The "Plotting Witness" and Beyond: A Continuum in Ancient Near Eastern, Biblical, and Talmudic Law

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הִתְעַנְּגוּ עַל רֹב שָׁלוֹם

This essay deals with the laws of "plotting witnesses" and bodily injuries, two subjects for which *talio* is mentioned in ancient Near Eastern, biblical, and talmudic law. A comparison of these three sources reveals classifications that are similar to the modern distinction between punitive and compensatory damages.

The laws governing maliciously false witnesses are succinctly summarized in the form of a paradox in a *baraita* of the Babylonian Talmud, as follows:

> If they have not slain they are slain; but if they have slain they are not slain. (*b. Mak.* 5b)[1]

The modern reader may be shocked by the first clause; the *Wissenschaft* scholars were shocked by the second. In reality, the first clause is in accordance with the law; false witnesses[2] who testified in a capital case, intending for the defendant to be executed, will themselves be put to death even if

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Author's note: It is a pleasure to participate in this volume in honor of Shalom M. Paul, *landsmann*, fellow student, good neighbor, and colleague, whose scholarship delights the many.

1. The casting of this law in the form of a paradox was pointed out by Shlomo Naeh, in his essay, "A Study of *m. Makkot* 1:4–6 and Its Talmud" [Hebrew], in *Neti'ot Ledavid: Jubilee Volume for David Weiss Halivni* (ed. Yaakov Elman, Ephraim Halivni, and Zvi Arie Steinfeld; Jerusalem: Orhot, 2004) 112.

2. 'False witnesses' = עדים זוממים throughout the essay, unless specified otherwise.

the defendant was not executed. However, why would they be *exonerated* if the defendant *was* in fact executed? According to Abraham Geiger, writing in 1857, the exemption was absurd and was simply a result of judicial cowardliness and *pilpulistic* thinking. Indeed, according to Geiger, this stance was a travesty of justice and absolutely unknown elsewhere:

> Die b. G. Mak. 5 b. macht einen Zusatz, der allem Rechtsgefüle hohnsprechend, auch allen sonstigen Quellen unbekannt ist. Sie behauptet, die pharis. Ansicht sei, dass die lügenhaften Zeugen nur bestraft werden, wenn das Urtheil gesprochen, nicht aber wenn das Urtheil vollzogen sei. Es ist Dies die Milde einer Zeit, die, der Strafpraxis fern, sich blos noch in Spitzfindigkeiten der Theorie bewegt.[3]

H. M. Pineles, who was usually against Geiger, was nonetheless influenced by him on this point, remarking as follows: "Can the fact that the witness's evil plot was indeed carried out serve as a reason for exonerating him?"[4] Other *Wissenschaft* rationalists followed suit.[5] Louis Finkelstein sums up by declaring that this *baraita*:

> is late and without authority [. . .]. It would, of course be absurd to suppose that the Pharisees, when they had judicial authority, punished false witnesses whose testimony had not led to execution, but refrained from punishing those whose testimony had resulted in the death of the accused.[6]

To begin, I would like to separate the literary question from the substantive question. We are dealing with a late Babylonian *baraita*, which recorded a position that is not spelled out in this form in the classical Palestinian sources of the talmudic corpus. However, I maintain that the *norm espoused* is not absurd and indeed fits well with the early juristic concept of "false witnesses." To verify this conclusion, I will analyze pertinent passages in Deuteronomy, in the law codes of the ancient Near East, and in early Halakah.

3. A. Geiger, *Urschrift und Übersetzungen der Bibel, in ihrer Abhängigkeit von der innern Entwicklung des Judentums* (Frankfurt am Main: Madda, 1928) 140.

4. H. M. Pineles, *Sefer Darkah shel Torah* (Vienna: Förster, 1861) 172.

5. Isaac Hirsch Weiss, *Dor Dor ve-Dorshav* (5 vols.; Vienna: Hertsfeld, 1876) 2:131; M. Friedmann (Ish Shalom), "False Witnesses and Warning, *Beth Talmud* 5 (1886) 234, 237 [Hebrew].

6. L. Finkelstein, *The Pharisees: The Sociological Background of Their Faith* (2 vols.; Philadelphia: Jewish Publication Society, 1962) 2:843 n. 75.

Deuteronomy

The Deuteronomy passage reads:

> If a man appears against another to testify maliciously and gives false testimony against him,[7] the two parties to the dispute shall appear before the Lord, before the priests or magistrates in authority at the time, and the magistrates shall make a thorough investigation. If the man who testified is a false witness, if he has testified falsely against his fellow man, you shall do to him as he schemed to do to his fellow. Thus you will sweep out evil from your midst; others will hear and be afraid, and such evil things will not again be done in your midst. Nor must you show pity: life for life, eye for eye, tooth for tooth, hand for hand, foot for foot. (Deut 19:6-21)

Who are "the two parties to the dispute"? Tannaitic interpretations differ on this point. According to the halakic Midrashim, the two parties are the two litigants; according to the Tosefta, they are the two witnesses.[8] This conflict underscores one basic difficulty in our passage. Stylistically, the statement "the two parties to the dispute" seems to refer to litigants, but this interpretation leaves the false witness out of the picture, and the concluding ruling becomes incomprehensible. On the other hand, if "the two parties" are the two witnesses, why are they referred to by a phrase that is indicative of litigants? This problem led to the following desperate combination of the two tannaitic opinions in the Babylonian Talmud:

> The rabbis taught: it reads [Deut 19:17]: "Then shall the two men, who have the controversy, stand before the Lord"; this means the witnesses.

7. לענות בו סרה. Compare the parallel in Law of Hammurapi §3: *ana šībūt sarrātim* 'for the purpose of false testimony'. Cf. E. Jenni, "Dtn 19,16: sarā 'Falschheit,'" in *Mélanges bibliques et orientaux en l'honneur de M. Henri Cazelles* (ed. A. Caquot and M. Delcor; Kevelaer: Butzon & Bercker / Neukirchen-Vluyn: Neukirchener Verlag, 1981) 209-10; *CAD* S 179.

8. *Mekilta d'Rabbi Išmael*, Kaspa 20 (ed. H. S. Horovitz and I. A. Rabin; Jerusalem: Bamberger & Wahrman, 1960) 322. Cf. *Sipre Deuteronomy* §190 (ed. L. Finkelstein; New York: Jewish Theological Seminary, 1969) 230, §286, 302; *Sipre Zuta on Deuteronomy* (ed. M. I. Kahana; Jerusalem: Magnes, 2002) 282.

T. Sanh. 1.9. Kahana (*Sipre Zuta*, 282) attempted to interpret the meaning of the Tosefta as being like the Midrashim—that is, litigants. However, the Tosefta clearly refers to witnesses, as does its parallel, *b. Sanh.* 6b although somewhat less clearly, because the subjects (judges and witnesses) and the prooftexts are in chiastic order. Compare chap. 12 in my Hebrew study, *Towards Talmudic Terminology: Be Rabbi and Stimtaa* (forthcoming).

> You say "witnesses," but perhaps it means the contending parties themselves? No, for these are mentioned in the second stich: "Who have the controversy"; this is where the contending parties themselves are mentioned! (*b. Šebu.* 30a).[9]

The simple reading of our passage leads to the conclusion that "the two parties to the dispute" were the witness suspected of dishonesty and the person whom he accused.[10] These two were now litigants in opposition over the question of whether the testimony was true or false. The testimony was given against one individual, and there is no basis for projecting "two original litigants."[11]

The clash over the truth of the testimony and the eventual punishment of the witness are both subsumed under the one original trial of the accused. There may be no force at all to the testimony of a single witness, unless and until he is joined by a second, as is indeed explained in the previous verse (Deut 19:15). But in any case, the witness is here pictured as voicing his testimony and being challenged *singly*, which follows the classic situation in ancient Near Eastern law (see below). The result will be either establishing his testimony as true or punishing him as a false witness. The possibility that the defendant could eventually be sentenced and, subsequent to his execution, the witness could be proven false is out of the purview of this passage, which presents the determination of false testimony and the punishment of its perpetrator as being part and parcel of the original trial. And, most likely: "out of sight, out of mind." There would be no opportunity to reexamine the witness and overturn his testimony after the trial or after the judgment was carried out.[12]

9. Thus Rashi on Deuteronomy ad loc.

10. With S. R. Driver, *A Critical and Exegetical Commentary on Deuteronomy* (ICC; Edinburgh: T. & T. Clark, 1895) 235; contra J. H. Tigay (*Deuteronomy* [JPS Torah Commentary; Philadelphia: Jewish Publication Society, 1996] 184), who sees the phrase as referring to "the two original litigants of the case"; and Kahana (*Sipre Zuta*, 279), who writes: "according to the simple meaning, 'the two parties to the dispute' are the litigants."

11. Emphasis mine; see above quotation of Rashi on Deuteronomy.

12. Especially in light of the fact that court action in the ancient Near East was *victim initiated*; see I. L. Seeligmann, *Studies in Biblical Literature* (ed. A. Hurvitz, S. Japhet, and E. Tov; Jerusalem: Magnes, 1992) 253.

