exodus 21:17

expression monetary compensation, as codified in the Mishnah?<sup>7</sup> When we study the context of "an eye for an eye" carefully, we immediately find many logical and grammatical implications that the Biblical text is ambiguous and capable of sustaining both interpretations, i.e., physical retaliation and monetary compensation.

In my study, I will examine carefully, the many different perspectives and approaches to the text in support of the literal or figurative understanding of the scripture. My hope is that through thorough systematic analysis I will be able to come to a definitive conclusion.

### III.

### CHAPTER 1:

#### STUDY OF SCRIPTURAL SOURCES

"An eye for an eye" covers two verses (Exodus 21:24-25), concluding a context of six verses (Exodus 21:18-19, 22-25). The conclusion makes sense only in conjunction with the context. It is a contextual teaching concluding a final aspect of two chapters in Biblical civil law.

The chapter begins with a case of intentionally inflicted injury. It concludes with a case of accidental injury. The opening verses (18-19) - on intentionally inflicted injury - read as follows:

*"And if men quarrel and one strikes the other with a stone or a fist, and he [the victim] does not die, but falls into bed - if he gets up and goes outside under his own power, the one who struck him is absolved, except for the loss of his time, which he [the one who struck him] shall pay - and he shall cause him to be thoroughly healed."*<sup>8</sup>

The closing verses (22-25) - on accidentally inflicted injury reads as follows:

*"And if men shall fight and collide with a pregnant woman and she miscarries, but does not herself die, he [the fighting man] shall surely be punished, in accord with the assessment of [the value of the fetus] made by the woman's husband . . . But if the woman shall die, you shall give a life for a life; an eye for an eye, a tooth for a tooth, a hand for a hand, a foot for a foot; a burn for a burn, a wound for a wound,...."*<sup>9</sup>

The "eye for eye" punishment is an extension of the punishment for accidental pregnancy reduction. Two men fight; they intend to injure each other, but in the process accidentally destroy a fetus. Its loss must be compensated monetarily (on this ruling's implications for abortion, more below). But if bodily injury is accidentally inflicted on the woman herself, and the injury is fatal, the fighting men must give "a life for a life." Analogously, if an accidental bodily injury destroys another person's eye, the injurer must

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<sup>8</sup> Hertz. Ex. 21:22

<sup>9</sup> Ibid. Ex. 21:22-25

give "an eye for an eye" and so on down the line for a tooth, hand, foot, burn, wound and bruise.

Serious questions arise. What is the meaning of "life for life" if any harm follows? In this unintentional tragic mishaps, can we seriously maintain that the Bible decrees the death penalty for the one who caused this accident? This is clearly an unfortunate circumstance for which the Bible set aside cities of refuge<sup>10</sup>. What is striking is that in the case of intentional inflicted injury, the Bible does not introduce the punishment of "an eye for an eye." All that the Bible requires from the perpetrator is to pay for time and medical expenses. This is contrary to the closing verse of an accidentally inflicted injury where the Bible introduces the phrase "an eye for an eye." Could the Bible possibly mean that in the case of an intentional injury, the punishment is restricted to lost time and medical expenses, but in the case of an accidental injury, the punishment is to gouge out the injurer's eye? Could the Bible possibly impose a less severe punishment for an intentionally inflicted injury than for an accidentally inflicted one?

Clearly, the Biblical context rules out the popular reading of "an eye for an eye" as the obligation to blind him who accidentally blinded someone else. Logically one is forced to interpret here the meaning of "eye for an eye" as the value of an eye, -financial compensation.

There are two distinct cases here: in the first case the child is lost, in the second case the woman is hurt. In the first case, it is reasonable to assume that the Torah expects the attacker to pay for some kind of estimated value of the lost child. In the second case, if the woman who is the victim is dead, the attacker – assuming his action was deliberate – is guilty of murder, and "life for life" means execution not as payment for the victim's

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<sup>10</sup> Bakon, S. (1988). "Eye for Eye." Dor le Dor 16(3): 158-163., p. 162

loss but as punishment in criminal law. If the victim lives but is wounded, just as there was a financial payment where the attacker paid for the value of the child, why cannot we say that here too there is a financial payment for the value of the eye? If the penalty for any kind of physical harm would always have to be physical retaliation, why not retaliate against the child of the attacker? Or against his pregnant wife?

If we broaden the context to proximate passages in Exodus (Ex. 21:18) we find a distinct differentiation between punishment for murder, manslaughter and lesser harm, where payment is expected for his essential loss: his loss of earnings and the cost of healing. It is instructive to notice how the concept of healing is used: not in terms of healing the victim's desire for vengeance, but healing him physically; that is, paying his doctor's bills.

We must admit the difficulty of the explicit language: The injury he inflicted on another shall be inflicted on him. Perhaps the Torah was trying to say that morally the assailant should suffer the same harm, pain, shame, loss of wages, medical expenses as he inflicted on his victim. Perhaps for this reason, even the rationalist and traditionalist Maimonides, when he was engaged in giving the philosophical rationalization of the laws rather than their legal explication and elaboration, actually does defend the law of eye-for-eye in literal terms:

*We must take life for life...And he who mutilated a limb of his neighbor, must himself lose a limb. 'As he has caused a blemish in a man, so shall it be done to him.' You must not raise an objection from our practice of imposing a fine in such cases. For we have proposed to ourselves to give here the reason for the precepts mentioned in the Torah, and not for that which is stated in the Talmud. I have, however, an explanation for the interpretation given in the Talmud, but it will be communicated viva voce. Injuries that cannot be reproduced exactly in another person, are compensated for by payment: 'Only he shall pay for the loss of his time, and shall cause him to be thoroughly healed' (Guide for the Perplexed III: 41)*

This is most strange. Usually we have to defend the talmudic position and we embrace Maimonides and what he has to say with enthusiasm. Here it is he who is so impressed by the literal language of the Torah text that he actually accepts and defends the principle of *lex talionis*, while it is the Talmud that takes the more reasonable and plausible version of monetary payment. Rather than distinguish between cases where the penalty can exactly duplicate the crime so eye-for-eye is applied literally, and other cases where such precise retaliation is impossible so monetary payment is applied, the Talmud simply assumes that physical retaliation can never be precise and identical and therefore the Torah must have meant monetary compensation in all cases.

Furthermore, as Shimon Bakon points out from the following verse in Exodus (21:26)

*And if a man strikes the eye of his bondsman or the eye of his bondswoman and destroy it, he shall let him go free for his eye's sake. And if he smite out his bondsman's tooth or his bondswoman's tooth, he shall let him go free for his tooth's sake*<sup>11</sup>

The text clearly indicates that the loss of any limb, from the most essential down to the least indispensable, gave the slave immediate freedom. It is absurd to assume that causing bodily injury, such as the loss of an eye or tooth to a bondsman, will result in his going free, while striking the eye or tooth of a free man shall be penalized by causing the perpetrator to lose either an eye or a tooth.<sup>12</sup>

But we must ask if the reasonable conclusion of the contextual approach to the scripture is that we are talking about financial compensation, then why does not the Bible say so? What is the biblical basis for many of the sages and rabbis of the Talmud, as we shall see later, to interpret the text in such a manner?

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<sup>11</sup> Hertz. Ex. 21:26

<sup>12</sup> Bakon., S. P. 162

Here we must carefully examine the wording of the text. If the Bible meant, take the eye of the injurer for the eye of the victim, the Bible would have said so. But the Bible never says "take an eye for an eye." The Bible says, *venasatah ונתתה* (Ex. 21:23), which means "you shall give" premising the punishment in the context of "and you shall **give** . . . an eye for an eye" As Avigdor Bonchek has noted, "Were the text's intention to extract an eye from the villain, the use of the word 'give' is inappropriate. The lex talionis punishment is meant to take from the guilty, not to give to the victim. Giving implies something that is meant to reach the recipient. Monetary compensation fits that definition." If the text "eye for an eye" were to be taken literally, then the appropriate Hebrew word "ו לקח" which means "and you shall **take** . . . an eye for an eye" should have been employed.

Many Hebrew and Biblical scholars identify another multi-century mistranslation of the "eye for eye" text which, when corrected, offers further support for the Talmudic exegesis of monetary compensation.<sup>13</sup>

For thousands of years, when discussing this maxim in the Torah, the term "eye for an eye" was used, and continues to be used, as a description of the Torah's retribution. But after careful reading of the Hebrew text, we find that no such terminology is found in any of the four places of which the Torah uses this form of retribution.

The Bible does not say, "an eye for an eye." It says, "and you shall give תחת (*tachat*) an eye" What does the Hebrew word תחת (*tachat*) mean? This is a word seldom used in the text of the Torah and requires our attention so that we may understand what

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<sup>13</sup> Bonchek, A. (1997). Studying the Torah. New Jersey, Jason Aronson. , pp. 64-68



the law is indicating. We find the word תחת (*tachat*) employed, earlier in the text in another place in the Bible, in the Book of Genesis. After Abraham, lifts his sword ready to sacrifice his son, Isaac on Mount Moriah, he was suddenly told by the angel of G-d not to sacrifice Isaac, "Abraham went and took the ram and brought it up for a burnt offering **instead of (*tachat*)** his son."<sup>14</sup> In the Hebrew *tachat* - connotes not identical substitution, but one item substituted for a different item. תחת (*tachat*) in Hebrew means "in place of; instead of. This strange phraseology of *tachat* is found in our case of "eye *tachat* eye" *Tachat* does not imply a duplicate substitution (retaliation), but rather implies monetary compensation.<sup>15</sup> So the text in the end is implying "but if any harm follow, then you shall **give** an eye *tachat*, a similar substitute, in place of an eye. "An eye for an eye" means to give something in place of the lost eye, that being monetary compensation.

The sage, Eliahu of Vilna, supports this premise. He states that the correct Hebrew grammar to express "eye for an eye" should have been stated עין בעד עין (*ayin baad ayin*) which means literally "an eye **for** an eye", instead of *ayin tachat ayin*. Why did the Torah not use the more appropriate "*ayin baad* (literally, for) *ayin*" instead of "*ayin tachat*" (literally, underneath)? "*Tachat*", he answers, implies that in the practical world the Torah only demands monetary payment for the loss of an eye.<sup>16</sup>

But the pressing question is why does the text insist on labeling compensation by the term "eye"? Some scholars suggest that the ambiguity of the text in why it doesn't use the word "compensation" is to teach that monetary compensation can never truly deliver a just retribution. When the Jewish courts came to compensate victims, they

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<sup>14</sup> Genesis 22:13

<sup>15</sup> Bonchek, A. (1997). Studying the Torah. New Jersey, Jason Aronson., pp. 64-68

<sup>16</sup> Eliahu ha Mishpatim

recognized that they could never fully restore the damage done. No price can be put on sight; no payment can replace it. In essence, the injurer deserves to lose his eye. His compensation to the victim is morally incommensurate to the injury, no matter how much he pays. Compensation cannot complete atonement. The Bible uses the harsh phraseology, "an eye in place of an eye," to emphasize that compensation does not wipe the slate clean. The injurer must fill himself with remorse and repent.<sup>17</sup>

The revered Chazon Ish reinforces this idea of the harsh language. "The law acts more as a moral force rather than by way of its material consequences, In emphasizing appreciation of the evil committed, it is proper for the text to adopt a strong phrasing."<sup>18</sup>

In his commentary on parshas Mishpatim, Rabbi Hillel Goldberger asks why should there be moral culpability? Did not the injurer inflict harm accidentally, to which no moral culpability can be attached? Why is the injurer morally responsible at all? While culpability is less for accidental than for intentional harm, there is no such thing as a scot-free accident. Accidents unveil personal traits, whether of malice or of sloppiness. The person was not careful or sensitive enough to his or her surroundings or did not carefully calculate the consequences of their actions. Accidents teach people lessons about themselves. Accidents are occasions for self-scrutiny and repentance. Even for an accidentally destroyed limb, the injurer must engage in deep repentance.

There are counter arguments from a textual point of view, supporting the literal translation of 'eye for eye.' They are found in Exodus 21: 22-25:

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<sup>17</sup> Goldberger (2001). On the Law of Retaliation - 'An Eye for An Eye'.

<sup>18</sup> Enker, A. (1991). "Lex talionis: The "Plain Meaning" of the Text." S'Vara 2(1): 52-55. (Cited in Enker, p. 55 )

With those who prove monetary compensation from the word ונתתה *venasatah* stated in Exodus 21, counter that with a clear statement from another passage in which "eye for eye" appears and to which the same question is relevant Leviticus 24:19-20:

If anyone maims his fellow, as he has done, so shall it be done to him: fracture for fracture, eye for eye, tooth for tooth. As he has maimed a man so shall it be rendered unto him.

In this passage the Torah does not ambiguously as in Exodus state, that you shall give him an eye instead of an eye, but clearly mandates "as he hath done, so shall it be" done to him exacting an eye for an eye.

Furthermore, in the setting in which the "eye for an eye" formulation appears for the first time,<sup>19</sup> there is a contextual support for the translation of literal retribution:

And if men shall fight and collide with a pregnant woman and she miscarries, but does not herself die, he [the fighting man] shall surely be punished, in accord with the assessment of [the value of the fetus] made by the woman's husband. And shall pay as the judges determine. . . . But if the woman shall die, you shall give a life for a life; an eye for an eye, a tooth for a tooth, a hand for a hand, a foot for a foot; a burn for a burn, a wound for a wound,....

If there is no "*ason*" אָסוֹן to the woman, the one who struck her shall be punished monetarily; he pays as the woman's husband imposes upon him and "by the judges", who obviously must approve of the fairness of the claim and who have the power of enforcement.

