

DAVID DAUBE

WITNESSES
IN BIBLE
AND TALMUD

CALUM CARMICHAEL

BIBLICAL LAWS
OF TALION

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PREFACE

Early in 1957, shortly after I had joined the Faculty of Oriental Studies as the Cowley Lecturer in Postbiblical Hebrew, I met Professor David Daube and so began a friendship which has lasted ever since. For more than a decade I derived great benefit from his extraordinary erudition, his generosity of spirit, his kindness and wise advice. Not many years later David recommended his graduate student Calum Carmichael to attend some of my lectures, and another long friendship ensued, from which I have again derived great enrichment in academic, intellectual and social terms. As an intermediary between master and pupil and one corner of a Berkeley, Cornell and Oxford triangle, it gives me great pleasure to contribute this Preface to these two fascinating papers.

More than fifteen years have passed since Professor Daube left his Regius Chair at Oxford for the warmer climes of California. Shortly afterwards Professor Carmichael was appointed to a Chair at Cornell, where he has proved to be a worthy disciple and indeed, perhaps, the leading exponent of his erstwhile master's copious writings. Both of these distinguished scholars were involved in the pre-establishment discussions which led to the founding of the Oxford Centre for Postgraduate Hebrew Studies, and both have since made important contributions to its academic development. Professor Daube, our first Honorary Fellow, delivered the Inaugural Lecture, *Ancient Hebrew Fables* on 17 May 1973, while Professor Carmichael gave the Ninth Sacks Lecture entitled *The Ten Commandments* on 25 May 1982.

It is entirely appropriate, therefore, that the following two papers should be published under the Centre's imprint, and I am happy to accede to Professor Daube's specific request that his letter to Professor Carmichael of 6 September 1985 be included as part of the Preface.

My dear Calum,

Thanks for Talion. It is characteristic of your triad of extraordinary learning, rigorous argumentation and unique, imaginative connection with your favourite authors of the past. I think your thesis is basically right; and have no taste for nitpicking queries about a point here or there. *But*—here comes my proposal to which I have referred in last week's brief message.

The accompanying piece, which bears on a small segment of yours, was written many years ago. Reuven Yaron and I had been encouraged by a publisher to compile a reader on the Law of Bible and Talmud, each chapter to consist of two parts, texts and discussion. Among my chapters

was that enclosed, on Witnesses. Alas, when we submitted the book, our sponsors found it too academic, upon which we decided to scrap the enterprise. Later on, I hoped to take it up again together with Bernard Jackson, but we did not pursue it for long. Now I should like to bring out my Witnesses appended to your Talion. It differs, of course, in approach and some results. It represents an earlier stage and the future belongs to you. But precisely this feature may make the combination interesting. Our colleagues and successors can sort out, if so minded, how much (or little) of my old-fashioned reconstruction is capable of supplementing your novel one. Bernard and several others long ago saw the chapter and, indeed, at the time he sent a few comments. I have not the energy, however, to revise. If my proposal appeals to you, we ought to ask him to list any publications of his relating to the topic, in order that they could be cited in the first or last footnote. My fantasy may considerably outrun reality; yet supposing that you are favourable to my idea—do you think the Oxford Centre would publish the joint brochure? Might it even be made part of the celebration that is being planned? And for an explanation of the coupling of the two articles, would this very letter do?

I intend to write you about personal things within a very few days.

Ever yours

David

It is both interesting and illuminating that Professor Carmichael's paper develops a line of inquiry which stands in some tension with that of Professor Daube, and it is with characteristic generosity that the master acknowledges that his approach has to pay attention to that of his former pupil. May both these fine scholars go from strength to strength, and may the Oxford Centre enjoy the privilege of publishing more of their papers in the years to come.

David Patterson, President
April 1986

WITNESSES IN BIBLE AND TALMUD

David Daube

The Texts

Leviticus

- 24.13: And the Lord spake unto Moses, saying,
14: Bring forth him that has cursed without the camp, and all that heard him shall lay their hands upon his head, and all the congregation shall stone him.

Numbers

- 35.30: Anyone who smites a soul, at the mouth of witnesses shall the murderer be slain, and one witness shall not prefer a charge against a person to die.