Law Codes of the Ancient Near East

In the Sumerian Laws of Ur-Namma (21st century B.C.E.)[13] we find these two stipulations:

> §28 (B iv 34–40) If a man presents himself as a witness but is demonstrated to be a perjurer, he shall weigh and deliver 15 shekels of silver.
>
> §29 (B iv 41–46) If a man presents himself as a witness but refuses to take the oath, he shall make compensation of whatever was the object of the case.[14]

These two paragraphs present the oldest distinction between categories that later yielded distinctions such as "punitive damages" and "compensatory damages." In §29, the potential witness who *withheld* his testimony could be compared with a perpetrator who damages the accused or one of the litigants. He was required to make "restitution," and his payment was more a matter of "compensation" than a "fine." In §28, the "perjurer," who delivered *false* testimony, was unmasked within the context of the trial and could be compared with a thief caught in the act[15] who was punished and made to pay a fine, even though he actually succeeded in stealing nothing.[16] His false testimony was uncovered in time, and his payment was punitive.

13. The oldest extant law code from the ancient Near East and thus the world's oldest.

14. The Laws of Ur-Namma, translated by M. T. Roth, in *Law Collections from Mesopotamia and Asia Minor* (SBLWAW; 2nd ed.; Atlanta: Scholars Press, 1997) 525 (all ANE quotations are from this edition).

15. Indeed the word translated 'perjurer' (lú ni-zuḫ = *šarrāqu*) is literally 'thief'. In his earlier *ANET* translation, Finkelstein commented thus on the word 'perjurer': "Literally, 'thief,' in that the false accusation is considered tantamount to an attempt at unlawful taking" (*ANET* 525 n. 25). Cf. J. J. Finkelstein, "Sex Offenses in Sumerian Law," *JAOS* 86 (1966) 371 n. 47.

16. Contra Finkelstein, who is at pains to explain the contrast between §28 and §29: "§26 [= §29] presents an aggravated extension of the same offense." See J. J. Finkelstein, "The Laws," *JCS* 22 (1969) 80. Tikva Frymer-Kensky ("Tit for Tat: The Principle of Equal Retribution in Near Eastern and Biblical Law," *BA* 43 [1980] 231) does not engage the contradiction of §28 and §29 and simply notes §29 as an exception: "The Laws of Ur-Namma are familiar with the idea of equal retribution for §16 [should be 26 = 29 in the edition used above–S.F.] provides that a witness who comes forward and refuses to take an oath to substantiate his claim must pay as much as was involved in that lawsuit. Nevertheless, the Laws of Ur-Namma do not apply this idea as a general operating principle; they limit it to this one case." In my opinion, §29 is closer to compensation than to retribution (which, furthermore, is

The criminality of the false witness is all the more serious if his testimony is volunteered on his own initiative rather than being solicited. He is thus at once witness and accuser. The situation is therefore somewhat related to §§13-14 of this code, where false *accusation* of an act requiring a river ordeal led to the imposing of a fine upon the perpetrator,[17] which should be viewed as imposing punitive damages. The perceived similarity of the situations ("witness" and "accuser") in these passages is borne out by the parallel laws of Hammurapi that exhibit the same juxtaposition:[18]

> §1 If a man accuses another man and charges him with homicide but cannot bring proof against him, his accuser shall be killed.
>
> §2 If a man charges another man with practicing witchcraft but cannot bring proof against him, he who is charged with witchcraft shall go to the divine River Ordeal, he shall indeed submit to the divine River Ordeal; if the divine River Ordeal should overwhelm him, his accuser shall take full legal possession of his estate; if the divine River Ordeal should clear that man and should he survive, he who made the charge of witchcraft against him shall be killed; he who submitted to the divine River Ordeal shall take full legal possession of his accuser's estate.
>
> §3 If a man comes forward to give false testimony in a case but cannot bring evidence for his accusation, if that case involves a capital offense, that man shall be killed.
>
> §4 If he comes forward to give (false) testimony for (a case whose penalty is) grain or silver, he shall be assessed the penalty for that case.

Laws 3-4, which deal with false or unsubstantiated[19] testimony, are linked to false accusation both by similar terminology and by being positioned after §§1-2. However, a stark contrast between Ur-Namma and Hammurapi is the substitution of *talio* for a monetary fine. In Ur-Namma, the false witness/accuser must pay a fine of 15 shekels, whereas in Hammurapi he is killed if it is a capital case, or he otherwise suffers appropriate *talio*. This substitution is paralleled by the same well-known substitution of *talio* for fine in cases of bodily injury[20] and demonstrates the wider context of the

basically a punitive concept). The removal of this exception opens the way to a clearer determination of the development of fine into *talio* for both bodily injury and false witnesses in parallel, as Frymer-Kensky indeed sought to establish there (p. 233).

17. "Shall weigh and deliver 3 shekels of silver"; "shall weigh and deliver 20 shekels of silver."

18. Translation is taken from Roth, *Law Collections*, 81-82.

19. See n. 20.

20. See S. E. Loewenstamm, "[Review of] Goetze, A: The Laws of Eshnunna," *IEJ* 7 (1957) 194; A. S. Diamond, "An Eye for an Eye," *Iraq* 19 (1957) 151-55; J. J. Finkelstein, "Ammisaduqa's Edict and the Babylonian 'Law Codes,'" *JCS* 15 (1961) 98; W. F. Albright, *History, Archeology and Christian Humanism* (New York: McGraw-Hill, 1964) 74; R. Yaron, *The Laws of Eshnunna* (Jerusalem: Magnes, 1969) 174-75; idem, "Bodily Injuries in Ancient Near Eastern Laws" [Hebrew], *P'raqim* 2 (1969-74) 228-34; S. Friedman, "Glosses and Additions in TB Bava Qamma viii" [Hebrew], *Tarbiz* 40 (1971) 443; S. M. Paul, *Studies in the Book of the Covenant in the Light of Cuneiform and Biblical Law* (Leiden: Brill, 1970; repr. Eugene, OR: Wipf & Stock, 2006) 74-77; B. S. Jackson, "The Problem of Exod. XXI 22-5 (Ius Talionis)," *VT* 23 (1973) 297-300; N. M. Sarna, *Exploring Exodus* (New York: Schocken, 1986) 182-85. On whether this was an internal evolution or the adoption of another existing system, see J. N. Postgate, *Early Mesopotamia* (London: Routledge, 1994) 290, and others.

development. For a false witness, *talio* was already mandated in the Sumerian laws of Lipit-Ishtar, which predated Hammurapi by almost two hundred years.[21]

At this point we must note Tzvi Abusch's learned essay on Hammurapi §§3-4.[22] In the course of a detailed philological analysis, Abusch defended a thesis that led to the following translation:

21. Sumerian law §17. See *ANET* 160, where the "rendering of this law is doubtful" (n. 15); and contrast Finkelstein ("Ammisaduqa's Edict," 80), where the content of false accusation or indictment is spelled out clearly. Roth's translation reads: "If a man without grounds(?), accuses another man of a matter of which he has no knowledge, and that man does not prove it, he shall bear the penalty of the matter for which he made the accusation."

Regarding bodily injury, contemporary scholarship often credits Hammurapi personally for the innovation of *talio* (Sarna, *Exploring Exodus*, 184); "Extant evidence indicates that talion is an innovation of the laws of Hammurabi" (J. Milgrom, *Leviticus* [AB 3; New York: Doubleday, 2001] 2134); "The institution of talionic punishment in LH was a conscious departure from what was plainly the established custom" (J. J. Finkelstein apud Milgrom, *Leviticus*, 2134). The talionic punishment of false witnesses in Lipit-Ishtar opens the question of the antecedents of Hammurapi (Lipit-Ishtar does not contain laws about bodily injury). E. A. Speiser wrote that Hammurapi "had a solid precedent for his own legal project; not only is his arrangement the same as Lipit Ishtar's, but there is an intimate relationship in contents wherever the individual enactments can be compared" (*Oriental and Biblical Studies* [ed. J. J. Finkelstein and M. Greenberg; Philadelphia: University of Pennsylvania Press, 1967] 540).

22. T. Abusch, "'He Should Continue to Bear the Penalty of That Case': Some Observations on *Codex Hammurabi* §§3-4 and §13," in *From Ancient Israel to Modern Judaism: Intellect in Quest of Understanding–Essays in Honor of Marvin Fox* (4 vols.; BJS 159; ed. Jacob Neusner, Ernest S. Frerichs, and Nahum M. Sarna; Atlanta: Scholars Press, 1989) 1:77-96.

> If a man came forward in a case to bear witness to a wrongdoing but then has not proved the statement that he made, if that case is a capital case, that man should be put to death. If he came forward to bear witness to (a claim for) barley or silver (but then has not proved the statement that he made), he should continue to bear the penalty of that case.

I must add here a note regarding the cultural/literary continuum that will enhance our understanding of these laws. The great similarity of structure and sequence from code to code[23] indicates that the same basic tradition was being transmitted for the most part, despite the change in terminology from "false witnesses" to "witnesses *unable* to substantiate a claim." Thus Ur-Namma spoke of a "perjurer" and Lipit-Ishtar and Hammurapi referred to the lack of substantiation ("and that man does not prove it" / "but cannot bring proof against him").