If there is an "*ason*" אָסוֹן to the woman, the punishment is "life for life". Attached to this statement is: "eye for eye, tooth for tooth, hand for hand, foot for foot, burn for burn, break for break, wound for wound."<sup>20</sup>

The ancient translations (Targum Onkelos, Targum Yonatan) render "*ason*" אָסוֹן as death. The only other Tanakh attestations of this word refer to the tragedy in Genesis 42:4, 38; 44:29 referring to the tragedy Jacob feared might befall his youngest

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<sup>19</sup> Hertz. Ex 21:22, 25

<sup>20</sup> (2001). On the Law of Retaliation - 'An Eye for An Eye'. Judaic Seminar, Sephardic Institute.

son, Benjamin if he permitted him to travel to Egypt with his brothers, supporting somewhat its translation as "death". By translating it so in our context, the two clauses yield: if the woman does not die, but suffered a loss, the punishment is monetary compensation; if she does die, the penalty is "life for life." If she suffered injury, the punishment is "eye for eye", etc.<sup>21</sup>

If "eye for eye" means monetary compensation, there would be a difficulty in comprehending the text. The first statement - the case in which the woman lived but suffered a miscarriage, of which the text clearly mandates, that monetary compensation should be given for any suffered loss. This would appear to cover all possible injuries, as it only excluded death (If there is no *ason* to the woman, meaning she did not die, the one who struck her should be punished monetarily), and thus would have already mandated monetary payment for injury, making the "eye for eye" statement redundant. This would imply that when the text mandates "eye for eye" it does not mean monetary compensation but equivalent bodily retaliation.

As for the Hebrew proposition *tachat* תחת, in furnishing support for financial compensation, this argument is by no means conclusive. For the term *tachat* is also incorporated in the case of intentional murder,<sup>22</sup> and there the rabbis agreed to interpret *tachat* in a literal sense "life for life" even though the word *tachat* is incorporated.

Others translate "*ason*" more broadly, referring it to physical calamity, either bodily injury or death, and understand the two cases to be saying: if the woman lived and had no injury there is monetary compensation for the lost fetuses; if she was the victim of death or injury there is corporal punishment, measure for measure - life for life, eye for eye, etc.

But this translation can help support who advocate "eye for an eye" as monetary compensation. Thus the text would read, 'if the woman lived and had no *ason* (injury) then there is monetary compensation for the lost fetus.' This is with the understanding that losing a fetus is not a bodily injury. For the fetus is seen as a separate being from the

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<sup>21</sup> Ibid

<sup>22</sup> Enker, A. (1991). "*Lex talionis*: The "Plain Meaning" of the Text." *S' Vara* 2(1): 52-55. (as cited in Enker, P. 52) e.g., Genesis 4:25:

Adam knew his wife again and she bore a son and named him Seth, meaning "G-d has provided me with another offspring in place of Abel," for Cain had killed him.

mother and does not contribute or diminish from the mother's full bodily functions. And the second verse would read, 'If she was the victim of an *ason* (an injury) where part of her functional system was destroyed, then one must pay the value of that particular organ, as explained before. The difficulty with the third account of *eye for eye*<sup>23</sup> is that this time we are embarrassed the fact that eye-for-eye is placed directly together with life-for-life. If life means literal execution, does not eye mean literal excision? But what is the situation here? The perjured witness did not physically attack his fellow, but the Torah wants to deter other false witnesses. The punishment is for intention alone. Usually we must have intention plus actual harm. Harm alone without intention is the category of *shogeg*, unintentional murderer or committer of other crimes. Intentional alone without harm may bring moral guilt, but no humanly administered punishment.

This is the only case where evil intention alone is itself punished. But what was the intention of the false witness? For example, did he testify that his fellow had committed murder; do to him as he intended to do to his fellow. But if he testifies that his fellow maimed another man, what he intended for the victim of his false testimony was not literal eye-for-eye but the monetary compensation. Therefore, his punishment is also monetary and not literal.

Others have brought a proof favoring the monetary compensation interpretation from a parallel passage. In Leviticus 24:18 we read: "He that smiteth a beast mortally shall make it good: life for life." This only means fair compensation; otherwise, any man who slew an animal would have to forfeit his own life in return! "The word "*yeshalemenah*" (to pay for) does not lend itself to another interpretation. Clearly here it is a legal term, a mere technical phrasing, for the demand of adequate equitable and fair compensation. "Life for life" is used for monetary compensation. This being the case, surely "eye for eye" can also be so used. The Talmud had cited this verse as proof but rejected it to stand on its own, as it considered language referring to animals inadequate to prove the meaning of legislation regarding humans."<sup>24</sup>

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<sup>23</sup> Hertz. Deut.19:18

<sup>24</sup> Goldberg

### III.

### CHAPTER 2

#### CRITICAL ANALYSIS OF BABYLONIAN TALMUDIC DISCOURSE OF “AN EYE FOR AN EYE”

##### **Introduction:**

A basic fundamental belief within Judaism is that the Biblical written law of Moses, in Hebrew called *Torah she bictav* (written Torah) was accompanied by the oral Torah, in Hebrew: *Torah she bal peh*. (the oral tradition). The oral Torah was the expanded explanation and detailed application of method and form, philosophy and ethic in how to perform the 613 commandments. This tradition, as Maimonides notes, was passed on from mouth to mouth, heart to heart, and generation to generation. Without an oral tradition, many of the Torah's laws would be incomprehensible.

For instance, the Torah states: "Bind them for a sign upon your hand," the last verse instructs. Bind what? The Torah doesn't say. "And they shall be for frontlets between your eyes." What are frontlets? The Hebrew word for frontlets, *totafot* is used three times in the Torah — always in this context (Exodus 13:16; Deuteronomy 6:8, 11:18) — and is as obscure as is the English. Only in the Oral Law do we learn that what a Jewish male should bind upon his hand and between his eyes are *tefillin* (phylacteries).

An Oral Law was needed to mitigate certain categorical Torah laws that would have caused grave problems if carried out literally.

Strangely enough, the Oral Law today is a written law, codified in the Mishna and Talmud. Orthodox Judaism believes that most of the oral traditions recorded in these books dates back to God's revelation to Moses on Mount Sinai. When God gave Moses the Torah, Orthodoxy teaches, He simultaneously provided him all the details found in the Oral Law. It is believed that Moses subsequently transmitted that Oral Law to his

successor, Joshua, who transmitted it to his successor, in a chain that is still being carried on.<sup>25 26</sup>

A lengthy discussion is recorded in the Talmud to explain the Mishnah's definitive statement mandating monetary compensation for all cases of infliction of bodily damage.<sup>27</sup> The Talmud cites and at least partially rejects a great number of attempts to prove through textual analysis rationale and deep philosophic implications that the Torah's intent is monetary compensation, never approaching a consensus on what the Mishnah's proof was. There is much substance in the dialogue, demonstrating the difficulty of ever achieving true equivalence through the lex talionis. A partial summary of the Talmudic discussion<sup>28</sup> follows:

The justice of "an eye for an eye" is more apparent than real: one man's eyesight may be stronger or weaker than the other's, and by taking one eye for the other, true equivalent justice is not being served. Not only is the ratio of talion thus frustrated, but the biblical injunction that there should be one standard of law for all "mishpat ehad yihye lakhem"<sup>29</sup> would also be violated. Also, if a blind man takes another's eye, or a cripple without legs destroys somebody else's leg, how can justice be served? Further, when an eye or any organ is extracted from a living body it causes serious incidental injury, often endangering the individual's life "and the Torah said an eye for an eye, not an eye and a soul for an eye".

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<sup>25</sup> Ethics of the Fathers. 1:1

<sup>26</sup> Telushkin, (1991) J. Jewish Literacy. NY. Morrow & Co.

<sup>27</sup> Neusner, J., (ed.) (1993). A History of the Mishnaic Law of Damages.1 Baba Qamma. Leiden, E.J. Brill. 83b-84a

<sup>28</sup> (1972). Encyclopedia Judaica, Vol. 15, Keter Publishing House. paraphrasing the, "Talion" entry, v. 15 p. 741

<sup>29</sup> Leviticus, 24:22

As the Talmud cited possible objections to most of the above arguments and as it was considered that it did not fully detail a decisive proof refuting the evidence in strict literal interpretation,<sup>30</sup> Nine Rabbis, representing various schools, ask one the same question. If the Divine law states “eye for eye,” why, then, is there compensation? Their arguments were that biblical intent from the start was financial compensation rather than literal application rank in importance with their unanimous interpretation and its implications.

Those scholars who consider the Talmudic verdict as a “humanizing” effort, fail to realize that certainly in the time of these Rabbis and their schools, the “eye of eye” was not in practice, and that their discussions were meant only to bring further proof why this biblical law could only have meant fair compensation and nothing more from its inception.

The Sages of the Talmud use every permissible rule of exegesis to elucidate this point. Thus, since it is stated in Leviticus “he that smiteth a man” and “he that smiteth a beast,” the rule of analogy applies, and just as compensation is paid to one, so also to the other.<sup>31</sup>

Another Sage uses the following logic. “In Numbers 35:31 it is stated ‘you shall take no ransom for the life of a murderer’ that is, not for the murderer but for injuries inflicted one can accept compensation.”

That all the Rabbis were unanimous in their argumentation was in itself a rarity in Talmudic literature. Most clearly, they did not legislate the principle of fair compensation.

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<sup>30</sup> Baba Kama, 83-84

<sup>31</sup> Leviticus, 24:17-18



Later generations of rabbis, perhaps as part of a process of gradual humanization and amelioration of the harsh biblical law, changed this law to require money compensation in its stead and “interpreted” the biblical text, rather freely and liberally, to accord with their more humane ideas. Others have insisted, no less firmly, the Mishna’s rendition of the biblical rule, monetary compensation, is the true deeper meaning of the biblical text, as it was originally intended and always understood.

One can also find support for this assumption in the fact that we have no record of an argument on this issue between Saducees and Pharisees, with the former sticking to the literal interpretation of the Pentateuch, and the latter emphasizing Biblical law as interpreted by Oral Law. It is perhaps equally important that an argument on the literal application of “eye for eye” did take place during the Karaite separation from the mainstream of Judaism, between Saadya Gaon and the School of Karaites.<sup>32</sup>

In order to have a better understanding of the Talmudic debate, one must first take a good look at the Mishna, from which this debate is based on.<sup>33</sup>

The Mishna, is the first writings of Jewish law in a codified composition, that is understood traditionally to be the practical application derived from the Bible. Its purpose is to state simply the law of which later the entire Talmudic philosophy, exegeses and elucidations are based on. I refer to the Mishna in the book of Talmud Bava Kama, 83b, in the chapter that deals with personal injury cases. This follows the previous chapter that discusses the laws of theft. For when one is a victim of a robbery, there is a natural tendency to become agitated, suspecting many people which can lead to physical confrontations.

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<sup>32</sup> See Ibn Ezra’s comment on Ex. 21:24

<sup>33</sup> Mishna, Baba Kama, ch. 8 Mishna 1

In the present chapter, where injury is inflicted on one person by another, for the one who inflicts the wound on his fellow, the Mishna details five types of compensation an assailant could be liable to pay, for there are five aspects that are contained in the injury.

The first is *nezek*, actual damage. The assailant must pay for the physical damage that he caused the victim. The second is *tzar*, for pain. The assailant must pay for the pain suffered by the victim. The third is *repuoy*. The assailant must pay the expenses of healing the wound; *sheves*, for loss of employment. The assailant must pay for the victim's inability to work as a result of the wound and *boshes*, for humiliation. The assailant is liable for the humiliation that he has caused his victim.

The Mishna goes on to elaborate how each form of these compensations is assessed. The rabbis of the Talmud immediately following this Mishna ask the obvious question concerning the first category of compensation, actual damage. They ask why? Why is the assailant merely obligated to pay for the damage he inflicts, when the Bible (Exodus 21:24) states *ayin tachas ayin*, "an eye for an eye." Hence we should say that he must actually lose an eye. That is, in retribution for wounding another person the assailant should be similarly wounded by the court.

It should be noted that Maimonides, in his book *The Introduction to the Commentary on the Mishna*, as well as *Hil.choveilU-Mazik*, 1:6 states that:

The Talmud challenge on the Mishna is not out of the sense of wanting to change the law. The rabbis did not doubt that an assailant is liable only to a monetary payment. For that law was taught to Moses at Sinai and every court from then onward adjudicated accordingly.

The Talmud's challenge to the Mishna is merely attempting to prove from the written Torah itself that the verse mandating "an eye for an eye" should not be taken literally. This means that the Talmud is trying to understand the source of this Mishna.

### **TALMUDIC ANALYSIS:**

The Talmud opens by bringing two proofs for the argument of compensation. The purpose of bringing two proofs is because each on its own can be considered weak and objectionable.

