

## THE INTERPRETATION OF EXODUS 21:22-25 (*LEX TALIONIS*) AND ABORTION\*

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### I. Introduction

W.C. Kaiser, in defending the use of OT law for formulating Christian ethics, argues that many ethical questions of interest to the modern Christian are not addressed in the NT, but only in the Old. "Where," he asks, "will we obtain authoritative materials on the abortion question if the OT is not consulted?"<sup>1</sup>

The passage most directly relevant to the abortion question according to Kaiser is Exod 21:22-25, the case of a pregnant woman struck during a brawl.<sup>2</sup> Key to finding direct relevance in this passage to the abortion question is the interpretation that, contrary to the view exemplified by most commentators and translators,<sup>3</sup> premature birth rather than miscarriage is involved in the first half of this passage where there is no serious injury (ךָּוֹטָא). Only in the second case with serious injury is the death of the fetus and/or mother contemplated, and there the *lex talionis*, the "law of retaliation," is applied 'life for life,' implying that the killing of the fetus was regarded as taking a human "life" (וְנַפְשׁוֹ). This interpretation, which is reflected in the NIV translation, implies that deliberate induced abortion of a human fetus is murder.

Many anti-abortion Christian theologians and ethicists adopt this interpretation to bolster their case against abortion.<sup>4</sup> However, this line of interpretation is subject to criticism on exegetical grounds. It will be my

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<sup>1</sup> W. C. Kaiser, Jr., *Toward Old Testament Ethics* (Grand Rapids: Zondervan, 1983) 34.

<sup>2</sup> Kaiser, *Ethics*, 168-72.

<sup>3</sup> Kaiser (*Ethics*, 170) lists the *RSV*, *Berkeley Version*, *NAB*, *JB*, *Amplified Bible*, *Douay-Rheims*, *Moffatt*, and *Goodspeed*, which take the miscarriage view. *Tanakh*, *NEB*, *REB*, and *Today's English Version* can be added to the list.

<sup>4</sup> Among them: J. W. Cottrell, "Abortion and the Mosaic Law," *Christianity Today* 17 (March 16, 1973) 6-9; J. M. Frame, "Abortion from a Biblical Perspective," in *Thou Shalt Not Kill* (ed. R. L. Ganz; New Rochelle, NY: Arlington House, 1978) 51-56; J. W. Montgomery, *The Slaughter of the Innocents* (Westchester, IL: Cornerstone, 1981) 98-101; J. J. Davis, *Abortion and the Christian* (Phillipsburg, NJ: Presbyterian and Reformed, 1984) 49-52; id., *Evangelical*

purpose to reexamine the interpretation of this passage and reassess its relevance to the issue of abortion.

## II. Exegetical Problems in Exod 21:22-25

Any interpreter of Exod 21:22-25 should begin by confessing that this passage is extremely difficult due to the large number of exegetical cruxes it contains. The variety of ways in which scholars have resolved these cruxes has resulted in a multitude of specific interpretations of the pericope as a whole.<sup>5</sup> The following is an interpretive translation of Exod 21:22-25 which will facilitate a discussion of its exegetical difficulties.

(22) If men are in struggle with one another and butt a pregnant woman so that the product of her womb [יִלְדֵיהָ] comes forth in fatal miscarriage, but there is no further serious injury [אִסוֹן] to the woman, then someone (the guilty party or a representative of the guilty parties) will be charged tort in accordance with what the woman's husband requires of him, paying the amount for which he is culpable (?) [בְּפִלְלִים]. (23) But if there is further serious injury [אִסוֹן] to the woman, then you Israelite will payout [נִקְקָה] as the guilty party according to the formula: "the monetary value of life in exchange for the life lost [נֶפֶשׁ תַּחַת נֶפֶשׁ], (24) value of an eye in exchange for the eye lost, the value of a tooth in exchange for a tooth lost, value of a hand in exchange for the hand lost, the value of a foot in exchange for the foot lost, (25) the value of injury caused by burning in exchange for burning inflicted, the value of a wound in exchange for a wound inflicted, the value of a stripe in exchange for stripe inflicted."

Here are the main exegetical issues in this passage: Did the men strike the woman intentionally or unintentionally, or does intention make a difference in this case? Was the husband involved in the brawl? Was the woman actively involved, or merely an innocent bystander? Why is the plural יִלְדֵים rather than the singular יֶלֶד, used for the fetus? Must the woman's יִלְדֵים that "come forth" have been born dead or does the regulation contemplate also the possibility of their being born alive? Related to this, what is the meaning of אִסוֹן: death? serious injury? disaster for which no one can be blamed? What accounts for the change in person and number in this passage in which "men" struggle, but only one man (the verb is 3d masc. sing.) pays a tort to the woman's husband in the case without אִסוֹן, but if there is אִסוֹן

*Ethics* (Phillipsburg, NJ: Presbyterian and Reformed, 1985) 150-51; P. B. Fowler, *Abortion: Toward an Evangelical Consensus* (Portland: Multnomah, 1987) 147-49; J. K. Hoffmeier, "Abortion and the Old Testament Law," in *Abortion: A Christian Understanding and Response* (Grand Rapids: Baker, 1987) 57-61; R. J. Sider, *Completely Pro-Life* (Downers Grove: Inter Varsity, 1987) 46-47; N. Geisler, *Christian Ethics: Options and Issues* (Grand Rapids: Baker, 1989) 145.

<sup>5</sup> For a partial tracing of the history of the interpretation of this passage, cf. B. S. Jackson, *Essays in Jewish and Comparative Legal History* (SJLA 10; Leiden: Brill, 1975) 75-107 [= "The Problem of Exod 21:22-25 (*Ius Talionis*)," *VT* 23 (1973) 273-304], and S. Isser, "Two Traditions: The Law of Exod 21:22-23 Revisited," *CBQ* .52 (1990) 30-44.

not "he" but "you" pay "life for life"? Why does only one person pay a tort if more than one man were fighting? Who is the "you" who renders "life for life": the same man who paid the fine in the case without  $\text{וְאִם}$  or Israel? What is the meaning of  $\text{בְּפִלְלֵי־יָדַיִם}$ : by judges? by arbitrators? by assessment? alone? as the culpable party? Can some of the problems be best explained on the assumption that there are textual corruptions, or that two originally unrelated laws have been awkwardly thrown together? How does the so-called Law of Retaliation relate to the situation described? Was the application of "life for life, eye for eye, tooth for tooth" applied literally in the sense of capital punishment ("life for life") and physical mutilations of the offenders, or does this formulation imply monetary composition ("the value of a life for the life taken," etc.)? If the latter, how would such pecuniary values be determined? How does this regulation relate to the regulations which precede it and follow it which concern slaves? Why is this example addressed at all? What principle(s) does it seek to convey?

The analysis will be simplified a bit by eliminating all views--and these are not uncommon--which suppose that the text is so corrupt as to require radical surgery to make sense of it.<sup>6</sup> I operate on the assumption that the text as it stands makes sense if rightly interpreted, an assumption vindicated through exegesis. The key issue for the remaining interpretations of the text as it stands pertains to the question of whether or not the text implies the death of the baby (or babies) both in the case with and the case without  $\text{וְאִם}$ , or whether the case without  $\text{וְאִם}$  allows for the possibility of the child surviving.