It follows from the above analysis that the payments imposed on false witnesses in the early stages of ancient Near Eastern law should be understood as "punitive damages" and not "compensatory damages," based on our distinction between Ur-Namma §28 and §29, קנסא and not ממונא.[24] We will see below that this characterization of the statute of false witnesses was explicit in tannaitic law and amoraic interpretation:

> The false witness is not sold [for testifying falsely about theft]; R. Aqiva says, "Neither is he required to pay by his own admission [of his falsehood], because [the payment] is punitive (קנס), and whenever [the payment] is punitive, one does not pay by his own admission." (*t. Mak.* 1.1)

If one voluntarily admits to a compensatory obligation, one still must pay. However, voluntarily admitting to punitive obligations exempts the perpetrator from punishment. His or her contrition removes the need for a fine.

> There is a tannaitic authority who considers [the statute of false witnesses] as punitive [. . .]. Rava said, "That is demonstrated by the fact that they caused no harm, but are still killed." (*b. Mak.* 2b)[25]

23. The term *code* is used in this essay for convenience.

24. The word קנס is usually considered to derive from Latin *census*, despite its impressive distribution in West Semitic languages; see J. C. Greenfield, "Studies in the Legal Terminology of the Nabatean Funerary Inscriptions" [Hebrew], in *Henoch Yalon Memorial Volume* (Ramat Gan: Bar-Ilan University Press, 1974) 75–76 and n. 58. Regarding the possibility of Semitic etymology, see A. Radzyner, *Foundations of 'Dine Qenasot' in Talmud Law* (Ph.D. diss., Bar-Ilan University, 2001) 27–38.

25. Cod. Jerusalem, Yad Harav Herzog (*Hendkind Talmud Text Databank*, CD ROM, Saul Lieberman Institute of Talmud Research). A. Enker writes regarding the Deuteronomy passage: "This law cannot have contemplated compensation of the victim for his injuries, because it envisages situations in which the perjury was uncovered before any penalty was imposed on the witness's intended victim. Punishment *alone* is the chosen mode" ("Lex Talionis: The 'Plain Meaning' of the Text," *S'vara* 2 [1991] 54–55 [emphasis added–S.F.]. In other words, it would be more than forced to claim that the status of this *talio* changed in terms of whether the perjury was uncovered "before" or "after" the verdict was carried out (and in our opinion, it may not operate at all "after").

I arrived at the basic punitive nature of the ancient Near Eastern institution of "false witnesses" through internal analysis of the Ur-Namma law and have demonstrated that this punitive determination was derived logically from biblical law by the talmudic tradition.

It is now interesting to note how much effort and discourse were devoted to this very point in Driver and Miles's commentary on Hammurapi law, §4 which resulted in a belabored but, fortunately, correct conclusion. The point of departure was the terminology in §4 (*arnum* 'penalty'):

> The next problem is to discover what is meant by saying in §4 that the offender "shall bear the penalty of that case [. . .]"; for a "penalty" ([Babyl.] *arnum*) is not suitable to a claim for corn or money, for a debt or damages, or for a breach of contract, as for example when a farmer has to pay corn "like his neighbour [. . .]." The term occurs frequently in the documents, especially when a court is said "to inflict a penalty" ([Babyl.] *arnam emēdum*) on a plaintiff who has brought a vexatious claim. Sometimes a definite *arnum* is prescribed such as shaving half a man's head to make him an object of ridicule; but this is probably an additional penalty, somewhat similar to the Attic προστίμημα, which was an additional penalty inflicted in certain cases by the court. Here the phrase means that the false witness must pay the penalty applicable to the case in which he has given the false evidence, and what this means is quite obvious: the principle is that he must suffer what he has tried by his false evidence to bring upon another person. The penalty, therefore, will be an amount equivalent to that of the corn or money which the man against whom he gave evidence would have had to pay if it had been true; it is called *arnum* as it is a penalty which the false witness is condemned to pay, although the suit between the parties was for breach of contract.[26]

In a word, קנסא.

26. G. R. Driver and J. C. Miles, *The Babylonian Laws* (Ancient Codes and Laws of the Near East; 2 vols.; Oxford: Clarendon, 1952–55) 1:67–68.

Talio: *Compensatory or Punitive?*

Why did Miles[27] raise a question with regard to Hammurapi law §4 and not §3? It is clear that, were it not for the word *arnum* 'penalty', he would have taken §3, *talio*, as being closer to "compensatory damages" than "punitive damages." *Talio* appears to him to be a type of "compensation"—an *eye* for an *eye*.

This point deserves elaboration. My distinction between Ur-Namma §28 as a monetary fine and §29 as compensation, and my thesis that Lipit-Ishtar §17 and Hammurapi §§3–4 are a talionic outgrowth of that fine lead to the conclusion that this *talio* is punitive. And indeed, it appears that all *talio* is punitive. Although *talio* is tailored to match the damage committed, it does not *compensate* the injured party but satisfies his and society's desire for justice through punishment befitting the crime—or, if you wish, just vengeance.[28]

Retaliation is punitive rather than compensatory. Matching retaliation to a deed committed appears to be similar to compensation, in that it is calculated to mirror the offense exactly, but in truth it is penalty. Retaliation for *intent alone*, before the fact, is all the more punitive because the deed was not done, and retaliation is, in this case, punishment for the unsuccessful attempt. Miles assumed that this *talio* was closer to compensation but was forced to a correct conclusion, at least for the second category, by the use of the word *arnum* 'penalty' in the Hammurapi text.

Are They Slain if They Have Slain?: The Case for Limited Culpability

Miles's next question is also quite germane to our subject. Was a separate trial held for the false witness, or was his trial part and parcel of the case for which he offered testimony? Once more, Miles presents a lengthy investigation of possibilities, using English law as a backdrop and refraining from a definite decision:

> The last question is whether the false witness was tried at the hearing of the principal case or in a subsequent proceeding. The text says that he has not proved what he said; it does not say merely that his evidence was not believed or accepted by the court. No final answer can be given, since so little is known of Babylonian procedure, but Babylonian justice was certainly not so technical, as that of English law. The plaintiff in a suit might not only lose his action but also be punished for bringing it to the court of trial. It, therefore; seems possible, if not probable, that the court of trial dealt with any question that might arise in the proceedings and itself was competent to try and condemn the witness who has perjured himself.[29]

27. Presumably Miles was the author, because, of the two editors, he was the legal authority.

28. On justice and vengeance, see Deut 32:41; Ps 149:7, 9.

Several considerations enhance the probability that this suggestion is correct. All of the rhetoric of these paragraphs in the Laws of Hammurapi pertains to the original trial only.[30] The same is true, as we have seen, of the biblical parallel, adduced in detail by Miles for other aspects of this law but not for false witness. In Deuteronomy, the false witness/accuser becomes the litigant facing the accused: they are "the two parties to the dispute" who "appear before the Lord."

Even more to the point is the low amount of fine imposed on the perjurer in the earliest form of this law. It appears that his ineffective false testimony in the context of the original trial was deemed an impropriety to which the low amount was fitting. However, if there were a separate trial for perjury, or were a separate trial to take place after the false testimony had succeeded in convicting the accused, we would expect a much stiffer penalty.[31] The relatively small penalty of Ur-Namma became *talio* in Lipit-Ishtar and Hammurapi within the general framework of converting certain fines to *talio*. The literary tradition of applying *talio* to false witnesses is maintained in Deuteronomy.

The actual Sitz im Leben of the "false witness" procedure across this continuum of legal traditions is the original courtroom. The falsity was uncovered through immediate examination of the witness, most likely fueled by the passionate denial of the accused, given the fact that they were "the two

29. Driver and Miles, *The Babylonian Laws*, 1:68.

30. Compare §5, which is against a judge who changes his decision after the trial. As noted by Cyrus Gordon, "The absolute concept of law precluded any review of a case in the courts, or the reversal of any verdict. A judge who could not make up his mind, or who could not abide by his own decision, would not last long in his judgeship." See C. H. Gordon, *Hammurapi's Code: Quaint or Forward Looking?* (New York: Rinehardt, 1957) 4.

31. This consideration helps ameliorate J. J. Finkelstein's lack of ease over the low amount: "surprisingly mild" ("Sex Offences," 371); "The prescription of a fixed penalty of fifteen shekels implies that the issue at stake did not involve the accusation of a serious crime, and did not involve the solemnity of the oath" (idem, "The Laws," 79–80).

parties to the dispute." There is not a shred of evidence indicating that a trial of the false witness would be opened after the accused was executed.[32]

Thus we have seen that biblical, ancient Near Eastern, and rabbinic law all deal with a false witness in the context of the trial in which he presented his false testimony. In Deuteronomy, the victim-to-be turned accuser; the witness and the accused-turned-accuser now operate as "two litigants" in a system in which victim-initiated litigation may have been the only type of litigation. In ancient Near Eastern and rabbinic law, the treatment of false witnesses was expressly classified as punitive, and thus, in tannaitic law punishment was waived for false witnesses who voluntarily admitted their falsehood. These conclusions seem more compatible with legal conceptualizations of the false witness as having breached the propriety of courtroom procedures than as having been the direct and responsible cause of the damage inflicted by the court's verdict.

