

LEX TALIONIS AND THE HUMAN FETUS

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The most significant thing about abortion legislation in Biblical law is that there is none. It was so unthinkable that an Israelite woman should desire an abortion that there was no need to mention this offense in the criminal code.

There is, however, one law in "the book of the covenant" (cf. Exod 24:7) that deals with a human fetus, and it has naturally received close scrutiny for the light it might shed on the critical question of the nature of the unborn child. This law, found in Exod 21:22-25, turns out to be perhaps the most decisive positive evidence in Scripture that the fetus is to be regarded as a living person. A quite different assessment of the matter is prevalent which alleges that this law assigns to the fetus a status of mere property, not that of a discrete living being. To some extent the prevalence of this view is due to the fact that the other major interpretation, the one that is usually advocated by the "pro-life" position in the current abortion controversy, fails to answer several of the key exegetical questions satisfactorily.

Undeniably, the passage is a Gordian knot formed by an intertwining of several exegetical problems entailing broad issues of legal principle and practice in the Bible. A better solution seems to be available, however, than has been provided in the exegesis presented by either of the opposing sides in the current dispute.¹

In Exod 21:18-36 there is a series of laws concerned with cases of criminal negligence. The law in vv 22-25 concerns a brawl during which a pregnant woman, an innocent bystander, is struck and "her fruit depart(s) from her" (v 22a *KJV*). Two varieties of this basic situation are then distinguished, which we will call Case A and Case B. Each of these includes a protasis (v 22b and v 23a) depicting one or another consequence of the act described in v 22a and an apodosis (v 22c and vv 23b-25) giving the penalty. The protasis in Case A reads: "yet no mischief (*'āsôn*; *RSV* 'harm') follow" (*KJV*). In Case B the protasis reads: "if any mischief/harm follow."

According to the interpretation reflected in most modern English translations of this law, miscarriage is involved in the basic situation described in v 22a as a common denominator of both Case A and Case B. The *RSV*, for example, translates: "so that there is a miscarriage." The *'āsôn* mentioned in vv 22b and 23a can only refer then to the

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¹Several of the major elements contributing to this solution find expression in the study by B. S. Jackson, "The Problem of Exod. 21:22-5 (*Ius Talionis*)," *VT* 23 (1973) 273-304. The point of this law in its canonical form, as I see it, was, according to Jackson, found in a hypothetical earlier form. But it is his contention that the law in its present form no longer bears this meaning and in fact contains self-contradictory elements that betray a history of editorial modifications reflecting an evolution in legal attitude on the issue.

woman. Case A thus involves loss of the fetus only, and the penalty (v 22c) takes the form of monetary indemnification of the woman's husband according to a scale of assessment in which the determining factor is the age of the fetus.² In Case B, in addition to the miscarriage the woman suffers *'āsôn*, and the penalty clause (vv 23b-25), utilizing the talion formula, prescribes capital punishment, "life for life," if the woman dies. There is, according to this interpretation, a difference in kind in the penalties for destroying the fetus and for killing the woman, and the fact that a monetary settlement is prescribed for a miscarriage rather than a life being required as in the case of the woman's death means that the fetus was regarded in Israelite jurisprudence as mere property, not as a living person like the woman.

Over against this exegesis stands the interpretation of Exod 21:22-25 widely endorsed in the anti-abortion movement. According to it, miscarriage is not involved in the basic situation described in v 22a. What comes forth is denoted by the plural of the regular word for child (*yeled*), and it is argued that there is no linguistic warrant for understanding this as a miscarriage.³ Verse 22a describes the premature birth of a healthy child. The *'āsôn* statement in vv 22b and 23a refers in each case to both the mother and the child. Case A involves only some minor harm to the mother, something less than is denoted by *'āsôn*, and therefore a pecuniary penalty is sufficient. In Case B, the *lex talionis* applies whether the victim is the mother or the fetus singly or whether both are victims. The fetus is thus treated as a living person, just like the mother.

While accepting as sound the conclusion concerning the unborn child reached on this second interpretation, I would maintain that that conclusion must be set on a different exegetical base. By way now of developing such an exegesis, attention will first be given here to the penalties in the two apodoses. It will appear that even if it were granted that the first penalty has reference to a miscarriage and the second penalty to harm suffered by the woman, as the dominant interpretation suggests, it would still not follow that the penalty for the destruction of the fetus was different in kind or even in degree from the penalty for harming the woman.

