

MISCARRIAGE OR PREMATURE BIRTH: ADDITIONAL THOUGHTS ON EXODUS 21:22-25*

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THE interpretation of Exodus 21:22-25 has received much attention in the last few years in evangelical circles. This writer's interest was sparked from the article "Old Testament Texts Bearing on Abortion" by Bruce Waltke in *Christianity Today* and another essay by Waltke in *Birth Control and the Christian*. In addition, the various interactions between Waltke, John Warwick Montgomery, and Jack Cottrell provided too much interest for me not to examine the area anew for myself. This paper is an exegesis of Exodus 21:22-25 with special attention given to Waltke's position.¹

Several basic studies must be done before this passage will lay itself open for the interpreter: (1) One must understand the meaning of **לִצְיָן** in the text and ascertain whether the translation of the term as "miscarriage," as found in most translations, is correct. (2) Also, one must determine whether the use of **לִדְיָן** the normal word for child, is to be understood as an unborn child of equal worth with an adult, or whether the child was only of property value in the Hebrew culture. (3) Since several Near Eastern legal documents have similar passages, should one consider the Mosaic statement dependent on these, and so to be similarly interpreted? (4) a question of importance

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¹ Waltke has revised some of his thinking on the question of abortion since the publication of the above mentioned works. He recognized the importance of Cottrell's arguments against his position but retorts: "Although I still think that interpretation [the viewpoint on Ex. 21:22-25 he offered] is the proper one, Cottrell made a good case against it and the evidence supporting it is less than conclusive." (*JETS*, 19, No. 1, 1976, 3). Though I deeply respect the exacting scholarship of Waltke, I think that Cottrell has given us the proper direction for the understanding of this passage.

is whether **נִזְק** (harm) refers to the mother or child, or both, and what degree of harm is involved in the word **נִזְק**. (5) How is the *lex talionis* of verses 24-25 related to verse 22? (6) One must then decide the value of the passage for study on the abortion question.

The importance of interpreting Exodus 21:22 becomes apparent when one reads a statement on the moral legitimacy of abortion such as what follows:

A second argument in favor of permitting induced abortion is that God does not regard the fetus as a soul [Hebrew *nephesh*], no matter how far gestation has progressed. Therefore, the fetus does not come under the protection of the fifth commandment. That he does not so regard the fetus can be demonstrated by noting that God does not impose a death penalty for the destruction of a fetus. A basic feature of the Mosaic Code is the *lex talionis*, or principle of 'an eye for an eye, life for life' (e.g. Lev. 24:28). The law plainly exacts: 'If a man kills any human life [Hebrew *nephesh adam*] he will be put to death'. But according to Exodus 21:22ff, the destruction of a fetus is not a capital offense. The divine law reads: 'When men struggle together and one of them pushes a pregnant woman and she suffers a miscarriage but no other harm happens, he shall be fined according as the woman's husband exact from him ... But if harm does ensue, then you shall impose soul [*nephesh*] for soul [*nephesh*] . . .' (Ex. 21:22-24). Clearly, then, in contrast to the mother, the fetus is not reckoned as a soul [*nephesh*]. The money compensation does not seem to have been imposed in order to protect the fetus but to indemnify the father for his loss.²

In contrast to the above translation, Cassuto presents the most accurate rendition of which this writer is aware of the intent of Exodus 21:22:

When men strive together and they hurt unintentionally a woman with child, and her children come forth but no mischief happens--that is, the woman and the children do not die--the one who hurts her shall surely be punished by a fine. But if any mischief happens, that is, if the woman dies or the children, then you shall give life for life.³

² Bruce M. Waltke, "Old Testament Texts Bearing on the Issues," *Birth Control and the Christians*, eds. Walter O. Spitzer and Caryle L. Saylor (Wheaton, Ill.: Tyndale House Publishers, 1969), pp. 10-11.

³ U. Cassuto, *Commentary on the Book of Exodus* (Jerusalem: Magnes Press, The Hebrew University, 1967), p. 275.