The majority view, both in ancient times among rabbinical interpreters and among modern exegetes, is that the death of the child is assumed throughout this case.<sup>7</sup> On the other hand, the view that the death of the

<sup>6</sup> E.g., A. S. Diamond ("An Eye for an Eye," *Iraq* 19 [1957] 153) calls the *lex talionis* "one of the plainest interpolations in the Pentateuch, being inconsistent with its immediate context." S. E. Loewenstamm ("Exod XXI 22-25," *VT* 27 [1977] 357) thinks that "the text of a law dealing with a blow given to a pregnant woman has become mixed up with the text of another law providing for the consequences of blows which men dealt upon one another in a brawl." Jackson (*Essays*, 105) claims that Exod 21:24-25 (the *lex talionis*) is a later interpolation inserted on the basis of the similar language of the slave law of vv. 26-27. H. Cazelles (*Etudes sur le code de l'alliance* [Paris: Letouzey et Ane, 1946] 56) thinks vv. 24-25 belong after vv. 18-19 rather than in their present position. Similarly, A. H. McNeile (*The Book of Exodus* [3d ed.; London: Methuen, 1931] liii and 129) comments that vv. 23b-25 are irrelevant in their present context. L. Schwienhorst-Schonberger (*Das Bundesbuch* [Ex 20, 22-23, 33] [BZAW 188; Berlin: Walter de Gruyter, 1990] 81-83) concludes a more complete survey of critical scholarship with the remark that only a few exegetes (R. Westbrook is the only one footnoted) regard Exod 21:22-25 as a unity in the strict sense.

<sup>7</sup> This category of interpretation is the most common among commentators. Along the lines of this interpretation are the standard commentaries on Exodus by S. R. Driver, M. Noth, B. Childs, and J. P. Hyatt, as well as S. M. Paul (*Studies in the Book of the Covenant in the Light of Cuneiform and Biblical Law* [VTSup 18; Leiden: Brill, 1970] 70-77), and R. Westbrook, ("Lex Talionis and Exodus 21:22-25," *RB* 93 [1986] 52-69). Isser ("Two Traditions," 31-38) notes that the majority ancient Jewish tradition followed this interpretation: Josephus, *Ant.* 4.8.33 §278; *Tg. Onq.*; *Mek.*; *m. Ketub.* 3:2; *m. B. Qam.* 5:4.

fetus is not assumed has existed from ancient times, going back at least to Philo of Alexandria, and continues to be defended today.<sup>8</sup> According to this interpretation, the focus of the passage is not on the woman's life, but on the child's, or at least a combination of both woman and child. The death of the child is not assumed in the expression "her children [יְלֵדֶיהָ] come forth," since premature labor induced by the trauma of the blow could result in a healthy birth and no permanent injury to the mother. Moreover, the verb "come forth" (צָיַן) can be used of ordinary birth rather than miscarriage.<sup>9</sup> Hence the expression "there is no מִשָּׁפָּח" could mean that there is not "serious mishap" to either the mother or the child. If there is no deadly and/or serious injury (מִשָּׁפָּח may not always imply death), the offender is still guilty of exposing a pregnant woman and her fetus to unnecessary life-threatening danger, an offense deserving monetary penalty. On the other hand, if the child (or the mother) dies or is seriously injured so that there is מִשָּׁפָּח, then the so-called talionic formula "life for life" (נִפְשׁ תַּחַת נִפְשׁ) applies, sometimes taken in the sense of capital punishment for murder. The fetus, according to this view, is in any case a human "life" (נִפְשׁ).

### III. A Proposed Interpretation

What I would like to do is examine the cruxes of interpretation in this passage and offer an analysis of the passage based on solutions to these cruxes.

#### 1. An Intentional Blow to the Woman?

To begin, was the blow to the pregnant woman intentional or unintentional? A few interpreters have argued that the attack on the pregnant woman was intentional.<sup>10</sup> It is true that the verb הִגִּיחַ, "butt, push, gore,"

<sup>8</sup> Along the lines of this general interpretation are the standard commentaries on Exodus by Cassuto and Durham, as well as J. Weingreen ("The Concepts of Retaliation and Compensation in Biblical Law," *Proceedings of the Royal Irish Academy* 76 [1976] 1-11), M. G. Kline ("Lex Talionis and the Human Fetus," *JETS* 20 [1977] 193-201), H. W. House ("Miscarriage as Premature Birth: Additional Thoughts on Exodus 21:22-25," *WTJ* 41 [1978] 108-23), and J. Ellington ("Miscarriage or Premature Birth," *BT* 37 [1986] 334-37). Several elements of this interpretation are also found in Jackson ("The Problem of Exod. 21:22-25 [*Ius Talionis*]," , 273-304). Isser ("Two Traditions," 36-38) notes the minority ancient Jewish tradition which contemplates the possibility that the child might be born alive: Philo De spec. leg. 3.108-9.

<sup>9</sup> Cf. "and the first one was born [צָיַן] red" (Gen 25:25); "this one was born [צָיַן] first" (Gen 38:28).

<sup>10</sup> D. Daube, *Studies in Biblical Law* (London: Cambridge, 1947) 108, for example, argues from Deut 25:11f. (where wife grabs the genitals of a man lighting her husband), that the blow in Exodus "must be regarded as a deliberate, malicious attack." But, unlike Deut 25:11f., the text's silence concerning the relationship between the woman and the men lighting more likely indicates that whether or not her husband was involved is of no relevance to this case.

usually refers to intentional acts. But in this case, given the plural, that "men. . . butt a pregnant woman," it seems more likely that the men, while intentionally fighting each other, have flown out of control and unintentionally hit the woman as an innocent bystander.

## 2. *The lex talionis: Literal or Figurative?*

Next, is the punishment in the so-called *lex talionis* formula literal or figurative? According to the figurative view, the *lex talionis* has to do with "composition" in the legal sense of the satisfaction of a wrong or injury by money payment, this being an old rabbinic interpretation.<sup>11</sup> Modern scholars, however, frequently understand it to refer solely to literal retaliation involving execution and maiming. In the discussion which follows, the figurative interpretation will be defended.

There are a number of arguments favoring the figurative interpretation.<sup>12</sup> First, the literal application of the so-called *lex talionis* is inconsistent with the principles and legal outcomes of other laws elsewhere in the literary unit of Exod 20:22-23:33. Exod 21:18-19, for example, presents a more serious case, a case of deliberate injury as opposed to the accidental nature of the injury of the pregnant woman described here in Exod 21:22-25. The penalty there, however, is not to strike the offender and injure him in exactly the same way in which he injured the other man as one would expect on a literal understanding of *lex talionis*--which, by the way, would be absurdly impractical--but for the offender to pay money, i.e., to pay for the medical costs and for the lost time of the man he injured.<sup>13</sup> In Exod 21:26-27, the penalty for striking out the eye or tooth of a bondsman likewise does not result in a talion against the owner's eye or tooth, but a release of the bondsman, equivalent to forgiveness of the bondsman's debt. Moreover, the literal talion of "life for life" in the case of accidental killing of a pregnant woman would be in contradiction with the principle expressed in Exod 21:13-14, which says that accidental manslaughter is not a capital offense.

Deut 25:11ff. is a substantially different case of little relevance for comparison. Accordingly, Kaiser's statement (*Ethics*, 102) that this "pregnant woman intervened" in the fight--as if a pregnant woman were likely to jump into the middle of the brawl!--and was "perhaps the concerned wife of one of them" is needless speculation. Surely the active "intervening" of the woman would affect the legal outcome inasmuch as the one striking her could with justification plea "self-defense."

<sup>11</sup> Cf. *b. Sanh.* 79a; *b. B. Qam.* 83b; *b. Ketub.* 33b; Rashi on Exod 21:24; *m. B. Qam.* 8:1.

<sup>12</sup> P. Doron, "A New Look at an Old Lex," *Journal of the Near Eastern Society of Columbia University* 1 no. 2 (1969) 21-27; and J. K. Miklitzanski, "The Law of Retaliation and the Pentateuch," *JBL* 66 (1946) 295-303, summarize most of these arguments.