The penalty clause for Case A reads in part: "He shall be strictly penalized; whatever amount the husband of the woman demands of him he must pay" (v 22b). The verb *'nš* denotes punishment.⁴ This may take the form of a fine (cf. Deut 22:19), but possibly the verb refers to punishment in general, including physical punishment.⁵

The expression for exacting the fine, literally "lays on him," is

²This mode of assessment is attested in a case of miscarriage in the Hittite laws (17, earlier version).

³Cf., e. g., J. W. Cottrell, "Abortion and the Mosaic Law," *Christianity Today* 17 (1973) 604.

⁴It is used here with the emphatic infinite absolute—hence, "strictly."

⁵Cf. Prov 17:26, where the parallel is flogging.

used again in the adjacent law of the goring ox in Exod 21:28-32. There the owner of the ox is said to be liable to the death penalty (v 29), but since the offense was one of criminal negligence rather than premeditation the law allows that a ransom for the redemption of his forfeited life be laid on him (v 30). Exod 21:22 is similarly concerned with a case of criminal negligence or recklessness, and the use here of the same penalty formula found in v 30 suggests that the offense in this verse too is a matter of extreme gravity.

The Hebrew expression at the end of v 22 (*bpllym*) is puzzling. Suggestions that it denotes a process of assessment⁶ are linguistically dubious and encounter the difficulty that such a process would contradict the provision by which the setting of the penalty is left completely to the discretion of the woman's husband. Those who understand v 22c as the penalty for miscarriage often read into *bpllym* the feature found in extra-biblical legislation⁷ whereby the penalty is a fine in an amount adjusted to the age of the fetus.⁸ But there is no terminological correspondence whatever to support this supposed parallel. Unfortunately, all the Biblical contexts where the word in question appears are difficult. I take it in Exod 21:22 to be an adjectival form, *pe'îlî* (cf. Job 31:28), with an enclitic *-m* (as also in Job 31:11). In fact, there is no clear basis for the entry *pālîl* ("judge") in the lexicon of Biblical Hebrew. In Deut 32:31, *pllym* is the plural masculine of this adjective. There the enemies of God's people are described as having incurred guilt that calls for divine vengeance (cf. vv 34-43). The two instances in Job 31 refer to a crime (*'āwôn*) against high heaven (vv 11, 28) calling for punishment to the depths of Perdition (v 12; cf. Deut 32:22). In every context the reference is thus to an offense of the most serious nature, one that can by no means escape condign punishment. In fact, the meaning could well be liability to death.⁹ This meaning of *pe'îlî* can be seen in Exod 21:22 also. The other terms associated with it there all comport with this emphasis on the extreme gravity of the offense. Instead of contradiction there is clear congruity between *bpllym* and the husband's unrestricted prerogative of assessment.

Further, the preposition *b-* is now readily accounted for instead of being problematic. It is the *bêt* of equivalence (or price). Significantly, this use of *b-* is found in the talion formula in Deut 19:21 (replacing the preposition *taḥat* found in the formula elsewhere): "a life as the equivalent of a life, etc." Of interest also is the usage in a Ugaritic text (1161:3) where this preposition marks the role of three men who become human pledges as bail for two other men. Hence, *bpllym* in

⁶Cf. E. A. Speiser, "The Stem *PLL* in Hebrew," *JBL* 82 (1963) 301-306.

⁷See note 2 above.

⁸Cf., e. g., S. M. Paul, *Studies in the Book of the Covenant in the Light of Cuneiform and Biblical Law*, VTSup 18 (1970) 72.

⁹Cf. *dāmîm*, "blood guilt," in Exod 22:2, 3 (1, 2 Hebrew).

Exod 21:22 may be regarded as an archaic legal formula expressing the same principle of ransoming a forfeited life that is more fully expressed in Exod 21:30.¹⁰ To parse the final *mēm* in *bpłlym* as the emphatic enclitic is preferable to taking it as an abstract plural. The penalty clause states then that the offender must pay whatever is demanded as the equivalent for himself as one who is guilty unto death. How the English translator might best handle this is difficult to say. If the objective is to convey the sense of the original, a translation like "he must pay for his forfeited life" or "he must pay as one deserving of death (or retribution)" might be considered, the first retaining the force of the preposition and the second adhering to the meaning of the adjective.

