

The so-called Jus or Lex Talionis "the law of retaliation," is found in the Sumerian Code of Ur-Nammu,<sup>1</sup> the Akkadian Laws of Eshnunna,<sup>2</sup> the Code of Hammurabi,<sup>3</sup> the Middle Assyrian Laws,<sup>4</sup> the Hittite Laws,<sup>5</sup> and in the Hebrew Bible.<sup>6</sup>

Among the various points of interest arising from this law<sup>7</sup> is the question whether or not the various cases involving talion in the Hebrew Bible are to be taken literally ("eye for an eye" etc.), or whether monetary compen-

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<sup>1</sup> Published by Samuel N. Kramer and Adam Falkenstein, *Orient* 23 (1954), pp. 40-51. Cf. Kramer, *History Begins at Sumer* (Garden City, New York, 1959), pp. 51-4 and *idem*, *The Sumerians*, (Chicago, 1963), pp. 83-5. There is no reference to talion in the 38 extant laws of Lipit-Ishtar.

<sup>2</sup> Albrecht Goetze, *The Laws of Eshnunna*, *AASOR* 31 (New Haven, 1966), #42-7, pp. 117-9 and #54-8, pp. 132-3. Cf. #23-4, pp. 68-9.

<sup>3</sup> CH #195-214.

<sup>4</sup> G. R. Driver and J. C. Miles, *The Assyrian Laws* (Oxford, 1935), Tablet A #7-9 (p. 384), #21 (p. 392), #50-2 (pp. 418-20).

<sup>5</sup> E. Neufeld, *The Hittite Laws* (London, 1951), #7-18.

<sup>6</sup> Ex. 21:22-5, 29-30, 32; Lev. 24:17-21; Deut. 19:21. Cf. Num. 35:31.

<sup>7</sup> The question of whether the principle of talion is one of punishment and to be connected with "criminal law," or whether it is a matter of some kind of compensation and in the realm of "civil law," has been discussed by David Daube in a long, laborious chapter in his *Studies in Biblical Law* (Cambridge, 1941), pp. 102-53. For a discussion of the different attitudes of biblical law as compared to ancient Near Eastern law (especially on matters of homicide and vicarious punishment) see M. Greenberg, *Yehezkel Kaufmann Jubilee Volume* (Jerusalem, 1960), pp. 5-28.

sation is meant.<sup>8</sup> The purpose of this study is to advance arguments, based largely on internal evidence, for the view that monetary compensation is indeed meant in the biblical passages concerning talion.

The Lex Talionis occurs three times in the Pentateuch in formulaic form.<sup>9</sup> The fullest form, containing eight items, is found in Ex. 21:23-25. It stipulates "when men fight and one of them pushes a pregnant woman and a miscarriage results, but no other misfortune<sup>10</sup> ensues, the one responsible (he) shall be fined according as the woman's husband may exact from him, the payment to be based on reckoning.<sup>11</sup> But if other misfortune ensues, the penalty shall be life for life,<sup>12</sup> eye for eye, tooth for tooth, hand for hand, foot for foot, burn for burn, wound for wound, bruise for bruise."

<sup>8</sup> As is the Rabbinic interpretation known by the phrase עין תחת עין, see Babylonian Talmud, Sanhedrin 79a; Baba Qama 83b; Ketubot 33b according to which the wrongdoer has to pay for the damage caused; the loss of an eye, tooth, etc. The value of the damage is arrived at by determining the depreciated value of the victim on the slave market, as a result of the damage suffered. See Rashi on Ex. 21:24 and Mishna, Baba Qama 8:1.

<sup>9</sup> Ex. 21:23-25; Lev. 24:18, 20; Deut. 19:21.