Back to the Baraita

Thus in historical perspective, there is an uncanny accuracy to the Talmud's *baraita*: "If they have not slain they are slain; but if they have slain they are not slain." It may seem illogical, but at the same time it corresponds well with the root reality of this legal institution in ancient Near Eastern law.

Furthermore, Geiger and the early *Wissenschaft* authors vented their spleen on the Babylonian *baraita* but maintained that the "Pharisaic" position in the Mishnah does *not* exclude punishment of the witness after the accused has been executed. This assumption now bears reevaluation. This is the passage referred to:

> False witnesses are put to death only after judgment has been given. For, the Sadducees used to say: Not until he that was falsely accused has been put to death, as it is written, "Life for life" (Deut 19:21). The Sages answered: Is it not also written, "Then shall ye do unto him as he had thought to do unto his brother" (Deut 19:19)? Thus his brother must be still alive. If so, why was it written, "Life for life"? I might think that they were put to death as soon as their evidence was received [and found false]. But Scripture says, "Life for life"; thus they are not put to death until judgment [of death] has been given [against him that was falsely accused]. (*m. Mak.* 1:6)

32. Contra Milgrom, who maintains that "life for life" in Deut 19:21 fits these witnesses in that their "testimony may have put someone to death" and therefore means "literally, life for life" (*Leviticus*, 2123).

I have dealt elsewhere with the entirety of this passage in the Mishnah[33] and will address only one aspect here. The verse "you shall do to him as he schemed to do to his brother/fellow" is interpreted as "his brother/fellow is still alive." Does this not mean that the author of the Mishnah presents the Pharisees as limiting the punishment of false witnesses to the situation in which the accused is still alive, as stated in the Babylonian *baraita*, "if they have slain they are not slain"? If so, the *baraita* should be interpreted as simply making explicit what the Mishnah already says. It was the assumption that the position of the *baraita* was unique or unreasonable that must have led to explaining the Mishnah as meaning "*even* if the accused is alive"—that is, "whether alive or dead."[34]

I propose reexamining the possibility that the simple meaning of the Mishnah indeed limits this law to the situation in which "his brother [= the accused] is still alive."[35]

Development of the Rabbinic Laws of the "Plotting Witnesses"

Our task will be made easier if we have a proper understanding of the stages of development undergone by the rabbinic laws with regard to a "plotting false witness." Many scholars take as their point of departure *m. Mak.* chap. 1, where the law of false witnesses applies only to a situation in which

33. S. Friedman, "'If They Have Not Slain They Are Slain; but if They Have Slain They Are Not Slain' (*b. Makkot* 5b): Tradition or Transition?" [Hebrew with English summary], *Sidra* 20 (2005) 171–93; there I seek to demonstrate that the position ascribed to the Saducees is an artificial one that was never advocated historically by them or by any other rabbinic authority.

34. This interpretation is still maintained by Shlomo Naeh ("A Study," 111, 113), who takes the position that the Mishnah's explanation of the verse is not "exclusive." In other words, the Mishnah says "even" and not "only." However, it appears to me that this sort of midrash is meant to be absolute. If the Torah says he is alive, how can it be read as either alive or dead? Naeh goes on to say that the biblical phrase "you shall do to him as he schemed to do to his fellow" can even refer to when the false testimony led to a verdict that was indeed executed (see ibid., n. 12; compare P'ne Yehoshua on *b. Mak.* 5b: "כאשר זמם includes whether they killed or did not kill"). However, if the accused is one of the "two parties to the dispute" standing before the judges, he must certainly be alive.

35. See below, n. 81.

there are two false witnesses, and their falsehood can be established only by the arrival of another pair of witnesses, who declare, "How can you testify so, for lo you were with us that same day in such and such a place?" Thus the testimony of the two "plotting" witnesses is completely valid as a basis for arriving at a judgment and executing it, unless or until they are proven false in a formal procedure that involves two other witnesses who testify: "You were with us." This has all the appearances of a second procedure which can take place at any later date–that is, even after the (falsely) accused is executed.

Taken historically, however, this law is simply the final stage of a long development process. We have seen that the ancient Near Eastern antecedents and the verses in Deuteronomy present the judgment of the false witness as part of the original trial. Even Deuteronomy speaks of *one* witness. The witness's testimony may not be valid in itself for carrying out a verdict, but he is still liable to punishment for false accusation. There is no mention of other witness(es) needed to declare, "You were with us," and there is every reason to assume that the judges' conclusion of falsity, based on internal contradictions or similar evidence, is sufficient. This is still the case in the book of Susanna:

> 54. Now then, if you really saw her, tell me this: "Under what tree did you see them being intimate with each other?" He answered, "Under a mastic tree." [. . .] 56. Then he put him aside, and commanded them to bring the other. And he said to him [. . .], "Under what tree did you catch them being intimate with each other?" He answered, "Under an evergreen oak." [. . .] 61. And they rose against the two elders, for out of their own mouths Daniel had convicted them of bearing false witness; 62. and they did to them as they had wickedly planned to do to their neighbor; acting in accordance with the law of Moses, they put them to death. Thus innocent blood was saved that day. (RSV)

Here, contradictory testimony is a sufficient basis for carrying out Deuteronomy's punishment, reflecting an older stage of Halakah before the acknowledgment "you were with us" was required.[36] Although the examination of the witnesses by Daniel[37] took place "as she [Susanna] was being led

36. Cf. Geiger, *Urschrift*, 195; D. Henshke, "Scheming Witnesses," *Tarbiz* 72 (2003) 345–88.

37. The decision that the witnesses are זממים 'scheming, plotting' was determined during examination, in accordance with the simple meaning of Deut 19:18, and it is reasonable to think that this was still the practice by the time of Shimʿon ben Shetaḥ (see more below). The regular tannaitic practice was to examine the witnesses one by one (*m. Sanh.* 3:6, 5:1–4; *m. Roš Haš.* 2:6).

Charles explains the ultimate identification of the youthful champion of justice as the biblical Daniel as being inspired by the literal meaning of this name: 'El is my judge', thus aptly fitting his character. See R. H. Charles, *The Apocrypha and Pseudepigrapha of the Old Testament in English* (2 vols.; Oxford: Clarendon, 1913) 1:643. The talmudic counterpart of "Daniel" was "ben Zakkai": "The more a judge examines the witnesses, the more he is deserving of praise: Ben Zakkai once examined the witnesses even to the point of inquiring about stalks of figs" (*m. Sanh.* 5:2). The Talmud (*b. Sanh.* 41a) wanted to interpret this as referring to Rabban Yoḥanan ben Zakkai, which is how Sherira, Epstein, and others came to the conclusion that the Mishnah's language in this case was fixed before the destruction of Jerusalem. More likely, it reflects the sagacious judge Susanna (cf. Geiger, *Urschrift*, 195), who is also dubbed "the one who finds merit (זכות) for the innocent." See also R. Margaliot (*On Names and Pseudonyms in the Talmud* [Hebrew] [Jerusalem: Mosad Harav Kook, 1960] 10), who wishes to explain R. Yoḥanan's patronym as containing this symbolism. On these matters, see my "If They Have Not Slain."

38. Sus 49–50: "Return to the place of judgment [. . .]." Then all the people returned in haste. And the elders said to him, "Come, sit among us [. . .]."

39. Although *m. Mak.* 1:6 presents this as the position of the Pharisees only, with the Sadducees requiring a sentence of execution first, I have maintained that this does not represent a historical position of the "Sadducees" or any other early Halaka (Friedman, "If They Have Not Slain"). Those who interpret the Mishnah as representing a historical controversy between Sadducees and Pharisees sought to read Susanna as an anti-Sadducean polemic, written by a Pharisee, and thus were forced to ascribe a relatively late date to the composition of Susanna rather than what might otherwise be concluded. Charles claims that the book "also seeks to vindicate the execution of false witnesses, although their victim may be delivered before his sentence was carried out. The story is a product of the Pharisaic controversy with the Sadducees in the later years of Alexander Jannaeus, *c.* 95–80 B.C."(Charles, *Apocrypha*, 638 [cf. p. 643]). I maintain that the "Pharisaic" position is the sole representative of ancient Halakah and that the "Sadducean" position is artificial.

40. "Once, Simon the son of Shetaḥ sentenced to death one false witness. Judah b. Tabbai then said to him: May I live to see the consolation if you did not shed innocent blood."

away to be put to death," it was apparently immediately after the trial, which was reopened for this purpose.[38] The false witnesses were executed even though the accused was not.[39]

The simple meaning of Deuteronomy, which is that false-witness procedures were conducted against a single witness, still appears to have been operating in the courtroom of Shim'on ben Shetaḥ (Mekilta, kaspa 20, 327), where a single witness was executed for falsehood.[40] Apparently this

was also still the judge's decision alone and was prior to the period when the requirement to declare "you were with us" was introduced.[41]

The introduction of the later formality may have flowed out of a desire to soften the edge of the apparent irrationality of the laws of false witnesses, once their basic function as avoiding קנסא 'punitive damage' was no longer emphasized.[42] After their rationality was improved by these additions, the tendency to think of them in logical terms (for example, a fortiori; *b. Mak.* 5b) was natural, and their inherent paradox ("if they have not slain they are slain; but if they have slain they are not slain") became unbearable to the reasonable observer.[43]

Compensatory Damages

I have interpreted the apparent conflict between Ur-Namma §28 and §29 as a contrast between fine and compensation. "He shall make compensation of whatever was the object of the case"[44] is the oldest formulation of compensatory damages we have. The contrast between the two categories also appears in Hammurapi §§206–7:

> §206 If an *awīlu* should strike another *awīlu* during a brawl and inflict upon him a wound, *that awīlu* shall swear, "I did not strike intentionally," and he shall satisfy the physician [i.e., pay his fees].
>
> §207 If he should die from his beating, he shall also swear ["I did not strike him intentionally"]; if he [the victim] is a member of the *awīlu*-class, he shall weigh and deliver 30 shekels of silver.