The following is a brief translation from Talmud Baba Kama 83b:

*One might think that if a person blinded his fellow's eye, the court blinds his eye; if he cut off his fellow's hand, the court cuts off his hand; or if he broke his fellow's leg, the court breaks his leg. The torah therefore states, "one who strikes a person" and "one who strikes an animal." The torah compares wounding a person with wounding an animal, to teach; just as one who strikes an animal is subject to monetary payment, so too one who strikes a man is subject to monetary payment. And if it is your desire to say that for some reason the comparison is flawed, behold, another verse states: you shall not accept ransom for the life of a murderer who is deserving to die, which teaches for the life of a murderer you shall not accept a ransom. But you shall accept a ransom for the loss of tips of limbs that do not regenerate.*

In expounding the first proof, the Gemara above incorporates an analogy between two laws established on the basis of identical expressions in the Biblical text. This form of elucidation in Hebrew is called *gezeirah shavah*. Both sets of laws, the one of injury to a man and injury to an animal incorporate the same word "מכה" (*makeh*) meaning strikes. And because of this existing similarity that exists between one who **strikes** an animal life shall pay for it (Leviticus 24:18) and the following verse, If a man inflicts a wound on his fellow, as he did so shall be done to him. (Leviticus 24:19) That is, v. 18

instructs regarding v. 19 that just as monetary restitution is made for wounding an animal, so it is made for wounding a person [i.e., and the assailant is not wounded in kind].

A multiple exchange of arguments ensues from which the above *gezeirah shavah* is challenged. The word *makeh* is also incorporated in Leviticus 24:21 ***from one who strikes a person!*** Just as in the latter case the assailant is actually executed, so in the wounding case the assailant's corresponding limb should actually be severed. Since v. 21 refers to an actual execution, through such a *gezeirah shavah* the phrase so shall be done to him (in v. 19) would be taken literally to mean that the assailant would actually lose his limb as a penalty.

This school of thought is also stricken with a counter objection arguing that the above is not a true dilemma, because if we have a choice of how to expound a *gezeirah shavah*, then we would rather derive laws of injuries from other laws of injuries (that of a person from that of an animal), and not derive laws of injuries from laws of death. Hence, we derive from the *gezeirah shavah* that an assailant must pay money. It is therefore not a sufficient cause for the Talmud to abandon the first proof and exert an additional proof.<sup>34</sup>

The previous argument is ultimately rejected because one can argue the contrary. We should derive laws pertaining to a person from other laws pertaining to a person (injury from death), and we should not derive laws pertaining to a person from those pertaining to an animal. This is why the Talmud initially implied that for some reason the comparison is flawed, and thus incorporated two proofs.<sup>35</sup>

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<sup>34</sup> Talmud Baba Kama, 83,b

<sup>35</sup> Ibid

After establishing the weakness of the first proof, which is remedied by the second proof, the reverse is then argued.

The Talmud again challenges: And now, after it is written You shall not accept ransom etc., why do I need the striking/striking *gezeirah shavah*? If the Baraisa's second exegesis suffices to teach that an assailant compensates monetarily, why is its *gezeirah shavah* needed? To this the Talmud response that the second proof has its inherent weakness because if our only indication that an assailant pays money was from this verse about the ransom it might have been suggested that the assailant has a choice: If he wishes, he may give his actual eye, and if he wishes, he may give the value of his eye. [The *gezeirah shavah*] from striking an animal thus informs us that just as striking an animal subjects one only to a monetary payment, so too striking a person subjects one only to a monetary payment. Therefore, even if the assailant pleads to be blinded as punishment for blinding his victim, we do not fulfill his request, as the noted Talmudic commentator, the Meiri expressed.<sup>36</sup>

There is an additional discussion in the Talmud regarding the nature of the damage payment for wounding another person. R'dostai ben Yehudah says:

When the torah states, an eye for an eye, it refers to compensation. For where the eye of this one is large – and the eye of this one is small, how can I apply to that case the penalty of an eye for eye? An eye for an eye implies a comparable deprivation, and if the assailant's eye is of unequal size, that requirement is not met. The verse must therefore mean a monetary payment.<sup>37</sup>

R'dostai ben Yehudah continues his proof:

But where the eyes are of equal size of a victim and his assailant, the assailant must actually lose his eye.

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<sup>36</sup> Ibid

<sup>37</sup> Ibid

Here, the response would be: The Torah stated in the “wounding” passage itself, (Leviticus 24:22) *One law shall be for you*, This teaches that there shall be the same law for all of you. That is, the penalty for all wounding cases must be the same. Since we cannot blind the assailant in all cases, we exact monetary payment in all cases.

The Talmud clearly rebuts this reasoning, for the law of *eye for an eye* is not measured by the size of the limb (eye), but rather by the limb’s function, in this case the ability of sight. There is no inherent difficulty about the case where the eyes of the assailant and his victim are of unequal size? The assailant took sight from the victim, and the Torah said that in return we should take sight from the assailant. From this perspective the assailant suffers a comparable deprivation, and so the mandate of *an eye for an eye* is fulfilled.

For if R’dosta’s argument has any validity, and the exact measurements of particular limbs exacts equitable retribution or inequitable retribution, then in the case of a small man who killed a large man or a large man who killed a small one, how can we execute the murderer? Since the murderer and his victim are of different size, we will not be inflicting the identical punishment mandated by *a life for a life*. (Exodus 21:23) And we surely cannot say that sometimes the punishment is capital and sometimes it is monetary, for we will be frustrating the law of (Leviticus 24:22) *One law shall be for you*.

Once again, the Talmud is unable to derive a conclusive proof that *eye for an eye* means a monetary payment.<sup>38</sup>

The sage R’Shimon ben Yochai attempts another proof that *an eye for an eye* means monetary payment. For where a person was blind and he blinded someone else, or

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<sup>38</sup> Ibid

he was an amputee and he severed the corresponding limb of someone else, or he was lame and he crippled someone else, how can I fulfill in this case *an eye for an eye*? How can the court inflict a reciprocal wound when the assailant already has it? And if you say that in such exceptional cases the assailant makes a monetary payment, "אחד יהיה לכם", *משפט* why, the torah stated, *one law shall be for you*, which teaches that there shall be the same law for all of you.. Hence, the payment cannot sometimes be corporal and sometimes monetary.<sup>39</sup>

This proof is also refuted in keeping with the constitutional norm of a society and the application of general laws. Where it is possible to fulfill *an eye for an eye* literally, it is possible – and we do so; -and where it is not possible to fulfill it, it is not possible, -and we exempt the assailant from the penalty. And under this formula the law is the same for every assailant: He either actually loses his limb or he is completely exempt. There are no alternative penalties (as explained by the Talmudic commentary of Rashi).<sup>40</sup>

An example of this premise is found in the case of the *tereifah* (a person possessing a well-defined physical defect or disease that will certainly cause his death). Talmud Chullah, 42a gives an example of a membrane of a person's brain that is pierced. Because of the inevitability of the person's death he is viewed in certain respects as though he is already dead.<sup>41</sup> What happens if this *tereifah* killed a healthy person, what do we do to him? We cannot execute him, since he is considered legally dead, and that is the law. Rather, where it is possible to impose the capital punishment, it is possible – and we do so; and where it is not possible to impose it, it is not possible, and we exempt the

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<sup>39</sup> Ibid

<sup>40</sup> Ibid

<sup>41</sup> Talmud Sanhedrin, 78a

murderer from punishment. Thus, this Baraisa too is not conclusive proof that an eye for an eye means a monetary payment.

Here too, the Talmud is unable to come to a conclusive proof that *eye for an eye* is monetary compensation.

The Talmud then offers another attempted proof from the academy of the sage, R'Yishmael that states from the verse “כֵּן יִנָּתֵן בּוֹ” *so shall be given upon him*. (Leviticus 24:20) The word יִנָּתֵן *yenaten* indicates that something is being given and there is no giving except of the giving of monetary compensation. From here we see that the assailant gives money as payment for damage.

Again, the Talmud rebuts R'Yishmael's proof for in the description of the assailant causing damage to the victim, the Torah incorporates the word *yitain* “giving.

“וְאִישׁ כִּי יִתֵּן מִוֶּם בְּעַמִּיתוֹ” (Leviticus 24:19) As the verse states, when one shall “give” a wound on a person, it is clear that the word “give” in this instance is not a reference to money, but rather the giving of a wound. Why, then, does R'Yishmael assume that the word “give” in the penalty part of the verse, *so shall be given to him*, refers to monetary compensation?

To this rebut R' Yishmael's academy responds with greater clarification, claiming that what the academy expounded upon was the superfluous verse, i.e., Their intension was not that the word “giving” always indicates monetary payment. Rather, in this verse it must have that connotation, for otherwise the verse is superfluous. Since it is written in the preceding verse, “*And if a man gives a wound on his fellow, as he did so shall be done to him.*” (Leviticus 24:19) This verse seems to clearly indicate that the assailant is punished with an actual wound. Why is it then that in the next verse (Leviticus 24:20) it



is repeated: “so shall be **given** upon him”? From this the academy expounds that the Torah is clarifying the retribution to mean a payment of money, not the infliction of a reciprocal wound.

The noted commentator of the Talmud, the Gur Aryeh,<sup>42</sup> explains that the academy was intrigued by the Bible’s change of language from so shall be “done” to him (v. 19) to so shall be “given” upon him (v. 20), the Torah alludes to a payment that can be “given” into the hand of the victim –viz. monetary payment.

It seems at this point that the Talmud derives a conclusive argument for monetary payment from the academy of R’Yishmael. But it is also clear that the Talmud is not completely satisfied with the monetary interpretation based on a superfluous elucidation. Hence, the Talmud continues to pursue other scholarly teachings that can affirm the monetary argument.<sup>43</sup>

The third citing of this law is brought down in the book of Deuteronomy 26:21

*If an unrighteous witness rise up against any man to bear perverted witness against him; then both the men, between whom the controversy is, shall stand before the LORD, before the priests and the judges that shall be in those days. And the judges shall inquire diligently; and, behold, if the witness be a false witness, and hath testified falsely against his brother; . then shall ye do unto him, as he had purposed to do unto his brother; so shalt thou put away the evil from the midst of thee. And those that remain shall hear, and fear, and shall henceforth commit no more any such evil in the midst of thee. 21. And thine eye shall not pity: life for life, eye for eye, tooth for tooth, hand for hand, foot for foot.*

The academy of R’ Chiya understood this verse that deal with false witnesses, where one must pay *a hand for a hand*, עֵין בְּעֵין שֵׁן בְּשֵׁן יָד בְּיָד רֶגֶל בְּרֶגֶל: (Deuteronomy 19:21) implies a thing that is given from hand to hand.

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<sup>42</sup> Talmud Baba Kama 84a

<sup>43</sup> Ibid.

The argument is as follows: The verse in Deuteronomy 19:21 is in singular variance from previous verses that speak of “*eye for an eye*.” (Leviticus, 24:19-20, Exodus 21:22-25) It does not speak of עין תחת עין *ayen tachas ayen* but rather עין בעין *ayen be ayen* which can be translated literally hand into hand, instead of as previously stated, a hand for a hand. For example, if witnesses testified that Reuven cut off Shimon’s hand and they were subsequently contradicted through *hazamah* interrogation it was revealed that they are false witnesses. They make a monetary payment, which can be given from “hand into hand.” From here the academy wishes to derive clarity for the case when someone actually injures another person he is liable to a monetary payment. For *zomemin* (false witnesses) receive the very punishment they sought to have imposed on the victim of their plot; and so if they must pay money when testifying falsely about a personal assault, an actual assailant is perforce liable to pay money (Pnei Yehoshua; see also Chidushei HaRim).<sup>44</sup>

After a series of objections by the Talmud, which would accept a law to be established based on the phraseology of the text, R’Chiya’s academy clarifies their position by expounding on a superfluous verse. For, it is written regarding *zomeim* (false) witnesses: (Deuteronomy 19:19)

ועשיתם לו כאשר זמם לעשות לאחיו *You shall do to him as he conspired to do to his brother*. If this verse were to be translated, literally, that they receive an actual corporal punishment, why then in verse 21 does the text redundantly repeat רגל ברגל: עין בעין שן בשן יד ביד (eye to eye, tooth to tooth, hand to hand). From this superfluous verse we learn from this that *zomemin*, in fact, pay money when they testified about an

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<sup>44</sup> Ibid

assault. If an assailant receives a reciprocal wounding, then zomemin witnesses who testified about a personal assault would receive the selfsame wounding, pursuant to the verse, *You shall do to him as he conspired to do to his brother*. The phrase *a hand for a hand* is therefore unnecessary to teach that zomemin witnesses can receive monetary punishment.<sup>45</sup>

*Abbaye*, finding support in the School of Hezekiah, suggest that the pecuniary compensation is derived from the principle of fair justice, based on common sense: “It is stated ‘eye for eye: life for life’, but not life and eye for eye.” Since the taking of the eye may cause his death, this could not have been intended.<sup>46</sup>

The torah states, *an eye for an eye* and *a life for a life*, which implies: but not a life and an eye for an eye scripture implies that while the assailant, must compensate for the eye that he injured, he should not lose his life in the process; further, that a life be taken only in reciprocity for a life.

Sometimes a case would be found that an eye and a life were taken for just an eye, where at the time when [the court] was blinding [the assailant] his soul departed [i.e., he died]. This exegesis thus establishes that an eye for an eye refers to a monetary payment, which ensures that his penalty does not entail loss of life as well.

The Talmud challenges the proof:

For if the court would inflict corporal punishment, it would be their lawful obligation to first assess the physical condition of the assailant to determine if he is able to endure being blinded. And if he is not able to endure being blinded, then the court will absolve itself out of the fear of inflicting additional damage.