THE TRANSLATION OF יצא

Cassuto translates יצא as "come forth," a translation contrary to the NASB, RSV, NEB, and a host of others, in addition to a number of ancient and modern commentators. Most, like Waltke, take יצא as the "child miscarries or aborts"; however, there seems to be no lexicographical or impelling contextual reason for doing so. The consistent use of יצא in the Hebrew Old Testament hears out the meaning "come or go out."⁴ Not only is this true, but יצא is found in specific texts concerning childbirth⁵

Gen. 25:25 ויצא הרשון אדמוני
And the first came out (was born) red

Gen. 38:28 זה יצא ראשונה
This one came out (was born) first

Also the adjoining passages Gen 25:26 and Gen 38:29 read similarly.

The Ugaritic uses a cognate for יצא. Although this writer did not find an example in Ugaritic texts for "birth," the term was consistently used to mean "come out"⁶:

Text 68:2 [] hy [] lassi. hm. ap. amr []
[] alive []
I shall bring them out

Text 68:6 [b] ph. rgm. lysa. bspth. wtn gh. kgr
From his mouth the word went forth
From his lips, his utterance

⁴ Francis Brown, S. R. Driver, and Charles A. Briggs, *A Hebrew and English Lexicon of the Old Testament* (Oxford: At the Clarendon Press, 1907), pp. 422-25. It gives "go or come out" as the basic meaning. Then it lists a number of synonyms. The Ex 21:22 passage is mentioned as meaning "untimely birth." Not one time, however is יצא used for miscarriage.

⁵ Cf. also Job 1:21; 3:11 ; Eccles 5:15; Jer 1:5; 20:18. In one passage, Nurn 12:12, NY+ is used for a still-born birth, but this still is not a miscarriage.

⁶ All Ugaritic texts cited are from Cyrus H. Gordon, *Ugaritic Textbook, Texts in Transliteration, Cuneiform Selections* (Roma: Pontificium Institutum Biblicum, 1965). Translations are from C. H. Gordon, *Ugaritic Literature* (Roma: Pontificium Institutum Biblicum, 1949).

Even as *ys'* in Ugaritic, **אצ׳** basically means what the Greek word ἐξέρχομαι, conveys, "from within to without." The LXX renders the phrase in question **καὶ ἐξέλθη τὸ παιδίον αὐτῆς**. So then one may agree with Jackson:

Exod. xxi refers not to a miscarriage, but rather to a premature birth, a *Fruhgeburt*, not a *Fehlgeburt*. This view is not entirely new. Geiger was of the opinion in 1857, and Kiel & Delitzsh, basing themselves on *yeladeyhah*, and Dillmann also voiced it. Budde objected to it, and Jacob, apparently the last author to have considered this possibility, gave it some approval. But none of these authors considered the evidence in any detail, or attempted to explain the historical development of the law.⁷

Had Moses intended to convey the idea of "miscarriage," he certainly would have used the Hebrew word for miscarriage, **שכל**. This term is used several times in the Pentateuch,⁸ as well as elsewhere:

Gen 31:38	רחליך ועזיך לא שכלו Your ewes and she-goats have not cast (aborted) their young
Hos. 9:14	תן להם רחם משכיל Give them a miscarrying womb
Ex. 23:26	לא תהיה משכלה בארצך There shall none be casting (aborting) their young in your land

Hebrew **שכל** has a cognate in Ugaritic, which is *tkl*.⁹ It apparently carries the significance of the Hebrew term:

Text 52:8	mt. wsr. ytb. bdh. ht. tkl. bdh In his hand is the staff of privation In his hand is the staff of bereavement
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⁷ Bernard S. Jackson, "The Problem of Exod. XXI 22-23 (IUS Talionis)," *Vetus Testamentum*, XXIII, 3 (July, 1973), 273-304.

⁸ Cf also II Kings 2:19, 21; Isa. 47:8; cf BDB, pp. 1013-1014 for further confirmation.

⁹ Root possibly *ylđ* or *ys'*.

Text 2002:4 ht. tk [1]
 Staff of bereavement

In addition Virolleaud cites *ttkl bnwth* (RS 24. 244:62) " 'she (*sps*) renders sterile his (Hrn's) creative powers' ".¹⁰ Here the sense might either be a forced sterility or making ineffective the results of his creative ability and so abortion.

