

When Two Men Fight: Legal implication of Brawling in the Ancient Near East

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Two people have an argument. The conflict grows increasingly heated, and the two come to blows. The laws of Eshnunna (LE), Hammurabi (LH), Middle Assyria (MAL), the Hittites (LHitt.), and the Covenant, Deuteronomic, and Priestly compilations in the Hebrew Bible all contain rules which deal with what could happen during the course of the fighting and the losses incurred as a result of the fighting (1). Even though none

1) LE 47, 47A (See Martha ROTH, *Law Collections from Mesopotamia and Asia Minor* (Atlanta: Scholars Press, 1995), p. 66 for text, translation, and numbering); LH 206-208; MAL A 8; LHitt. 174; Ex. 21:18-19; 21:22-25; Dt. 25:11-12; Lev. 24:10-15, 23. The terminology used in the Akkadian material to describe these fights, *ṣaltum*, is ambiguous, because it is also used to describe fights that could be either verbal or physical. The phrase *ina ṣigištim*, which occurs only in LE 47, is of uncertain meaning, whereas *risbatum* which occurs in LE 47A and LH 206 clearly refers to fisticuffs. (See CAD, vol. 16, pp. 86-88; vol. 17/2, p. 413 and Wolfram VON SODEN, *Akkadisches Handwörterbuch*, v. 2 (Wiesbaden: Harrassowitz, 1972), p. 988). Accordingly, I have excluded from this discussion those conflicts called *ṣaltu* which are not explicitly described as violent, e.g., MAL N 1, 2 and Middle Assyrian Palace Decrees, 10, 11, 21. (For the latter, see ROTH, pp. 201-202, 206). Similarly, LHitt. 127 which deals with a quarrel that got out of hand resulting in one of the antagonists losing property due to theft. With

of these ancient jurists sought to outrightly ban this violent activity (2), they recognized that the injuries and possible loss of life resulting from this all too frequent occurrence was a concern that had to be addressed. The intention of those responsible for these adverse consequences had to be assessed and appropriate penalties and reparations had to be fixed. The deaths or injuries stemming from an affray may not be cold-blooded acts, but, resulting from the passion of the fighters, they are not accidental or unintentional either. But even the nature of the passion might be subject to some evaluation. Brawls being what they are, regardless of who if anybody emerges victorious, either party,

respect to the Hebrew Bible the terminology is clearer. With the exception of Num 26:9, which refers to Dathan and Abiram's challenge to Moses' authority, the *hiphil* and *niphal* forms of the verb *našah* denote a violent encounter whereas the term *rib* means a conflict, though heated, but a non-violent one. I will exclude the brawl between the brothers recounted by their mother, the widow of Tekoa, because it was not a legal case but a parable concocted by Joab as a ploy to get King David to recall Absalom from exile (2 Sam. 14:1-23).

2) The same applies to Roman law. The *Digest* states that losses stemming from a *turba*, a tumult, were actionable for damages. Labeo said that two men or even three or four men having a *rixa*, a brawl, would not qualify as tumult, because it wouldn't cause that much of disturbance whereas ten or fifteen men going at it would be a tumult and therefore actionable (D., 47,4,2-3). In the Common Law, by the early sixteenth century, if two people fought because of "hot blood or a sudden falling out" and neither was killed, the case was heard in a *leet* court, a manorial court that met twice yearly to hear minor cases punishable by fine. If either or both were wounded, it was considered assault and battery. (William HOLDSWORTH, *A History of English Law*, vol. 5 (London: Mathuen, 1945), pp. 199-200; Frederick POLLOCK & Fredric MAITLAND, *The History of English Law*, vol 1 (Cambridge: Cambridge Univ. Press, 1968), pp. 531-532, 580).

once the fight started, intended to inflict bodily harm (3). Furthermore, at any time in the fracas the culpable fighter could have restrained himself before seriously harming his opponent. The possibility that the affray could have been avoided altogether if one of the two adversaries chose not to fight back after being struck first (thus the issue would be an assault rather than affray) must also be considered. In addition, the injuries sustained by innocent bystanders has to be considered.

The legal material from Mesopotamia and Asia Minor treats brawling in the manner just described, that is, as a matter of reparations for injury intentionally inflicted but lacking premeditation. The laws of the city-kingdom of Eshnunna (c. 1770 B.C.), provide the earliest mention of the legal consequences of a brawl (4). LE 47 specifies that the person who inflicted any serious injury on a person in the course of a brawl (Akk. *ina šigištim*) must pay the injured party ten shekels of silver. The five sections of the Eshnunna Laws that precede #47 specify the penalties for assaults resulting in serious injuries without mentioning accident, negligence, or brawling and hence

3) This does not seem to be the case in Roman law. A death as a result of a *rixa* was regarded as accidental. (Adolf BERGER, *Encyclopedic Dictionary of Roman Law* (Philadelphia: American Philosophical Society, 1953), p. 686).