<sup>13</sup> Paul (*Studies in the Book of the Covenant*, 67-68) argues that the reason the talionic punishment ("eye for eye, tooth for tooth," understood literally) is not invoked in this case is that there was no original intent to cause injury. But whether or not there was "original intent," the use of a stone shows that there was certainly "subsequent intent," and this would have been sufficient, had the man died, to make it a *מוֹת יְוָמָת* offense.

It is a general hermeneutical principle that one should assume that an author or editor of a literary unit can be expected to be self-consistent; hence, one regulation of our unit of Exod 20:22-23:19 ought not be interpreted in ways contradictory to another regulation so long as there are other possibilities which are not in conflict. This principle leads to the rejection of a literal talion.

Second, Exod 21:29-30 shows that ransom could serve as a substitute for literal talion. A man who does not constrain an ox with a known tendency to gore, so that as a result it gores someone to death, is liable on the principle of "life for life" to give up his own life. Hence, the text says, "also its owner is to be put to death" (Exod 21:29b). But the text immediately allows the possibility of ransom: "If a ransom is laid upon him, he will pay the price of redemption for his life [נפש] whatever is laid on him." In other words, v. 29 applies the principle of נפש תחת נפש a man whose negligence has caused the loss of a life forfeits his own life. But v. 30 goes on to show that this operates within a system that permits a payment of money to take the place of the actual execution of the offender. Though in principle such a man forfeits his life, it was possible (and in practice probable)<sup>14</sup> for him to redeem his life by paying the offended party a ransom. A similar principle seems to be implicit elsewhere in this collection. For example, if someone injures another person, as in the case in Exod 21: 18-19, the offender on the principle of "wound for wound" deserves to be injured in the same way. But rather than actually injuring him, which does nothing for the original victim, the man normally pays a ransom, consisting in the case of Exod 21:18-19 of payment for the inactivity and medical expenses of the man he injured. By paying this "ransom," the culprit thereby avoids having the same injury imposed on him.

<sup>14</sup> Acceptance of ransom is the probable resolution to the situation described here. (1) The death of the negligent owner would give no tangible benefit to the victim's family, whereas ransom would both punish the culprit and benefit the family. Family self-interest dictates the ransom opinion. (2) Other forms of negligent but unintentional homicide are not capital offenses--cf. Exod 21:12-15; Num 35:9-15; Deut 19:1-13. To make negligence with an ox a capital offense, but negligence with a stone, ax head, or some other inanimate object not a capital offense seems inconsistent. (3) As I read the OT, it seems clear to me that the moral sensitivities of the ancient Israelites were not radically different from those of modern people. Modern people would see capital punishment for unintentional manslaughter as excessive, and hence morally objectionable as compared with accepting a ransom. So also did the ancient rabbis of the Talmudic period who therefore concluded that ransom must always be accepted in such cases--cf. J. J. Finkelstein, *The Ox that Gored* (Philadelphia: American Philosophical Society, 1981) 31; *b. B. Qam.* 40b-c; *m. B. Qam.* 4:5. It seems to me probable that Israelites of the biblical period would also be sensitive to the injustice of making unintentional manslaughter a capital offense, and would ordinarily on that basis be persuaded to accept a ransom. In sum, there is good reason to suppose that the death sentence of v. 29 is mostly hyperbole to underscore the seriousness of negligence which threatens the life of another human being.

Additional evidence that 'life for life' can be related to ransom is provided by I Kgs 20:39: "Guard this man! If he is missing it will be your life for his life [נפשך תחת נפשו] or [א] you must weigh out silver." Here "life for life" in the sense of capital punishment has an explicit alternative of monetary substitution, which obviously would be the option chosen by anyone who could afford to pay. There is reason to suppose that this option was available even where not explicitly stated. The availability of ransom seems to have been so prevalent that when biblical law wants to exclude it, as in the case of intentional murder, it must specifically prohibit it (Num 35:31).<sup>15</sup> The system of ransom means that though the *lex talionis* could in principle be applied literally,<sup>16</sup> normally it was not. Rather, monetary composition substituted for literal talion.

Third, the use of the verb נתן, "you will give life for life" suggests monetary exchange. The "you" here most plausibly refers to the nation Israel personified as an individual (cf. the same usage in Exod 21:2, 14; 22:17, 20, 22, 24-25, 27-29; 23:1-19). נתן is used here in the sense of making monetary payment: "you, O Israelite, must pay money [as the guilty party]."<sup>17</sup> The sense "pay money" is well attested for נתן in the immediate context. נתן is used in the sense of monetary payment immediately before the so-called *lex talionis* when Exod 21:22b states, "and he will pay [ונתן] by פללים." A few verses earlier in Exod 21:19b, נתן is used to describe payment for an injured man's time of convalescence (יִתֵּן שְׂבוֹתוֹ--"he will pay for his inactivity"). A few verses later, three other examples occur: Exod 21:30, "And he will pay/give [ונתן] the ransom for his life"; Exod 21:32, "He will give

<sup>15</sup> Num 18: 15-17 gives further illustration of the ransom principle. This text specifies that the firstborn son who was in principle to be sacrificed to God must in practice be redeemed for live shekels, the "sacrifice" in effect being a legal fiction. The broad availability of "ransom" is also illustrated here, for the text is compelled to prohibit the redemption of firstborn sheep and goats precisely because otherwise its availability would be assumed.

<sup>16</sup> Josephus (*Ant.* 4.8.35 §280) seems to suppose that the *lex talionis* was applied literally "unless indeed the maimed man be willing to accept money." Hence he sees the possibility of either literal application or the substitution of a ransom.

<sup>17</sup> Another sense of נתן is just possible: "You, O Israel, are to impose (monetary) penalty" (insofar as you act as a judge in such a case). For the sense "impose penalty" for נתן, see 2 Kgs 18: 14 and 23:33, where the verb is used of Sennacherib's "imposing" tribute and of Neco's imposing a "fine" (עֹשֶׂה, a word cognate with the verb used in Exod 21:22, which refers to a case without אָסֹף, and which requires the offender to give monetary payment to the father). Cf. Lev 17:11; Deut 26:6. This usage of נתן is infrequent, however, and the examples listed differ from our text in that there נתן is used in conjunction with עַל, which designates the one on whom the penalty is imposed; therefore, whereas the sense "impose penalty" is possible, the other sense, "to pay money," seems the more likely. Cf. U. Cassuto (*A Commentary on the Book of Exodus* [Jerusalem: Magnes, 1967] 275), who renders "You O judge (or you, O Israel, [through the judge who represents you) shall adopt the principle of 'life for life' "; "Schwienhorst-Schonberger (*Das Bundesbuch*, 126) who renders "you are to utilize [the principle]"; and TWAT 5.696 which shows that נתן can take the sense of שִׁים and שִׁית.

[תִּתִּי] thirty shekels of silver to his master"; and in the context of bailments Exod 22:6, "If a man gives [תִּתִּי] his fellow silver." Hence, the general employment of תִּתִּי in the verses surrounding Exod 21:23-25 suggests the giving of money is a probable meaning in v. 23 as well.<sup>18</sup>

Fourth, the usage of the word translated "for" (תַּחַת) is consistent with the monetary interpretation. The meaning here can be taken as "instead of, in place of," that is, substitutionary compensation--"eye in compensation for an eye." This usage is illustrated in Exod 21:26b, 27b where a bondsman whose master has struck out his eye or tooth is freed in compensation for/in place of the eye or tooth he lost. Likewise, in Exod 21:36, if an ox was known to be a gorer and yet it was permitted to gore to death another man's ox, the owner is negligent and must make restitution "ox for [תַּחַת] ox," that is, he must provide compensation either by giving the monetary value of an ox, or by providing the live animal itself as a substitute for the dead one. In Exod 21:37 a thief makes restitution "five members of the herd in place of [תַּחַת] the ox" he stole, and "four members of the flock in place of [תַּחַת] the sheep." That is, he compensates for his stealing by restoring not only a replacement for the sheep or ox he stole, but also by providing additional sheep (or their monetary value) as a penalty for the act. This monetary understanding of תַּחַת is further supported by the parallel in Deut 19:21 where the תַּחַת is replaced by בַּ, the *beth pretii*, "of price."