"Pay for the physician" is a clear example of compensation.[45] I contend that the text's emphasis on the fact that the wound was not inflicted deliberately is the key to distinguishing between punitive damages (definitely *talio*, according to Hammurapi, for a case in which there was intention to

41. Cf. B. Lifshitz, "On Six Double Meaning Words or Phrases" [Hebrew], *Tarbiz* 51 (1982) 416. This understanding is independent of Lifshitz's further thesis there.

42. And after the "correction," even more irrationality ensues; see *b. B. Qam.* 72b (and MSS).

43. Even for Geiger, who correctly assessed some of the evolution.

44. The more-literal *ANET* translates: "He must make good as much as involved in that lawsuit."

45. "The penalty for wounding is pure compensation" (R. Westbrook, *Studies in Biblical and Cuneiform Law* [Paris: Gabalda, 1988] 76). Compare Exod 21:18–19; Hittite Law §10 (Roth, *Law Collections*, 218–19). See U. Cassuto, *A Commentary on the Book of Exodus* (trans. Israel Abrahams; Jerusalem: Magnes, 1967) ad loc.; M. Greenberg, "Crimes and Punishments," in *IDB* 1:740; Paul, *Book of the Covenant*, 67–69.

harm)[46] and compensation (when there was no intention to harm). Taking into consideration other passages in the Laws of Hammurapi,[47] we can cautiously approach a tripartite distinction: full *talio* was the punishment for intentional bodily injury within the aristocracy, lesser punitive *talio* for injury due to criminal negligence, and compensation for unintentional injury.[48]

In historical perspective, *talio* was punitive, and the monetary payments that it replaced were also punitive. This is supported by the fact that fixed tariffs were legislated for these payments,[49] which paralleled the same development that we noted above regarding the false witness, where *talio* supplanted fines that were levied as punishment for perjury. This corrects the widespread notion that the system of monetary payments that preceded *talio* were considered compensation or restitution.[50]

Lack of intention may be a reason for levying compensatory payments in place of penalty, but it is not the sole reason. *Talio* is a severe penalty and may be limited to severe injuries—namely, *loss of limb*. Less severe injuries, not resulting in permanent loss or disfiguring,[51] are an occasion for assessing actual financial loss. This perhaps is the key to understanding the differences between Hammurapi §206 and Exod 21:18–19, in light of the great similarities that also exist between the two passages.

46. Contra Milgrom, who writes: "In ancient Near Eastern talion, intention is essentially irrelevant" (*Leviticus*, 2136).

47. Laws 116, 218.

48. Going beyond Miles (in Driver and Miles, *Babylonian Laws*, 1:412–13), who again did not explicitly mention the category of compensation. Radzyner correctly categorized ancient Near Eastern *talio* as punitive (*Foundations*, 67 n. 12).

49. Cf. Jackson, "The Problem of Exod. XXI," 282, 298–99.

50. See authorities cited by Paul, *Book of the Covenant*, 77 n. 4; Greenberg, "Crimes"; Friedman, "TB Bava Qamma viii," 443; Sarna, *Exploring Exodus*, 184, 185; H. B. Huffmon, "The oldest Near Eastern law provides for compensation, whereas the Laws of Hammurapi," etc. (*ABD* 4:322); Milgrom, *Leviticus*, 2134: "The oldest ancient Near Eastern laws provide for compensation (Sumer, Ur Namma, Eshnunna, Hatti), but later Mesopotamian laws prescribe talion (LH and CH, MAL)." Apparently, reversing the historical sequence in the minds of scholars had often left the conceptualization unchanged. Even though scholars eventually took *talio* to be later than monetary payments, these same scholars still tended to maintain the previous conceptualization that the payments were compensatory (Driver and Miles, *Babylonian Laws*, 1:408), a conceptualization that flowed specifically from the (now rejected) assumption that payments replaced *talio*. My analysis leads to viewing the monetary payments as fines and, concomitantly, closer to criminal law than civil (cf. Frymer-Kensky, "Tit for Tat," 230; note, however, her stand cited above, in n. 15).

51. See n. 63.

Hammurapi	*Exodus*
§206 If an *awilu* should strike another *awilu* during a brawl and inflict upon him a wound, that *awilu* shall swear, "I did not strike intentionally," and he shall satisfy the physician [i.e., pay his fees]. §207 If he should die from his beating, [the assailant] shall also swear ["I did not strike him intentionally"]; if [the victim] is a member of the *awilu*-class, [the assailant] shall weigh and deliver 30 shekels of silver.	When men quarrel and one strikes the other with stone or fist, and he does not die but has to take to his bed if he then gets up and walks outdoors upon his staff, the assailant shall go unpunished, except that he must pay for his idleness and his cure. When a man strikes his slave, male or female, with a rod, and he dies there and then, he must be avenged. But if he survives a day or two, he is not to be avenged, since he is the other's property.

The impressive literary parallelism of these two passages tempts one to interpret them alike; namely, a sentence of compensation rather than penalty in Exodus is exacted if the assailant did not intend murder, as in the Hammurapi Laws.[52] The blow delivered in the Exodus passage "with stone or fist"[53] was a severe blow, and there was every reason to expect that it might be fatal. Were the injured party to die, the assailant would *not* go unpunished but would presumably be executed.[54] Thus the act was not at all unintentional. However, the person who was attacked not only survived but completely recovered, suffering *no loss of limb*. No fine was imposed, but compensation for loss was required.[55] Hammurapi cast the entire episode in the light of intent or lack of intent, which was to be determined by the perpetrator's oath. Exodus maintains the same literary format but does not absolve the attacker for stating that murder was not intended. Therefore, the situation itself is one that may indeed be considered intentional. The injury is defined as nonpermanent and justifying compensation alone, which is presumably the opposite of Hammurapi's "inflict upon him a wound."[56]

A distinction such as Hammurapi's between intentional injury demanding *talio* and unintentional injury for which payments are made is found in

52. See my "TB Bava Qamma viii," 431; Paul, *Book of the Covenant*, 67–68, 74.
53. Compare Num 35:16–18.
54. See Philo, *On the Special Laws* 3.106.
55. See Jackson, "The Problem of Exod. XXI," 290–91, 299 and references cited there on p. 291 n. 1.
56. The fact that the literary format has been maintained, rather than appearing as a free composition or full revision explains riddles such as "we would expect to find still another *mishpat* dealing with the procedure in case of permanent injury results" (see J. Morgenstern, "The Book of the Covenant, Part II," *HUCA* 7 [1930] 65 n. 61 [although considered there to be "unpremeditated"], and others).

the Mekilta in the name of the conservative *tanna*, R. Eliezer:

> R. Eliezer says: "eye for eye," etc. I might understand that whether one injures intentionally or unintentionally one is to pay only an indemnity. But behold Scripture singles out the one who inflicts an injury intentionally, declaring that he is not to pay money but is actually to suffer a similar injury. (*Nezikin* 8)

The other *tannaim*, who substituted payment for *talio*, divided the cash settlement for personal injury into five categories: "One who wounds his neighbor is liable to pay for the following five things: damage, pain, healing, loss of time, and disgrace" (*m. B. Qam.* 8:1), which were required for both intentional and unintentional injury,[57] like the medical bill mentioned by Hammurapi. Of the five categories, "healing" and "loss of time" are mentioned explicitly in Exod 21:19 ("he must pay for his idleness and his cure").[58] They are compensation in the most literal sense, corresponding to actual monetary loss and, as I have pointed out, are both mentioned in ancient Near Eastern laws.[59] Evaluating bodily damage and pain in monetary terms does not necessarily make them compensation. This categorization—namely, that all five payments are compensatory—was achieved expressedly only in the later, anonymous stratum of the Babylonian Talmud.[60]

Maimonides still maintained that only "healing" and "loss of time" are compensatory, but "damage," "pain," and "disgrace" are punitive and thus in conflict with the latest talmudic stratum. His position is rejected out of hand by Raavad (Abraham ben David of Posquières): "I do not find penalty [קנס] in the laws of bodily damage."[61]

57. *M. B. Qam.* 2:6; *Mekilta d'Rashbi* on Exod 21:22 in *Mekilta d'Rabbi Šim'on b. Jochai* (ed. J. N. Epstein and E. Z. Melamed; Jerusalem: Mekize Nirdamim, 1955) 176; small print. See A. Weiss, *Studies in the Law of the Talmud on Damages* [Hebrew] (Jerusalem: Feldheim, 1966) 382–90. Regarding "disgrace," see below.
58. This law entitled "When Men Quarrel," refers to "healing" and "loss of time." Verses 22–25, entitled "When Men Fight," proscribes *talio*. Regarding the second, *Mekilta d'Rashbi* says: "Here he is required to pay 'healing' and 'loss of time'; there 'damage' and 'pain.' By analogy they all apply to both" (ed. J. N. Epstein, 176). See also *Midrash Haggadol: Exodus* (ed. M. Margulies; Jerusalem: Mosad Harav Kook, 1967) 476, lines 17–18.
59. Hammurapi Law §206; Hittite Law §10 (Roth, *Law Collections*, 218–19).
60. *B. B. Qam.* 4b, 84b. See my "*TB Bava Qamma* VIII," 423–32. It is implicit in *m. Šeb.* 5:5. In the earliest stratum of tannaitic law, damage payments were considered punitive; see my forthcoming study, "Your Ox Killed Mine."
61. *To'en V'nit'an* 1:16. Maimonides wrote: "'Healing' and 'loss of time' are compensatory (ממון) and not punitive (קנס), for if he does not pay him he suffers a real monetary loss" (*Hovel uMaziq* 5:7).