4) J.J. FINKELSTEIN in his translation of the laws of the Sumerian King Ur-Nammu (c. 2100) that appeared in *ANET*, p. 524 rendered sec. 16, “If a man, *in the course of a scuffle* [emphasis mine], smashed the limb of another man with a club, he shall pay one mina of silver”. The troublesome verb here is *al-mu-ra-ni*. In a translation he subsequently prepared for publication in *JCS*, 22 (1969), 77-82, he changed the rendition to “in a deliberate attack” (p. 66). ROTH’s translation (p. 19) is similar in omitting reference to a brawl.

were probably intentional. These penalties were higher: biting off a nose or destroying an eye, a mina (60 shekels); a tooth or an ear, a half mina (30 shekels); a severed finger, one-third of a mina (20 shekels); a broken hand or foot, a half mina, and a broken collarbone, one-third of a mina. The only penalty that was the same as the one in LE 47 dealing with brawling (10 shekels) is in LE 42 for a slap on the cheek, a compensation more for damaged honor than one's injured body. LE 47A stipulates that if the brawl (Akk. *risbatum*) resulted in the victim's death, the brawler who caused the death shall pay two-thirds of a mina (40 shekels) of silver (to whom not specified). This is the same penalty that the owner of a habitually goring ox or vicious dog paid when such animals caused a free person's death (5). We can conclude from the Eshnunna material that a death caused in the heat of passion of a brawl was on the same level of culpability as a death due to negligence, and the case was settled by composition (6).

Hammurabi's laws (c. 1750 B.C.) indicate that deaths and injuries that stemmed from brawling homicides were regarded as unintentional but not accidental. LH 206 stipulates that if a man wounded another man in a brawl, the assailant's obligation was

5) LE 54, 56. LE 55, 57 specify a payment of fifteen shekels if a slave is gored or mauled to death, but this is more a matter of compensating the owner of the slave for his property loss than penalizing a culpable person with a fine.

6) Like the Babylonian collection that came after it, the Hammurabi collection, Eshnunna has nothing directly to say about cold blooded murder. We may assume that in both laws it was a capital offence. See *e.g.*, LE 12, 13, 24, 58; LH 1, 3, 14, 21, 22, 153.

limited to swearing that he acted unintentionally (7) and paying the other man's physician. We may assume that if his injuries did not require the services of a physician, the assailant was free of any penalty or obligation towards the man he hurt. Damage to one's pride or honor was not an issue, probably because the victim had just as much intention to humiliate his opponent as vice versa. LH 207 states that if the victim died and was a member of the *awilum* or noble class, the assailant, in addition to swearing that he acted unintentionally had to pay a half mina of silver. The next section (LH 208) states that if the victim was a *muškenum*, a commoner, the payment was one-third of a mina. We may assume that if the assailant could not swear that his act was unintentional, malice was presumed and heavier penalties could be inflicted including talion (8). So then, if one aristocrat should blind an eye, break a bone, or knock out a tooth of another aristocrat, talion was applicable (9). If a pregnant noblewoman died as a result of an assault, vicarious punishment was visited upon the noble assailant's daughter, that is to say, his daughter was put to death (10). If the blinding, fracturing, or loss

7) *ina idu amhašu* Lit., "I did not strike knowingly".

8) G.R. DRIVER & John C. MILES, *The Babylonian Laws*, vol. 1 (Oxford: Clarendon Press, 1960), pp. 406-413, 494-501.

9) LH 196, 197, 200. If a death resulted, on the basis what is implied in LH 1, the death penalty would be inflicted. Since the talion in each case is something "they" shall inflict rather than "he", we may assume these punishments were inflicted under a court's supervision. If the noble parties agreed to composition, that was a private matter.

10) LH 210. LH 209 states that if only a miscarriage resulted, there was a payment of ten shekels. This was the only situation where talion was not available when one nobleman victimized another.

of tooth was done to a commoner by a nobleman, there was composition. The striker payed a mina for the eye or broken bone and one-third of a mina for the lost tooth ⁽¹¹⁾. If an aristocrat beat a pregnant commoner and caused a miscarriage, he paid five shekels for the loss of the fetus, half what he would have had to pay if the woman was of noble extraction ⁽¹²⁾. If the pregnant commoner died of the beating, he paid a half mina of silver, just ten shekels more if the victim was a slave owned by fellow aristocrat ⁽¹³⁾. A physical assault that damaged one's honor rather than one's body, such as slap on the face, as previous stated, was of no legal consequence if it occurred during a scuffle, but if the assault was of the type that was not within the scope of LH 206, there was a presumption of malice, and striker had to pay for the damage to one's honor. If a nobleman slapped a nobleman of higher rank, he was publicly flogged sixty times; if the two noblemen involved were of equal rank, the perpetrator paid a mina ⁽¹⁴⁾. One commoner slapping another carried a far lighter penalty, ten shekels ⁽¹⁵⁾.

Tablet A of the Middle-Assyrian Laws (c. 1300 B.C.) is unique in that it is exclusively concerned with marriage and legal rules as they applied to women. Even if we assume that brawlers

11) LH 198, 201. As stated in n. 5 above, the assaults on slaves (LH 199, 213) were a matter of *res* rather than *persona*.

12) LH 211.

13) LH 212, 214.

14) LH 202, 203.

15) LH 204.

are usually men and the gender of the nouns used in these laws reflect that customary assumption, it should not be too surprising, given the context and apparent purpose of MAL A to find a law that applied to brawling as applied to women ⁽¹⁶⁾. We may assume that an altercation between two women would not be treated in the local laws any differently than if the combatants were both men and therefore was of no interest to the compiler of this tablet, but a case involving an assault and injury of a sexual nature made by a woman brawler upon a man was an issue that the compiler could not ignore ⁽¹⁷⁾.

The law in question, MAL A 8, states that a woman who, in the course of a fight with a man, crushed his testicle had one of her fingers cut off; if she crushed both testicles or the second one became irreversibly damaged despite the best efforts of a physician, parts of her body are cut off. The state of preservation of the tablet makes it impossible to determine which parts. Given the sexual nature of the offense, and use of the word *kilallun*, which means both, the most likely candidates for mutilation would be those female sexual characteristics which, like the testicles, are in pairs, the breasts or the nipples ⁽¹⁸⁾. There was no

16) DRIVER & MILES, *The Assyrian Laws* (Darmstadt: Scientia Verlag, reprint, 1975), pp. 30-31.