If our explanation of the penalty clause in Case A is correct, it amounts to very much the same thing as the talion penalty prescribed for the offense in Case B (Exod 21:23-25). In Biblical legislation the talion formula, found elsewhere in Lev 24:18-21 and Deut 19:21, does not denote a special type of punishment, i. e., mutilation. It does, of course, express the distinctive judicial principle that the punishment must be commensurate with the crime. And it does serve a special function in the legislation, for it is employed in the penalty clause of laws where the protasis does not refer to a single injury but rather to a variety of possible injuries, all of which must be covered by the penalty formulation. The precise nature of the penalty for any specific injury contemplated in the protasis must then be determined according to the analogy of the whole system of penal principles and procedures presented in Biblical law. The talion formula itself simply requires that strict, unsparing justice be applied in dealing with whatever injuries are in view.

The phrasing of the talion formula is vividly corporal, and at the level of a capital crime the penalty expressed by "a life for a life" could actually be capital punishment. Since the use of the talion formula is accounted for by the necessity of prescribing succinctly for a variety of offenses, we should not conclude from the use of this formula in place of the usual "he shall surely be put to death" that the penalty intended must be some substitute for capital punishment.¹¹ On the other hand, the corporal terminology of the talion formula did not necessarily mandate physical punishment of one sort or other. A different kind of penalty might be indicated when all the legally relevant factors were brought to bear on the case. Thus if the offense involved a loss of human life but it was a matter of criminal negligence, not of premeditated murder, the life-for-life formula did not preclude the application of the ransom procedure customary in such cases. While the use of the talion formula does not negate the requirement of capital punishment expressed in Num 35:31, neither does it negate the provision presupposed in that verse for ransom in appropriate cases.

¹⁰Verse 30 shares with v 22 the use of the verb *ntn*, "pay," as well as the phrase "lay on him."

¹¹Cf. P. Doron, "A New Look at an Old Lex," *JANESCU* 1 (1969) 26.

Thus in Lev 24:18 the life-for-life formula is used in explication of a demand for compensatory payment. Here as always this formula is resorted to because of the variety of offenses comprehended by the penalty clause—specifically, in this case, the variety of the kinds of animal victims for which restitution must be made.

Since the talion formula is not to be understood as necessarily prescribing physical execution when it says “a life for a life,” it need not be interpreted literally in the case of the lesser penalties it lists either. In the Lev 24 passage just mentioned, when the talion formula, begun with “a life for a life” in v 18, is resumed with the list of lesser injuries in vv 19 and 20 (though now with reference to humans rather than animals as in v 18), the assumption is warranted that the identification of the talion principle with monetary compensation that obtains in v 18 carries over into the continuation of the formula in vv 19 and 20. Hence, the consensus that has prevailed through the centuries that the talion principle in the Bible was never intended to be applied in the form of such literal mutilations appears to be sound.¹² One consideration supporting a non-literal understanding of the talion penalty series is that it will hardly have been the deliberate purpose of an assailant to inflict on his victim precisely one of the disfigurements cited in the talion formula, and intent is taken into account in Biblical law when fixing penalties. Another consideration to the same effect is the stereotyped nature of the talion formula. It is particularly obvious in Deut 19:15-21 that there is not a simple literal equivalence between the terms of the talion penalty clause and all the variety of cases in which false witness might figure; clearly we have to do with a fossilized formula whose graphic terms are meant to express only the general principle that the offense must receive a just punishment, neither more nor less. This is evident again in the Exod 21 context, where the kinds of injuries mentioned in the talion formula are not the most likely ones to be encountered in the situation described, and some of them are altogether unlikely.

If the foregoing analysis is substantially correct, there are no essential differences between the penalties prescribed in Case A and Case B of the law in Exod 21:22-25. In both cases the penalty contemplates an offense involving death (as at least one possibility), and in both cases, where a death is involved the penalty may be understood as demanding a ransom for the offender's forfeited life. Therefore no matter whether one interprets the first or second penalty to have reference to a miscarriage, there is no difference in the treatment accorded the fetus and the woman. Either way the fetus is regarded as a living person, so that to be criminally responsible for the destruction of the fetus is to forfeit one's life.

