

# SEPHARDIC INSTITUTE

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בס"ד

## Parashat Mishpatim Part III On “An Eye For An Eye”

### 1. Introduction

*Parashat Mishpatim* contains most of the Torah’s laws that concern the infliction of bodily injury and their penalties. This legislation includes the famous statement of the *Lex Talionis* principle, “life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burn for burn, wound for wound, bruise for bruise” (Exod. 21:23-25, NJPS). A major question that has engaged sages and commentators through the centuries has been whether the Torah intended “an eye for an eye,” etc., literally. Or was this a figurative expression intended to be understood as monetary compensation that was to be in accordance with the severity of the injury, perhaps relying on an established tradition that explained it so and as was eventually codified in the Mishnah (*m. B. Qam.* 8:1)?

The “eye for eye” formulation occurs two additional times in the Torah. Following the case of the blasphemer (in a passage that is linked to the previous subject in an unusual manner, a matter that may be relevant to our topic), the Torah states: “If anyone maims his fellow, as he has done so shall it be done to him – fracture for fracture, eye for eye, tooth for tooth. As he has maimed a man so shall it be rendered unto him” (Lev. 24:19-20). And in the passage dealing with false witnesses, it states: “Do to him as he had schemed to do to his brother...Your eye shall have no pity – life for life, eye for eye, tooth for tooth, hand for hand, foot for foot” (Deut. 19:19, 21).

Besides these cases, the Torah speaks of bodily mutilation as punishment in one other instance, that of a woman who intervened in a scuffle between her husband and an opponent by seizing the opponent’s genitalia. There it states, “you shall sever her hand” (Deut. 25:12). Although the punishment is not exact bodily equivalence, it is a derivative of the talion principle in that it conforms to an essential feature of

the offense – the hand was the offending organ so it is to be cut off. Here too, the sages interpreted it as monetary compensation.

### 2. On Exodus 21:22-25

The setting in which our *parasha*’s “eye for eye” formulation appears is as follows (Exod. 21:22-25): Two men are fighting and they strike a pregnant woman bystander resulting in the “exiting” of her fetuses. (Most commentators assume this means she suffered a miscarriage.) The text addresses two possibilities:

a) If there was no *ason* to the woman, the one who struck her shall be punished monetarily for the loss he caused, that of the fetuses. He pays in accordance with the amount the woman’s husband imposes upon him and בְּפְלִיטָם, “by the judges,” who must approve of the fairness of the claim.\*

b) If there was an *ason* to the woman, the punishment is “life for life, eye for eye, tooth for tooth, hand for hand,” etc.

*Targume Onqelos* and *Jonathan*, as well as the *Mekhilta*, take *ason* to mean death. The only other biblical attestations of this word (Gen. 42:4, 38; 44:29) refer to the tragedy Jacob feared might befall Benjamin were he to travel to Egypt with his brothers. Translating it so, our two clauses, on the surface, yield the following: If the woman does not die, but suffers injury (the miscarriage), the punishment is monetary compensation; if she dies, the penalty is “life for life.” The continuation of the verse addresses the possibilities of her having been injured in various organs, stating that the penalty is “eye for eye, tooth for tooth,” etc., in accordance with the nature of the injury. There is a bump in the road here since the continuation of the verse was under the heading of *ason*, which supposedly means death. To remove the

bump, others translate *ason* as referring to physical calamity, whether death or bodily injury.

There is another difficulty. The first case had already addressed an aspect of injury – the miscarriage – and prescribed monetary compensation. So if “life for life” translates literally, it would appear that “eye for eye,” etc., would also be literal.

Before continuing, it is necessary to address the “life for life” clause that precedes “eye for eye.” The penalty of taking one’s life for having committed murder, in contrast to penalties for causing injury, can only be imposed when the perpetrator had acted intentionally. This principle is categorically established several verses earlier in our chapter, in the case of manslaughter (v. 13). As the man who struck the woman was fighting with another man and obviously had no intention of killing her, the question arises as to the meaning of “life for life.” Even assuming that the fighting men had intended to kill one another, does the law prescribe the death penalty for one who had intended to kill A and mistakenly killed B? This is a matter of dispute among Tannaitic sages (see *b. Sanh.* 79a), with one school holding that the perpetrator is liable for the death penalty and another school exempting him. Accordingly, some Tannaim may consider “life for life” in our context as possibly literal, while some necessarily take it as referring to monetary compensation (79b).