17) MAL 9 excepted, all other assaults in MAL A are concerned with men causing miscarriages (MAL A 21, 50-52, 57).

18) Shalom M. PAUL, "Biblical Analogues to Middle Assyrian Laws", in Edwin B. FIRMAGE *et al.* (eds.), *Religion and Law: Biblical-Judaic and Islamic Perspectives* (Winona Lake, Ind., 1990), p. 337.

provision for ransom (19). If only one testicle was damaged, the man's reproductive capability was not at an end, and it would seem that outrage at the indecency of the assault prevailed over any notion of composition, but when the woman inflicted injury that permanently ended his ability to propagate, more drastic measures were indicated. Talion, if strictly applied, would mean destroying the woman's reproductive organs, such as the uterus or ovaries, but the Assyrians did not utilize talion as a punishment and, in any event, such a procedure may not have been within their surgical capacities. The next section does not concern itself with brawling but is concerned with a man who makes an indecent assault on a woman's genitalia (20). The penalty is the same as a woman assaulting a man's genitals, severing the finger (21). When both testicles were destroyed, a more drastic penalty had to be found. If talion is ruled out, because, as just noted, it was not an Assyrian mode of punishment, vicarious punishment, which in this case would have meant castrating the woman's husband, was not provided for either. Unlike Hammurabi, who viewed vicarious punishment

19) The preceding section of MAL A which dealt with a simple assault by a woman against a man did provide for ransom, thirty minas of lead, and she was also beaten with rods twenty times.

20) I here follow ROTH's rendition of *ki bure epussi [ub]ta'erus* in preference to others who prefer to render *bure* to mean a small child thus rendering the phrase "to treat like a child", which is less sensible in terms of contrast with sec. 8 and more sensible in terms of what the second part of this law says. (See n. 21).

21) In the same section a man who steals a kiss from a woman has his lower lip cut off. This is a clear example of punishing the peccant member and forms a counterpart to the first part of this law.

as a variation on talion, the Assyrians appear to be opposed to vicarious punishment as a matter principle ⁽²²⁾. MAL A 2 states that the immediate family of a woman who spoke improperly or blasphemously shall not be criminally liable for what she might have uttered. MAL A 50 states that if a man struck another man's pregnant wife causing her to miscarry, "they shall treat him as they treated her". This rule can be forced to make sense only if the assailant's wife happened to be pregnant at the time of the assault. It is highly unlikely that the legislator would rely on such a coincidence to settle this issue. Alternatively, the same section specified payment for the loss of the fetus. Section 55 of the Middle Assyrian laws is not, strictly speaking, vicarious punishment. It states that if a man raped an unbetrothed virgin who was still living in her father's house, the father shall seize the rapist's wife and have her raped and not restore her to her husband. This made the wife sexually tainted in the same way his daughter was. Certainly emotionally painful to the rapist, but it was not vicarious punishment as Hammurabi would understand it. If it were, the father himself would do the raping rather than have someone else or others do it. Also, if this were vicarious punishment, it would be the rapist's daughter that would be victimized, not his wife. In short, the Assyrians' understanding did not view talion or vicarious punishment as viable alternatives to composition or mutilation as Hammurabi did.

22) *Contra*, DRIVER & MILES, *Assyrian Laws*, pp. 35, 347. Cf. LH 116, 210, 230. The Deuteronomist felt the same way (Dt. 24:16).

Section 174 of the Hittite Laws (c. 1500 B.C.) stipulates that if two men fought each other and one killed the other, the killer shall give one person (23). The opening section of these laws states that if anyone killed a man or a woman “in anger” (24), he shall give four persons (25). According to LHitt. 3, if the killing was accidental, the wergeld was two persons, the same number if a slave was killed in anger (26). As shown above, Hammurabi regarded a death at the hands of a brawler as an unintentional act arising from the heat of the altercation, and Eshnunna also viewed such a homicide as unintentional, and its gravity, of which, as far as penalty was concerned, was on a par with a death as a result of negligence. The Hittite law differed from those two by regarding a killing at the hands of a brawler as an act to be considered apart from a crime committed in anger, the contributory factor of anger notwithstanding. The brawler obviously intended to harm his adversary, but he went beyond

23) The “person” or “persons” referred to in the Hittite Laws might be slaves, because the Sumerian word meaning heads is used, a term in Mesopotamian legal literature used to refer to slaves. (See Ephraim NEUFELD, *The Hittite Laws* (London: Luzac, 1951), p. 130, n. 8 for discussion). Harry HOFFNER, Jr. in his translation of this section uses the word slave and persons in LHitt. 1-3 (pp. 217, 234 in ROTH). Other translators such as NEUFELD, pp. 1, 47; Johannes FRIEDRICH, *Die Hethitische Gesetze* (Leiden: Brill, 1959), pp. 17, 79 and Albrecht GOETZE, *ANET*, pp. 189, 195 use person or persons throughout.

24) So NEUFELD, p. 1. Others render “in a quarrel” thus blurring the distinction that these laws make between death in an actual altercation as opposed to an act of passion.

25) Here and in LHitt. 2-5, according to HOFFNER and NEUFELD, the guilty party must also see to the burial of his victim.

26) LHitt. 2. The accidental killing of a slave costs the killer one person (LHitt. 4).

harm to homicide. The law here seems to take cognizance of the possibility that the victim might have done the same thing to his antagonist had he had the luck or skill, or he might have been able to avoid his misfortune by shrinking from combat. In the light of these considerations, the Hittite legist apparently decided to fix a penalty that was not only much lighter than a homicide done in passion, but one that was even lighter than one done accidentally.