THE MEANING OF לֵילִים

Those who would use the passage under discussion as a proof text for abortion seek to differentiate between the fetus and a human being. To quote Waltke again, "God does not regard the fetus as a soul ... no matter how far gestation has progressed." The reason that Waltke believes this is that "God does not impose a death penalty for the destruction of a fetus."¹¹ As will be seen in further discussion, God does require the death penalty for the death of a fetus ; our immediate concern is to show that the Hebrew did not distinguish between a fetus and a child already born. Keil, in his commentary on Exodus, when discussing this passage, sees the word לֵילִים as strategic to his argument.¹² לֵילִים refers in Hebrew literature to a "child, son, boy, youth."¹³ There seems to be no distinction in Moses' mind between a fetus and a normal child. One could posit ignorance on his part, since he did not have the advantage of our arbitrary scientific terminology, but it seems that equal value is on the born and unborn. There also seems no reason to assign arbitrarily a different status to the לֵילִים of Exodus 21:22, especially with a correct understanding of יָצָא, than to the לֵילִים of Isaiah 9:6 (5).

Montgomery refers to Kiel for evidence of לֵילִים referring to a child, not only a fetus, with which interpretation Waltke differs:

¹⁰ Gordon, *UT, Glossary*, p. 502, entry 2674.

¹¹ Waltke, p. 10. Waltke has subsequently changed his thinking concerning this issue. He has since concluded that the fetus is fully human, its life seminally mediated through the parents, and a possessor, from conception, of the image of God. Bruce K. Waltke, "Reflections from the Old Testament on Abortion," *JETS*, 19, 1 (Winter, 1976), 5-13.

¹² C. F. Keil and F. Delitzsch, "Exodus," *Commentary on the Old Testament*, Vol 1 (Grand Rapids: William B. Eerdmans Publishing Company, n.d.), p. 135.

¹³ BDB, p. 409.

In addition, Montgomery is mistaken when he says: 'The equality of mother and unborn child in Exodus 21 is upheld ... by a classic Old Testament scholar such as the nineteenth-century Protestant Delitzsch.' In reality, Keil (not Delitzsch) is making a different point; namely, the child in question is not a fetus but a fully developed human being. Lange calls this interpretation 'strange'. Obviously, Keil's interpretation has nothing to do with Montgomery's conclusion.¹⁴

Yet contrary to Waltke, it is not obvious that Keil is referring to a fully developed human being, since the statement by Keil on this issue reads thus:

If men strove and thrust against a woman with child, who had come near or between them for the purpose of making peace, so that her child come out (come into the world), and no injury was done either to the woman or the child that was born, a pecuniary compensation was to be paid, such as the husband of the woman laid upon him ... because even if no injury had been done to the woman and the fruit of her womb, such a blow might have endangered life."¹⁵

Waltke, in interpreting Keil's comment on this passage, apparently overlooked the context of Keil's statement. Keil was arguing with Philo and others who viewed the child in the passage as not having assumed human form yet in the womb and so to be considered less than a human being:

But the arbitrary character of this explanation is apparent at once; for לֵלֵךְ only denotes a child, as a fully developed human being [but here Keil understands a fully developed human being *inside* the womb, not one already born as Waltke intimates, so still a fetus], and not the fruit of the womb *before* it has assumed human form.¹⁶

In addition to the statement of Keil, the biblical text speaks of a premature birth, as will be demonstrated shortly. One wonders what differentiates the unborn child from the born child, unless one presupposes a creationist viewpoint? And, actually what more viability does a new born child have than the unborn? What new factor has entered in that could consider one death just an unfortunate miscarriage, and the other murder? The

¹⁴ Waltke, "Eutychus and His Kin," *Christianity Today*, (Jan 3, 1969), 14.

¹⁵ Keil and Delitzsch, pp. 134-35.

¹⁶ *Ibid.*, footnote 1, pp. 134-35.

point that is put forth here is that the Hebrew writers do not differentiate between child born or unborn.