Rabbinic Laws on "Disgrace" Compared with ANE Analogues

For my purposes, "disgrace" is the most interesting category. I will discuss three points at which "disgrace" differs from the other categories of payment for bodily injury, and in each case there is a specific connection with parallels in cuneiform law. These three points are the question of intention, the literary form of the laws, and social stratification.

First, we note the fact that intention is required in tannaitic law before the perpetrator can be fined for disgrace, in clear distinction from other payments, which are obligatory whether the act was intentional or not. The halakic midrash on Deuteronomy derives this position from the language of Scripture:

> If two men get into a fight with each other, and the wife of one comes up *to save her husband* from his antagonist and puts out her hand and seizes him by his genitals, you shall cut off her hand; show no pity. (Deut 25:11-12)
>
> *To save her husband.* Rabbi says, "Because we have found that there are perpetrators of damage regarding whom the Torah imposes responsibility for unintentional deeds to the same degree as intentional deeds, you might think here also. Therefore it says explicitly, *and puts out her hand and seizes him by his genitals,* in order to teach that one is not obligated to pay for "disgrace" unless the act was committed with intention. (*Sipre Deut.* §292, p. 311)

Legal theory must deal with the relationship of "intention" and "disgrace" in several ways. Is the *suffering* of disgrace by the victim conditional upon intention to *cause* disgrace? No intention, no disgrace? Are the specific physical acts that are linked to disgrace by literary tradition at all possible without intention?[62] Can you slap someone in the face unintentionally?

62. Yaron tended to interpret the acts described in the Laws of Eshnunna as being possible only if intentional:

> Rather more complicated are the provisions on bodily injuries. Sec. 42 deals with five possible injuries, some of which can hardly have been caused without intention. The first concerns the biting off of a man's nose: in this very peculiar case both negligence and accident seem to be excluded, but it may still be questioned whether intention was a material element. More significant may be the last case, that of *meḫeṣ letim,* 'slap in the face'; if this is correct, intention must be implied; it is the insult rather than the bodily injury which is the main point. It is therefore difficult to agree with Nörr [. . .] that the section takes into account only what he calls the exterior result of the deed. (Yaron, *Eshnunna,* 176; cf. idem, "Bodily Injuries," 228)

The Mishnah addresses itself to the separation of these categories. Disgrace can indeed be suffered even when there is no intent, and the specific acts can be committed by a person without intent. This separation is necessary in order to register the legal point meaningfully: even when the acts do take place, and disgrace is indeed suffered by the victim, the perpetrator is exempt when he acted unwittingly!

How is a slap in the face possible unintentionally? In order to solve this legal riddle, the "sleeping embarrassor" is introduced. And if this is not enough, the "embarrassor" who fell from a roof is presented. Nobody falls off a roof intentionally, but if someone does fall off accidentally, he may indeed cause bodily damage or indignity to someone else on the way down. He will have to pay for the physical harm but not for the indignity:

> If he that inflicted the indignity was asleep he is not liable. If a man fell from the roof and caused injury and inflicted indignity, he is liable for the injury but not for the indignity, for it is written, "and puts out her hand and seizes him by his genitals." A man is liable for paying "disgrace" only when he acts with intention. (*m. B. Qam.* 8:1)

This exemption, at least in the developmental stage of the law quoted, cannot be explained by the impossibility (objective or subjective) of causing disgrace unintentionally. One can of course claim that the Midrash created the law simply to assign some legal meaning to the words in the verse, which does indeed happen very often in halakic midrashim.[63] Here, however, it appears that some type of prior juridical principle is operating. In what follows, we will explore the hypothesis that, of all the five categories, "disgrace" reflects most closely the legal definitions of ancient Near Eastern law, in which injury was dealt with punitively (קנסא) and therefore could apply only to intentional acts.

On the legal continuum regarding striking the cheek, see N. M. Sarna, "Legal Terminology in Psalm 3:8," in *"Sha'arei Talmon": Studies in the Bible, Qumran, and the Ancient Near East Presented to Shemaryahu Talmon* (ed. M. Fishbane, E. Tov, and W. W. Fields; Winona Lake, IN: Eisenbrauns, 1992) 175–81. Even though tannaitic law speaks of liability for disgrace only when intention to embarrass is present (see also *m. B. Qam.* 3:10, 8:2), this was extended in the Babylonian Talmud to include intention to injure that resulted in causing disgrace (*b. B. Qam.* 27a, 35a).

63. It is my opinion that the pendulum should be swung back a bit from "supportive" to "creative" in characterizing the orientation of Midrash to legal material.

One of the marked literary features of ancient Near Eastern laws concerning bodily damage is the price list:

> If a man bites the nose of another man and thus cuts it off, he shall weigh and deliver 60 shekels of silver; an eye–60 shekels; a tooth–30 shekels; an ear–30 shekels; a slap to the cheek–he shall weigh and deliver 10 shekels of silver. (Eshnunna §42)

Even in the Laws of Hammurapi where *talio* takes the place of monetary penalty, disgrace is still treated through tariff:

> §203 If a member of the *awīlu*-class should strike the cheek of another member of the *awīlu*-class who is his equal, he shall weigh and deliver 60 shekels of silver.[64]

This literary form, a list of tariffs for "disgrace," survived in talmudic law:

> If a man cuffed his fellow, he must pay him a *sela*. R. Judah says in the name of R. Jose the Galilean: One hundred *zuz*. If he slapped him he must pay him 200 *zuz*. If [he struck him] with the back of his hand he must pay him 400 *zuz*. If he tore his ear, plucked out his hair, spat and his spittle touched him, or pulled his cloak off him, or loosed a woman's hair in the street, he must pay 400 *zuz*. (*m. B. Qam.* 8:6)[65]

64. This characterization, that the act dealt with (striking the cheek) approaches a pure case of "disgrace," may mitigate the "inconsistency" (cited by Paul, *Book of the Covenant*, 77) of Hammurapi's veering away from *talio* in this case; contra Milgrom, who sought an explanation for the inconsistency by taking this to be "physical invasion" rather than "physical loss" (*Leviticus*, 2135). I propose three categories: (1) permanent loss or disfiguration (thus explaining Exod 21:25 discussed by Milgrom there), (2) temporary damage (see n. 54 above), and (3) disgrace. A comment may be offered here on "measure-for-measure" *talio* in the Bible. Many scholars have noted the "clean" nature of biblical laws of injury, such as *talio* formulas (which caused some to take them as formalistic principles only). Mikliszanski wrote: "In Hebrew legislation there is no cutting out of tongue, burning of breasts, shattering of limbs, or similar atrocities of the *lex talionis*, found in other ancient penal codes" (see J. K. Mikliszanski, "The Law of Retaliation and the Pentateuch," *JBL* 66 [1947] 295). The only exception is the punishment of the offending (not simply immodest) woman of Deut 25:11-12 (contra Mikliszanski, who does not wish to take this literally) which parallels MAL §8 (on which, see M. Weinfeld, *Deuteronomy and the Deuteronomic School* [Oxford: Oxford University Press, 1972; repr. Winona Lake, IN: Eisenbrauns, 1992] 292-93).

65. The parallel law in the Tosefta (9.31) describes a "blow of disgrace" in terms of striking someone with writing materials (paper, *pinax*, skins, etc.) held in the hand (of a scribe?). It then proceeds to adduce verses that mention the "slap to the cheek," Ps 3:8, Mic 4:14, Isa 50:6, which support the Tosefta's contention that the payment is not for any pain from the blow but for the disgrace. Compare the Roman tariff lists (Westbrook, *Studies*, 71-72). Regarding these tariffs, a cultural parallel can be adduced, for example, when the reasonable amount of the tariff encourages attacks that can be easily paid for:

> The scoundrel Hanan, having boxed another man's ear, was brought before R. Huna, who ordered him to go and pay the plaintiff half a *zuz*. Because [Hanan] had a battered *zuz* he desired to pay the plaintiff the half *zuz* [which was due] out of it. But as it could not be exchanged, he slapped him again and gave him [the whole *zuz*]. (*b. B. Qam.* 37a)

L. Veratius is said to have amused himself by slapping people in the face and then ordering a slave who followed him with a bag full of money to pay each of them the 25 *asses* fixed by the Twelve Tables. See H. F. Jolowicz, *Historical Introduction to the Study of Roman Law* (Cambridge: Cambridge University Press, 1952) 287. The two accounts share the literary genre of humorous buffoonery.