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<sup>45</sup> Ibid

<sup>46</sup> Baba Kama 83-84

This, indeed, is the case concerning the corporal punishment of lashes, where the court requires a physical examination to determine the endurance of the assailant. For we know the law in Talmud Makkos 22b, which states that if the court assessed that the guilty party could withstand a certain number of lashes and the person died under the court agent's hand, while the agent was administering the lashes, the agent is exempt from exile punishment for this inadvertent killing.<sup>47</sup>

Ordinarily, a person who accidentally kills another is liable to exile in a city of refuge (see Numbers 35:9-15 and Deuteronomy 19:1-10). However, when someone dies while being judicially punished with lashes, the court's agent is not held responsible for his death. Rather, we view the death as an unavoidable accident. Similarly, were an assailant to die unexpectedly from his judicially imposed corporal penalty, we would not view the court as if it has taken "a life and an eye for an eye." Thus, no proof that the payment for damage is monetary can be derived from here.

The sage, Rav Pappa in the name of Rava attempts to derive proof of monetary compensation from the verses, *Exodus* 21:18-19.

*And if men contend, and one smite the other with a stone, or with his fist, and he die not, but keep his bed; if he rise again, and walk abroad upon his staff, then shall he that smote him be quit; only he shall pay for the loss of his time, and shall cause him to be thoroughly healed.*

The text is commanding the assailant to pay his victim for loss of time and **He shall provide for healing**, to teach that he must give money for the victim's healing even where compensation is given for damage. This law is derived from the double expression

: ונקמה חמכה רק שבתו יתן ורפא ירפא (see Torah Temimah to verse §146).

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<sup>47</sup> Baba Kama 84,b

But if the compensation for damage is an actual reciprocal wounding of the assailant, then just as this victim needs healing, this assailant, also will need healing. If it were true that a reciprocal wounding is the compensation for damage, a similar formula should apply to healing: He does not pay for healing the victim, but instead incurs the expense of having to heal himself, as explained by the *Chidushei HaRim*. In that manner his “healing” obligation is discharged. Why, then, must the assailant, also make a monetary payment for the victim’s healing? Obviously, an assailant is not wounded as compensation of damage, but pays money instead.

Here, too, the Talmud rejects the argument.

Perhaps involved in the wounding incident there is one whose flesh heals quickly. And the assailant must give the victim that which is the difference. That is, it is possible to say that an assailant is wounded in the manner he wounded his victim (as payment for damage), and also that *he shall provide for healing* teaches us that at the same time a monetary payment is made for healing. This teaching applies specifically to where the assailant heals more quickly than his victim (i.e. the cost of his healing is less). In that case the assailant must pay the victim the difference. Thus nothing about paying money for damage can be derived from here.<sup>48</sup>

The last proof that the Talmud presents that the penalty for damages is monetary comes from the sage, Rav Ashi who derives the law from the teachings of *gezerah shevah* (an analogy between two laws established on the basis of identical expressions of the Biblical text) *תחת תחת* for/for from a verse that speaks of damage to an ox as follows: It is written here, regarding the payment for damage to a person, *an eye “for” תחת an*

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<sup>48</sup> Ibid

eye; and it is written there, regarding damage to an animal: *he shall surely pay an ox* “for” תחת an ox. The common word for תחת links the two passages, to teach that just as like in the case of the animal the compensation is monetary, here also vis-à-vis damage to a person, the compensation is also monetary.<sup>49</sup>

The Talmud challenges this *gezerah shevah*. For the word *tachas* is also stated in *Exodus* 21:23 from the verse that discusses the murder of a person *You shall give a life* “for” תחת a life. The common word for תחת links that passage with our assault passage, to teach that just as there in the murder verse the actual life of the murderer is taken, here also the actual eye of the assailant is taken.

The word *tachat* (תחת) is stated in three separate cases:

1. תחת in the case of the animal where clearly the punishment is monetary compensation
2. תחת in the case of intentional murder where the text clearly indicates you shall take a life for a life
3. תחת in the case of physical damage where the text states, *eye for an eye, tooth for a tooth* from which the Talmud is debating whether it is monetary or corporal punishment.

The Talmud is thus challenging Rav Ashi's teaching of *gezerah shevah* and asking why is the sage drawing the analogy between the of case number 3 and the תחת of case number 1. Perhaps we should draw the analogy between the תחת of number 3 to the תחת of number 2.

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<sup>49</sup> Talmud Baba Kama, 84, a

Rav Ashi defends his position with common logic of when and where analogies are drawn. We should derive laws of injuries from other laws of injuries (those of a person from those of an animal), and we should not derive laws of injuries from laws of death. Hence, from the animal injury verse we learn that the payment for human injury is with money.<sup>50</sup>

Once again, the Talmud based on this logic presents a contrary position. We should derive laws pertaining to a person from other laws pertaining to a person (injury from murder), and we should not derive laws pertaining to a person from laws pertaining to an animal. Accordingly, we derive from the murder verse that an assailant actually loses his eye.

After being refuted by the Talmud, from which no conclusive proof is presented, Rav Ashi presents a clarified opinion from a new source. This alleviates the previous dialect. The *gezeirah shavah* of תחת תחת which Rav Ashi is referring to comes from Deuteronomy 22:28-29 in a case that speaks of both: from: a human being and injury to that human being, as well as a clearly-stated monetary payment.

*If a man find a damsel that is a virgin, that is not betrothed, and lay hold on her, and lie with her, and they be found; then the man that lay with her shall give unto the damsel's father fifty shekels of silver, and she shall be his wife, because he hath humbled her; he may not put her away all his days. תחת אשר ענה*

According to Rav Ashi we derive [*a for/for gezeirah shavah*] from this verse that speaks of one who violates a virgin: Then the man ... shall give the father of the girl fifty silver [shekels]. . . . “for” תחת *he had afflicted her*. The verse states that the attacker must remit a fine of fifty silver *shekels*, in addition to regular compensatory payments, to the father of the violated girl (*naarah*). In this exegesis we derive both laws of a person

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<sup>50</sup> Ibid

from laws of a person, and laws of injuries from laws of injuries. The Talmud ostensibly means that the assailant pays for the “damage” that was inflicted upon the girl. Thereby we learn for all other cases of damage inflicted on human beings that the payment for damage is monetary.

The Talmud text before us adopts neither of these extreme viewpoints. To the rabbis who transmitted and developed the Oral Law, the biblical text was ambiguous, perhaps even deliberately so. It was capable of sustaining both interpretations, namely, physical retaliation of injury for injury and monetary compensation. The task of the oral Law was to choose the preferable solution between these two textually viable options.<sup>51</sup>

The Hebrew preposition *tach*, “in place of” or “in substitution for” in the sense of replacement and compensation,<sup>52</sup> thus furnishing support for the interpretation adopted by the Mishna that a financial award is to be imposed. But this argument is by no means conclusive. The term *tach* is also used in the case of inflicting the death penalty to mean “for” in the sense of “in response to” or “in retaliation for.” But if another misfortune ensues, the penalty shall be life for life.”<sup>53</sup>

If one analyses the case of inflicting bodily injuries upon a person to that of inflicting physical injuries upon an animal, then monetary compensation would seem to be the proper sanction. On the other hand, comparison of the case of maiming a person to that of killing a person would suggest that literal retaliation is the intended meaning. Which is the preferable analogy? Should we take into account the nature of the victims in each case, equating killing and maiming when done to persons? Or is the better choice to

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<sup>51</sup> Ibid

<sup>52</sup> E.g., Genesis 4:25 Adam knew his wife again and she bore a son and named him Seth, meaning « G-d has provided me with another offspring in place of Abel,” for Cain had killed him.

<sup>53</sup> Ex. 21:23



consider the nature of the injuries and deal similarly with injuries to persons and animals, leaving the killing of persons to be treated differently, as a special case? Neither choice of analogy is absolutely conclusive. One may prefer one analogy or the other. There can be no single incontrovertible answer to this question.

The textual argument is ultimately resolved in our passage by resort to a distinct source, that is, to a “third text.” The Bible commands us not to accept ransom payment for capital murder, perhaps thereby suggesting that it would be proper to accept such payment for lesser injuries. Though forceful, this argument also not irrefutable. Argument from negative inference is never conclusive. There is always the possibility that local concerns caused the special stress, without yielding an inference that opposite conclusions were intended for other cases.

In the final analysis, the choice is between arguments that are persuasive to varying degrees, not those that are conclusive. In our case, the argument from the mandate forbidding the taking of ransom for capital murders is weighty, especially against the background of the clearly unique place occupied by murder in the biblical law, even though it is not irrefutable.

Our passage also has resort to moral arguments. Literal application of the law of retaliation could yield unjust results. The perpetrator and the victim may have different pain thresholds. Loss of a particular limb or organ might be more injurious to the one than to the other. Once again, these arguments are not regarded as conclusive, because it is possible to offer various counterarguments, as, in fact, the Talmud does.

Ultimately, it is the combination of arguments that determines the choice. The preferred analogy is that between less than fatal injuries to persons and injuries to animals

rather than that between killing a person and injuring him. And the rule forbidding accepting ransom payment for killings supports the conclusion that such payment is acceptable in the case of lesser physical injuries.

Monetary compensation has advantages over corporal punishment in that it combines the two purposes. It compensates the victim for his injuries and alleviates his suffering at the same time as it atones for the perpetrator's guilt. That may be a likely reason why it is to be preferred. Still, it cannot be gainsaid but that by combining these two aspects in a single mode, each may be somewhat weakened. But that is a price worth paying, considering that the alternative is to deny the victim all compensation for his injuries. Only in the case of murder is the option of compensation, even (perhaps especially) by way of ransom (*kofer*) rejected. To allow the option of money payment would suggest an inappropriately commensurate equality between life and money.

The biblical law of taliation appears not merely in retaliation to the infliction of physical injuries by a tortfeasor but is also recorded in the case of false witnesses. In certain circumstances, such witnesses are to be punished by inflicting on them the same injury as they would have caused to be inflicted on their intended victim. "You shall do to him as he schemed to do to his fellow...life for life, eye for eye, tooth for tooth, hand for hand, foot for foot."<sup>54</sup> This law cannot have contemplated compensation of the victim for his injuries, because it envisages situations in which the perjury was uncovered before any Penalty was imposed on the witnesses intended victim. Punishment alone is the chosen mode.<sup>55</sup>

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<sup>54</sup> Deuteronomy 19:19-21

<sup>55</sup> See above note 4. This was emphasized further in that portion of the passage which was deleted above: Thus you will sweep evil from your midst; others will hear and be afraid, and such evil things will not again be done in your midst. Nor must you show pity: life for life...

Now, in the case of perjurious witnesses, the biblical text does not use the preposition *tach*at, which as we have seen carries two possible meanings. Instead of ‘*ayin tach*at ‘*ayin*, the Bible says ‘*ayin b’ayin*, and similarly for life, tooth, hand, and foot. These two different usages would seem to support our suggestion that the primary text calling for talia for physical injuries (‘*ayin tach*at ‘*ayin*) has deliberately chosen a phrasing that is susceptible of more than one meaning. When only one meaning is intended, namely physical punishment as in the case of false witnesses, a different usage is chosen.

A popular biography of the late revered Chazon Ish reports that, as a young man, he recorded a note to himself concerning our passage. In this note he stressed the educational function of the law. Punishment serves to instill in the hearts of people detestation of the ugly criminal act, beyond instilling fear. The law acts more as a moral force rather than by way of its material consequences. He continues:

*Perhaps, also this is the same in the matter of “an eye for an eye,” for the intention is to teach the punishment in order to instill in the hearts of the people appreciation of the evil, and to this end it is proper to adopt a strong phrasing...*<sup>56</sup>

Phrased in terms that convey this range of possible meanings, the law allows for compensation of the victim for his injuries all the while communicating a sense of moral outrage over the injurious act. So the law seeks to combine many goals in one: assisting the injured party, reconciliation of the tortfeasor and his victim, and reconciliation with G-d. A system of religious law would not miss the opportunity to combine such objectives.

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<sup>56</sup> Shlomo Cohen (ed.) *Pe'er ha Dor*: Vol. 3 (Jerusalem: B'nei B'rak, rep. 1970), p. 139 n. 30

### POST-TALMUDIC & ACHRONIM POSITIONS

Many post-Talmudic authorities addressed the subject, seeking persuasive arguments for a non-literal interpretation. Often they refined arguments that were challenged in the Talmud. Thus, Saadia Gaon stated that because it is impossible in most cases to properly and successfully apply "measure for measure" and the risk of exceeding the proper punishment would often be unavoidable. Suppose, for example, a man hit his neighbor, causing him to lose one-third of his sight. How could a court insure that the one to be punished lost exactly one-third of his vision? It is, therefore, logically impossible to assume that the Torah meant "eye for eye" literally.<sup>57</sup>

Maimonides put forth his argument as follows:

...the Torah does not mean to inflict on the damager as he did to another, but means that he is worthy of having his limb removed or be injured as he did to another and he therefore pays the monetary compensation. How do we know "eye for eye" is monetary compensation? For written together with it is "wound for wound" and regarding a wound the Bible clearly legislated compensation in a previous passage: (Ex. 21:18-19).

From here we learn that the word "*tahat*" in the case of "wound for wound" is only monetary, so "*tahat*" in the case of "eye for eye" must be the same.... and this is the way they judged... in every bet din since the days of Moshe Rabenu until today<sup>58</sup>.

Jacob Chinitz<sup>59</sup> argues in the case of the pregnant woman, just as there was a financial payment where the attacker paid for the value of the child, why cannot we say that here, too, there is a financial payment for the value of the eye? If the penalty for any kind of physical harm would always have to be physical retaliation, why not retaliate

<sup>57</sup> Gaon, S. (1988). Book of Beliefs and Opinions. New Haven, Yale University Press.

<sup>58</sup> Maimonides Mishneh Torah Hilkhoh hobei Umazig, Moznaim.