Some arguments can be raised in support of taking the *lex talionis* as literal retaliation, but they are not conclusive. The usual understanding of the Ancient Near Eastern laws takes the references to talion there quite literally. A. S. Diamond,<sup>19</sup> for example, supports this view by citing LH (Laws of Hammurapi) §§229-30:

If a builder has constructed a house for a seignior but did not make his work strong, with the result that the house which he built collapsed and so has caused the death of the owner of the house, that builder shall be put to death. If it has caused the death of a son of the owner of the house, they shall put the son of that builder to death.<sup>20</sup>

Diamond also cites LH §§196-97: "If a seignior has destroyed the eye of a member of the aristocracy, they shall destroy his eye. If he has broken a(nother) seignior's bone, they shall break his bone." Diamond draws further support from the "sympathetic" sanction of MAL (Middle Assyrian Laws) §9, which decrees the cutting of man's lower lip for kissing a married woman.

<sup>18</sup> Compare the frequent employment of the Akkadian cognate *nadanu* in economic texts for the payment of money (C4D N 1.45-46). Schwienhorst-Schonberger (Das Bundesbuch, 102) thinks the Akkadian expression "X kima X nadanu" corresponds to the Hebrew expression "X תַּחַת X תִּתִּי," both meaning "to pay a sum corresponding to the value of X."

<sup>19</sup> Diamond, "Eye for an Eye," 151-55.

<sup>20</sup> My translations of cuneiform laws are from ANET.

R. Westbrook, however, argues that even in Ancient Near Eastern laws that appear to demand a literal talion there is an unstated assumption that a ransom of money could be substituted for literal talion. Scholars have noted the contrast between the LH §196 (above), where literal talion seems to be specified, and LE (Laws of Eshnunna) §42, where it is not: "If a man bites the nose of a(nother) man and severs it, he shall pay 1 mina of silver. (For) an eye, (he shall pay) one mina of silver, (for) a tooth, 1/2 mina; (for) an ear, 1/2 mina; (for) a slap in the face 10 shekels of silver." Such differences have often been explained on the basis of supposed progress from a "primitive" society where literal talionic maiming was applied, to the more advanced society where payment of money substituted for literal talion. However, the contrast between LH §§229-30, 196-97 and LE §42 just cited contradicts this theory<sup>21</sup> in that the latter with its pecuniary penalty precedes by a few years those of Hammurapi with its literal talion. The contrast, moreover, is unexpected, since the two collections are from societies that are closely related chronologically, geographically, and culturally. Westbrook argues that this difference is more apparent than real. The solution to this discrepancy, according to Westbrook, is that the "ransom" principle operated in Mesopotamia as it did in Israel, so that the statement in the Laws of Hammurapi requiring talion also assumes the possibility of ransom. The LE §42 simply specifies the ransom price appropriate to various injuries. Among other examples Westbrook uses to support his thesis is MAL B §2, where in the case of murder the "owner of the life" can either execute the murderer or receive compensation from him.<sup>22</sup>

J. J. Finkelstein has pointed out the absurdity of taking some of the Mesopotamian laws literally. He notes that LH §230 (cited above) could not be applied literally in the case of a builder who had no son. Even more absurd if applied literally is LH §218 which states that a physician whose patient dies in surgery or is blinded by surgery is to have his hand cut off. Finkelstein remarks that "it is inconceivable that any sane person in ancient Mesopotamia would have been willing to enter the surgeon's profession" if such a law were literally enforced. Finkelstein concludes that such laws were never meant to be complied with literally even when they were first drawn up, but that they were from the beginning hyperbolic, having more of an admonitory than a legal function, saying in effect, "Woe to contractors and physicians who because of negligence, greed, laziness, or any other reason endanger the life and limb of others."<sup>23</sup> It can be added, however, that if a system of ransom were assumed where the life of the builder or his son could be redeemed and the hand of the physician could

<sup>21</sup> This theory is also contradicted by the early Sumerian collection of laws, the Laws of Ur-Nammu, where pecuniary penalties occur rather than talion.

<sup>22</sup> R. Westbrook, *Studies in Biblical and Cuneiform Law* (CahRB 26; Paris: J. Gabalda, 1988) 45, 47-55.

<sup>23</sup> Finkelstein, *Ox that Gored*, 34-35.

be redeemed by pecuniary ransom, these laws would not only have an admonitory function (for which the more graphic statement of the penalty--execution or mutilation--is more effective), but would also be practical as law. Such observations support Westbrook's view.

It has also been argued that literal talion was practiced in the Bible. One passage cited in this regard is Judg 1:6-7, which records the cutting off of thumbs and big toes of king Adoni-Bezek, who himself had previously done the same to seventy kings. Although this is often taken as a literal application of the principle of *lex talionis*, it may be more "poetic justice" than an application of the original, intended meaning of this law.<sup>24</sup>

Lev 24:19-20 also sounds like a literal application of talion: "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. The injury which he inflicted on another shall be inflicted on him." This *prima facie* seems to imply literal talion, but such language does not do so necessarily. Lev 24:17-18 applies the principle of "life for life" to cover not only homicide, but also the destruction of a beast. In the case of an animal monetary substitution surely would have been acceptable. In addition, literal sounding language is not always literal. As Ibn Ezra pointed out, Samson in Judg 15:11 says, "as they have done to me, so I did to them," yet he had not done exactly what the Philistines had done to him, for they had burned to death his wife and father-in-law (Judg 15:6), but he simply slaughtered a great many of them (Judg 15:8).<sup>25</sup> In a similar way, in Lev 24:20, the "injury which he inflicted upon another" could be "inflicted on him" not by exact reduplication of the injury, but figuratively through a ransom which served as a substitute for that injury. Moreover, in Deut 19:15-21, the so-called *lex talionis*--is applied to the case of a false witness, with the judgment that whatever verdict would have been carried out against the falsely accused should be carried out against the false witness. Here the so-called talionic formula "life for life, eye for eye, tooth for tooth, hand for hand, foot for foot" is not applied literally, but merely means that the punishment varies with the severity of the accusation. On the basis of these arguments, a strong case can be made that the *lex talionis* did not have to be carried out literally, but could have been applied figuratively through payment of ransom in order to achieve composition.

The purpose of the *lex talionis* is to express the principle that the (monetary) penalty one can demand for an injury must be proportional to the degree of injury involved so that the less the injury, the less should be the penalty. Moreover, it limits the penalty to the monetary equivalent of the injury caused, excluding punitive damages (e.g., "two eyes for an eye").

<sup>24</sup> So also similar statements of "poetic justice" in the prophets who predict that crimes committed by people against others will, as punishment, be inflicted on the offenders need not be considered direct application of this law.

<sup>25</sup> Cited by Doron, "A New Look at an Old Lex," 25-26.