66. The jurisdiction of the sages in Babylonia was limited.

67. Explained away by the majority of authorities following the later (anonymous talmudic stratum) characterization of all five categories as ממונא, including "disgrace" (*Tosafot* 27b, 84b, s.v. קנסא vs. Rashi 27b).

A list of fines for damages already found in the Jerusalem Talmud (*y. B. Qam.* 8.6, 6c) is cited in the Babylonian Talmud as an introduction to a question:

> R. Hisda sent the following message to R. Naḥman: "It was said: [it is the custom of the judges to fine] 'one who kicks the other with his knees three [selas]; one who kicks the other with the foot, five; one who strikes the other with his fist, thirteen.' What is the fine if one strikes his neighbor with the handle of a hoe or with the iron of the hoe?" He returned the following answer: "Hisda, Hisda, are you collecting fines (קנסא) in Babylonia?" (*b. B. Qam.* 27b)[66]

Not only does this passage preserve the ancient Near Eastern form of lists for damages, it also maintains the understanding that the amounts stipulated are not compensatory but, rather, punitive.[67] Jewish courts in talmudic Babylonia, according to some sources, did not have the authority to impose punitive fines.

The third characteristic of "disgrace" is the surprising fact that the ancient class distinction for payment of damages, so familiar from Hammurapi, survives in talmudic law for "disgrace" alone:

> The disgrace is appraised with consideration for the station and rank of the one who causes it as well as of the one who suffers it. (*m. B. Qam.* 8:1)
>
> There is a difference if one is disgraced by an aristocrat or a plebeian; there is a difference between a great person suffering disgrace and a lowly

> person suffering disgrace, the son of the great being disgraced and the son of the lowly being disgraced. (*t. B. Qam.* 9:12)

This emphasis on social status as a determination of the level of payment due is surprisingly similar to the Laws of Hammurapi. This concentration of terms for social differentiation based on wealth as being equivalent to aristocratic nobility is unprecedented in talmudic literature.[68]

"The son of the great" here appears to be the exact stylistic and functional equivalent of *mār awīlim* in Hammurapi and "the son of the lowly" of *mār muškēnim,* terms that pervade the Hammurapi passages on damages.[69] The phrase 'the son of the great' (בן גדולים) appears in a limited number of passages in the talmudic-midrashic corpus as a term for the wealthy and aristocrats.[70] I am unable to find any other reference to 'the son of the lowly' (בן קטנים). 'Aristocrat' (יקיר) appears as a term of social distinction in cultic settings in Second Temple Jerusalem.[71] The word פגום (translated 'plebeian' here) has the general meaning 'damaged', 'imperfect',

68. Roman law manifests only partial similarity. Selecting only the comparable items in laws of *iniuria*, we find (according to Adolf Berger):

> *iniuria* embraces particular crimes, both bodily injuries (*iniuria re facta*) as well as offenses against the good reputation of a person [. . .]. "There is no *iniuria* done to those who wished it (to be done)." D. 39.3.9.1 [. . .]. Penalties varied [. . .], the amount of which was set by the judge, who had great discretion in estimating the damage done to the reputation and the social rank [. . .] according to the gravity of the injury and the social status of the culprit [. . .] *Iniuria atrox*. An atrocious, aggravated outrage [. . .] when the wrong was done in a public place (theatre, *forum*), when the offended person was a magistrate, or when a senator was insulted by a person of a lower social class. The atrocity (*atrocitas*) of the *iniuria* was thus distinguished according to the fact itself (*ex facto*), the place (*ex loco*), and the person (*ex persona*). (A. Berger, *Encyclopedic Dictionary of Roman Law* [Philadelphia: American Philosophical Society, 1953] 502 [with thanks to Prof. Daniel Sperber for this reference]).

"In classical law *inuria* was the delict of insult or outrage by words or conduct, including physical injury" (Westbrook, *Studies*, 72).

69. See Driver and Miles, *Babylonian Laws*, 1:409–11, who leave this usage without enough explanation to justify its appearance. It must therefore be stated that the terms clearly represent social and cultural concepts.

70. See Friedman, *Talmudic Terminology*. In *Sipra Lev.* 19:15, wealth, aristocracy, and their bearers' vulnerability to embarrassment are brought together. *Leviticus Rabbah* 35 addresses the impoverished aristocrat (בן גדולים שירד מנכסיו) who is embarrassed to accept charity.

71. *M. Yoma* 6:4 = *t. Yoma* 3.13; *t. ʿArak.* 2.2.

'spoiled' and comes closest to signifying a class in the laws that deal with forbidden marriages.[72]

The remarkable concentration of all these terms in one passage and their application denoting social stratification as a basis for setting the level of payment for "disgrace" can only be explained as a remnant of the ancient Near Eastern norms as expressed in the Laws of Hammurapi. However, it is foreign and jarring in its current talmudic setting.

The ancient law of redress for bodily injury based on a sliding scale of differentiation by social class was dramatically reformed by the Torah: "You shall have one standard for stranger and citizen alike: for I the LORD am your God" (Lev 24:22).[73] Although scholars viewed this reform as embodying a complete elimination of the caste system for free Israelites, we have seen that *rabbinic* law maintained the ancient stratification for payments of "disgrace." This left the final stage of democratization to Rabbi Akiva:

> This is the general rule [for payments of "disgrace"]: all is in accordance with a person's honor. R. Akiva said: Even the poorest in Israel are looked upon as nobles who have lost their possessions, for they are the sons of Abraham, Isaac, and Jacob. (*m. B. Qam.* 8:6)

R. Akiva's statement contains an acknowledgment of the law *quo ante*, a legal fiction to overcome it, and an ideological justification for the entire decision. Indeed the existing law stipulated that the poor receive less than the rich for "disgrace" inflicted upon them. Next he states: *our* poor, however, can be considered as being inherently aristocrats (בני חורין) who are suffering temporary financial reverses.[74] The use of בני חורין for aristocrats is unique here in the talmudic corpus, the usual meaning being "free persons." The meaning intended reflects the biblical חורי and is close to Qoh

72. *M. Qidd.* 3:12; *t. Yebam.* 1.9. Noteworthy also are these remarks: "There is no more dispised and lowly (פגום) a person as one who walks naked in the public market" (*Sipre Deut.* 320 [Finkelstein, 367]); "You were unwilling to be subject to God, behold now you are subjected to the most inferior (פגום) of the nations" (*Mek. Baḥodeš* 1 [Horovitz, 203]).

73. See also Num 15:16. See Paul, *Book of the Covenant*, 76; Sarna, *Exploring*, 189; Milgrom, *Leviticus*, 2135. Although the literary structure is the same, the law applies equally to the free community.

74. On rabbinic legal fictions, see L. Moscovitz, "Legal Fictions in Rabbinic Law and Roman Law: Some Comparative Observations," in *Rabbinic Law in Its Roman and Near Eastern Context* (ed. Catherine Hezser; Tübingen: Mohr Siebeck, 2003) 105–32.

10:17 בן חורים 'noble'.[75] Again, the lack of rabbinic caste terminology underscores the fact that the concept had largely receded, preserved here through biblical linguistic usage and an anachronistic legal concept, now being put to rest.

The democratic principle that is stated in the Mishnah and quoted above in terms of common equal descent from the patriarchs is reminiscent of *m. B. Meṣ.* 7:1 and is as stirring a milestone in the history of democracy[76] as *m. Sanh.* 4:5: "[but a single man was created] for the sake of peace among mankind, that none should say to his fellow, 'My father was greater than thy father.'"

Conclusion

A word of caution is always in order when contemporary concepts, in our case contemporary legal concepts, are applied as categories to ancient material.[77] However, as always, responsible handling must be applied in both directions (comparisons should not be overdone or *underdone*), much like the practice of geologists and statisticians.[78] In the passages dealt with here, the very antecedents of the modern concepts appear, which requires that we be aware of specific concepts in the ancient sources that may have *differed* from stage to stage; at the same time, we must be aware of *similarities*, which sometimes need to be considered on a developmental continuum.[79]

We must also be aware of the literary nature of the laws in the documents before us. Thus the continued appearance of similar laws in various cultures indicates an ongoing literary tradition rather than the exigencies of reality. Even the remote but exact parallel in the Roman XII Tablets that juxtaposes *talio* and composition is perhaps less a demonstration of independence than it is an indication of the influence of Semitic law on Roman law.[80]

75. See R. Gordis, *Koheleth: The Man and His World* (New York: Jewish Theological Seminary, 1955) 316–17.

76. Compare also the legal narrative attached to *m. Baba Qamma.*

77. Cf. Yaron, "Bodily Injuries," 221.

78. Geologists and statisticians cite margin of error for dating in both directions. See my "Towards a Characterization of Babylonian *Baraitot*: 'ben Tema' and 'ben Dortai'" [Hebrew], in *Neti'ot Ledavid: Jubilee Volume for David Weiss Halivni* (ed. Yaakov Elman, Ephraim Halivni, and Zvi Arie Steinfeld; Jerusalem: Orhot, 2004) 202.