Waltke now acknowledges the truth of this statement:

No evangelical would deny that a baby is a human being and that it is made in the image of God, that is, that it has the capacity for spiritual, rational and moral response. The question, then, is 'Does the fetus have that capacity?' The answer is that it does and that this capacity was already present at the time of conception.¹⁷

Before passing from the discussion on ילד the reason for the plural will be briefly presented. Keil says that "the plural ילדיה is employed for the purpose of speaking indefinitely, because there might possibly be more than one child in the womb."¹⁸ Something more than what Keil has suggested may be involved in the text since the "irregularity of the situation is the fact that the birth is prematurely and maliciously induced."¹⁹ The use of ילדיה may be a plural "to indicate natural products in an unnatural condition,"²⁰ giving added evidence for a premature birth being involved in the text.

NEAR EASTERN LAWS ON MISCARRIAGE

Several Near Eastern codes speak to the subject of miscarriage caused by an injury to the woman; intentional abortion was not the normal practice: "foeticide, throughout the course of history, has never become a recognized social practice, but has been in the main sporadic."²¹ In the Old Testament legal codes there are many laws governing man's relationship to his fellow man, though these are not the oldest Semitic laws:

The Pentateuch does not contain the oldest system of Semitic laws which is found in the jurisprudence of Babylon,

¹⁷ Waltke, "Reflections from the Old Testament on Abortion," p. 13.

¹⁸ Keil and Delitzsch, p. 135.

¹⁹ Jack W. Cottrell, "Abortion and the Mosaic Law," *Christianity Today*, XVII, 13 (March 16, 1973), 6-9.

²⁰ Ronald J. Williams, *Hebrew Syntax, an Outline* (Toronto and Buffalo: University of Toronto Press, 1967), p. 8, paragraph 10. I owe credit for this observation to Barry Craig, a former classmate at Western Conservative Baptist Seminary.

²¹ E. Neufeld, *Ancient Hebrew Marriage Laws* (New York: Longmans, Green and Co., 1944), p. 252, footnote 3.

mainly as laid down in the Code of Hammurabi. The instances given in this code of the rule of 'measure for measure' go far beyond the 'eye for an eye' of the Mosaic code, even when the latter is taken in its most literal sense. Thus, where a man strikes a pregnant free-born woman so as to cause her death through miscarriage (cf. the case put in Ex. xxi. 22-23) under that old Babylonian code . . . the daughter of the assailant should be put to death. Again, when through the carelessness of the builder a house falls and the owner's son is struck and killed in the ruins, the builder's son should be put to death. This extravagant application of the 'measure for measure' law is made impossible in Israel by Deut. xxiv. 16—'Fathers shall not be put to death for the children, neither shall the children be put to death for the fathers.'²²

From the previous quote one may see that although there is similarity between the basic idea of *lex talionis* in the Babylonian and Mosaic codes, there is no necessity for there to be exact parallel. This point is important to the discussion that follows.

Waltke believes that a primary argument in favor of allowing induced abortion is the absence of any biblical text forbidding it:

Here we must appeal to the literature of the Ancient Near East to weigh this negative evidence. In this case the silence of the Bible is significant because an Assyrian law dated between 1450 B.C. and 1250 B.C. prescribed death by torture in cases of induced abortion. The text reads: 'If a woman by her own deed has cast [aborted] that which is within her womb, and a charge has been brought and proved against her, they shall impale her and not bury her. If she dies from casting that which is in her womb, they shall impale her and not bury her.'²³

²² *The Jewish Encyclopedia*, Vol X, ed. Isidore Singer (New York and London: Funk and Wagnalls Co., 1905), 385. Findings at Ebla were not publicized when this paper was written and I have not had opportunity to examine the legal material that may be available from that site. An interesting parallel to the Ex 21:22 passage is found in a papyrus of 89 B.C.: "An inhabitant of Hermopolis complained that another woman 'met me in the square of Hermes by the court there, and attacking me in consequence of a dispute gave me many blows with her hands on every part of my body, and it was the fifth month that I was with child. The blows caused me to be laid up with sickness and my life is endangered. I inform you in order that T. be brought up and secured until my case be ascertained in the appointed period, so that if anything happens to me, she may be treated according to the enactments concerning such conduct, and if I survive, I may obtain satisfaction from her as is right (λαβω παρ' αυτης το δικαιον ως καθηκει). Jackson, pp. 295-96.

²³ Waltke, *Birth Control and the Christian*, p. 9.