Understanding the laws in the Pentateuch dealing with brawling is complicated by the fact that they are found in law collections which appear as parts of larger literary strata. The theological and moral predispositions of the writers in each literary stratum must be considered, not to mention the attitudes of the later editors who were responsible for the final redaction of these texts. The material we have been dealing with up to now presents no such problems.

The earliest legal information on brawling in the Hebrew Bible comes from two provisions in the Covenant Code in Exodus 21. Whereas all the other law corpora deal with deaths or serious injuries from brawls, the first law to appear on the subject in the Covenant Code, Ex. 21:18-19, deals with the more common outcome of brawls, that is, injuries that are only temporarily disabling. The law states: "If men ⁽²⁷⁾ argue (Heb. *yerivun*) and one man strikes another with a rock or a fist, but he

27) The Syriac and Hexapla have "two men".

does not die, but falls ill (28), if he gets up and goes about out-of-doors with his staff, the striker is free (of penalty); he shall pay only for his [the victim's] idleness and healing”.

The Hebrew verbs in the prodisis, *yerivun* and *hikah*, clearly show what happened. A heated argument got out of hand, and violence ensued with the two men going at each other with their bare hands or any hard object that may be at hand (29). The fight ended without death or permanent injury to the loser, but he was temporarily unable to function normally, and his wounds required attention. The assailant's responsibility was limited to paying for the victim's loss of income or productivity during his period of incapacity and defraying his medical costs. The words, *venigah hamakeh*, the striker is free (of penalty), indicate that bloodguilt or monetary payment as punishment was excluded from consideration. The legist regarded the payments mentioned in the law not as a penalty or punishment for wrongdoing but as reimbursement of the other man's expenses. There is a similarity here to LH 206, except that in the latter the perpetrator's obligation to the victim was not limited to curable injuries. As we have already adduced in the discussion of the Hittite law, even if there was a passionate intention to do harm, the intention was mutual, and it was only the luck and skill of the assailant that

28) Lit., “He falls that he lies down”.

29) PAUL, *Studies in the Book of the Covenant in the Light of Cuneiform and Biblical Law* (Leiden: Brill, 1970), p. 67; Julius MORGENSTERN, “The Book of the Covenant, Part II”, *HUCA*, 7 (1930), pp. 30-31; Albrecht ALT, “The Origins of Israelite Law”, in *Essays on Old Testament History and Religion* (Garden City, N.Y.: Doubleday & Co., 1967), pp. 114-115. For discussion of the term *rib*, see above.

prevented the victim from doing the same or worse to his assailant. Indeed, both men could have suffered the injuries of the type intimated by this law, payments of the kind described could have moved in both directions. Furthermore, the outcome could have been much worse. The assailant, by virtue of restraining himself (or being restrained by others?), prevented more serious consequences ⁽³⁰⁾.

The words *venigah hamakeh* are unusual for another reason. Laws usually come into being when there is a need or desire to forbid or require a certain action with compliance ensured by specifying a punishment or sanction if the rule is violated. If there was no significant wrongdoing to be identified and punished, then why legislate? As we shall discuss at greater length below, the Hebrew Bible's jurists maintained that life is sacred, and the law, therefore, must treat homicides and assaults that result in permanent injury in ways that are special and different from other societies. By introducing this rule the legislator made an implicit statement that the sanctity of life doctrine does not apply in this instance ⁽³¹⁾.

30) There is no reason to assume that going about on one's staff meant that the payment was limited to a partial recovery from his injuries, because the victim still was unable to do heavy field work (See ALT, p. 115). It was not unusual for men to go about in public with a staff in hand whether they were disabled or not. Indeed, one may take the expression to mean that the patient completely recovered (cf. Gen. 32:10; 38:18, 25; Ex. 12:11; 1 Sam. 17:40).

31) Hittite laws dealing with incest furnish further examples legislating what was permitted. LHitt. 190-191 which permitted certain sexual unions in order to clarify what unions were forbidden. LHitt. 194 permitted certain unions with slave women that would probably have been prohibited if the women were free. LHitt. 192-193 permitted a version of levirate, probably as a concession to an unusual local practice. (See my

Because it contains the first and fullest reference to talion, Ex. 21:22-25 has been the subject of extensive commentary from antiquity to modern times⁽³²⁾, but as the prodisis clearly shows, this law was originally and primarily concerned with what happened when an innocent bystander was injured as a result of the affray, and a special bystander with a special injury at that, a married pregnant woman who had a miscarriage, not *lex talionis*. We render the rule as follows: (vs. 22) If men fight and push a pregnant woman causing her to have a miscarriage, and there is no other serious harm [Heb., *'ason*], he shall be fined what the husband demands, and he shall pay based on reckoning [Heb., *venatan biflilim*]. (vs. 23) But if there is serious harm, you shall give life for life, (vs. 24) eye for eye, tooth for tooth, hand for hand, foot for foot, (vs. 25) burn for burn, wound for wound, bruise for bruise.

The problems these verses pose are many. The verb we have translated as push appears in the plural implying that both (or all) the fighters were responsible for the *'ason*, but when it came to pay the penalty only the directly responsible party was liable. In

“Legal Rules on Incest in the Ancient Near East”, *RIDA*, 35 (1988), 85-96). LHitt. 197 granted immunity from punishment to a man who killed his wife and her lover *in flagrante*.