Other features of this law must now be examined. If as mentioned above the penalty in Case A envisages a death (or even a grave injury), the statement in v 22b about “no *'āson*” (and its positive counterpart in v 23a) cannot refer to both the woman and the fetus. One or

¹²For some of the approaches leading to this interpretation see Jackson, “Problem,” pp. 280-283.

the other is killed, and therefore only one or the other can have escaped 'āsôn. As a matter of fact it will appear that the data are best accounted for if the mother is the victim in Case A and the fetus in Case B.

If a death is involved in Case A it must be mentioned in the description of the basic situation in v 22a, for it is not mentioned in the special protasis of Case A in v 22b. The force of the verb (*ngp*) used in v 22a for the blow against the woman has often been slighted. Those who refer the "no 'āsôn" statement in v 22b to both the woman and the fetus must render *ngp* as "push" or "shove." But this is quite inadequate, for this verb (and its nominal derivatives) is used for fatal divine judgments (see, e. g., 1 Sam 25:38; 26:10) and for slaughter in battle (see, e. g., Judg 20:35; 1 Sam. 4:3). In Exod 21:35, *ngp* is used for the fatal attack of the goring ox. Accordingly in Exod 21:22 we are to understand that the victim, whether the mother or her child, is killed. As for the plural form of the verb, this might be a generic plural to cover either of the brawlers (or perhaps both of them) or it might be the indefinite plural active used as a passive, signifying "a pregnant woman is struck." Verse 22a would seem most naturally understood as saying that the woman herself, the immediate object of the blow denoted by *ngp*, suffered the fatal effect in her own person. Also that would most readily account for the reference to the one who imposes the ransom as the "husband of the woman." Though the meaning could conceivably be that the fatal effects of the blow are experienced by the woman in the loss of her child and that it is as family head and father of the child that the husband is brought into the judicial process, this explanation seems less likely than the other.

Since the death assumed in the penalty clause can be accounted for by the verb *ngp*, with the woman herself as the victim, it is not necessary to interpret the expulsion of the fruit of her womb (v 22a) as a miscarriage. Indeed, as noted above, some would insist there is no warrant for understanding *wys'w yldyh* in terms of a miscarriage. But it is not demonstrable either that this language in itself *must* be understood with reference to a miscarriage or that it *cannot* be so understood. If fact, even those who allege it cannot be taken that way do so themselves when they come to Case B (which, of course, also builds on the foundation of v 22a). For they relate to both mother and child the 'āsôn (v 23a) which, according to the penalty imposed, may be fatal. To avoid this dilemma by the arbitrary assumption that this law would not treat of the most probable kind of 'āsôn that would befall a fetus under these circumstances, namely death, but only with the lesser injuries that sometimes attend such a premature birth, certainly will not do. As noted above, the word translated "fruit" in *KJV* is the plural of the word for child. The suggestion by those who reject the miscarriage view that the plural takes account of the possibility of a multiple birth does not commend itself. If as is here maintained the first variety of this case (v 22b) deals with a premature but live birth and the second (vv 23-25) with a miscarriage, the plural form

is best understood as a generic plural used with a view to covering both contingencies. The use of the term *yeled*, "child," is particularly suitable for the live birth, and a secondary consideration for the use of the plural is that it is peculiarly appropriate to an aborted fetus, especially at an earlier, more amorphous embryonic stage.

It has been established above that when the protasis of Case A (v 22b) says there is no *'āsôn* it cannot refer to both mother and fetus. The meaning of the term *'āsôn*, as well as the location of the statement immediately after *wys'w yldyh*, favors a reference to the fetus. A calamitous loss involving serious injury or even death is denoted by *'āsôn*.¹³ In the only other Biblical context where *'āsôn* is found it describes the grievous calamity that Jacob fears might befall Benjamin on the journey to Egypt (Gen 42:4, 38; 44:29). The choice of this unusual word in Exod 21:22 (problematic if the reference were to injury or death of the woman, for which the more common terminology would then be expected) is readily explained if *'āsôn* refers to the less everyday circumstance of the calamitous loss of offspring by violently induced miscarriage.