<sup>59</sup> Chinitz, J. (1995). "'Eye for an Eye' - An Old Canard." Jewish Bible Quarterly 23(2): 79-85., p. 80

against the child of the attacker or against his pregnant wife, reinforcing the argument for financial compensation?

In his book *Exploring Exodus*,<sup>60</sup> Nahum M. Sarna questions the relevance of the lex talionis as stated in Exodus to the situation of the pregnant woman<sup>61</sup>. He believes that the list of injuries mentioned hardly seems to have any connection with a woman's miscarriage. Sarna therefore understands the list as a general statement of legal policy – a rhetorical formulation of the law of equivalence.<sup>62</sup> Certainly, the statement of the lex talionis in Leviticus essentially repeats the formula: Sarna rightly questions the feasibility of a literal application of the talionic principle in cases of perjury. He points out the impossibility of any witness causing a defendant to receive any of the listed mutilations by his testimony in court, and no such has ever been recorded.

Despite the clear evidence in the biblical text itself supporting such an interpretation, it is nevertheless surprising that some scholars believe that the Pentateuchal law as stated was barbaric, illustrating the primitive nature of the Torah. Thus, Jakob J. Petuchowski, in his book *Heirs of Pharisees*, regards the interpretation of the rabbis as a cloak for the pharisaic evolution of the law, by which they in fact innovated a change in what was a primitive law, by the substitution of a humanizing interpretation.<sup>63</sup> However, as has been indicated, all of the evidence points to the contrary, in that the interpretation of the rabbis was not innovative but represented the plain understanding of these verses.

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<sup>60</sup>Sarna, N. M. (1996). Exploring Exodus: The Origins of Biblical Israel. New York, Schochen. pp. 185-189.

<sup>61</sup> Exodus 21

<sup>62</sup> Sarna. p. 186.

<sup>63</sup> Petuchowski, J. J. (1986). Heirs of the Pharisees, University Press of America. pp. 26-27

What Petuchowski and the other scholars also failed to realize was that in the time of these rabbis and their schools, the “eye of eye” was not in practice. Their discussions were meant only to bring further understanding as to why this biblical law was never implemented in a practical sense and was always applied in Jewish courts through fair compensation since its inception.

It is interesting to note the fact that we have no record of an argument on this issue between Saducees and Pharisees, with the former sticking to the literal interpretation of the Pentateuch, and the latter emphasizing Biblical law as interpreted by Oral Law<sup>64</sup>. It is perhaps equally important that an argument on the literal application of “eye for eye” did take place during the Karaite separation from the mainstream of Judaism, between Saadya Gaon and the School of Karaites.<sup>65</sup>

The third place where we find this law is in Deuteronomy 19:18.

*If he has testified falsely against his fellow man, you shall do to him as he schemed to do to his fellow. Thus you shall sweep out evil from your midst ...Nor must show pity: life for life, eye for eye, tooth for tooth, hand for hand, foot for foot. (Deut. 19:18)*

Here, the perjured witness did not physically attack his fellow. The punishment is for intention alone. Usually Jewish law requires intention and actual harm. Intention alone without harm may bring moral guilt, but no punishment. This is the only case where evil intention alone is itself punished.<sup>66</sup>

Arnold Enker points out that the biblical text does not use the preposition *tachat*. Instead of ‘*ayin tachat ayin*’, the Bible here says ‘*ayin b’ayin*’, and similarly for life, tooth, hand and foot. These two different usages would seem to support the suggestion

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<sup>64</sup> Goldberg

<sup>65</sup> (cited in Bakon) See Eben Ezra’s comment on Ex. 21:24

<sup>66</sup> Chinitz pp. 83-4

that the primary text calling for taliation for physical injuries (*'ayin tachat' ayin*) has deliberately chosen a phrasing that is susceptible of more than one meaning for “eye for eye” within the context of bodily injuries.<sup>67</sup>

All in all, one might say cynically that when there are too many proofs it is because none of them is truly convincing. Or you can be friendly and deduce from this that the Talmud was so convinced that the literal meaning was impossible that it examined every possible proof.<sup>68</sup>

The Biblical commentator Eben Ezra and others have written that the Torah text does not contain a truly decisive proof for either physical retaliation or monetary compensation and we must ultimately rely on tradition that the latter is the meaning.<sup>69</sup>

Reverence must always be made to the *masorah*, the oral tradition<sup>70</sup>. It was always needed to accompany the Written Law, because the Torah alone, even with its 613 commandments, is an insufficient guide to Jewish life.<sup>71</sup> Without an oral tradition, many of the Torah's laws would be incomprehensible. The Oral Law was needed to mitigate many categorical laws that would have caused grave problems if carried out literally.

The Mishna, in Ethics of the Fathers (Chapter 1, Mishna 1) proclaims that the oral traditions recorded in these books dates back to G-d's revelation to Moses on Mount Sinai.<sup>72</sup> After the destruction of the second temple in Jerusalem in 421 B.C.E., the Jewish

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<sup>67</sup> Enker, p. 55. The Talmud also added compensation for pain, shame, etc.

<sup>68</sup> Chinitz, p. 83

<sup>69</sup> Goldberg

<sup>70</sup> Hecht (1971). Have You Ever Asked Yourself These Questions. New York, Shengold Publishers, Inc., pp. 99-108

<sup>71</sup> Telushkin, R. J. (1991). Jewish Literacy. New York, William Morrow and Co., Inc.,

<sup>72</sup> (1994). Ethics of the Fathers. New York, Judaica Press, Inc.,

community was exiled and dispersed throughout the eastern, northern and southern regions of Babylon, Syria and Israel, itself.

The temple had served not only as the single house of worship with the Jewish faith, but also as a centre of social and economic development from which all laws of Judaism, including that of the calendar, times of holiday, civil and criminal cases were brought before the Sanhedrin (Jewish Supreme Court) which was housed in the temple in Jerusalem. When all of that was destroyed, and Jews were now living dispersed throughout the land, a great concern arose. The laws were being forgotten. Without the centre there was no Sanhedrin to adjudicate the various legal issues. The details in fulfilling the 613 Commandments were now at stake for future generations.<sup>73</sup>

The rabbis, led by Judah the Prince, Ravina and Rav Ashi established a proclamation stating that it was better to violate one Commandment (Deuteronomy 6:5-9) than to violate all commandments of the Torah. The commandment in question is as follows:

*Let these matters that I command you today be upon your heart. Teach them thoroughly to your children and speak of them while you sit in your home, while you walk on the way, when you retire and when you arise.*  
(Deuteronomy 6:5-9)

This commandment and others were interpreted throughout the generations to mean that the Oral Law that elaborates the way the commandments are fulfilled should not be written on a book or a parchment, relegating its teachings to a print form where it would be placed on a bookcase. Rather the Torah must be transmitted from heart to heart”, from mouth to mouth, from parent to child so that it pulsates as a living organism, always upon the heart of its student so that it becomes a way of life.

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<sup>73</sup> Becher, M. (2005) Gateway to Judaism. P.235



As a result of the destruction of the temples, the rabbis were forced to break this commandment and give up the notion of Oral Law and begin to write them down in a magnum opus that was codified in the Mishna, and later elaborated up in, what we know today as the Babylonian Talmud. It was a work that stretched a scope of 500 years. These books became the basis of all Jewish law and concern. They were characterized as the mobile temple from which every Jewish community, henceforth, wherever they might live would have now a basic constitution that addressed every facet of Jewish law, philosophy, ethics and observances.

This is why, when the rabbis in the Talmud began addressing the commandment of *eye for an eye*, they were not establishing a new law of interpretation, but rather they were bringing to print that which had been transmitted to them orally from teacher to student, from generation to generation, going back to the time of Moses. In this way the method for compensation in understanding eye for an eye was unanimously accepted as the Oral Torah, which is the basis for understanding the written Torah.<sup>74</sup>

Having said that it is still the responsibility of the biblical student to not only rely on tradition, but as the Oral Law, itself, encourages, to reason, reconcile, and bring an ultimate understanding and truth to the text.

What is clear from the above is that the literal application of the talionic principle was incorporated in cases of intentional murder and the figurative interpretation of monetary compensation was incorporated in cases of the killing of an animal. Somewhere in the middle is the question of injury to man. To whom do we equate? If the analogy of murder is appropriate, then, as with murder, which requires the death penalty, actual retaliation must be imposed for injuries to others. If the proper analogy is to injuries done

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<sup>74</sup> Telushkin, Jewish Literacy. Pp. 111-122

to animals, then money damages are appropriate. What seems to be the acceptable and more suitable interpretation is the permissibility of money damages for human injury, equating injuries of animals to those injuries of people.

There is a moral issue underlying this discussion as well: Can it be right to treat injured humans in the same way as we treat injured animals?<sup>75</sup> The Talmud is concerned with this notion. For with capital punishment the text established a uniquely valuable character of human life, by insisting that ransom cannot be taken for the life of man. This denotes that life cannot be measured in terms of money. But how then can money compensate for injuries to humans? Are we not degrading the human body from its status as the uniquely valuable image of G-d, and thereby relegating people to the level of animals?

The Talmud advises this point, in a related issue of degradation, and with its suggestive decision we can reconcile the requirement of compensation once we see that it means we are to value the offender, not the injured party, as the basis for depreciation. We are giving the injured party, not the value of his own eye, but the value of the eye of the offender! The advantage of this approach is, of course, that it is the offender, not the injured person, who suffers the degradation of being valued in monetary terms.

The rabbis choose injury to animals, not human death, as the appropriate analogy for human injury. The implication is that a man's body parts, his hands, his legs, his eyes, are not unique and priceless. They are valuable, but valuable because they serve him in ways not fundamentally different from the ways his animals serve him. In the same way that he can be compensated in money for this loss of his cattle, he can be compensated in money for the loss of his hand, or eye. It is only human life that must have distinctive

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<sup>75</sup> Gerstein, R. (1991) "Compensating for Injuries to Persons." *S'Vara* 2(1): 56-60., p. 57

treatment.<sup>76</sup> The Gemara does not recoil from maiming because it is wrong, but because it is unnecessary. We can accept money instead in this kind of case because there is nothing wrong with doing so.

This agrees with the broader pattern of the law, and with what we can conjecture of its history. The biblical texts the rabbis are explicating insist that ransom cannot be accepted for a human life. On the other hand, “ransom” can be accepted for damages to property, to animals, and to people’s bodies. It is only human life that must have distinctive treatment.

From our knowledge of primitive law, we can surmise that at one time ransom could be accepted for any offense, including murder. Previously, the apprehended offender could buy off the vengeance of those he offended with money, whether he had injured or killed. The biblical rule forbidding us to take ransom for a killer’s life (Numbers 35:31) is prohibiting what had previously been permitted.

The Gemara can be understood, then, as justification for denying to the integrity of the human body the same special sanctity which surrounds human life. This refusal of special status to the body is vindicated against an uneasy sense that there is something untoward about treating human body parts in the same way as to those of animals. The need to give material help to those who have been injured is valued above a concern for the potential degradation of putting injured persons in the same category as animals (or valuing them as slaves).

Robert Gerstein brings a parallel case between this Gemara and two of the opinions in the recent decision of the California a Supreme Court in the case of *Moore versus Regents of the University of California*.<sup>77</sup>

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<sup>76</sup> Ibid, p. 58

Moore the claimant declared that when the doctor removed his spleen, to treat his leukemia, the surgeon, the University and others then used it to generate a cell line of immense profitable and commercial worth. Moore took legal action against them for altering his spleen, maintaining that it belonged to him. The accused objected to Moore's grounds for alteration and the court sustained their argument.

The court of appeal overturned the verdict. The Supreme Court reestablished the original decision, maintaining that an individual does not have property rights in "removed body parts." And Moore's claim of alteration was not valid.

The popular view within the Supreme court for refusing these grounds of alteration depended primarily on the necessity of not hindering medical exploration. However, Justice Arabian, though he agreed with the decision, voiced his apprehension when he questioned:

Does it uplift or degrade the "unique human persona" to treat human tissue as a fungible article of commerce? Would it advance or impede the human condition spiritually or scientifically, by delivering the majestic force of the law behind plaintiff's claim. I do not know the answer to these troubling questions, nor as I willing – like Justice Mosk [a dissenter] – to treat them simply as issues of "tort" law...<sup>78</sup>

The Gemara suggests that we consider queries concerning reparation for using body parts as legal compensation. Furthermore, we are obligated to do so when we determine to regard damages to people as matters of "tort" running, needing reparation similar to that of damages to property.

Rabbis would agree with Justice Mosk's opposition, which maintains that should anybody benefit from Moore's cells, he is entitled to a portion of those gains. This does not mean that the everyday need to fair compensation rises above all obstacles. Contrary

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<sup>77</sup> As cited in Gerstein, p. 59-60. 51CAL. 3d 120 (1990)

<sup>78</sup> Ibid. P. 60

to contemporary courts which are ready to set a price on people's lives to compensate relatives for wrongful death, the rabbis would not permit pecuniary value to be placed on the life of a human being.

Yet the worth of the wounded to possessing an entire, operational human body ought to be lessened to monetary compensation. Financial compensation is the first obligation, even if it implies grouping individuals with animals.

The Talmud that we stated earlier suggests that we treat questions of this nature, i.e., body parts for monetary compensation, as a valid, legal claim. The rabbis committed themselves to that conclusion when they decided to treat injuries of people as tissues of "tort law," imposing compensation for injured people the same way it imposes compensation for injured cattle. There is no reason to assume that the rabbis would not agree with Justice Mosk's opposition, which maintains that should anybody benefit from Moore's cells, he is entitled to a portion of those gains.