32) Also, Lev. 24:17-20; Dt. 19:21. For a survey of the modern literature on the subject see, for example, Bernard S. JACKSON, “The Problem of Exodus 21:22-5 (*Ius Talionis*)”, in *Essays in Jewish and Comparative Legal History*, p. 75, n. 1 *et passim*.

the course of a brawl it is not always possible to determine whose blows caused serious injury to a bystander, unless there were witnesses as to who actually inflicted the injury. If the responsible party did not confess, the court would have to contend with either the combatants' hate-filled accusations or their self-serving silence or denials. In the absence of reliable witnesses, making all the fighters pay seems reasonable.

The meaning of the rather vague and obscure word *'ason* has been controversial⁽³³⁾. Injuries that were neither permanently disabling nor irreversible were covered by the law on brawling in vss. 18-19. The difficulty arises when the term is used not only in reference to death (vs. 23), which is obviously more than just a serious injury, but the term also governs the minor injuries mentioned in vs. 25, the type that would be clearly covered by the law in vss. 18-19. Both uses of the word seem to unreasonably extend its meaning to something beyond what the original legislator intended — *prima facie* evidence of interpolation.

The way in which the text describes the penalty process when a miscarriage ensued has also caused problems⁽³⁴⁾. On the basis of the phrase *'anos ye'ones ka'ašer yasit 'alav ba'al ha'išah*, JACKSON imputes to the woman's husband the right to name any price he wished and regards the words *venatan biflilim* as an

33) See JACKSON, pp. 76-78 for discussion.

34) See JACKSON, pp. 79-81 and PAUL, *Studies*, pp. 72-73 for discussion.

interpolation⁽³⁵⁾. The phrase is admittedly vague, but the same may be said of the husband's demands (not to mention possibly outrageous) unless they were made subject to some sort of review, especially when one considers the many variables that can be brought into play. PAUL and David DAUBE⁽³⁶⁾ take note of LHitt. 17 which dealt with a pregnant free woman whom someone causes to miscarry. The penalty paid there is based on how far along she was in her pregnancy: ten shekels of silver if it happened in her tenth [sic] month and five if in her fifth month. A similar standard could well have been in force in ancient Israel, but a court might wish to consider other factors. For example, did the husband have other offspring, especially male? Did the husband have another wife or wives by whom he could sire children should the miscarriage result in a future inability to have children? If she was in the early stages of pregnancy, the fighters might not have known that she was with child, and maybe they would have been more careful if her pregnancy was obvious. There was also the issue of contributory negligence on the woman's part: Why was she, especially in her condition, standing so close to harm's way? Could she have avoided the assault? And what of the husband who, according to the law, collected the damages? Could he have protected his pregnant wife from attack? Was it possible that he was more interested in collecting damages than protecting his wife from harm?

35) JACKSON, p. 80.

36) PAUL, pp. 71-72; DAUBE, *Studies in Biblical Law* (N.Y.: KTAV, 1969), p. 148, n. 6.

A supposedly aggrieved and angry husband may not fully weigh all these factors when he presents his bill, but a court would. In short, the husband may propose, but judges will dispose. There is no need to posit interpolation here.

What has caused the most difficulty and therefore attracted the most attention are the talionic clauses in vss. 23-25 of the law. We have already noted above the apparent misuse of the word *'ason* as indicating possible textual interpolation. Also to be considered is the shift in vs. 22 from the third person casuistic form (“If men fight and push..., he shall be fined..., he shall pay...”) to the second person in the vs. 23 (“you shall give...”). Furthermore, these talionic provisions are contextually inappropriate. Verse 23b-24 mentions death and the serious deformities that are repeated in the Deuteronomic Code verbatim except for the change in preposition from *tahat* to *b*. Talion applies when the assailant is successful in killing or maiming the person he intended to harm. This is not what is described in the prodisis of vs. 22. This is what JACKSON has cited as *aberratio ictus*, a blow that went astray, that is, when A intended harm to B, but missing his aim, hurt C instead (³⁷). Since the actual victim was not the intended one, talion cannot apply. If the bystander woman had died, as vs. 23 envisions, the asylum provisions for unintentional homicide in vs. 13 of the Code would apply, and the perpetrator would pay no penalty. The injuries listed in vs. 25 are minor and curable and to which talion also does not apply and would come under the rubric of the rule

37) JACKSON, p. 88.

in vss. 18-19 discussed above. This does not mean that vs. 25 should be moved to follow vss. 18-19 ⁽³⁸⁾. Talion applies only when bloodguilt is present, a condition explicitly excluded by the phrase *venigah hamakeh*. In sum, a rule which (like vss. 18-19) had a very narrow focus, namely, the legal consequences of an innocently bystanding pregnant wife loosing her baby as result of being pushed during a brawl was used by a later editor as the place to insert a *lex talionis*.

The question is why the insertion of talion and why was it placed where it is. The most significant theological and jurisprudential difference between the law collections of the Hebrew Bible and those of Mesopotamia was the identity of the legislator and the promulgator. In Mesopotamia the king assumed both roles acting under the command and inspiration of a god or the gods. A king was expected to be a *šar mešarum*, a king of justice and equity whose laws embodied the cosmic truths (Akk. *kinatum*) of which the gods were the custodians. The drafter (in consultation with scribal jurists) and promulgator of the laws of Hammurabi was Hammurabi himself implementing cosmic truths emanating from Shamash, the god of justice ⁽³⁹⁾. The laws in the Hebrew Bible are ascribed directly to Yahweh. Moses, who was not a king, was a law promulgator not a law maker ⁽⁴⁰⁾. This

38) E.g., Rudolf KITTEL (ed.), *Biblia Hebraica* (Stuttgart: Wurt. Bibelanstalt, 1949), p. 110, n. on Ex. 21:19.