But in peshat, it does not appear likely that “life for life” could be intended literally while the immediately following “eye for eye” refers to monetary compensation. It also does not appear likely that “life for life” means monetary compensation, while the attached clauses of “eye for eye,” etc., are meant literally. Moreover, it does not appear that the *וְכִי יִנָּצוּ אֲנָשִׁים* (“When men are fighting”) circumstance of our case implies that the men (or one of the men) had the intention to kill so that “life for life” could be translated literally. It seems to merely be a case of two men fighting. These are significant problems to which we will return after surveying the traditional attempts to demonstrate from within the Torah that its intention with an “eye for an eye” is monetary compensation.

### 3. The Talmudic Discussion

The Mishnah mandates monetary compensation for all cases of an individual inflicting bodily injury on

another (*b. B. Qam.* 83b-84a). The Talmud records a lengthy discussion in explanation of this rule. It cites and rejects many attempts to prove the monetary compensation interpretation through textual analysis and logic. However, the discussion does not reach a consensus on the source of the Mishnah’s ruling. The dialogue contains much substance, demonstrating the difficulty of ever achieving true equivalence through the *lex talionis* principle. We will quote a partial summary of the talmudic discussion as formulated in the *Encyclopedia Judaica* under the entry of “Talion,” with slight paraphrase:

The justice of “an eye for an eye” is more apparent than real: one man’s eyesight may be stronger or weaker than the other’s, and by taking one eye for the other, true equivalent justice is not being served. Not only is the ratio of talion thus frustrated, but the biblical injunction that there should be one standard of law for all *מִשְׁפָּט אֶחָד יִהְיֶה לָּךְ* (Lev. 24:22), would be violated. Also, if a blind man takes another’s eye, or a cripple without legs destroys somebody else’s leg, how can justice be served? Further, when an eye or any organ is extracted from a living body it causes serious incidental injury, often endangering the individual’s life, and the Torah said “an eye for an eye,” not “an eye and a soul for an eye” (vol. 15, p. 741).

Since the Talmud cites objections to the many arguments proffered and since it is clear that a simple peshat interpretation does not easily yield a decisive proof against a literal interpretation, many post-talmudic authorities searched for persuasive arguments for a non-literal interpretation. They sometimes refine arguments that were presented and challenged in the Talmud.

Saadia Gaon points out that in most cases it is almost impossible to accurately and successfully apply “measure for measure” literally. In addition, the risk of exceeding the proper punishment would be unavoidable. Thus, it is logically impossible to assume the Torah – with its great emphasis on fairness and justice – meant an “eye for an eye” literally. As regards the Leviticus 24:19 verse, “If anyone maims his fellow, as he has done so shall it be done to him,” Saadia does not interpret the words as calling for the meting out of the exact injury. He cites the words of Samson who used the identical clause in the plural –

“As they did to me so I did to them” (Judg. 15:11) – although he punished the Philistines in a manner different from what they had done to him. They set fire to his wife and her father; he smote a group of them a powerful blow. The equivalence is considered fulfilled despite being a punishment of a different sort.

Leviticus 24:20 – the following verse in that Leviticus context – states: “Break for break, eye for eye, tooth for tooth,” and concludes with “as he has maimed a man, so shall it be rendered unto him” (בְּכַף יָדוֹ יַחַד בָּרוּ). Saadia understands that clause to mean, “in proportion to the degree he maimed the other person, just so is punishment placed upon him,” referring to the amount of monetary compensation that would be considered “fair” for the injury suffered.

Others derive support for a monetary compensation interpretation from an earlier verse in that Leviticus passage, “One who killed an animal must pay for it, life for life” (24:18). The word translated “pay for it” – שְׁלֵמָה – does not lend itself to an interpretation other than monetary compensation; accordingly, the immediately following words “life for life” should be understood as prescribing monetary compensation, insisting on equivalence. This being the case, “eye for eye” should also be interpreted with such a meaning.

The Talmud had cited this verse as proof for the monetary compensation principle but rejected it because it was speaking of animals; language referring to animals was declared to be of a different genre than language referring to humans. (The Talmud’s point may very well have been an *aggadic* device calculated to impart a moral lesson concerning human dignity, but use of “life for life” as concerns an animal does appear to be an unusual locution.)

Ibn Ezra and others have written that the Torah text does not contain a truly decisive proof for the monetary compensation interpretation and we must rely on tradition that the latter is the meaning.