Again another example is given

With respect to an accidental miscarriage the contrast between the Mosaic law and the Assyrian law is once again instructive. In a similar context the Assyrian law reads: 'If a seignior struck another seignior's wife and caused her to have a miscarriage, they shall treat the wife of the seignior who caused the other seignior's wife to have a miscarriage, as he treated her: he shall compensate for her fetus with a life. However, if that woman died, they shall put the seignior to death ; he shall compensate for her fetus with a life. But when that woman's husband has no son, if some struck her so that she had a miscarriage, they shall put the striker to death; even if her fetus is a girl he shall compensate with a life.' We should note this contrast between the Assyrian Law and the Mosaic: the Old Testament, in contrast to the Assyrian Code, never reckons the fetus as equivalent to a life.²⁴

Waltke's arguments for induced abortion are twofold: (1) Since the Old Testament does not forbid such an act, in light of other ancient Near Eastern literature that does, it must be legitimate. (2) Nothing is legislated in the Old Testament against abortion as is common in other crimes.

Scott aptly replies to both these problems, first:

In reply one might question the prevalence of abortion among the Israelites whenever the surrounding civilization prohibited it. If we assume that it was not common in the Old Testament community, then we may regard the absence of any Biblical text forbidding it as being due to its exceptional occurrence. What is exceptional scarcely requires an explicit prohibition.

And Scott answers the second argument:

"Again one could argue that this could well be due to the exceptional occurrence of abortion, not only in Israel, but in the surrounding communities."²⁵

One may readily see that an argument from silence, as Waltke has presented, is of very little value, and certainly does not de-

²⁴ Ibid., p. 11. Waltke argues from this law that the death penalty is required in Assyria for inducing an abortion by striking a woman. That is true, if the woman also dies, but the quotation may suggest that the death of the fetus only calls for the death of another fetus unless the man has no heir." C. E. Cerling, Jr., "Abortion and Contraception in Scripture," *Christian Scholars Review* (Fall, 1971), 42-58.

²⁵ Graham A. D. Scott, "Abortion and the Incarnation," *JETS*, XVII, I (Winter, 1974), 33-34.

serve a primary place in argumentation, as he has made it. In this argument of silence the most that would be achieved would be a "stand-off." One could just as easily argue that since there is no prohibition of euthanasia, it too is acceptable (apart from the theological issue of the soul). In reality, all the discussion concerning the lack of *lex talionis* for the fetus does not apply, since the passage does not deal with abortion, but premature birth, as shall be demonstrated later. Though one might wonder why the Mosaic legislation does not speak to the same issue as does the Assyrian, Babylonian, and Hittite codes, even in view of Scott's reply, a casuistic law, such as Exodus 21:22f, cannot envisage all possibilities.²⁶ In addition, one familiar with legal literature of the Bible realizes that in many areas the laws of Israel and those of the surrounding nations are not identical. On the contrary, though the writer realizes the exception with Scott, one could argue that the principle in foreign law was so common that it need not be mentioned in the Mosaic law. Thus this line of argument from silence is both perilous, unfruitful, and highly speculative.

THE SIGNIFICANCE OF תִּזְנוּ

To whom does the תִּזְנוּ, refer in verse 22, and what kind of "harm or injury" is to be understood? Montgomery argues that Exodus 21:22-24 does not distinguish between the life of the mother and the life of the child in meeting out punishment. The תִּזְנוּ could be either to the mother or child, and if either one was injured, *lex talionis* came into play. Cerling believes that "Waltke gives an adequate answer to this interpretation [the immediately preceding one] when he says that it is possible, but improbable, and rejected by most translations and many commentators."²⁷

²⁶ The strong desire to maintain the family name in the Near East may account for the rarity of abortion. Children, born and unborn, were apparently held in high esteem, especially male children. Even child sacrifice, which *prima facie* is total disregard for the young lives, may be seen, in view of the sacredness of the event for the worshippers, as an offering of their very best. The total lack of a case law on abortion or miscarriage in Israel may be due to the concern for the family name making it unnecessary. As well, it may be due to a Messianic consciousness, of Messiah coming through a Jewish woman, making abortion, or the like, totally unthinkable, and certainly needing no law to counteract it.

²⁷ Cerling, p. 51, footnote 50.