39) Moshe GREENBERG, "Some Postulates of Biblical Criminal Law" in M. HARAN (ed.), *Yehezkel Kaufmann Jubilee Volume*, pp. 6-7, 9-11; PAUL, *Studies*, pp. 3-26.

40) The parable cited above (n. 1) indicates that the king had a role in the judicial process which included hearing petitions and acting on them,

means that if the laws do not appear to serve a moral purpose consistent with the legislator's or the redactor's theology, then the legislator or the redactor would take the necessary steps to make that happen.

Of the three law corpora found in the Hebrew Bible, the Covenant Code has the most secular and the most narrowly legal cast, and based on its content and draftsmanship bears very close resemblance to the cuneiform material discussed above. The biblical writer wanted to make clear to his readers that initial appearances to the contrary this law was of directly divine origin and part of a covenant that Israel was party to and must live by. This involved employing the historical prologue form of the Hittite vassal treaties and the prologue-epilogue form found in the Mesopotamian law collections⁽⁴¹⁾. By way of prologue, like the vassal treaties, there was an appeal to history, in this case, the redemption from Egyptian bondage⁽⁴²⁾. The reward that Israel will reap for keeping the covenant would be by being a special people from among all others, by being for Yahweh "a kingdom of priests and a holy nation"⁽⁴³⁾. The prologue also included an

but he apparently had none in the legislative process. On the role of Moses as prophet in this process, see David Noel FREEDMAN, "The Formation of the Canon of the Old Testament", in FIRMAGE, *Religion and Law*, pp. 326-331.

41) George E. MENDENHALL, *Law and Covenant in Israel and the Ancient Near East* (Pittsburgh: The Biblical Colloquium, 1955); PAUL, *Studies*, pp. 27, 36-37, 100-101.

42) Ex. 19:4; 20:1-2.

43) Ex. 19:5-6.

exhortation to loyalty to Yahweh and moral living as apodictically stated in the Decalogue, and a final and unequivocal statement that these are, indeed, Yahweh's laws of which Moses is the proclaimer: "These are the rules [Heb. *mišpatim*] that you shall place before them" (44). Immediately preceding this statement are two divine ordinances which Moses was to announce to the people: They should not make any idols of gold or silver and how an altar was to be constructed. That these purely cultic directives immediately preceded the Covenant Code itself was not a haphazard matter (45). The epilogue of the Code is similarly constructed. A group of moral and religious exhortations and a cultic directive, in this case a holiday calendar, come at the end of the Code (46).

With regard to a compilation so apparently secular in character as the Covenant Code, simply framing the Code with cultic directives and moral exhortations was insufficient to an editor who regarded human life as sacred. The editor maintained that Yahweh's laws for Israel were morally superior to those of the mortal monarchs of other nations, because murder to Yahweh was not merely a crime but a sin, and the editor felt that the law should clearly reflect that idea (47). This attitude towards murder

44) Ex. 21:1.

45) Ex. 20:2-14, 19-23.

46) Ex. 22:18-23:13, 19b; 23:14-19a.

47) See GREENBERG, "Postulates", pp. 11-13, 15-20; ID., "More Reflections on Biblical Criminal Law", in *Scripta Hierosolymitana*, 31 (1986), 2-3, 15-17; PAUL, *Studies*, pp. 37-41, 100-102 for full discussion.

also explains why the editor reformed the *lex talionis* which Hammurabi regarded as an aristocratic prerogative to apply to everyone regardless of social station. The criminal law of the Pentateuch makes no distinction between high and low born or citizen and alien ⁽⁴⁸⁾. If that is so, then Ex. 21:22 had to be morally and theologically troubling, because it treated the woman's miscarriage (which was regarded as the husband's loss) as a matter to be settled by composition, the same way the laws of idolatrous kings treated the matter ⁽⁴⁹⁾. Moreover, composition for the loss of a fetus implicitly denies legal personality and full humanity to someone created in Yahweh's image. Even though the miscarriage was not intentionally caused, the editor of the Covenant Code evidently felt that this rule could be interpreted as a contradiction of the principle that ransom is not to be accepted whether the homicide is intentional or accidental ⁽⁵⁰⁾. It was precisely at this point in the Code that the editor deemed it appropriate to state in the strongest way possible that nothing up this point in the Code or hereinafter should be construed as in any way negating the notion that human life is sacred and therefore cannot and indeed must not be financially bargained for. Since this provision dealt with brawling, the editor rather clumsily added curable injuries that come from brawling. In the Deuteronomic version of the talion the injuries are the same

48) This position is most strongly enunciated in P. *E.g.*, Lev. 24:17, 22.

49) LH 209-214, MAL A 21, 50-52, LHitt. 17-18. For the Sumerian rules, see *ANET*, p. 525 and ROTH, pp. 26-27, 43.

50) Num. 35:31-33.

but the preposition is changed from *taḥat* to *b*; whereas P retains *taḥat* but changed the injuries. We are probably dealing with a priestly redactor who was familiar with both P and D⁽⁵¹⁾.

Dt. 25:11-12 provides as follows: “If men are fighting with each other and the wife of one of them gets in close to save her husband from the man who is hitting him, and she extends her hand and grabs him by the genitals, you shall cut off her hand. You shall show no pity”⁽⁵²⁾. Whereas in other ancient Near Eastern law collections bodily mutilation is a frequent punishment, this is the only statute (besides *lex talionis*) in all the law collections of the Pentateuch that specifies such a punishment. This law invites comparison with MAL A 8 discussed above since both laws deal with women whose bodies were mutilated as punishment for their participation in a brawl⁽⁵³⁾. There are, however, significant differences between the biblical law and the Assyrian one. In the Assyrian law the woman was one of the original brawlers, whereas in Deuteronomy we are dealing with the intervention into a fight that is already under way, and the intervening woman is identified as the wife of one of the fighters, and furthermore, we are told that she chose to get involved, because her husband seemed to be getting the worst of it from his opponent. Her intervention

51) See above, n. 32.