#### 4. Maimonides

The Rambam presented his arguments for monetary compensation as follows:

This that the Torah states, “As he has maimed a man so shall it be rendered unto him” (Lev. 24:20), does not prescribe the inflicting of injury

on one who caused injury to another – as he did to the other – but to imply that he is worthy of having his limb removed or be injured as he did to the other and he therefore pays for the damage. It states [in support of this thesis]: “Do not accept ransom for the life of a murderer” (Num. 35:31) – for a murderer only there is no ransom but for one who caused the loss of a limb or other injury [we deduce that] there is ransom [monetary payment]. This that it states regarding [punishing] one who injured another, “Your eye shall not pity” (Deut. 19:21), means not to have pity regarding payment, lest you say, “He is poor,” “He did not intend it”...[But] how do we know that “eye for eye,” [etc.,] means only monetary compensation? For written together with it is “wound for wound” (Exod. 21:25), and regarding a wound it had previously stated, “when a man strikes another with a stone or a fist and he does not die but takes to bed, if he recovers...the one who struck him is guiltless, but he must pay for his idleness and his cure” (Exod. 21:18-19). (“Idleness” includes the monetary value of the damage.) From here we learn that the word תַּחַת (“in place of,” “for”) used in the case of “wound for wound” (חַבֵּרָה תַּחַת חַבֵּרָה [v. 25]) is only monetary, so תַּחַת in the case of “eye for eye” must be the same...and this is the way they judged...in every [Israelite] court since the days of Moses our Teacher until today. (*MT Laws of Wounding and Damaging*, 1:3-6)

Subsequently, in discussing this topic in his Guide for the Perplexed, the Rambam does not cite the scriptural evidence he referred to in *Mishneh Torah* but takes a different position. He writes:

The punishment meted out to someone who wronged another is that he is given exactly the same treatment he gave the other – if he injured the other’s body, he should be injured in his body...Someone who has deprived another of a limb shall be deprived of the similar limb: “As he has maimed a man so shall it be rendered unto him” (Lev. 24:20). You should not be concerned by the fact that in such cases we punish by imposing monetary compensation, for here I am explicating the Torah text, not the Talmud’s pronouncements. Nevertheless, I have an opinion concerning the Talmud’s position that should only be expressed in person. (Guide for the Perplexed, III:41)

Many have speculated as to his opinion that he chose not to express in writing. Moses Narbonne, the 14<sup>th</sup> century commentator on the *Guide*, wrote that he thought the Rambam's view was that the sages were of the opinion that the original intention of the Torah was literally an "eye for an eye." They dispensed with this application of law because of the tremendous practical difficulties involved.

If Narbonne's interpretation is correct (and others have similarly interpreted the *Moreh*), perhaps the Rambam adduced support for such an understanding of the talmudic sages' view from the format and upshot of the relevant talmudic discussion cited above (*b. B. Qam.* 83b-84a). It is replete with challenges to the interpretations that explained the Mishnah's prescription of monetary compensation, forced interpretations that the Rambam probably considered subjective or *asmakhta* (a lesson attached to the text as a mnemonic device or for another purpose, but not its true meaning). After the Talmud cites a group of Tannaitic explanations the discussion records several Amoraic explanations indicating that the former were unacceptable to the later sages. Further, after concluding the lengthy series of proofs against the literal interpretation, the Talmud cites the view of the Tanna Rabbi Eliezer, that "an eye for an eye" should be understood literally (עַיִן תַּחַת עַיִן מִמֶּנּוּ). Although talmudic sages of a later century reinterpreted Rabbi Eliezer as referring to something else, the Rambam may have understood the latter as apologetic, striving to reconcile Rabbi Eliezer with the Mishnah and the agreed-upon practice of monetary compensation.

## 5. Recent Discoveries

Recent advances in uncovering the practices of the ancient Near East, including discovery of several of its major law codes and many thousands of documents of court proceedings, have shed vast new light on the background of this subject. They also contribute to a deeper understanding of the Torah's use of talion terminology. We now know that the widely established practice for many centuries in the pre-Torah world of the Near East was to impose monetary compensation for inflicting physical injury, including when one caused the loss of another's eye or limb. The Eshnunna laws, which preceded Hammurabi by several centuries, and other ancient codes, are clear on this matter.