<sup>10</sup> The text has in verse 22 אסון which means "fatal damage." Cf. Gen. 42:4, 38; 44:29, also TB, Ketubot 33a הכתוב מדבר אסון במצות שבמיתה ודכהיב ואם אסון יהיה and Rashi's remark שמחה האשה "the verse speaks of quarreling involving death as it is written 'but if there should be an אסון thou shalt give life fore life'" Rashi: "if the woman died." According to the LXX the case without an אסון is that where the child is not yet fit to live, and the case with an אסון where the embryo would have lived, barring the brawl, i.e. where the time of birth is very near. This distinction is very reminiscent of the provisions of the Hittite Laws (##17-18) which provide that if anyone causes a woman to miscarry in the tenth month he pays a fine of ten sheqels, in the fifth month, five sheqels.

<sup>11</sup> All renderings are according to the JPS (1962) translation. In a footnote the translators add "i.e., 'the age of the embryo,' others 'as the judges determine.'" With "the age of the embryo" they probably refer to the Hittite Law (17) cited above, and by "others" Rashi is meant, who interprets the words בפלילים with על פי הדינים (according to the judges) - this in turn is based on TB, Megilla 15b and Sanhedrin, 111b.

<sup>12</sup> Goetze, op. cit., p. 121, comparing the various bodily injuries in the Laws of Eshnunna, Code of Hammurabi, Hittite Laws and in the Hebrew Bible, translates the word נפש (life) by "nose," thus arriving at a closer parallelism between the biblical and Eshnunna laws. In note five he states: "usually translated 'soul,' but originally 'breathing organ, breath'; cf. Akkadian napištum 'throat' and 'soul.'" However tempting

The second occurrence is in Lev. 24:18-20. The situation here is rather complicated. In the first place, the formula seems to be split up, with v. 19 intervening between its various clauses.<sup>13</sup> In the second place, the formula here contains only four items instead of the eight in Exodus. In the third place, a new item (v. 20 "fracture for fracture") not mentioned in Exodus appears.<sup>14</sup> Finally, the context seems to state explicitly that bodily injury should be inflicted upon the person of the criminal.<sup>15</sup> The text reads: "One who kills a beast shall make restitution for it: life for life. If anyone maims his fellow, as he had done so shall it be done to him: fracture for fracture, eye for eye, tooth for tooth. The injury he inflicted on another shall be inflicted on him."

The third occurrence is in Deut. 19:21, in a context dealing with a false witness who is to suffer the fate he had intended for the accused: "Nor must you show pity: life for life, eye for eye, tooth for tooth, hand for hand, foot for foot." Unlike the formula in Ex. and Lev., the preposition used here is not ל but ב.<sup>16</sup>

#### The meaning of the prepositions ל / ב

A definition of the terms used in the formula, viz. ל/ב is obviously crucial to our discussion. Of the several meanings of ל in the Hebrew Bible,<sup>17</sup> the basic one is "under." But, in a transferred sense, it often refers to one thing taking the place of another, or being given in the place of another by way of compensation: Gen. 2:31 ל אבל "instead of Abel," Gen. 30:15 ל בנות "in return for your son's mandrakes." Thus, the talion formula should be

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and clever as such comparisons might be, it is doubtful whether a single passage can be found in the Bible in which the meaning "nose" can be definitely assigned to נפש. The onus of proof, therefore, rests upon Goetze, as there is no such meaning for נפש in the standard dictionaries.

<sup>13</sup> Daube, *op. cit.*, p. 112 suggests this was done so as to cover both homicide and the destruction of a beast under the same formula.

<sup>14</sup> *Ibid.*, p. 113, suggests the word שבר (fracture) stands for שבר-יד and שבר-רגל (fracture of the hand/foot) and replaces the items "hand for hand, foot for foot" of Exodus.

<sup>15</sup> Flanking both sides of the formula in vv. 19-20.

<sup>16</sup> Why this form has been chosen is difficult to say. Daube, p. 129, suggests the beth here may mean "to atone for," but the entire context speaks of punishing the culprit, not of atonement!

<sup>17</sup> See the standard dictionaries.

rendered, "You shall give life in the place of life, eye in the place of eye, etc."