52) Lit., “Your eyes shall not spare”.

53) See PAUL, *Analogues*, pp. 335-339, Moshe WEINFELD, *Deuteronomy and the Deuteronomistic School* (Oxford: Clarendon Press, 1972), pp. 292-293 for discussion.

involved seizing the other man's genitals. Unlike the Assyrian law which stated that the woman's attack on the man's genitals resulted in serious and permanent injury, the biblical law makes no mention of any injury of any kind, not even of the minor sort that would be actionable pursuant to Ex. 21:18-19. For a woman to make any kind of an attack, however physically harmless, on a man in such a part of his body while he was fighting with her husband would be sufficient to distract him and possibly turn the advantage in the affray to her beleaguered husband. Viewed in this light, the punishment, reinforced by the admonition, "Show no pity", is not only unique but unduly harsh.

The issue here is not the wife's intervention *per se*, but the manner in which she intervened. The Deuteronomist omitted mention of injury to the man not because there was none, but because for his purpose, as far as this law was concerned, the issue was not injury to the man but gross immodesty on the part of the woman⁽⁵⁴⁾. This emphasis on immodesty explains the exhortation to be pitiless: A court might be inclined to be lenient toward the woman if she inflicted no real injury on the man⁽⁵⁵⁾.

Surely the situation described in this pericope could not have been a very common occurrence, but Deuteronomy should not be considered a collection of laws of the kind we have heretofore encountered. What we have here is a literary work which emphasizes social justice and personal morality expressed in a

54) *Contra*, Anthony PHILLIPS, *Ancient Israel's Criminal Law* (N.Y.: Schocken, 1970), pp. 94-95.

55) WEINFELD, p. 2.

highly homiletical and didactic way and which frequently employs the well known and venerable legal forms as a mode of expression, as in this rule which has both casuistic and apodictic components. One way in which the Deuteronomist articulated this ethical conception was, on the one hand, to vindicate and defend the reputation of those women whose behavior he regarded as virtuous and honorable but were nevertheless treated unfairly and on the other hand to see it that those women whose conduct did not meet his moral standards were dealt with condignly.

This contrast is best exhibited in the law dealing with the bride whose husband, after the *prima nox*, falsely accused her before the local elders of not being a virgin ⁽⁵⁶⁾. Publicly flogging the man and making him pay the father of the slandered bride one hundred shekels of silver and then forcing the husband to keep her as his wife would certainly not ensure a happy marriage for the girl, but as far as the Deuteronomist was concerned a virgin in Israel must not be slandered, and insinuations about her virtue might persist despite her legal exoneration if the man were allowed to walk away from the marriage. If, on the other hand, the charges turned out to be true, to treat the matter as breach of contract whereby the marriage would be annulled and the bridegroom would get a refund of his *mohar* and perhaps a something extra to assuage his honor would be to apply silver to a moral outrage, and for the Deuteronomist a resolution of that type was unthinkable. Rather, the men of the town stoned the woman to death in front of her father's house, because "she acted

56) Dt. 22:13-21.

shamefully in Israel fornicating while in her father's house" (57). In this zeal to condemn the wayward bride, the Deuteronomist neglected his own twice stated judicial standard which specified that no one is to be put to death unless there were at least two witnesses (58). In this case, however, the unsupported allegation of a cuckolded bridegroom coupled with the inability of the bride's parents to produce a blood stained cloth that could exonerate their daughter was sufficient to secure a death sentence for an alleged offense that was neither violent nor sacreligious. In this eagerness to preserve the reputation of the already exonerated bride, he also ignored the rule that a person who gives false testimony must suffer the same penalty had the accusation stuck (59). Instead, he forced a marriage that no one could have wanted, not the husband, not the wife, nor her parents (60). It is problems such as these, especially where family or personal morality was involved, that leads one to conclude that these were not actual statute laws, but moral pronouncements cast in a legal idiom.

The case of the loyal but dirty fighting wife was the Deuteronomist's exemplification of how the way a decent woman should not act. It is no accident that immediately before he dealt with this case he took up the cause of an aggrieved woman who expressed her loyalty to her husband in a way he regarded as

57) Dt. 22:21.

58) Dt. 17:6; 19:5; cf. Num. 35:30.

59) Dt. 19:16-19.

60) The Deuteronomist would settle a rape case in a similar fashion (Dt. 22:28).

exemplary. The aggrieved woman in this case was a widow who came before the elders with a complaint that her husband died without issue, and his surviving brother refused to do his levirate duty. Although the court did not compel a marriage in this case, the author showed his sympathy to her and her cause by requiring the recalcitrant brother to be subjected to public humiliation at the hands of the widow (61).

The case involving brawling taken up by the priestly writer reflects his concern about cultic matters. In this case, the author departed from the customary apodictic or casuistic legal form and presented the case as a simple narrative. The decision as to how the matter was to be handled was deferred until Yahweh instructed Moses as to what to do. The petition of those who due to ritual impurity could not offer the paschal sacrifice at the specified time, the case of the man who gathered wood on the Sabbath, and the petition of Zelophad's daughters regarding their inheritance rights are all presented in the same way (62). The divine instruction would serve as a guide and legal precedent for future cases. Lev. 24:13-23 deals with the case of a man who had an Egyptian father and Israelite mother who got into an altercation with a man both of whose parents were Israelite. In the course of the affray the man of mixed parentage uttered the divine Name. Moses had the man placed in custody until Yahweh would indicate what should be done with him. Yahweh's instructions to

61) Dt. 25:5-10.