79. On various cautions applicable to comparative ancient law, see S. Greengus (apud Paul, *Book of the Covenant*, xiv).

80. On *independence of traditions*, see Yaron, "Bodily Damages," 233. On Semitic influence, I agree with Westbrook, *Studies*, 71–72.

The possible continuum of certain cases from ancient Near Eastern law that culminated in talmudic law deserves concentrated attention in comparative studies across the board of the legal systems.[81] The creation of a category of cash payments imposed by law is indicated by the contrast between §§28–29 in Ur-Namma and is also reflected in the clause "he shall satisfy the physician" in Hammurapi §206 and Exod 21:19. The very creation of these clauses offsets them from the standard legal payments for damage, which, by this distinction, take on the flavor of "penalty," "punitive damages." These two classes are called קנסא and ממונא in talmudic terms. For "damage," the Mishnah made a valiant attempt to convert the original punitive category into compensation that reflects the degree of monetary loss: "'For injury,' thus: if he blinded his fellow's eye, cut off his hand, or broke his foot, [his fellow] is looked upon as if he were a slave to be sold in the market: they assess how much he was worth and how much he is worth now" (*m. B. Qam.* 8:1, and other passages). Only the latest talmudic

81. Cf. D. B. Weisberg, "Some Observations on Late Babylonian Texts and Rabbinic Literature," *HUCA* 39 (1968) 71–80; B. Levine, "Mulugu/melug: The Origins of a Talmudic Legal Institution," *JAOS* 88 (1968) 271–85; J. Elman, "Babylonian Echoes in a Late Rabbinic Legend," *JANES* 4 (1972) 13–19; S. E. Loewenstamm, "Exodus XXI 22–25," *VT* 27 (1977) 352–60; M. J. Geller, "New Sources for the Origins of the Rabbinic Ketubah," *HUCA* 49 (1978) 227–45; S. Friedman, "The Case of the Woman with Two Husbands in Talmudic and Ancient Near Eastern Law," *Israel Law Review* 15 (1980) 530–58 (with methodological introduction and references); idem, *Talmud Arukh, BT Bava Metzi'a VI: Critical Edition with Comprehensive Commentary–Text Volume and Introduction* (New York: Jewish Theological Seminary, 1996) 418, s.v. משפט המזרח הקדום בהשוואה לחוקי התלמוד; S. Greengus, "Filling Gaps: Laws Found in Babylonia and in the Mishna but Absent in the Hebrew Bible," *Maarav* 7 (1993) 149–71; M. J. Geller, "The Influence of Ancient Mesopotamia on Hellenistic Judaism," in *Civilizations of the Ancient Near East* (ed. J. M. Sasson; Peabody, MA: Hendrickson, 2002) 43–54. Comparison is mandated, not only by similarity of content and concepts but also by terminology, e.g.: *dīn napištim* / דיני נפשות: 'capital case(s)'. The comparison of laws should operate in tandem with the comparison of linguistics and folklore; see I. Jacobs, "Elements of Near Eastern Mythology in Rabbinic Aggadah," *JJS* 28 (1977) 1–11; S. J. Lieberman, "A Mesopotamian Background for the So-Called *Aggadic* 'Measures' of Biblical Hermeneutics?" *HUCA* 58 (1987) 157–225; M. Fishbane, "Rabbinic Mythmaking and Tradition: The Great Dragon Drama in *b. Baba Batra* 74b–75a," in *Tehillah le-Moshe: Biblical and Judaic Studies in Honor of Moshe Greenberg* (ed. M. Cogan, B. L. Eichler, and J. H. Tigay; Winona Lake, IN: Eisenbrauns, 1997) 273–83; A. Demsky, "Shulgi the Runner: Sumerian-Talmudic Affinities," in *"An Experienced Scribe Who Neglects Nothing": Ancient Near Eastern Studies in Honor of Jacob Klein* (ed. Y. Sefati et al.; Bethesda, MD: CDL, 2005) 95–97 and references cited there.

anonymous stratum is willing to categorize this explicitly as ממונא, a position also implicit in the standard tanaaitic literature, whereas Maimonides still sees it as קנסא, as was indeed hinted in the earliest tanaaitic stratum.

In light of this distinction, the monetary payments that preceded *talio* for bodily damages in ancient Near Eastern law (often fixed by tariff) are certainly to be interpreted as punitive, as are the *talio* punishments that took their place. Thus the unintending offender is exempt.

The traditional expression of *talio* in the ancient Near East, as in the Torah, was specifically for bodily damages and false testimony. The punitive aspect of the latter is even more striking, for the uncovery and sentencing of the false witness took place as part of the original trial of the accused, who thus escaped responsibility for compensation for any damage that resulted from the malicious testimony. The designation of the punishment of the witness as *arnum* ('penalty') in Akkadian perplexed the commentators of the Code of Hammurapi (Miles). However, this categorization was already explicit in tannaitic jurisprudence for false witnesses in the biblical parallel: "R. Aqiva says, 'Neither is he required to pay by his own admission [of his falsehood], because [the payment] is punitive [קנס].'" Miles could have been aided by the rabbinic material in the same way that he used the biblical material to explicate Hammurapi.

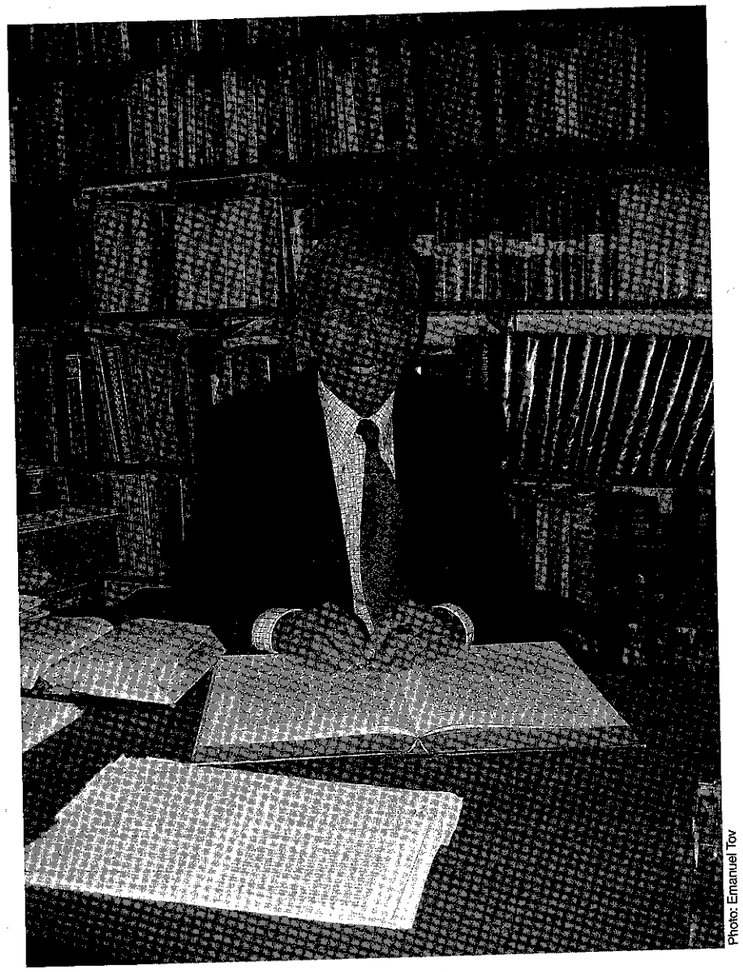
This analysis contributes to our appreciation of the aphorism regarding the institution of false witnesses found in the Babylonian *baraita*: "If they have not slain they are slain; but if they have slain they are not slain." The use of paradox as the literary form to summarize the law of false witnesses corresponds to the historic reality of the institution that penalized the offender for a crime if its harmful results were prevented but, in its ancient form, demonstrated no mechanism for penalizing him or her if his/her malevolence bore fruit.[82] Modern rationalists were distracted by the paradox.

82. This reopens the discussion whether the Mishnah is being exclusive. "Which means that his brother is still alive." That is, not "*even* when his brother is alive" but "*only* when his brother is alive." In the inclusive interpretation, the end of the Mishnah could have been worded otherwise. "Why, then, is it written 'life for life?'" This could have been answered that in *some cases* the accused may have already been put to death and even then the witnesses were punished. However, instead of this simple explanation, the Mishnah explains the necessity of having the phrase "life for life" in Scripture as being to block the mistaken conclusion that they were put to death as soon as their evidence was received and deemed false. Therefore, Scripture says, "Life for life"; thus they are not put to death until a judgment (of death) has been passed (against the person who was falsely accused); taking "life" metaphorically is

The literary device used to underscore its *legitimate* paradoxical irrationality led them to reject the law as irrational and absurd.

Various features of ancient Near Eastern law regarding bodily injuries survived in rabbinic passages that were eventually subsumed under "disgrace" (ברשת). These included the question of intention, tariff lists of fines, and social stratification for determining the sliding scale of obligation. The social sliding scale reveals the continuum between Hammurapi's laws and the tannaitic tradition, which was finally abrogated by Rabbi Aqiva.

forced and unnatural if a simpler midrash is possible (see comparison to *Sipra* in my "If They Have Not Slain," 188–89).



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