This does not mean that the answer to all legal issues hinges on monetary and fair compensation. Contrary to contemporary courts which are ready to set a value on people's lives to compensate relatives for wrongful death actions, the rabbis would not permit pecuniary value to be placed on the life of a human being.

Yet the importance of the injured to obtain a whole and proper functioning body can and should be assessed through financial compensation. Material well-being must be addressed first, even if it implies grouping individuals with animals.

In the introduction to his Commentary on the Mishna, which is the earliest statement of his philosophy of law, Maimonides defines the category of a law of Moses

from Sinai as “a atraditional interpretation about which there is no disipute.” His example is the lex talionis:

For, up until now, we have not found that at any time any of the sages from Moses to Rav Ashi ever said that whoever blinds the eye of a person his eye is to be blinded according to the word of the L-re, blessed be he, “an eye for an eye,” and that another said he is only liable for monetary payment<sup>79</sup>

In his treatment of lex talionis in the Mishneh Torah, Maimonides presents arguments in the talmudic case for basic consistency between rabbinic law and the biblical sources. Then he notes:

Even though these things can be seen from the biblical text, all of them are a law of Moses which we have. This is how our fathers saw it being adjudicated in the court of Joshua and in the court of Samuel the Ramaite and in every other court that exited from the days of Moses until now.<sup>80</sup>

When setting forth the various procedures to be used by any court in adjudicating civil cases, Maimonides admonishes the judges “to judge...on the bais of those matters to which their reason inclines to accept as true and about which they are certain.” At the end of the same chapter in the Mishneh Torah Maimonides speaks of the importance of judges acting for the sake of G-d and respecting human dignity.<sup>81</sup> If these are the criteria for application of the law, surely they are the criteria for enacting the law. Thus the argument can be made that the criterion of respecting human dignity is the rational

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<sup>79</sup> *Commentary on the Mishna*, introduction, (Y. Kafih [ed.] Jerusalem: Mosad Harav Kook, 1964) 1:9 Cf H. Horovitz and Y.A. Rabin (eds.), *Mekhilta: Mishpatim*, 277 and n.8 *ad loc*; *Baba Kamma* 84a (the view of R. Eliezer ben Hyrkanus).

<sup>80</sup> *Halkhot Hovel U'Maziq*, 1:6

<sup>81</sup> *Hilkhot Sanhedrin* 24:9. *K'vod hab'riyyot* is clearly good in and of itself. It is only qualified when it presumes to be greater than G-d's dignity. See, e.g., *Berakhot* 19b and parallels; *JT Kelayim* 9:1, 32a; *Kiddushin* 32b..

principle which connects Scripture and the traditional lex talionis. We can see this in the Babylonian Talmud's treatment of the law and in Maimonides' allusion to that treatment in the Guide of the Perplexed.

Maimonides in his Guide of the Perplexed distinguishes between "necessary equality" and "general equality" Human lives are subject to necessary equality, whereas human body parts are subject to general equality. What is the basis of this essential difference? Maimonides, himself, simply states it, but so often in the simplistic style in his statements in the "Guide", he invites our rational speculation.

David Novak understands Maimonides to mean that when a personal injury occurs, the worth of body parts of different people is precisely disproportionate because the worth of A's eye relative to his entire life will always be different from the worth of B's eye with regard to her whole life. That is why a third aspect, material wealth, is presented. This establishes the relationship between the worth of an eye attacked and it can be approximated and then the proportionate worth in currency can be taken from the perpetrator. This gives us indirect commensurability, what Aristotle called "proportional" equality as opposed to the more direct "arithmetic" equality. That, is what is meant by "general equality." In the case of homicide, we are not dealing with a part of a larger whole; rather we are dealing with a whole itself.<sup>82</sup>

One can draw two conclusions from this premise: The first view is that human lives are disproportionate overall. Therefore one life cannot replace another life. The second view is that they are essentially and equally the same. Therefore one life cannot contain greater value than another life. The classical Biblical teaching of the equality of all human lives created in the image of G-d emanates this principle of necessary equality.

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<sup>82</sup> As cited in Novak, P. 64

As the sages proclaimed in the Babylonian Talmud, “Why do you think your blood is redder; perhaps the other person’s blood is redder than yours?”<sup>83</sup>

In his book Studies in Biblical Law, David Daube struggles with the spirit of the text that implies literal retaliation and with the wording and phrasing of the text, implying monetary compensation. He tries to reconcile these two opinions by stating that the text, indeed, meant both retaliation and restitution. He bases it on the theory that evil acts have a perpetuating life. When a person deprives another of a certain power or faculty, this power or faculty becomes part of that person. A murderer, for example, possesses and obtains the soul of his victim.

He illustrates traces and proofs of this idea from numerous examples of literature in the Bible, citing David’s remark to Saul: “Yet thou huntest my soul to take it.” He notes the Hebrew term *lakach*, not only to take away the soul from another man but also to take to oneself, to capture.<sup>84</sup>

In another example, he cites Baalam’s prophesy. It is a picture of a man’s thriving on the corruption that he has caused. Daube uses the quote “to eat souls” suggesting the process of gaining wealth and strength by making others poor and weak. (Ezekiel 24, 11)

He also cites the expression *doresh damim*, to require the blood. (Genesis 9:5) It is used of G-d’s requiring the murdered man’s blood from his murderer. And he gives many other examples, all attempting to demonstrate that the soul of the slain comes under the influence of his subjugator.

In view of this belief, Daube concludes that the ‘eye for an eye’ legislation worded in Exodus and Leviticus speaks of retaliation as restitution. By inflicting

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<sup>83</sup> Talmud Pesachim 25B

<sup>84</sup> Daube, D. D. (1969). Studies in Biblical Law. New York, Ktav Publishing House. p. 122



retaliation, or killing the murderer, the person harmed, or his family, not only punishes the wrongdoer but regains the spirit of the soul or faculty lost from the victim. Vengeance is compensation. It really is from this standpoint, a matter of exacting “life” in the place of “life,” “eye” in the place of “eye”.<sup>85</sup>

The rabbis obviously rejected this notion and concluded that monetary compensation as well combines both retaliation and restitution. For it compensates the victim for his injuries and alleviates his suffering at the same time as it atones for the perpetrator’s guilt. Still, it cannot be contradicted by combining these two aspects in a single mode: Each may be somewhat weakened. But that is a price worth paying, considering that the alternative is to deny the victim all practical compensation for his injuries.

Novak, in his essay *Lex talionis*, attempts to find the very source of the Talmudic interpretation. His question is, has there been rabbinic unanimity about this category of law in general because it is from Moses, or is it considered to be from Moses because of rabbinic unanimity? If the former view is correct, then rabbinic reasoning is only a confirmation of perceived revelation; if the latter view is correct, then rabbinic reasoning itself constitutes the tradition of perceived revelation.<sup>86</sup>

The implications would be whether political authority determines what is right, or, conversely, whether the decisions of this authority are determined by what is right. In the case of ‘eye for an eye,’ is there sufficient textual foundation for rabbinic unanimity about the traditional interpretation of the law, or was there a guiding principle within the structure of Jewish law that determined the resulting unanimity of the rabbis?

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<sup>85</sup> Ibid, pp. 121-124

<sup>86</sup> Novak, p. 61

Maimonides speaks of the importance of judges acting for the sake of G-d and respecting human dignity.<sup>87</sup> If these are the criteria for application of the law, surely they are the criteria for enacting the law. Respecting human dignity is the rational principle, which connects Scripture and the traditional lex talionis.<sup>88</sup>

To attempt to practice literal equality by physical injury would result in real inequality in the end. As we have cited the examples brought in the Babylonian Talmud, it would result in a legal assault on the human dignity of the assailant as serious as the original assault on his or her victim. Perhaps this can explain why all the Rabbis were unanimous in their arguments, a rarity in Talmudic literature.

What should be noted is that the rabbis of the Talmud, and throughout Jewish history, did not justify the 'eye for an eye' legislation as a moral advance in relation to earlier legislative codes in ancient Palestine. (see below) They saw this piece of legislation not as a relative norm but as an absolute moral code in applying justice, concentrating on making the victim 'whole' again through healing and compensation.

In doing so they developed a highly sophisticated system of liability as rich and multi-faceted as anything contemporary societies have devised. An injury contained five categories of damages. –*nezek, tzar, repo, shevet, boshet*. The amount you had to pay would depend on the actual wages they lost (a baseball pitcher with a broken arm would lose more wages than a psychiatrist, for example), as well as future wages and opportunity lost (if they became unfit for certain kinds of work in the future) doctor's bills, pain and suffering, and even possibly humiliation or loss of social status. This very

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<sup>87</sup> Ibid, p. 63 (as cited in Novak) *Hilkhot Sanhedrin* 24:9. *K'vod hab'riyyot* is clearly good in and of itself. It is only qualified when it presumes to be greater than G-d's dignity. See, e.g., *Berakhot* 19b and parallels; JT *Kelayim* 9:1, 32a; *Kiddushin* 32b..

<sup>88</sup> Note the dispute with Professor Marvin Fox on this question in "Natural Law, Halakha, and the Covenant," *Jewish Law Annual* 7, 1988, p. 47ff [hereinafter NOVAK]

humanitarian approach to re-establishing the social order often seems to have been lost in our modern use of the biblical text of punishment.<sup>89</sup>

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<sup>89</sup> Mishne, Baba kama 83-84

## V. CHAPTER 4

### **EVOLVING HISTORY OF THE PRINCIPLE: Its Moral Progress and Declines**

Fortunately, archaeological discoveries have unearthed legal materials from the ancient Near East cities. (i.e., the Sumerian Code of Ur-Nammu, to the Code of Hammurabi., dating from the eighteenth century, B.C.E.)<sup>90</sup> that have yielded documents and facilitated a better understanding of this piece of legislation. The ancient Mesopotamian code of Hammurabi seems to have been the first documented code to require physical injury for physical injury.

Recent advances in understanding the history of the ancient Near East, including discovery of several of its major law codes and of numerous documents of court proceedings, have shed vast new light on the background of this matter and contribute to a deeper understanding of the Torah's use of talion terminology. We now know that monetary compensation for causing physical injury including the loss of one's limb, was the widely established practice for many centuries in the pre-Torah world of the Near East.

Many scholars believe that when the Torah came and set forth its law of “eye for an eye” that it fell right in line and paralleled the Hammurabi Code that was already in effect in the Near East.

The Eshnunna laws, which preceded Hammurabi by several centuries, and other ancient codes, are clear on this matter. Hammurabi (who ruled in Babylon during the Eighteenth Century B.C.E.) introduced "eye for eye" legislation against the traditional practice of monetary compensation for physical injury. He intended to reform a

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<sup>90</sup> James B. Pritchard, ed., (1969) Ancient Near Eastern Texts Relating to the Old Testament (ANAT) 3<sup>rd</sup> edition with supplement (Princeton: Princeton University Press

problematic situation, as there had been many abuses. It now appears probable that even Hammurabi's legislation was meant mostly as a moral guideline for fairness and limitation, notwithstanding that his code applied equivalence only to members of the same social class and it included vicarious punishment: Interpreters are widely agreed that this formula, so brutal on the face of it, actually represented an advance over earlier legal thinking both because it allowed no favoritism and because it guaranteed that the punishment could not exceed the crime (Harper's Bible Dictionary 1985, entry: Retribution, p. 865). It prevented revenge by guarding against the infliction of arbitrary retribution by enraged parties, for there have been many abuses.<sup>91</sup>

The famous Code of Hammurabi, a Sumerian code written during the time of Abraham, bears similarity to the Law of Moses. That text reads:

*"If a man has caused the tooth of a man who is his equal to fall out, one shall make his tooth to fall out".*

This is an explicit legal statement. The justice of 'eye for an eye, tooth for a tooth' in the Torah, however, is presented as a general maxim of justice, rather than a specifically applicable legal principle.<sup>92</sup>

Now within that passage lies the infamous statements that for many, calls for what some think is a vigilante approval of getting even for crimes committed against individuals in society. However, in the context, these legislations were NOT given to individuals in society. It was "law" legislation given to "judges," appointed to rule and care for the peace and keeping of a lawful society. It was never intended to allow individuals to *avenge* their own injuries or losses as they saw fit. These laws were given for administering fair justice when wrongs, serious or minor, were perpetrated against

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<sup>91</sup> Harper's Bible Dictionary, (1985) p. 865

<sup>92</sup> Pritchard (1969) p. 164

members of society. Simply stated, the lex talionis, “law of the tooth” or law of retaliation was exclusively given to society to deal with sinful wrongdoing committed against it and individuals.<sup>93</sup> (Finnan)

Furthermore, as the Biblical scholar Nachum Sarna has pointed out, many ancient cultures regarded injury as a private matter to be worked out between families, resulting in widely varying consequences for offenders and perhaps even vengeful feuds.

Examining the laws of King Ur-Namm (2112-2095 B.C.E.), paragraphs 16-17 which state the following:

*If a man, in the course of a scuffle, smashed the limb of another man with a club, he shall pay one mina of silver.  
If someone severed the nose of another man with a copper knife, he must pay two-thirds of a mina of silver.*<sup>94</sup>

The city of Eshunna (c. 2000 B.C.E.), also provided laws for monetary compensation for injuries, in paragraph 42-45:

*If a man bites the nose of another man and severs it, he shall pay one mina of silver. For an eye he shall pay one mina of silver; for a tooth half a mina; for an ear half a mina; for a slap in the face ten shekels of silver.  
If a man throws another man to the floor in an altercation and breaks his hand, he shall pay half a mina of silver.  
If he breaks his foot, he shall pay half a mina of silver.*<sup>95</sup>

In the same way, the Hittite laws from Anatolia provide for monetary compensation, as shown in paragraphs 7, 11 and 13 of Tablet 1.