As for the formulation "life for life, eye for eye, tooth for tooth," which has a poetic ring to it, there is clear organization in three sections: (1) "life for life" representing the most serious, i.e., deadly injury; (2) "eye for eye, tooth for tooth, hand for hand, foot for foot" representing various parts of the body injured, working progressively from the head down to the foot; (3) "burning for burning, wound for wound, stripe for stripe" representing various types of injuries.<sup>26</sup> In this regard, categories (2) and (3) overlap—one can have a "wound" to a "foot" or "hand." It can also be noted that at least one element of this formula, e.g., "burning for burning," is an unlikely injury in the context of a blow to a pregnant woman. This confirms the conclusion that this formula is broader than the present context, expressing a general principle in a poetic/proverbial manner, a conclusion supported by the partial repeating of the formulation in Lev 24:18b, 20 (where "breaking for breaking" is added before "eye for eye" and the formula ends with "tooth for tooth"), and Deut 19:21 (where only "life for life" through "foot for foot" is quoted, and the preposition **ב** replaces **תחת**, "for"). In this context, the *lex talionis* is saying that if there is any further injury, no set rule can be given, but the extent of the (monetary) penalties paid to the aggrieved family should correspond to the extent of the injuries. As for the specific amount of payment for a specific injury, Exod 21:22 and 21:30 suggest that this was a matter of tort between the family and the offender. As a practical matter, judges could well become involved should the parties fail to agree on a price (cf. Deut 21:18-21 where the elders confirm that a son is incorrigible before allowing the parents to have him executed), though not necessarily otherwise. If judges became involved, guidelines such as those at Eshnunna (cr. LE §42 above) could well have been utilized, though presumably with enough flexibility to allow the judge to take into account individual circumstances.

The conclusion that the *lex talionis* has to do with composition is important since it undermines one line of argument that draws a distinction between the death of the fetus, in which money is paid, and the death of the mother, which is said to be a capital offense where "life for life" is exacted in terms of literal execution. On the contrary, the above argumentation has attempted to show that "life for life" in the present context probably does not imply capital punishment, but rather alludes to a system where composition is achieved through a ransom which substitutes for talion. If so, there is no distinction in the quality or kind of punishment between the death of the mother and the death of the child whether or not one sees miscarriage in the case without **יִדֹא**.

### 3. What is the Meaning of **יִדֹא**?

The key term **יִדֹא** is a rare one used but five times in the OT (twice in Exod 21:22-25 and three more times in the Joseph Story, Gen 42:4,38 and

<sup>26</sup> After H. J. Boecker, *Law and the Administration of Justice in the Old Testament and the Ancient East* (Minneapolis: Augsburg, 1980) 173.

44:29). It is also used in Sir 34:22; 38:18; 41:9 in the Apocrypha. Most interpreters have felt the general meaning offered by BDB, "mischief, evil, harm," to be more or less correct. A few interpreters<sup>27</sup> assert that this word more specifically implies "deadly calamity" or the like, support for which can be derived from the occurrences in Genesis in which **יָסַח** is used of Joseph's alleged death by the attack of a wild animal.

A quite different view of **יָסַח** has been offered by R. Westbrook.<sup>28</sup> He claims **יָסַח** does not mean "deadly calamity," but refers to "cases where responsibility cannot be located." This new meaning radically affects the overall interpretation. The woman, according to Westbrook, has a miscarriage after being struck in a brawl, but in the first instance there is not **יָסַח** that is, there is not a case of "perpetrator unknown," but rather the culprit is known. In that case the culprit pays the fine "alone" (**בְּפִלְלִים**).<sup>29</sup> But if there is a case of **יָסַח**, so that responsibility among the men (more than two being involved) cannot be established, then "you" pay "life for life, eye for eye, tooth for tooth," the "you" referring to Israel as a whole as elsewhere in the Book of the Covenant. The second half of this regulation is thus an example of a humanitarian principle that the Israelite community as a whole (through its representative) should compensate persons who suffer a loss where individual responsibility cannot be established.

Westbrook claims to find this meaning of **יָסַח** in Gen 42:4, 38; 44:29, the only other OT occurrences of this word. Westbrook adopts a suggestion of D. Daube<sup>30</sup> that Jacob did not believe that Joseph was killed by a wild beast, but said so in Gen 37:31-33 because he was legally bound to acknowledge the evidence of Joseph's coat covered with blood and declare his sons innocent of negligence (cf. the analogous regulation in Exod 22:10-12, where bringing the carcass of a sheep torn to pieces removes from the shepherd the responsibility of making restitution). Later, then, when Jacob expresses fear that **יָסַח** would befall Benjamin as it did Joseph, he feared, says Westbrook, not just "calamity" but "a disaster for which no one can be blamed."

Westbrook's interpretation in Genesis is highly suspect, however. It is doubtful that Jacob would follow legal formalities privately with his own sons; such is more appropriate in a courtroom setting with persons outside of one's own immediate family. Moreover, it is far from clear that Jacob at first disbelieved the story of Joseph's demise, as the view adopted by Westbrook implies. Indeed, it is Jacob who, upon looking at Joseph's bloody garment, jumps to the conclusion that a wild beast had devoured him (Gen 37:33). His sons do not have to lie directly about the matter; they

<sup>27</sup> Among the Rabbis, the *Mek.* states, "**יָסַח** here only means death" (cited by Paul, *Studies in the Book of the Covenant*, 72 n. 3). KB ("todlicher Unfall") agrees.

<sup>28</sup> Westbrook, "Lex Talionis," 52-69. j,

<sup>29</sup> *Ibid.*, 58-61.

<sup>30</sup> Daube, *Studies in Biblical Law*, 3-15.

simply do not contradict Jacob's false deduction. When he fears lest **לִדְבַח** befall Benjamin in Gen 42:4, he does not yet suspect the brothers of anything, so that a legally loaded meaning "disaster for which no one can be blamed" is inappropriate. It is only later in this chapter, when the brothers arrive back from Egypt with the grain and their money but without their brother Simeon, that Jacob begins to suspect the brothers of treachery, just as Joseph had planned for him to do by withholding Simeon and returning the money, making it appear as if they bought the grain by selling their brother.<sup>31</sup> **לִדְבַח** in Gen 42:38 cannot refer to a "case where responsibility cannot be located" because Reuben in v. 37 specifically volunteers to take responsibility for the safety of Benjamin, and yet Jacob refuses to let him go lest **לִדְבַח** befall him.<sup>32</sup> Moreover, in Gen 44:28-29 the brothers, who know Joseph only as an Egyptian official, repeat to Joseph Jacob's words to the effect that Jacob believed Joseph to have been torn by a beast, and fears **לִדְבַח** for his brother Benjamin as well. If **לִדְבַח** contained an obvious, implied suspicion of the brothers, they would not have incriminated themselves by repeating the accusation to an Egyptian official. In sum, **לִדְבַח** in Genesis need mean no more than "(deadly) disaster" from which Jacob wanted to protect Benjamin, the last remaining child of his favorite wife Rachel. Westbrook ignores the usage in Sirach, perhaps because he considers the meaning of **לִדְבַח** there to be a late development. It suffices to say that the meaning "a disaster for which no one can be blamed" does not fit the usage there.

Westbrook's meaning for **לִדְבַח** in Exod 21:22-25 does not fit the particulars of that case either. Westbrook supposes that the text contemplates a circumstance where the blame for striking the pregnant woman cannot be placed on any particular individuals. However, a case of striking a pregnant woman during a brawl seems an unlikely one for having a "perpetrator unknown." It is unlikely that a pregnant woman would be alone with strangers during a brawl. On the contrary, one would expect there to be plenty of witnesses: the woman, other brawlers, and gawking bystanders. Moreover, anonymity in the close-knit society of ancient Israel would be uncommon. The introduction of a "perpetrator unknown" *prima facie* seems farfetched.