True, הח sometimes approaches the meaning "because (of),"<sup>18</sup> but even in those cases the idea of recompense is present. Moreover, even if the sense "because (of)" was in the mind of the biblical legislator ("You shall give life because you have destroyed life," etc.), yet the phrase "you shall give" ( ונית ) makes it quite clear that he did think chiefly of compensation. The term נתן is used to designate monetary compensation, especially in the Covenant Law of Ex. 21. When providing that the assailant must pay for the idleness and care of the injured party, v. 19 states: "he shall give ( יתן ) his ceasing" or "his sitting down."<sup>19</sup> Again in v. 22, "He shall be fined ( עניש )"<sup>20</sup> ... the payment to be based on reckoning," the verb used is נתן . Also in v. 30, where a "ransom" is prescribed, the verb for "to pay" is נתן . And again in v. 32 (in the case of an ox killing a slave) it states that the owner of the ox "shall give ( יתן ) to the slave's master thirty shekels of silver." Similarly, חח is used in our chapter with נתן in cases where the idea is obviously one of compensation. In the case of one ox killing another v. 36 states, "... he shall pay ox for ( חח ) ox." Again in v. 37, regarding theft of an animal, "five oxen shall he pay for ( חח ) the ox and four sheep for the sheep."<sup>21</sup>

The preposition ב is even richer in meanings than חח .<sup>22</sup> In our verse, it is generally understood as the beth pretii (of price).<sup>23</sup> Daube suggests the ב may also mean "because of" or "corresponding to, in accordance with," which also conveys the idea of compensation.<sup>24</sup>

#### Arguments for Monetary Compensation

Before presenting the evidence for monetary com-

<sup>18</sup> E.g. Num. 25:13; Deut. 21:14; 22:29; 28:47 etc.

<sup>19</sup> A.V. "shall pay for the loss of his time."

<sup>20</sup> See the dictionaries for the use of עניש in contexts of paying fines.

<sup>21</sup> Cf. Lev. 24:18, 21.

<sup>22</sup> See the numerous (over a dozen) meanings given it in BDB pp. 88-91.

<sup>23</sup> See the dictionaries, and S. R. Driver, Commentary on Deuteronomy ICC, p. 236, and cf. Deut. 14:25. Note also Onkelos and Jonathan on Deut. 19:21. For Daube's objections to the beth pretii here on "logical grounds," see op. cit., p. 150 n. 46.

<sup>24</sup> See note 16.

pensation, it is necessary first to remove the main difficulties arguing against such an interpretation.

The first difficulty arises in the wording of Lev. 24:19: "If anyone maims his fellow, as he has done so shall it be done to him." This equation points to retaliation in kind. However, already Ibn Ezra noted that such a phrase is not always to be taken literally. He cites Samson's remark<sup>25</sup> "as they have done to me so I did to them," although his act of revenge does not correspond exactly to the Philistines' provocation of him by having set his wife and father-in-law on fire.<sup>26</sup>

The second difficulty is in v. 20, which states literally: "As he has given a blemish in a man, so shall it be given in him" which is even more explicit than v. 19. But here too Ibn Ezra comes to our aid. He remarks that sometimes נ stands for על<sup>27</sup> and "be given in him" is therefore to be rendered "on him." This phrase, then, corresponds to a similar expression in Ex. 21:22 "as the woman's husband shall exact from him (=put on him ישיח עליו which is parallel to יתן על = יתן ב). Furthermore, we have already seen that נתן is used for monetary payments. The confusion in our verse arises from the fact that in v. 20 נתן is used twice; the first meaning "give" (=inflict) a blemish. One naturally tends to equate the meaning of נתן in both clauses, especially since this is, grammatically, a comparative clause - using "as" in the opening and "so" in the second half, after which ינתן comes. But such an equation is not absolutely required.<sup>28</sup>

It should be admitted, however, that due to the formulaic nature of our texts nothing can be proved decisively one way or another; neither for talion "in kind," nor for compensation. All that is here argued is that there exists cumulative evidence for the Rabbinic assumption that the biblical law provides for monetary compensation - and this, quite apart from any considerations of "biblical hermeneutics."<sup>29</sup> The formula need, therefore, not necessarily mean

<sup>25</sup> Jud. 15:11.