What indications there are point rather definitely and consistently, even if not with absolute conclusiveness, to the view that the mother is the victim in Case A (cf. 1 Sam 4:19-21) and the child in Case B. The sequence of victims in Exod 21:22 ff. then corresponds to that in the legislation in Exod 21:28 ff., which we have found to be similar in other important respects as well. In the law of the goring ox, the order of the victims is: the man or woman (v 29), a son or daughter (v 31), a male or female servant (v 32). In the law of the striking of the pregnant woman, the victims are in order (on our interpretation): the woman (v 22), the child (v 23), and (if we continue into vv 26-27, which are linked to the preceding law by the transitional talion formula) a male or female servant. Moreover, the treatment of the fetus (on our interpretation of v 23) corresponds to that of the son or daughter in v 31 in that the penalty in their case too is identical with the penalty already prescribed for an adult. It may be noted that in one of the Middle Assyrian laws of miscarriage¹⁴ the penalty for striking a woman, whether with non-fatal or fatal result for her, is mentioned first and then the penalty for the loss of the fetus.

Assuming that the statements about *'āsôn* refer to the fetus, the use of the talion formula in Case B suggests that the meaning of *'āsôn* covers the variety of injuries that might be suffered by a child born prematurely, especially under such adverse conditions, as well as stillbirth. It is possible that only miscarriage is envisaged and that the talion formula was used because it could do double duty by leading transitionally to the following law, which deals with injuries of various sorts inflicted on slaves (vv 26, 27). It seems more likely,

¹³See *ibid.*, pp. 274-276.

¹⁴Tablet A, law 50.

however, that the talion formula was used because of its appropriateness to the situation in Case B (v 23) and that this then prompted the appending of the legislation in vv 26 and 27 as additional instances of criminal negligence (cf. also vv 20 and 21) for which the talion formula was serviceable.

Since, as we have seen, the penalty for Case B amounts to the same thing as the penalty in Case A, each case involving a fatal injury (either exclusively or as one possibility along with others) and each penalty taking the form of monetary payment, the question arises why the penalty is expressed in such different fashion in the two cases. In the case of the killing of a child by the goring ox, the repetition of the penalty prescribed for killing a man or woman takes the general form: "He shall be dealt with in this same way" (v 31). The distinctive formulation of the penalties in Case A and Case B of the Exod 21:22-25 law would appear to reflect some significant difference between the two cases. Since the talion formula used in Case B is designed for situations with a variety of possible injuries, we are probably to conclude that Case A, by contrast, deals with the death of the woman exclusively.

To sum up: Case A envisages the death of a mother in giving birth prematurely to a live, uninjured child, and the law prescribes that the assailant must give for his forfeited life whatever the husband demands. In Case B the law requires that if the child suffers calamitous injury or death the penalty payment must be a just equivalent.

On this interpretation of Exod 21:22-25, it is of particular importance for the Biblical view of the nature of the fetus that the life-for-life formula is applied to the destruction of a fetus, with no qualification as to how young the fetus might be. The fetus, at any stage of development, is in the eyes of this law a living being, for life (*nepes*) is attributed to it. To be sure, the life-for-life formula is also used in the case of the death of animals (Lev 24:18), so that this formula by itself does not establish that the referent is a human being. But if it is the fetus of a human mother that is identified by the life-for-life formula as a living being, there can be no question that this living being is a living *human* being. Significantly, the part of the talion formula specifying injuries to eye and tooth and the like is not applied to animals. Only in the case of human beings do these features take on the value that merits legal redress. And surely the living fetus in view when the talion formula mentions the loss of life (v 23c) must be identified with the human child referred to in the talion formula as suffering the loss of eye or tooth (vv 24, 25). Consistently in the relevant data of Scripture a continuum of identity is evident between the fetus and the person subsequently born. And Exod 21:22-25 makes clear that this prenatal human being is to be regarded as a separate and distinct human life.

As we observed at the outset, induced abortion was so abhorrent to the Israelite mind that it was not necessary to have a specific prohibition dealing with it in the Mosaic law. The Middle Assyrian laws

attest to an abhorrence that was felt for this crime even in the midst of the heathendom around Israel, lacking though it did the illumination of special revelation. For in those laws a woman guilty of abortion was condemned to be impaled on stakes.¹⁵ Even if she managed to lose her own life in producing the abortion, she was still to be impaled and hung up in shame as an expression of the community's repudiation of such an abomination. It is hard to imagine a more damning commentary on what is taking place in enlightened America today than that provided by this legal witness out of the conscience of benighted ancient paganism!

¹⁵Tablet A, law 53.