The etymology of the word **לִדְבַח** perhaps speaks against Westbrook's "legal" interpretation of this term. **לִדְבַח** could well be derived from **לָדַבַּח** meaning "to heal" (KB; contra BDB which takes it from **לָדַבַּח** II "be sorrowful" based on an Arabic root). If so, **לִדְבַח** would be related to the noun **רֹדֵבַח**, which means "physician" in Talmudic Aramaic and in Syriac. This

<sup>31</sup> Cf. M. Sternberg, *The Poetics of Biblical Narrative* (Bloomington: Indiana University Press, 1985) 298-300, for this analysis.

<sup>32</sup> Schwienhorst-Schonberger, *Das Bundesbuch*, 91.

term in turn is derived from Akkadian *asu*, itself a loanword from Sumerian A.ZU (traditionally "knower of the waters").<sup>33</sup> Denominative verbs have been derived secondarily from this non-Semitic noun in Aramaic (Aphel "to cure," Ithpaal "be cured, recover"). A reasonable interpretation is that the noun אָסוֹן in Biblical Hebrew is also a secondary development from this word, in which case אָסוֹן would be expected to be a medical, not a legal term, meaning something like "injury requiring attention of a physician, serious injury," from which a secondary sense such as "deadly injury" might have developed (cf. KB, "[healing, euphemism for] deathly accident"). In the context of Exod 21:22-25, אָסוֹן is not limited to "deadly injury"--even though that is the sense in Genesis--but "serious injury/medical calamity," including injuries up to and including death. This seems clear from the talionic formula after the case with אָסוֹן which does not end with "life for life," but contemplates various lesser injuries as well.

#### 4. *What Is the Meaning of בַּפְּלִיִּם?*

The philologically difficult term בַּפְּלִיִּם cannot be pinned down with certainty. Traditionally it has been understood to mean "by judges/arbitrators" (to keep the husband from demanding too much, so *Tg. Onq.*), but this meaning is doubtful. Although the verb of this root does seem to have the meaning "to judge,"<sup>34</sup> the lexical meaning "judge" for פָּלִי is not well established from its only other occurrences in Deut 32:31 and Job 31:11. Moreover, the context of Exod 20:22-23:33 makes the interpretation "judges" doubtful. If one excludes the philologically and contextually far-fetched view that אֱלֹהִים in Exod 21:6 and/or 22:7-9 means "judges,"<sup>35</sup> we find that (excluding Exod 21:22) there is no direct reference to judges in the entire legal unit of Exod 20:22-23:33. Indeed, it seems that even among those regulations in the Book of the Covenant which might not inappropriately be called "laws," those laws regularly lack administrative details such as who decides a case, who carries out a sentence, and how a sentence is to be carried out, all of which suggests that these so-called laws might be better characterized as moral comments on legal matters than as a complete law-code. This context casts further doubt on the traditional rendering.

<sup>33</sup> S. A. Kaufman (*The Akkadian Influences on Aramaic* [Assyriological Studies 19; Chicago: University of Chicago Press, 1974] 37) provides some of this information, though he in fact rejects association of *asu* with אָסוֹן. CAD A II.347 rejects that A.ZU means "knower of the waters."

<sup>34</sup> Interestingly, the Hebrew term for "to pray" (הִתְפַּלֵּל) can be understood as a HtD stem of this root meaning "to seek a judgment for oneself." Cf. M. Greenberg, *Biblical Prose Prayer* (Berkeley: University of California Press, 1983) 21-22.

<sup>35</sup> Cf. J. M. Sprinkle, "A Literary Approach to Biblical Law: Exodus 20:22-23:19" (Ph.D. dissertation; Hebrew Union College-Jewish Institute of Religion, Cincinnati, 1990) 163-70, 344-49, or the forthcoming revision of this work for the JSOTSup, for a discussion of אֱלֹהִים in these texts.

If **בפללים** does not refer to judges, then to what does it refer? There has long been a conjectural emendation that replaces this term with **בנפלים**, meaning "the price of the miscarriage."<sup>36</sup> I am normally reluctant to accept conjectural emendation, but this reading cannot be altogether ruled out.

Another interpretation of **פללים** was defended by E. Speiser.<sup>37</sup> He argues that the root has to do with "reckoning, assessing" and that **בפללים** means "by assessment/reckoning." Hence, the penalty paid is assessed on the basis of the stage of the development of the dead fetus. The rationale for this view is that the later the stage of pregnancy, the more time has been lost to the woman, the greater the grief for the loss of a child, and the more difficult the miscarriage. This may have been the view of the LXX, which paraphrases **לֹא יְהִי אִסוּן** as "imperfectly formed child" and translates **בפללים** "with valuation."<sup>38</sup> Furthermore, Speiser's view gains credibility in that penalties for miscarriage actually do vary with the age of the dead fetus in the parallel ancient Hittite Law § 17, which states, "If anyone causes a free woman to miscarry-if (it is) the 10th month, he shall give ten shekels of silver, if (it is) the 5th month, he shall give five shekels of silver and pledge his estate as security."<sup>39</sup>

Speiser makes a good case for his interpretation of **פלל**. Those who oppose abortion are understandably uncomfortable with this view because the life of a young fetus being worth less than that of an older one might be used to justify first trimester abortions when the fetus is less valuable. This conclusion is not a necessary deduction from Speiser's interpretation, however. Lev 27:1-8 gives monetary values for redeeming persons who have been given as a votive offering to the sanctuary. It is interesting to note that the monetary value assigned to people varies according to age and sex, from a low of three shekels for a girl between one month and five years, to a high of fifty shekels for a male aged twenty to sixty. Yet despite these differing monetary valuations, probably reflecting the market value of slaves, the intentional killing of anyone of them would be considered murder. The same could be true of the fetus, having a lower economic value for the family early in pregnancy, and a higher economic value later on, but perhaps being considered equally human throughout. Note also Exod 21:32 where a monetary value of thirty shekels is assigned to a male or female slave gored to death by an ox, but the transcendent life value of the slave

<sup>36</sup> S. R. Driver (*The Book of Exodus* [Cambridge: Cambridge University Press, 1911] 219) attributed this view to Budde. It is mentioned by BDB.

<sup>37</sup> E. A. Speiser, "The Stem **פלל** in Hebrew," *JBL* 82 (1963) 536-41.

<sup>38</sup> **μη ἐξεικονισμένον** and **μετὰ ἀξιώματος**. The LXX seems to imply the view that an imperfectly formed child who is not yet viable independently of the mother is not yet fully human; consequently, there can be no case **אִסוּן** ("deadly injury") in the case of the death of the fetus. Weingreen, "The Concepts of Retaliation and Compensation in Biblical Law," 9-10, argues that the LXX's rendering was influenced by the debate among Greek thinkers as to whether or not the embryo is to be considered a living entity.

<sup>39</sup> A later version of this law increases the penalties.

is nonetheless affirmed by the execution of the ox as a murderer for taking a human life in violation of Gen 9:5. This stoning of the ox is in contrast with the case where an ox gores an ox to death in which the goring ox need not be dispatched because human life is not involved.

There is another view of the meaning of פלל which is neutral on the question of whether or not the fetus dies. Westbrook, as we have seen, understands this root to imply the sense of "sole responsibility" and that בפללים means "[he pays] alone." He argues that פלל in the G stem means "take sole responsibility" and in the D stem means "shift responsibility (to )1 subject or object of verb )."<sup>40</sup> A. Berlin, however, has rightly criticized Westbrook's emphasis on "sole/alone" in his view that פלל means "sole responsibility." Instead, she has made a good case that this root has to do simply with "responsibility, accountability." According to her, בפללים means "as the culpable party."<sup>41</sup>

Berlin's view could be slightly modified, however, by taking the ב as a "beth of price," and the plural as that of abstraction, and read the text, "he pays/gives the amount for which he is culpable" (lit. "amount of [ב] culpable ones/culpability"). If taken this way, the expression could refer to some customary set amount (perhaps varying according to the development of the fetus as in the Hittite Laws), or an amount which takes into account any extenuating circumstances. My translation above tentatively adopts this modification.