Hammurabi, who began his long rule in Babylon during the later part of the 18<sup>th</sup> century B.C.E., introduced the "eye for an eye" concept against the traditional practice of monetary compensation for physical injury. His purpose with this innovation was to improve the legal justice system by removing one of its blatant deficiencies. Prior to his reform, the causing of bodily damage was viewed as a somewhat private matter between injurer and injured. They negotiated and ultimately agreed upon a settlement. The system was rife with uneven application, exploitation and abuse. Hammurabi's reform transformed the infliction of physical damage into an objective violation with governmental guidelines as to definitive, equitable and limited punishment. A major purpose of his code appears to have been to increase justice by establishing guidelines for equity and for fairness of penalties.

As we pointed out in our *Parashat Mishpatim Part I* study, by Torah standards Hammurabi's code contained numerous serious shortcomings that reflected the thinking and standards of ancient Near Eastern society. (It limited equivalence to members of the same class, ordained the death penalty for crimes against property and for unintended consequences, included vicarious punishment, and prescribed judgment by dangerous ordeal.) But it did have some admirable goals.

To sum up regarding Hammurabi's "eye for an eye" statute: "Interpreters are widely agreed that this formula, so brutal on the face of it, actually represented an advance over earlier legal thinking both because it allowed no favoritism and because it guaranteed that the punishment could not exceed the crime" (Harper's Bible Dictionary, 1985, "Retribution," p. 865). Excavations have provided much evidence that Hammurabi's judges and those following them throughout the ancient Near East during the centuries before the Torah did not apply "an eye for an eye" literally. They commonly assigned monetary compensation for bodily injury as was the practice prior to Hammurabi.

## 6. Back to Exodus 21

We will now return to our discussion on the Exodus 21 passage. Although each argument that was brought in the Talmud and by later commentators to prove that "an eye for an eye" referred to monetary

compensation may not have been decisive on its own, together they seem to have shown the Torah's inclination in that direction. Now, however, knowing that pre-Torah law for centuries used the talion formula merely as a guideline for fairness and as a constraint on excessive indemnification, we may more fully appreciate it. We may assume, as M.D. Cassuto explains in his Commentary on *Shemot*, that "an eye for an eye" was viewed as a centuries-old, archaic formula that had long lost any literal meaning that it may have once possessed (which it possibly never did). It was retained in legal contexts of the Torah for its well-known and powerful emphasis on equivalence. There was no danger of any misunderstanding. Torah use of the formula is also philosophically justified, as monetary compensation is viewed as ransom for what theoretically should have been the perpetrator's punishment. Only in the case of murder is ransom prohibited.

In addition, in peshat, as pointed out earlier, it is most probable that the case of the two men fighting when the woman was killed did not involve any intention to kill. Had there been such intention it would have been indicated in the text. Unintended consequences often ensue from fighting. Therefore, the "life for a life" clause cannot be taken literally. Accordingly, the following clauses of "an eye for an eye," etc., should also not be taken literally.

True, the talmudic passage that elaborated the Tannaitic opinion that held that a person who had intended to kill A but with that action unintentionally killed B is culpable for the death penalty (*b. Sanh.* 79a) had cited the "life for a life" clause of our passage as evidence. However, this does not mean that some sages had truly interpreted our passage in that manner. Our case was probably cited in that talmudic passage as an *asmakhta*. It was an available case that could serve to vividly illustrate the principle being

argued over since it theoretically could have been relevant, but the controversy recorded in that *Sanhedrin* context stands on its own, not as an elaboration of our verse. Without showing the presence of intent, there was no possibility that any talmudic sage would interpret our "life for a life" clause as a literal statement since the requirement of intent is biblical and of broad consensus.

Nahum Sarna, who also considers the talion formula merely "a rhetorical formulation in concrete terms of an abstract principle – the law of equivalence," supported this view with a syntactic observation. The talionic expression in our Exodus passage begins with a surprising change in tense from the preceding third-person clauses to the second person *וְנָתַתָּה נַפְשְׁךָ תַּחַת נַפְשִׁי*, "and you shall give life for life," which applies to the whole statement. "That this stylistic formulation is unique in these otherwise impersonally and casuistically formulated laws indicates that the passage in question is not an organic part of the wider text." (JPS Commentary on Exodus pps. 126-127). He also points out that in both the Leviticus 24 and Deuteronomy 19 passages the statement of "an eye for an eye," etc., is extraneous to the legal context, serving the purpose of emphasizing fairness in monetary retribution.

### Endnote

\* The unusual formulation of this law may be a result of its "correcting" the previous practice in the ancient Near East that obligated one who caused a miscarriage to pay in accordance with the social status of the victim. In the Hammurabi Code the payment depended on whether the woman was the daughter of a seignior, of a commoner or was a slave.