<sup>26</sup> See also the "arguments from logic" which he quotes from Saadia (loc. cit.).

<sup>27</sup> Neh. 2:12. (הבהמה אשר אני רוכב בה = עליה)

<sup>28</sup> See Rashi on this verse and cf. TB, Sanhedrin 84a.

<sup>29</sup> The so-called "principles of biblical exegesis"; the thirteen taught by R. Ishmael and the thirty two of R. Eliezer b. R. Yosi Haglili. For the Talmud's use of these principles to interpret the biblical text as requiring monetary compensation see TB, Baba Kama 83b-84a.

retaliation in kind -- appearances to the contrary notwithstanding. The following arguments may be presented: (1) With respect to homicide, where talion does apply, Lev. 24:17 states explicitly: "If a man kills a human being, he shall be put to death." Here the formulaic wording נפש חמה נפש is conspicuously absent, precisely because it is just a formula and the legislator wished to state in no uncertain terms that in the case of homicide capital punishment is to be meted out. It is part of a longer formula and therefore it is included in each of the three texts discussing bodily injury (Ex. 21:23ff., Lev. 24, Dt. 19:21), although נפש נפש חמה alone could not be relied upon to mean capital punishment. It is an ancient formula (see below) and was therefore left intact. Once capital punishment for homicide was explicitly provided,<sup>30</sup> the other texts can rely on the specific one and feel free to use נפש חמה נפש without fear of misinterpretation. This is again emphasized in the contrast expressed in v. 21: "He who kills a beast shall make restitution for it, but he who kills a human being shall be put to death." (2) Lev. 24:18 states: "One who kills a beast shall make restitution for it: life for life." This shows the last clause to be a mere formula applied even where monetary compensation is obviously intended. This may be instructively compared with MAL #50, the last clause of which reads: šumma ša libbiša subartu napšātema umalla, "if the fruit of her womb is a girl, he nonetheless pays (on the principle of) a life (for) a life."<sup>31</sup> (1. 80). (3) We have seen above that our contexts employ such terms as נ/נח, נפ, נח, all of which are terms designating monetary payment of one kind or another. (4) Perhaps the most telling of all is the fact that in the Code of Hammurabi, in the laws where talion is prescribed,<sup>32</sup> no formula is used, but the punishment is spelled out in detail, e.g. #196: šumma awīlum in mār awīlim uḥtappid inšu uḥappadū "If an awīlum has destroyed the eye of a son of an awīlum, they shall destroy his eye." Cf. #210 šumma sinništum šī imtūt mārassu

<sup>30</sup> Num. 35:31-2: "You may not accept a ransom for the life of a murderer who is guilty of a capital crime; he must be put to death." The logical inference from this is that for injuries payment may be accepted and is the proper compensation. This, too, would argue, indirectly, for compensation.

<sup>31</sup> Driver-Miles, Assyrian Laws, pp. 418-9. See also the discussion on pp. 109-14 where this translation is substantiated.

<sup>32</sup> ##196-7, 200-2.

idukkū "If that woman has died, they shall put his daughter to death." The wording here is as explicit as in the biblical laws cited above. By contrast, where compensation is provided, the Code of Hammurabi too, uses a formulaic statement not unlike our formula; e.g. #263: šumma [alpam] u lū immeram innadnūšum uḫtalliḡ alpam kīma alpim immeram kīma immerim ana bēlišunu iri'ab "If he has lost the ox or sheep which was entrusted to him, he shall make good ox for ox, sheep for sheep to their owner."<sup>33</sup> This is the same wording as in the Hebrew Bible, namely X חנה X (or X א X), with kīma = א/חנה.<sup>34</sup>

<sup>33</sup> Cf. also ##245-6 for the same formula.

<sup>34</sup> See the discussion of the meanings of kīma "in place of" in Driver-Miles, op. cit., pp. 491-2. Cf. von Soden, AHW sub kīma p. 476, also sub ina #4 c-d p. 380.