*If anyone blinds a free man or knocks out his teeth, they would formerly give one mina of silver, now he shall give twenty shekels of silver and pledge his estate as security.  
If anyone bites off a free man's nose, he shall give one mina of silver and pledge his estate as security.*<sup>96</sup>

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<sup>93</sup> Finnan, Dennis L., (commentator) Mar. 10, 2002, “The World and You.” Radio broadcast.

<sup>94</sup> Sarna, pp 182-185

<sup>95</sup> Pritchard P. 524

<sup>96</sup> Ibid, P. 189

In striking contrast to the notion of monetary compensation the Mesopotamian Code of Hammurabi (18<sup>th</sup> century B.C.E.) applies the *lex talionis* literally, in terms of corporal punishment. Paragraphs 196, 197, and 200 state:

*If a seignior has destroyed the eye of a member of the aristocracy, they shall destroy his eye  
If he had broken another seignior's bone, they shall break his bone.  
If a seignior has knocked out a tooth of a seignior of his own rank, they shall knock out his tooth.*

Although these laws seem retrogressive the Code of Hammurabi addressed a legislation that earlier laws were not concerned about. By its very nature, compensation was considered a private matter between the assailant and the injured party and, as such, was entirely within the province of civil law. The Code of Hammurabi moved the laws of *lex talionis* from a private aspect to the control of the state, namely. criminal law. It was laws created with society as a whole in mind rather than the individual.<sup>97</sup>

Some scholars are inclined to believe that even Hammurabi's judges did not apply "eye for eye" literally, finding evidence of their judging monetary compensation subsequent to promulgation of his famous code.

The Bible seems to clearly bring offenses against persons under the jurisdiction of the state, and mandates "fair" and limited punishment, while also preventing revenge killings and other cycles of bloodshed.

The Pharisees' understanding of Judaism was characterized by their belief in the Oral Law. They believe that when G-d gave the Torah to Moses, He also gave him an oral tradition that specified precisely how its laws were to be carried out. For example, although the Torah demands "an eye for an eye," the Pharisees maintained that G-d never

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<sup>97</sup> Ibid, P. 175

intended that physical retribution be exacted. Rather a person who blinded another was required to pay the victim the value of the lost eye. The Pharisees believed that the Oral Law also empowered them to introduce necessary changes into Jewish law, and to apply the law to unanticipated circumstances.<sup>98</sup>

In the time of the Talmud, “an eye for an eye” was not carried out literally, and Orthodox Jewish scholars teach that it was never practiced. The only punishment in this set that was not converted to a monetary fine was capital punishment for murderers, “a life for a life.” Because the Torah believed that premeditated murder deserved the death penalty, there was obviously no fear of punishing the killer excessively. Jewish law did dictate, however, that murderers be executed in the quickest manner possible. Hence, later Jewish law forbade the Roman punishment of crucifixion.<sup>99</sup>

Under Jewish law, there are a number of infractions for which the death penalty is proscribed, but in reality, this penalty was rarely invoked. The “cities of refuge” that are mandated in the Bible and existed during periods of Jewish sovereignty in the Land of Israel were created as means of preventing blood feuds and the cycle of violence resulting from manslaughter and accidental death.

Torah law also forbade remitting a murderer’s sentence with a monetary fine. Life and money, according to the biblical ethic, are incommensurate; one can never atone for murder by paying money. In this regard, too, Torah law differed from the laws of the ancient Jews’ neighbors, which would sometimes fine those who had murdered people belonging to a lower social class and which made certain property crimes (for example, looting at a fire) capital offences. In Jewish law, property crimes could never be

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<sup>98</sup> Telushkin, *Jewish Literacy*. Pp. 131-132

<sup>99</sup> Ibid. P. 501



punished with death, and murderers could never be let off with payment of money, even if the family of the victim were willing to accept it. (see Numbers 35:31, and Maimonides, Mishneh Torah, "Laws Concerning Murder," 1:4).<sup>100</sup>

The injunction to preserve human lives ("*pikuah nefesh*") is one of the highest priorities, and takes precedence over almost all other commandments.

The ancient rabbis didn't think they were reinterpreting these verses at all; they thought that this was the plain meaning all along. Now, one could object that the rabbis of the Talmud were indeed reinterpreting and cleaning up some pretty nasty laws. However, even if you reject the rabbinic view of the plain meaning of the text, you can still try to see these laws in their historical context. For example, by instituting additional rules of evidence and criminal procedure, it became nearly impossible for a court to mete out a death sentence. Any Jewish legislation subsequent to the Bible had to agree with the commandments laid down in the Torah, but their application could be modified according to changes in social norms.

So even if we take an "eye for an eye" at face value, it turns out to be nicer system of justice than some of the ancient alternatives. There were ancient Assyrian laws that mandated the death penalty even for property crimes, or horrible tortures as punishments, or permanent enslavement for insulting the wrong person, or different punishments for different social classes. It wasn't so long ago- about 180 years- that "civilized" England was hanging people convicted only of property crimes.

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<sup>100</sup> Ibid.

## CHRISTIAN UNDERSTANDING

By translation or mistranslation, the Hebrew Bible has probably supplied more staples to the Western canon of quotations than any other book (or set of books), including Shakespeare. Certain Biblical lines stand out, though the distinction is sometimes a dubious one from the perspective of scholars of Hebrew and of the Hebrew Bible. For reliance on mistranslation, projection of preconception, brutality of intent and ignorance of the Biblical context, probably no Biblical verses are more famous, or infamous, than this Torah portion's "an eye for an eye, a tooth for a tooth, a hand for a hand, a foot for a foot, a burn for a burn, a wound for a wound, a bruise for a bruise"<sup>101</sup>

Here, we are told, is vengeful, unbending, even inhuman justice, only too typical of the "Old Testament." Here is the "Law" against which Paul of Tarsus inveighed so heavily; here is Judaism's absolute, untrammelled and altogether one-sided rigor. Here is the transmogrified teaching of the jealous G-d of Moses - Him Who needed to be replaced, or, at the least, developed into Paul's G-d of love, mercy and understanding.

Unfortunately, the "eye for an eye" texts became the basis for colloquial speech. Its common use is reflected in dictionaries, encyclopedias, and other reference works as merely recording reality, and these in turn sanctify usage and thus the stereotype is perpetuated forever.

*The Random House Dictionary of the English Language* defines "eye for an eye" as "repayment in kind as revenge for an injustice." *Lex talionis* means "the principle of retaliation that a punishment inflicted should correspond in degree and kind to the offence of the wrong-doer, as an eye for an eye, tooth for a tooth."

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<sup>101</sup> Hertz. Ex 21:24-5

Jacob Chinitz notes that in a recent issue of The New York Times the term was used in a column about the new crime bill passed by Congress and it wondered whether the motivation was not a simple “Old Testament eye for an eye thirst for vengeance.”<sup>102</sup>

Perhaps the impression of this law goes back to the beginning of Christianity. In Matthew (5:38-42) Jesus was inviting Christians in their daily lives to go beyond the letter of the law, transcending the “eye for an eye” legislation.<sup>103</sup> “You have heard it said, “An eye for an eye and a tooth for a tooth.” But I say unto you, do not resist him who is evil” (Matt. 5:38, 39). This teaching can be seen as radical and beyond belief and Christians have been struggling with it ever since. For, as the French philosopher Rene Girard classifies the human race, as “the inherent complicity between culture and violence,” making this teaching an on-going and exhaustive challenge. None the less, what is stated in Matthew implies clearly that the Biblical “eye for an eye” was that of physical retaliation. And Jesus came and advocated forgiveness and saw retaliation as unworthy of man.

What’s interesting to note is that in Matthew 10:33, Jesus was saying, “But the one who disowns me in the presence of men, I will disown in the presence of my Father in heaven”. In other words, Jesus seems to advocate treating others as they have treated him; a standard of justice that is perfectly commensurate with the demand of “an eye for an eye”<sup>104</sup>

On the question of life for life, Christians throughout the generations have found it difficult to find textual or specific confirmations on the issue of capital punishment. Some opponents to the death penalty cite the incident in John where Jesus said to those

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<sup>102</sup> Chinitz, Jacob. “Eye for an Eye--an Old Canard.” *Jewish Bible Quarterly* 23.2 (1995): 79-85

<sup>103</sup> Ibid

<sup>104</sup> Telushkin, p. 501

who would stone the adulteress, "Let him without sin cast the first stone." (John 8:7) But most scholars would concede that the purpose of the passage was not to make an ethical pronouncement on the death penalty. Its purpose was instead to "show Jesus' wisdom in besting his adversaries."<sup>105</sup>

Some Christian scholars believe that the "love your enemy" teachings of Jesus remove the "eye for eye, tooth for tooth, life for life" requirements of the Mosaic Law?<sup>106</sup> Therefore they maintain that to deliberately take the life of another person is never justified, no matter how serious the crime. Capital punishment, they would say, applied in ancient Israel when the nation was a theocracy--ruled directly by God. Since God doesn't directly govern any nation now, according to this position, God would not put the power over life and death into the hands of imperfect man. Think of the injustices that would inevitably develop. For human judgments are not infallible and no penalty should be used which cannot be revoked in case of error. Capital punishment has not always been used impartially among all economic and racial groups. The rich and the powerful would "buy" their way out. And the crime of murder could never be completely eliminated, even if capital punishment were strictly enforced.

Christians who advocate the death penalty readily acknowledge the above arguments. However, they maintain that wherever capital punishment has been in force, the threat of the death penalty has helped to protect the public from violent crime and it has reduced the number of wanton killings. In Islamic countries, for example, where "eye for eye, tooth for tooth, life for life" laws tend to be carried out in a literal way, the crime

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<sup>105</sup> Zehr, H., "Death as a Penalty: A Moral, Practical and Theological Discussion." Published for Mennonite Central Committee, New Bloomfield, Missouri)  
<http://www.hereshelpnet.org/The%20Death.htm>

<sup>106</sup> Reid, Dr. David, "*Capital Punishment And Biblical Covenants*," Devotions for Growing Christians. 21, 2, 1993-4

rate is definitely lower than the crime rate of western nations where the death sentence is only carried out infrequently. While capital punishment as a deterrent to crime may be discussed and debated with all kinds of statistics, that particular aspect of the debate does not settle the case. The "bottom line" is that in spite of the regrettable cases of perverted justice and mistakes and ineffectiveness, the **biblical** basis for capital punishment has never been removed or changed.

God has never done away with, or changed any of His moral standards and principles that are contained in the Mosaic Covenant. God's moral standards never change but isn't it biblically inconsistent, then, to support the death penalty only for the crime of murder? For there are many other crimes, as stated before, that the Bible sanctions the death penalty.

The original biblical basis for capital punishment is found in Genesis 9, in the **Noahic Covenant**. This covenant was not limited to the nation of Israel--Israel did not exist at that time. God made the Noahic Covenant with the descendants of Noah (Genesis 9:9), and therefore it included **all mankind**. Genesis 9:12, for "**all** generations to come." We see from Genesis 9:6 that death was the penalty for the crime of murder only-. The stated reason for the death penalty was because God made man "in the image of God." and places a very high value on human life!<sup>107</sup>

The debate in modern scholarship revolves around two questions: 1) "Did Jesus, in fact, merely interpret the Law of Moses, or did His teaching (and acts?) move beyond it?" and 2) "If His teaching went beyond the Mosaic tradition did it involve any abrogation of that tradition?" The majority of scholars appear to fall in alignment with the

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<sup>107</sup> Ibid

idea that Jesus did indeed move beyond the Torah. Both camps cite good exegetical and theological reasons for their views.

In his book Understanding the Sermon on the Mount,<sup>108</sup> McArthur suggests several ideas in an attempt to demonstrate the relationship the Sermon on the Mount bears to the Mosaic Law. He concludes that the ethic of Jesus involved the abrogation of some aspects of the Mosaic tradition (Pentateuch). This is best illustrated by Jesus' teaching on divorce, swearing and retaliation. McArthur goes on to show that no matter how one tries to reconcile certain statements of Jesus with the Pentateuch, one is left with the fact that Jesus abrogated certain things.

Furthermore, McArthur contends that the ethic of Jesus was a legitimate development from the Mosaic tradition. This, he contends, is true because Jesus was born and bred a devout Jew, the Reformers did indeed see parallel between the Sermon and Pentateuchal legislation and many of Jesus' distinctions are found in existing Rabbinic literature.

What McArthur fails to recognize is that Christian teaching on retaliation did not go beyond or abrogate the Torah.. On the contrary, as I have pointed out, Christian teaching, if anything, falls right in line with the Jewish understanding and rabbinic teaching of the "eye for an eye" legislation.

Muhammad, the founder of Islam read these Scriptures like many of his day, and chose to follow it to the letter of the text in which these thoughts are found. In many Muslim controlled lands, a thief caught, publicly actually gets his hand cut off.<sup>109</sup> "Any newspaper or writer wanting to renounce the precepts and fundamental principles of

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<sup>108</sup> McArthur, Harvey K., Understanding the Sermon on the Mount (New York: Harper, 1960)

<sup>109</sup> Finnan

Islam such as Qesas (vengeance laws) must be seen as an apostate and death will be his punishment," Khamenei said.<sup>110</sup> Papers and writers have been strictly forbidden since the 1979 Islamic revolution from questioning the "ideological basis" of Islam and its sharia laws which are largely the basis of civil and criminal law in Iran.