In summing, there are too many uncertainties to make any firm conclusions based on בפללים.

##### 5. Is There a Miscarriage in the Case without אסון?

Does the case without אסון imply the death of the fetus? My answer is yes, and several lines of argument support this conclusion: there are medical

<sup>40</sup> Westbrook ("Lex Talionis," 58-61) applies this view to various passages. Deut 32:31 reads, "For their rock is not as our rock; our enemies are alone" (בפללים responsible for themselves). Job 31:11 & 28 takes און פללים as "a sin for which I alone am responsible." 1 Sam 2:25, "If a man does wrong against a man, God may take the blame for him [יתפללו אלהים], but if a man does wrong against the LORD, who will bear responsibility for him [ופללו אלהים]?" Ps 106:30, "Pinhas stood and took upon himself responsibility [יפלל] and the plague was halted" (cf. Num 25:7-8, where what יפלל refers to is taking bold initiative against the source of divine curse [Israel's sin] by killing an Israelite man in the act of immorality). Ezek 16:52, "You have taken responsibility [for the sins, פללת] of your sisters," i.e., Jerusalem, by being so much worse than her sister Samaria, has taken over responsibility for the sins of the latter. Gen 48:11, "And Israel said to Joseph, 'I did not take upon myself the responsibility [for holding out the hope] to see your face.'"

<sup>41</sup> A. Berlin, "On the Meaning of פלל in the Bible," *RB* 96 (1989) 345-51. Kline ("*Lex Talionis* and the Human Fetus," 195-96) earlier came to a similar view that פלל has to do with incurring guilt, though he exceeds the evidence by claiming that it could mean "liability to death." I doubt Kline's view that the final mem is an emphatic enclitic since this is both rare and mainly limited to archaizing texts.

reasons for thinking this view likely; the use of the plural ילדיה gives support to it; and comparison with similar ANE laws suggest this line of interpretation.

First, the medical reasons. In the days before modern medical science, most premature births under these circumstances would result in the death of the fetus. R. N. Congdon, writing as a physician, remarks on this passage by reviewing modern medical statistics concerning premature births following physical trauma (usually automobile related) to a pregnant mother. He points out that only in the last six weeks (of a normal forty weeks) of pregnancy would an infant's lungs be sufficiently developed for it to survive outside the womb. Apart from modern medical technology, any premature births before that time would result in fetal death. But not even premature birth in the last six weeks would necessarily result in a live birth. A blunt blow severe enough to induce premature labor frequently causes such damage as fetal skull fracture, disruption of the oxygen supply through the umbilical cord, uterine rupture, and overt disruption of connection between the placenta and the uterus, each of which is fatal for the fetus. Even less severe disruptions of the placenta creating an impaired oxygen supply, if not repaired, typically result in labor or in fetal death within forty-eight hours.<sup>42</sup> Congdon concludes: "There are only a few instances, in a nontechnological era, in which blunt trauma serious enough to cause abortion of the fetus would result in a viable birth. If medical data has anything to say about Exodus 21:22, it indicates that the overwhelming probability for such a situation is an outcome of trauma-induced abortion with fetal demise."<sup>43</sup>

Another argument in favor of assuming the death of the fetus comes from the use of the plural ילדיה. One of the arguments used by W. Kaiser against assuming the death of the child is that if the author wanted to denote a miscarriage, he should have used the root שכל (a verb used of miscarriages, cf. Exod 23:26) along with ילד.<sup>44</sup> This argument from silence is not particularly strong, however. It could be turned on its head by posing an equally weak argument from silence: why did the author not use the ordinary word for a live birth ילד, if he had that in mind, rather than the more ambiguous יצא ("came out")? The better answer to Kaiser, however, is to observe that the author does not need to use the term for miscarriage because the plural form ילדיה is a plural of abstraction with the sense "the product of her womb," an apt term for an inadequately developed baby.<sup>45</sup>

Other explanations for this plural are unconvincing. C. E. Keil argued that the plural ילדיה occurs "because there might possibly be more than

<sup>42</sup> R. N. Congdon, "Exodus 21:22-25 and the Abortion Debate," *BSac* 146 (1989) 140-42.

<sup>43</sup> Congdon, "Exodus 21:22-25," 142.

<sup>44</sup> Kaiser, *Ethics*, 170 n. 22.

<sup>45</sup> The recent monograph by Schwienhorst-Schonberger (*Das Bundesbuch*, 97-98) has come independently to similar conclusions.

one child in the womb."<sup>46</sup> This seems farfetched, however, since the possibility of twins introduces an unneeded complication to the point being made by this case. Kaiser adds that the plural "allows for. . . either sex,"<sup>47</sup> but this suggestion too is an irrelevant complication; moreover, such a plural is not the way in which the Book of the Covenant expresses the idea that a regulation applies regardless of sex (for that we expect something like *לֹד אִוּלָד*; cf. Exod 21:15, 17, 28, 31, 32).

More plausible is the view that the plural refers to a not fully developed fetus that is nonviable when born, and that the plural of abstraction "the product of her womb" is used proleptically in anticipation of, or foreshadowing, the fatal outcome (note that the situation described would usually result in stillbirth). This interpretation, by the way, need not imply that a live, unaborted fetus is subhuman. It merely implies that a corpse is sub-human.

Finally, the comparison with ANE laws confirms the view that the fetus is assumed to have died. When the case laws in the Bible are compared with those of the Ancient Near East, it is clear that in broad terms they come out of the cultural milieu. Indeed, the fact that in one case a biblical law is identical in wording with a known, earlier Mesopotamian one (cf. Exod 21:35 and LE §53) suggests some literary dependence. I argue (in general agreement with Cassuto)<sup>48</sup> that biblical laws are essentially making [moral comments on legal matters, but that their wording draws upon legal traditions that would have been known to the Israelites, though modifying those laws to express a uniquely Israelite ideology. But since Mesopotamian legal traditions (probably via the Canaanites) are being drawn upon, it is not irrelevant to make comparisons (and contrasts) with cuneiform laws that deal with similar subject matters, as has been the universal practice of modern scholars of biblical law.

When this is done, it is discovered that not only Hittite Laws §17, but also Sumerian Laws §§1-2, what has been provisionally taken as part of the Laws of Lipit Ishtar,<sup>49</sup> LH §§209-14, and MAL §§A 21,50-52 all refer to causing a miscarriage by striking a woman (sometimes discussing the penalties for killing her in the process), but none of them contemplates the possibility of a birth of a viable baby. Surely this evidence suggests that our case, where the language is a bit ambiguous and is set in a corpus of laws that is drawing upon contemporary legal traditions influenced by Mesopotamia, probably does not contemplate a viable birth either.<sup>50</sup>

<sup>46</sup> C. E Keil, *Commentary on the Old Testament: Pentateuch* (Grand Rapids: Eerdmans, 1978 [1864]) 135.

<sup>47</sup> Kaiser, *Ethics*, 103.

<sup>48</sup> Cassuto, *Exodus*, 262.

<sup>49</sup> Translated in M. Civil, "New Sumerian Law Fragments," in *Studies Landsberger* (Assyriological Studies 16; Chicago: University of Chicago Press, 1965) 4-6. The other texts are translated in ANET.