This viewpoint, no doubt, is why the NASB translates the passage, "she has a miscarriage, yet there is no *further* injury, he shall surely be fined as the woman's husband may demand of him." Cottrell speaks pointedly to the issue:

The second point I wish to defend is, as stated above, that any injury to the child no less than to the mother would demand the application of the *lex talionis*. That is, of course, contrary to the popular understanding, in which verse 22 refers to a case in which the fetus is killed but no *other* harm ensues, the death of the fetus being considered a minor injury that deserves to be penalized only by a fine. According to this view, then, verse 23 would be talking about some *further* harm of a much more serious nature, i.e., an injury to the mother herself. Only if the mother received injury would 'an eye for an eye' be required, or 'a life for a life.'²⁸

To add *other* or *further* to the text is simply to miss the argument, and also not to understand the meaning of וְיָדָן. The legislation is to be understood as saying that if a pregnant woman is injured so that her child is prematurely born, but no bodily harm or injury takes place, the man liable to the charge must pay a fine for his action. Cottrell states: "The fine presumably is imposed because of the danger to which mother and child are exposed and the parents' distress in connection with the unnaturally premature birth."²⁹ The וְיָדָן refers to either the mother or the child as Keil fitly retorts to the alternate view:

In a manner no less arbitrary וְיָדָן has been rendered by *Onkelos* and the *Rabbins* אָחִיז, death, and the clause is made to refer to the death of the mother alone, in opposition to the penal sentence in vers. 23, 24, which not only demands life for life, but eye for eye, etc., and therefore presupposes not death alone, but injury done to particular members. The omission of אָחִיז, also, apparently renders it impracticable to refer the words to injury done to the woman alone.³⁰

²⁸ Cottrell, p. 8.

²⁹ *Ibid.* Also Jackson, p. 296: "... the fact that the lives of the foetus and the woman were endangered may be a sufficient reason for liability," and again, "The danger of stillbirth, regarded with horror in Biblical times, may be another reason for the sanction."

³⁰ Keil and Delitzsch, p. 135, footnote 1. Also Jackson, p. 293: "... LXX and Philo preserve the meaning of the original, in that they take *aswn*, both in v. 22 and in v. 23, to refer to the child. Moreover, the reason why the unusual word *aswn* is here used now finds an explanation. Had it referred to the woman, it would be impossible to understand why

Those who believe the passage deals with the paying of a fine because of the miscarriage, and there not being any other harm to the mother, encounter difficulty in that their interpretation does not fit the meaning of **חַוְּלָה**. BDB gives little help in understanding the word, giving "mischief, evil, harm" as the meaning.³¹ The last term, "harm," has been followed by most.

Jackson says that the usage of the word outside this passage gives no support for a minor injury to be understood in Exodus 21:22, 23: "According to this view, (minor injury) *aswn* may refer to any injury. It thus comprehends the loss of the foetus in v. 22, the death of the mother in v. 23, and the whole range of injuries listed in vv. 24-25. But the usage of the word elsewhere provides no support for this." He then continues his discussion noting the other occurrences of the word in the Old Testament, in the Joseph story in Genesis. Three occurrences besides the Exodus passage are in the Joseph story. Jacob sent his son to buy grain in Egypt but he did not send Benjamin lest harm (**חַוְּלָה**) befall him (Gen. 42.4). Later when Joseph insisted that Benjamin come to Egypt Jacob's reply was that some harm might occur to Benjamin and so he would be in sorrow to the grave (v. 38). This same plea was given by Jacob's sons before their brother Joseph to the effect that their father would be in lifelong mourning if harm occurred to their younger brother Benjamin. Jackson then says that the harm Jacob anticipated as possible for Benjamin was death and although the word does not inevitably mean death it certainly would not apply to a trivial injury: "Driver was correct in taking it to refer to 'some serious, or even fatal, bodily injury.'"³²

the normal word for death was not used. But where a foetus is concerned, any hesitation to use the normal terminology of death is quite reasonable. It is also avoided by the ancient Near Eastern sources."

³¹ BDB, p. 62.