Under Jewish law, there are a number of infractions for which the death penalty is proscribed, as stated earlier, but what most people are not aware of, that in reality and in practice, this penalty was rarely invoked. The "cities of refuge" that are mandated in the Bible and existed during periods of Jewish sovereignty in the Land of Israel were created as means of preventing blood feuds and the cycle of violence resulting from manslaughter and accidental death.<sup>111</sup> Even the premeditated murder of another human being, in which the Bible unequivocally states "he shall be put to death" (Genesis 9:5) this, too, was rarely put into practice for there were a multitude of conditions, circumstances and requirements that were imposed on Jewish courts before an execution could take place. For instance, several verses in the Torah state clearly that the only cases where murders can be put to death are those in which the accused was seen by at least two people **who actually saw him do it**. Example Deuteronomy 17:6 "On the testimony of two or three witnesses a man shall be put to death, but no one shall be put to death on the testimony of only one witness."<sup>112</sup> Circumstantial evidence alone, would not suffice for a conviction.

All cases of Capital offences would come before the Sanhedrin, the Jewish Supreme Court, composed of seventy-one members of the highest legal and religious authority in Jewish life. In criminal cases, the judicial system practiced by the Sanhedrin

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<sup>110</sup> Ibid

<sup>111</sup> Steinberg, p. 2

<sup>112</sup> Watkins, James (commentary) 1992. "Is capital Punishment biblical?" Adapted from Death & Beyond.

differed greatly from the North American adversary system.<sup>113</sup> When a capital case came before it, the Sanhedrin's head would appoint different judges, some to investigate evidence pointing to the defendant's guilt, others to probe evidence pointing to his innocence. The examining judges then reported the results of their inquiries to their colleagues. Unlike contemporary prosecutors or defense attorneys, the Sanhedrin's judges had no vested interest in developing a good record of convictions, or in acquitting guilty defendants. When the vote was taken, the youngest, most recently appointed justices voted first, so that they would not be intimidated by the votes of their more mature colleagues.

Two Talmudic texts (Sanhedrin 17a and 36b) cite the necessary qualifications for Sanhedrin appointees: They had to be well versed in Torah and in the general sciences, including both mathematics and medicine. They also had to be fluent in many languages, to avoid relying on interpreters. Aged men and eunuchs were not appointed to the court, because it was feared they would be lacking in tenderness. The same was true for men who were childless; the rabbis believed that the experience of raising children makes a person more sympathetic and humble. Maimonides later codified seven additional qualifications for being appointed a judge in a Jewish court: wisdom, humility, fear of G-d, hatred of ill-gotten gain, love of truth, love of one's fellow man, and a good reputation."<sup>114</sup> A Sanhedrin that would exercise capital offence executions with two people in seventy years would be considered a brutal, murderous Sanhedrin.

Some Talmudic scholars supported a highly restricted use of the death penalty while others argued for its complete abolishment. The great sage, Rabbi Akiva would

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<sup>113</sup> Kaplan, R. A. (1997). Handbook of Jewish Thought. Brooklyn, Maznaim Publishing Corp., pp. 207-209

<sup>114</sup> Maimonides, M. "Mishne Torah: "Laws of Sanhedrin"." Chapter 2



have subverted the meaning of the Torah so severely that capital punishment would be abolished. Jewish law did dictate that if a capital case would be realized, the murderer was to be executed in the quickest manner possible. Hence, later Jewish law forbade the Roman punishment of crucifixion.<sup>115</sup>

Supported by the themes of Deuteronomy 32:35-- "To me belong vengeance and recompense" --and of Leviticus 19:18--You shall not take vengeance but shall love your neighbor as yourself"<sup>116</sup> and the prophet Ezekiel, "There is no pleasure in the death of the wicked, but turn back from evil ways and live." combined with the realistic concerns of capital punishment, formed the attitude of the popular Jewish thinking in making the claim that despite the literal character of the Bible, Jews generally do not favour the death penalty. Presently in Israel capital punishment is not, and since its inception never was, incorporated into its legal system.

It turns out that the many concerns that the Sanhedrin envisioned in applying capital punishment has become realized in modern legal systems, in a drastic moral decline. The death penalty has been handed out in an arbitrary manner. There are huge disparities between sentences received by whites and African-Americans. Juries are often biased. Mentally disabled individuals have been executed since 1900. Instances of cruel and unusual punishment have been experienced by botched executions. It's because of these possible and actual mistakes and injustices, the Sanhedrin concluded, that the application of the law of "life for a life" could be as perverted and cruel as the original crime.

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<sup>115</sup> Telushkin, p. 501

<sup>116</sup> Zehr

Yet, 66% of Americans support the death penalty. For them it comes down to one question. If a human kills another human in cold blood, with premeditation, he forfeits all his basic human rights. He has become less than human. Does that person deserve to die? The way civilization evolved and survived is by recognizing its harmful elements and removing them. That's what the death penalty is; ridding an extremely harmful poison to civilization. There are those that would argue two wrongs don't make a right, but if the first wrong is averted by the prospect of the second "wrong," then the punishment policy will have done its job, keeping the wrongs from happening in the first place.<sup>117</sup> Jewish law would and does agree with that principle, but has a difficult time applying it for the earlier stated concerns.

Concerning the role of experience, one might say that there is nothing we can do to bring back a loved one who was murdered. Does anyone really receive peace from “knowing the death of their loved one has been "avenged"? When you talk to people who have had relatives murdered by people sitting on death row, they will tell you that they are glad that the world is rid of the evil. You don't see too many mothers of victims advocating the abolition of the death penalty<sup>118</sup>

This is similar to the argument used by the moviemakers in defending their horrible immoral realism: “We are not creating violence, etc., we are merely holding up a mirror to reality.” The fallacy in this argument is, of course, that existing immorality is multiplied, suggested and proliferated in the process of reflection. Which is what happens

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<sup>117</sup> Kerkham

<sup>118</sup> Meganthom (pseduonom) (Jan. 2001) “Eye for an Eye” (argumentative essay posted on the internet) <http://www.half-empty.org/xml/newideas.xml>

when two mirrors are placed facing each other, and there is an infinite process of mutual reflection of the image.<sup>119</sup>

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<sup>119</sup> Chinitz, Pp. 79-85

## VII.

## CONCLUSION

From the point of legislators, politicians and religious leaders we do find moral progress in that down through the years the sacredness of life has been extended from just a few tribes of humans, to all humans. Thus the issues of abortion, making war, and punishing the worst of criminals are our greatest ethical challenges.

Professor Moshe Greenberg has stated: "It is not possible to comprehend the law of any culture without an awareness of its key concepts and value-judgments. Comparing individual laws of various systems could be misleading."<sup>120</sup> Physical retaliation was widespread in antiquity, but scholars who extrapolate that this same law was adopted by the Bible, have done so without carefully checking the evidence, or with intention to denigrate the uniqueness of the Bible. No doubt there are points of contact between the two value-systems, but what makes for uniqueness are those significant points in which they differ. Following are some significant differences.

Firstly, Biblical law insists on financial settlement for theft or property damage, "in Babylonian law breaking and entering, looting, trespassing, presumably for theft, and theft of another's possession, was punishable by death."<sup>121</sup>

Then, in the case of intentional murder, the Bible prescribes unequivocally ...He shall be put to death (Genesis 9:5). Having committed an unforgivable sin against G-d, an uncompromising death penalty is required.<sup>122</sup> Furthermore, being irreplaceable, human life cannot be measured in terms of money or property, therefore no ransom is allowed.

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<sup>120</sup> Some Peculiarities of Biblical Criminal Law, Moshe Greenberg, Jewish Expression (ed., Judah Goldin) p. 20.

<sup>121</sup> Ibid p. 27

<sup>122</sup> Bakon, P. 160 (The talmudical tendency to mitigate capital punishment is well known. Thus, according to Mishna Makkot 1:10, Rabbis Tarfon and Akiba state: "If we had been in the Sanhedrin, no one would have been put to death.")

On the other hand, ancient Near Eastern law on homicide “recognizes the right of the slain man’s family to agree to accept a settlement in lieu of the death of the slayer.”<sup>123</sup>

On vicarious punishment the Code of Hammurabi legislated retaliation against innocent parties. Thus, if A constructed a building for B, and the building collapsed and killed B’s daughter, then A’s daughter was put to death (Law # 229). A similar case in Exodus 21:31, where a goring ox of A has gored the son or daughter of B, the Bible offers the possibility of redemption for the loss of life sustained. (Exodus 21:31)

Thus the Bible categorically opposed vicarious punishment that was so prevalent at that time in the Near East. Individual culpability was stressed as expressed in the following: (Deut. 24:14):

*“Fathers shall not be put to death for children  
Neither shall children be put to death for the father  
Every man shall be put to death for his own sin.”*

Furthermore<sup>124</sup>, unlike Hammurabi’s code, one who caused another’s death accidentally was never executed. And as far as the application of law in Hammurabi, the law of retaliation was limited to crimes against society’s important people as opposed to Biblical law in which this law was applied equally to all members of society.<sup>125</sup>

Finally, Jewish Law requires courts to be biased towards mercy. This requirement is based on explicit Biblical verses. The consequent bias towards mercy in turn justifies a merciful interpretation of verses<sup>126</sup>.

Jewish judges can reverse a conviction if they find new evidence but they can't reverse an acquittal even if they find they have made a mistake. As Maimonides says

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<sup>123</sup> Ibid, (The Babylonian Laws, Driver and Miles Legal Commentary p. 20.)

<sup>124</sup> Telushkin

<sup>125</sup> Leviticus 24:22

<sup>126</sup> Hendel, Rashi is Simple. (2000) vol. 6, #25, <http://www.RashiYomi.com>

"exempt the person from conviction as long as you find any reason to exempt him"<sup>127</sup>.

Other examples: Exodus 23:2, Deuteronomy 16:20, Numbers 35:24-5, Leviticus 9:18, Leviticus 19:15:<sup>128</sup>

In actuality the Biblical standard of “eye for an eye” stood in stark contrast to the legal standards prevailing in the societies that surrounded the ancient Hebrews. It becomes clear that these differences are not coincidental, but reflect two diametrically opposed views on life. There seems to be a conscious effort on the part of Biblical legislation, in a number of instances, to counteract practices current among peoples with whom Israel was, or was to be, in contact: Mesopotamian, Egyptian, Canaanite. These Biblical laws are a logical extension of the exhortation:

After the doings of the land of Egypt wherein you dwell and after the doings of the land of Canaan, whither I bring you shall ye not do (Leviticus 18:3-5)

Many modern Biblical Scholars saw the "eye for an eye" principle as a progressive and innovative improvement, forbidding us from visiting excessive severity upon an individual in order to 'send a message' to the larger society. Primitive societies administered such symbolic punishments freely. <sup>129</sup> The “eye for an eye” is about proportional retribution and our society has certainly not outgrown it.

The law of equivalency was also a significant development in the history of jurisprudence in the sense that what used to be a private matter between two families escalating into blood feuds and vendettas where revenge was often carried out without restraint, was now law, a legislation given to judges appointed to rule and care for the peace and keeping of a lawful society.

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<sup>127</sup> Rambam, Laws of Parliament 20:1

<sup>128</sup> Leviticus, 19: 15 (Dr. Hendel, Rashi is Simple. 2000, Vol. 6, No. 22

<sup>129</sup> Bische, Paul M., (1977) “An Eye for an Eye: Get - Tough Laws Under Biblical Scrutany. News. 1, 4.

Judaism and the sages of the Talmud disagree with this notion that the only possible defense for biblical morality in the case of retaliation “an eye for an eye” was to argue that it was an advance over the contemporary legal criminal codes which exacted more than an eye for an eye as punishment.

The rabbis believed that the Torah, (Bible) the word of G-d established the absolute moral and ethical standards for all of life and for all of eternity. Thereby being the moral guide for all generations to come. To understand the “eye for an eye” legislation as an adoptive advance or relative norm to the Code of Hammurabi, would, in effect, deem the Bible and many of its laws as an irrelevant and outdated text denigrating the Bible and its uniquely Divine character.

In conclusion, what I find most fascinating is the ultimate paradoxes of history. On the one hand, Judaism, the so-called religion of ‘strict justice’, rejected the literal application of the law of retaliation, and knew neither torture in legal procedure nor mutilation as a legal punishment. We have no evidence in Jewish history of its literal application ever having been carried out. In Rabbinic Law, we find clear-cut legislation that 'an eye for an eye' is to be understood as financial compensation.

In Christian lands, on the other hand, mutation and torture are the indispensable accompaniments of justice from the middle of the thirteenth century down to the end of the eighteenth, and in some countries to the middle of the nineteenth century and beyond.<sup>130</sup>

I do not expect the average Christian to delve into the detailed debates of the Talmud, which shows how the Jewish legal system developed. Nor do I expect the average Christian to start reading either medieval or modern Jewish commentators and

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<sup>130</sup> Hertz p. 527

codifiers of Jewish law. But at the same time, Christian scholars, priests and pastors have, in my opinion, failed in the way they teach Christians about the Jewish scriptures and the Jewish concept of justice. The usual impression is the rigid justice of an Old Testament, and mercy is only found in the New. In fact, the message of the Torah is that justice and mercy must maintain a perfect balance. Otherwise both are lost.<sup>131</sup> I do believe that today both Jews and Christians agree that if “eye for an eye,” would be carried out literally, all it will produce is visionless men.

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<sup>131</sup> Gaon, S. Book of Beliefs and Opinions



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