<sup>50</sup> Paul (*Studies in the Book of the Covenant*, 71 n. 1) correctly observes, "The fact that so many of the legal corpora specifically refer to [causing a miscarriage], which apparently was not too

We conclude that the death of the fetus is to be assumed so that the question of **אָסִי** ("serious injury") applies solely to the mother.

#### 6. *How are the Changes in Person and Number in Exod 21:22-25 to be Explained?*

We may now review our conclusions, paying particular attention to the changes in person and number in this passage. If there is no **אָסִי** after the miscarriage, that is, no serious injury to the woman, then someone ought to pay the father for the economic loss to the family of the child. The purpose of the plurals (men brawl, men strike a pregnant woman) is to point out the accidental nature of the injury--they are fighting each other, not the woman, and are out of control.<sup>51</sup> The switch to singular, "he pays," reflects an indefinite use of the singular.<sup>52</sup> That is, "someone" pays, whether the most negligent party in the brawl (Berlin's view that **בְּפִלְלִים** means "as the culpable party" would go along with this view), or a representative of the men who brawled. The point is that the accidental, negligent taking of the life of an embryo has resulted in a great loss for the woman's family, and someone should compensate monetarily for the damage done by paying the father as the head of the family.

As for the other half of the regulation, if there is serious injury (**אָסִי**) to the woman up to and including death, then the so-called *lex talionis* applies which states that the penalty, in this case monetary, should vary according to the degree of injury caused. The "you" (sing.) who pays according to this principle is Israel represented by an individual. Westbrook, as seen above, also argues that the "you" is Israel, but in his view Israel pays only if the guilty party cannot be determined. In my view, in contrast, the "you" is Israel personified as the guilty party and is not a different entity from the one who pays the fine **בְּפִלְלִים** to the husband.<sup>53</sup> This usage of the second

common, may be due to the literary dependence of one corpus upon another." That the Bible refers to it suggests some literary dependence. Kaiser (*Ethics*, 103) states, "We cannot agree that these laws are the proper background for [Exod 21:22-25]." To this I can only ask, why not?

<sup>51</sup> Kline (*Lex talionis and the Human Fetus*, 198) suggests this plural may be "the indefinite plural active used as a passive, signifying 'a pregnant woman is struck.'" But the ready antecedent **אָנָשִׁים** ("men") speaks against this.

<sup>52</sup> Cf. E. E. Konig, *Historisch-comparative Syntax der hebraischen Sprache* (Leipzig: Hinrichs, 1897) 354-55, §§324d-dB, for examples of the indefinite use of the singular verb. Some examples: Gen 19:17, 38:28, 48:1, 50:26; Exod 10:5, 21b; Lev 2:8.

<sup>53</sup> The singular "you" in biblical law flows easily between Israel as a whole personified as the original patriarch and a particular Israelite within Israel. Compare the use of second person singular elsewhere: the "you" in Exod 21:2 ("If you acquire a 'Hebrew' slave") is Israel represented by an individual Israelite who happens to be a slaveholder; the "you" of Exod 21:14 ("from my altar you may take him") is Israel as represented through those responsible for executing murderers; the "you" of the Decalogue is Israel, and hence individual Israelites; "your poor" in Exod 23:6 is Israel's poor. For a complete discussion, see Dale Patrick, "I and Thou in the Covenant Code," *SBLSP* (1978) 1.71-86.

person serves to remind the reader that this is not an impersonal law-code, but YHWH's personal address to Israel.

#### IV. *Exod 21:22-25 and the Surrounding Context*

The case of the pregnant woman struck during a brawl breaks a sequence between the two bondsman laws, Exod 21:20-21 having to do with striking a bondsman to death, and 21:26-27 having to do with injuring a bondsman. Why the case of the pregnant woman should come between these two has puzzled commentators.

According to D. Patrick, Exod 21:22-25's link with Exod 21:26-27 is only superficial. The case of the injured bondsman came to the lawgiver's mind because, like the *lex talionis*, it deals with "eye" and "tooth" and uses the term *תתת*.<sup>54</sup> Others, less graciously, suggest scribal misadventure.

My own view, suggested to me by H. C. Brichto,<sup>55</sup> is that Exod 21:20-27 as a group is fundamentally about injuries to bondsmen, specifically debt slaves as in Exod 21:2-5, which is a natural sequel to the discussion of injury to the full citizen in Exod 21:18-19. Exod 21:22-25 on the pregnant woman is parenthetical, though necessary to further the author's discussion of bondsmen.

What the case of the pregnant woman introduces is the principle that one should as a rule pay the exact monetary equivalent for mayhem that one caused even if the mayhem was unintentional, as the striking of the pregnant woman in a brawl among men would be. This principle was introduced, however, to form a contrast with the case of injury to a bondsman that follows. The case of injury to a bondsman by using similar language but drawing a quite different conclusion indicates that this principle does not apply in the case of a beating of a bondsman in which the beating is intentional (this is the master's right if for the purpose of making him work), but the maiming was (in all likelihood) unintentional. In this case, and unlike the talionic formula, the penalty does not vary according to the degree of injury, but maiming of any sort, as great as the loss of an eye, as little as the loss of a tooth, results in the bondsman's freedom and the loss of the master's investment, i.e., the master loses the time owed by the bondsman in lieu of the bondman's unpaid debt.

The reason why the talionic formula does not apply, but that any maiming results in the slave's freedom, is that this bondsman (being actually a "distrainee" or an "indentured servant" rather than a "slave"--cf. Exod 21:2-4) must be treated as a human being despite his reduced social status. The master has the right to the bondsman's time and to a limited extent can use force to make him work, but the master has no right to his bondsman's person. If he murders the bondsman, he is subject to "vengeance"

<sup>54</sup> D. Patrick, *Old Testament Law* (Atlanta: Knox, 1985) 77.

<sup>55</sup> Personal dialogue.

(Exod 21:20-21) as with the murder of any other human being; if he maims him, he loses all rights as master (Exod 21:26-27) since he has no right to treat another human being in that way. Hence the biblical author has artfully expressed a philosophical concept concerning the humanity of a bondsman by this juxtaposition of the case of the pregnant woman and the case of the maiming of a bondsman.

If this view is correct, the *lex talionis* was introduced not to prove the humanity of the fetus--it is quite ambiguous on that point--but rather to prove the humanity of slaves.

#### Conclusion

Although one might like to find definitive answers to the abortion question from Exod 21:22-25, it is not possible to do so. The detailed exegetical analysis of Exod 21:22-25 (*lex talionis*) given above shows the passage to be ill suited for establishing a biblical ethic concerning abortion.

On the one hand, the case of the pregnant woman does not disprove the humanity of the fetus. The killing of the fetus and the killing of the mother are treated alike: in both cases composition is achieved through payment of money. The text talks only about accidental killing, and exegetically from this passage alone we have no way of knowing whether the intentional killing of the fetus by its mother would have been considered murder. What is clear here is that the accidental killing of the unborn is punished. What about the intentional killing of the unborn? Would it go unpunished? Exod 21:22-25 does not exclude the possibility that the intentional killing of the mother and the intentional killing of the fetus would also be treated alike, that is, as murder.

On the other hand, the case of the pregnant woman cannot be used to prove the humanity of the fetus either. Contrary to the exegesis common among certain anti-abortion Christian theologians, the most likely view is that the death of the fetus is to be assumed throughout the entire case. It cannot be proven whether the formula "life for life" applies to the fetus since it occurs in the instance with  $\text{נִדְּבַח}$  ("serious injury"), which deals exclusively with injuries to the mother. The wording of the case does not rule out the possibility that the fetus was considered subhuman. Rather than proving the humanity of the unborn, the passage instead serves (by its contrast with the subsequent case) to demonstrate the humanity of slaves.

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