62) Num. 9:6-14; 15:32-36; 27:1-11. All these cases are in the P stratum. Cf. Ex. 18:19.

Moses were to take the culprit outside the camp, have all who witnessed his sacrilege place their hands on him, and the entire community was to stone him to death. The pericope closes with the words, “The Israelites did as Yahweh commanded Moses”.

There has been considerable misunderstanding as to what the man did wrong. The issue was not blasphemy or cursing Yahweh; it was the improper and disrespectful use of his name⁽⁶³⁾. If any cursing took place, it was probably directed by the half Israelite against his full Israelite enemy. His utterance was probably some sort of magical incantation or formula which included the use of the tetragrammaton either to gain control over his opponent or to protect himself from him⁽⁶⁴⁾. This act was a clear violation of the provision in the Decalogue forbidding the improper use of Yahweh’s name and should have required capital punishment without any necessity for delay to obtain divine guidance. What apparently made the issue a doubtful one, requiring an oracle from Yahweh to clarify the matter, was the resident alien status of the guilty party⁽⁶⁵⁾. Yahweh’s response, given in vs. 22 was, “There shall be one law for the resident alien and the citizen”. The oracle was interpreted to mean that the obligation to show reverence and respect for Yahweh’s name was

63) See Herbert BRICHTO, *The Problem of “Curse” in the Hebrew Bible* (Phila.: Society of Biblical Literature, 1968), pp. 143-151.

64) Elias BICKERMAN, “Anonymous Gods”, in *Studies in Jewish and Christian History*, pt. 3 (Brill: Leiden, 1986), p. 279; Charles D. ISBELL, “The Story of the Aramaic Magical Incantation Bowls”, *BA*, 41 (1978), 5-16.

65) Ex. 20:7; Dt. 5:11; PHILLIPS, pp. 53-56.

the same for resident aliens and Israelites, and when that reverence and respect was not forthcoming from a man who was only half Israelite, the penalty should be the same if he were a full Israelite. In this case, stoning. As we have noted above, in situations where injuries and deaths were the outcome of brawling the law gave due consideration to the intention of the assailant. The harshness of the punishment required in this rule indicates that no consideration was given to the possibility that the utterance might have been blurted out in heat of battle and, therefore, might not have been a premeditated act. The issue here, however was not criminality or tortiousness but sinful conduct against the sanctity of Yahweh's name. What made the issue problematic was the man's foreign parentage.

This divine ruling connected to brawling afforded an opportunity for the editor to insert his views on talion as he did in the law of Covenant Code dealing with brawling. At this point in the priestly strand he deemed it fit to interpolate a statement that the "one law" rule meant that the *lex talionis* applied with no less rigor to resident aliens than it did to Israelites ⁽⁶⁶⁾.

Those responsible for legal draftsmanship and legislation generally in Mesopotamia and Asia Minor saw the law of brawling as an offshoot of the law of assault. They were primarily interested in such straightforward legal issues as death or serious injury, the intention of the assailant towards his victim and vice versa. Issues such as how the fight got started, who

66) Lev. 24:1-22.

struck the first blow, or the right of the other party to defend himself or engage in reprisals were irrelevant⁽⁶⁷⁾. In fact, there is no evidence that brawling *per se* was an illegal act⁽⁶⁸⁾. In any case, it accords well with concept of *šar mešarum* discussed above.

The legal rules regarding brawling found in the law corpora of the Pentateuch are more concerned with peripheral matters. The central issue of what happened when A killed or seriously injured B in an affray never unequivocally comes up. Discussion in the Covenant Code was limited to victims whose injuries would eventually heal and the bystanding pregnant woman who suffered a miscarriage. The Deuteronomist preferred to focus on the immodest conduct of the wife of one of the fighters, and the priestly writer's concern was confined to a religious offense that might arise from a brawl. The reason for all this movement around the edges of the law of brawling rather than dealing with it head on as the Mesopotamian and Hittite jurists did was that the writers and editors of these literary strands cherished certain theological and moral concepts which they felt should be reflected in Israel's law, and the rules such we have been discussing were

67) The Common Law is otherwise. "...it is lawful for him to repel force by force; and the breach of peace, which happens, is chargeable upon him who began the affray". So William BLACKSTONE, *Commentaries on the Laws of England* (Oxford: Clarendon Press, 1768, reprint, 1979), Bk. III, cap. 1, sec. 1, p. 3.

68) Again the Common Law differs. An affray, as defined by BLACKSTONE, *Commentaries* (1769), Bk. III, cap. 11, p. 145 was fighting in a public place "to the terror of his majesty's subjects" by two or more persons. This was an offense against the public peace punishable by fine or imprisonment. The fighters may also be confined "till the heat is over".

exemplifications of these moral and theological concerns. It was their view that Israel, having been chosen by Yahweh to be his special and holy people, had an obligation to articulate in her law the idea that because man was created in Yahweh's image, human life is sacred and must not be subject to ransom or financial bargaining of any kind. Furthermore, since Israel's lawgiver was Yahweh himself and not any human ruler, violating his law or transgressing the moral concepts that undergirded it was a sin as well as a crime. Finally, since Israel's true sovereign was Yahweh, his majesty and name had to be revered and respected by all those who were subject to the protection of his covenant. In sum, the biblical writers were not concerned with the criminal or tortious aspects brawling. Their interest was to bring to bear upon the law the moral and theological conceptions that were central to their world view, and they used the language and formulations of the law to express those conceptions.