³² Jackson, pp. 274-75. Jackson, though, has difficulty with the *ta.lionis* that follows the 11::K: "But can all the injuries enumerated in vv. 24-25 be serious enough to constitute *aswn*? Loss of an eye, hand, or foot may be conceded. More difficult are *kewiyah*, *petza* and *haburah*. But the notion that loss of a tooth is as *aswn* is quite inconsistent with the meaning of the word." *Ibid.*, 274. His conclusion is based upon a partial word study allowing too narrow a meaning for **חַוְּלָה**, though for his part the lexicons of Holladay and Koehler-Baumgartner define **חַוְּלָה** as "mortal accident," and "deathly accident." William L. Holliday, *A Concise Hebrew and Aramic Lexicon of the Old Testament* (Grand Rapids: Wm. B. Eerd-

Jackson should be tempered a little in his understanding of **אֵינָן** in view of the rarity of the word. He surely demonstrates that the word refers to severe or even fatal injury, but the text in Exodus, the only other section of the Old Testament using the word, could allow for **אֵינָן** to be applied to a lesser injury. One may conclude that a fine was exacted on the liable person because of either mental or physical discomfort he had caused. If bodily harm (**אֵינָן**) of any significant amount (eye, burn, bruise, etc.) took place against the mother or child, the principle of retaliation took over. As Cottrell concludes, "The text will permit no other understanding."³³

THE LEX TALIONIS

The *lex talionis* was the law of retaliation in the Ancient Near Eastern legal codes. If an individual was injured or killed, the same injury, or death, was to happen to the offender. In the Assyrian stipulations, as seen previously, if one caused an abortion on the part of a seignior's wife, then the wife of the one who caused the other woman to have an abortion was caused to have an abortion. Exactly the same kind of injury was required. "Life for life, eye for eye, tooth for tooth," then was the *lex talionis*. In the *lex talionis* of the Exodus passage, "life for life" was required for the death (fatal accident, **אֵינָן**) of either child or mother.³⁴

Jackson has difficulty in understanding the entire statement of *lex talionis* as referring to the **אֵינָן** of verses 22, 23. The referring of the "eye for eye, tooth for tooth," hardly could be considered a mortal accident. One would have to see the harm as a very general term, as seen in the Living Bible:

If two men are fighting, and in the process hurt a pregnant woman so that she has a miscarriage, but she lives, then the

mans, 1971), p. 23; Ludwig Koehler and Walter Baumgartner, *Lexicon in Veteris Testamenti Libros* (Leiden: E. J. Brill, 1958), p. 71.

³³ Cottrell, p. 9.

³⁴ Contra. J. K. Miklitzanski, "The Law of Retaliation and the Pentateuch," *JBL* 66 (1947), 297: "But significant about this [the Ex 21:24-25 *lex talionis*] is that exactly when life is to be undoubtedly paid with life the Pentateuch does not use the expression of 'life-for-life' but says in unequivocal terms: 'he shall surely be put to death' (Ex. 21:12; Lev. 24:17)."

man who injured her shall be fined whatever amount the woman's husband shall demand, and as the judges approve. But if any harm comes to the woman and she dies, he shall be executed. If her eye is injured, injure his; if her tooth is knocked out, knock out his; and so on--hand for hand, foot for foot, burn for burn, wound for wound, lash for lash.

With the above translation, understanding the meaning of $\eta \delta \alpha$ is obviously difficult. Jackson sees the law of retaliation in the Exodus 21:24, 25 passage as an interpolation. This would solve all the problems.³⁵ There being no textual evidence against the reading militates against the interpolation, unless one should argue only from subjective, prejudicial opinion.

Mikliszanski presents a possible solution to the problem:

Considered separately, the last two verses could rightly be taken as meaning literally evil for evil, or *lex talionis*, according to which the culprit is to suffer on his body the very same injury he had inflicted on his victim. However, as stated above, a written law must not be separated from its context. In the quoted context 'eye-for-eye' is preceded by 'life-for-life,' an expression that cannot mean penalty of death in view of the fact that, whether the 'mischief' refers to the death of the unborn child or of the woman, the killing was accidental; the Mosaic law does not require death for unintentional murder. 'Life-for-life' is not to be taken in its literal sense, but in the sense of proper and full compensation; notwithstanding the wording, the expression cannot literally be the *lex talionis*. Hence there is no reason to believe that 'eye for eye, tooth for tooth, hand for hand,' etc., uttered in the same connection, are to be understood as implying real retaliation. Besides, the provisions of blemish for blemish refer to accidentally injuring a pregnant woman, and it would be against the spirit of the Biblical code to assume that such unintentional injury be punished by corporal mutilation. The only possible way of restituting is to pay an indemnity, for as far as damages are concerned, there is no difference between intentional or unintentional acts.³⁶

The suggestions of Mikliszanski could alleviate much of the problem, but Ancient Near Eastern evidence seems to point out that the kind of retaliation mentioned in the biblical text was not unusual at all for that culture. The basic problem is to see the verses containing the *lex talionis* as being both the concluding of one idea and the introduction of others. The entire statement

³⁵ Jackson, p. 291.

³⁶ Mikliszanski, p. 296.

of the *lex talionis* then would not be intended to refer to the possible fatal injury but a concatenation, a joining with what follows. The difficulty with this view is the lack of smooth transition with what follows.

When the mother or child received no injury, the liable person was to pay a fine, according to what the husband would dictate, and the judges would determine. Some have had doubts about this portion of Scripture, even to the point of changing the Hebrew word *בנפלים* to *בפללים* "for the miscarriage."³⁷ Probably Morgenstern presents the best way to view this supposed inconsistency:

It goes without saying, of course, that this law never contemplated that the husband could demand of the offending party any sum of money or any other compensation that he might desire, for then there could well be no limit to what he might claim. Some method of regulation of the demand of the husband, so that it might be kept within reasonable limits, was absolutely indispensable; and just this must have been provided for in the last two words of the sentence. Now among the Bedouin, in cases of litigation such as this, where a fine or damages must be paid by one party to another, this amount may be fixed by the sheikh, or in extreme cases by the *gady*. But not infrequently each party chooses an umpire to represent him. Through the mutual discussion of these umpires, and by a process of bargaining or of give and take, the matter is eventually settled and the size of the fine fixed.³⁸

VALUE OF EXODUS 21:22-25 FOR THE QUESTION OF ABORTION

One may see from what has been read thus far that the passage under discussion in Exodus does not concern induced abortion, or miscarriage at all, but instead the purpose of its inclusion is to protect the rights of a pregnant wife and her unborn child. Both are seen as equal in value in the Mosaic casuistic legislation. Even though the weight of scholarly opinion favors an alternate view of this text, as Cottrell put it, "The weight of

³⁷ J. Coert Rylaarsdam and J. Edgar Park, "The Book of Exodus," *The Interpreters Bible*, Vol. I (New York and Nashville: Abington Press, 1952), p. 1000.

³⁸ Julian Morgenstern, "The Book of the Covenant, Part II," *HUCA* 7 (1930), p. 68, footnote 70. Contra. Jackson, pp. 277-78.

scholarly opinion . . . is outweighed by the text itself."³⁹ The text then gives no credence to abortion of the fetus but rather reveals the sanctity of both adult and fetal life.

CONCLUSION

The various difficulties posed tip to this point concerning the **תּוֹרָה** and the *lex talionis* vanish when one views the passage as presenting the situation envisioned in the following paraphrase of Exodus 21:22-25:

And *if* men struggle with each other and strike a woman with child so that she has a premature birth, yet there is no significant bodily injury, to the mother or child, he shall surely be fined (in view of initiating the traumatic experience) as the woman's husband may demand of him; and he shall pay as the judges decide. But if there is a significant bodily injury to the mother or child, then you shall appoint *as a penalty*, and according to that which applies, life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burn for burn, wound for wound, bruise for bruise.

This study has presented the teaching of Exodus 21:22-25, especially as it relates to the present controversy on abortion. It has discovered that the passage does not deal with a miscarriage caused by the injury of a pregnant woman in a physical struggle as is so often viewed. Instead the passage concerns a woman who was struck in a struggle and so prematurely gave birth. If there was no bodily injury resulting to the mother or child because of the blow, the liable man was to pay a fine to the woman's husband as he decreed and as it was judged fair by the judges. If bodily injury did occur to the woman or her child, *lex talionis* was enforced depending on the extent of the injury, from life for life to bruise for bruise. The passage, then, gives no support whatsoever to the legitimacy of abortion.

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³⁹ Cottrell, p. 9.

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