Deuteronomy

- 13.2: If there stand up in the midst of you a prophet or a dreamer of dreams and he give you a sign or a wonder,
3: And the sign or the wonder come to pass, whereof he spoke unto you, saying, Let us go after other gods which you have not known, and let us serve them,
4: You shall not hearken unto the words of that prophet or unto that dreamer of dreams.
6: And that prophet or that dreamer shall be put to death, because he has spoken rebellion against the Lord your God ... to draw you aside out of the way which the Lord your God commanded you to walk in.
7: If your brother, the son of your mother, or your son or your daughter or the wife of your bosom or your friend that is as your own soul entice you secretly, saying, Let us go and serve other gods which you have not known, you or your fathers,
9: You shall not consent unto him nor hearken unto him, neither shall your eye pity him neither shall you spare neither shall you conceal him,
10: But you shall surely kill him; your hand shall be first upon him to put him to death and afterward the hand of all the people.
11: And you shall stone him with stones and he shall die, because he has sought to draw you away from the Lord your God.
17.2: If there be found in the midst of you ... man or woman that does that which is evil in the sight of the Lord your God,
3: And has gone and served other gods,
4: And it be told you and you hear it, then you shall inquire diligently, and behold, true and certain is the matter,
5: Then shall you bring forth that man or woman ... and you shall stone them with stones and they shall die.
6: At the mouth of two witnesses or three witnesses shall he that is to die be put to death; he shall not be put to death at the mouth of one witness.

- 7: The hand of the witnesses shall be first upon him to put him to death, and afterward the hand of all the people.
- 19.15: One witness shall not stand up against a man for any iniquity or for any sin, in any sin that he may sin; at the mouth of two witnesses or at the mouth of three witnesses shall a matter stand up.
- 16: If an unrighteous witness stand up against a man to prefer a charge of rebellion against him,
- 17: Then the two men between whom the controversy is shall stand up before the Lord, before the priests and the judges that will be in those days,
- 18: And the judges shall inquire diligently and behold, a witness of lie is the witness, a lie is the charge he has preferred against his brother,
- 19: Then shall you do unto him as he had proposed to do unto his brother and you shall put away the evil from the midst of you.
- 20: And those that remain shall hear and fear and shall not continue any longer to do like this evil matter in the midst of you.
- 21: And your eye shall not pity: life for life, eye for eye, tooth for tooth, hand for hand, foot for foot.

I Kings

- 21.7: And Jezebel his wife said unto him (Ahab) ... I will give you the vineyard of Naboth the Jezreelite.
- 8: And she wrote letters in Ahab's name and sealed with his seal and sent the letters unto the elders and the nobles that were in his city, dwelling with Naboth,
- 9: And she wrote in the letters, saying, Proclaim a fast and set Naboth on high among the people,
- 10: And set two men, sons of Belial, before him, and they shall testify against him, saying, You have blasphemed God and the King, and lead him out and stone him and he shall die.
- 11: And the men of his city, the elders and the nobles who were the dwellers in his city, did as Jezebel had sent unto them, as written in the letters which she had sent unto them:
- 12: They proclaimed a fast and set Naboth on high among the people,
- 13: And there came two men, sons of Belial, and sat before him, and the men of Belial testified against Naboth before the people, saying, Naboth has blasphemed God and the King; and they led him forth out of the city and stoned him with stones and he died.
- 14: And they sent to Jezebel, saying, Naboth has been stoned and has died.

Susannah

- 34: Then arose the elders and judges and laid their hands upon her head.
- 36: Then the two elders affirmed, We were walking about in her husband's garden,
- 37: And as we came round the stadion, we saw this woman dallying with a man; we stood still and observed them consorting together.
- 41: These things we declare as witnesses. And the whole synagogue believed them.

- 44-45: And as she was being led away to be destroyed, behold, an angel from the Lord, and as it had been commanded him, the angel bestowed a spirit of discernment upon a young man, being Daniel.
- 48: Then separating the crowd Daniel stationed himself in the midst of them and said, Are you so foolish, O sons of Israel, that without examination and knowledge of the truth you have condemned a daughter of Israel to die?
- 51a: Now therefore let us take these men apart from each other, that I may cross-examine them.
- 52: And he summoned one of the two, so they brought forward the elder before the young man. Then Daniel said to him,
- 54: Now therefore under what tree and at what sort of place have you seen them together? The impious man answered, Under a mastick tree.
- 56: Then removing the one he gave command to bring the other before him, to whom he said,
- 58: Now therefore tell me under what tree and in which spot of the enclosure you did detect them consorting together? Who answered, Under a holm tree.

60-62a:

Then the whole synagogue shouted aloud in praise of the young man because from their own mouth he had proved them both to be confessedly false witnesses. And they dealt with them according as the Law prescribes (Deuteronomy 19.19), just as they maliciously intended against their sister. So when they had gagged them, they led them out and hurled them into a chasm; then the angel of the Lord cast fire in the midst of them. And thus was innocent blood kept safe on that day.

Philo, Special Laws

- 4.8.53: He (Moses) added a splendid rule when he ordained a single person's testimony not to be admissible. First, because it is possible for a single person to see wrongly or hear wrongly or understand wrongly or be deceived.
- 54: Secondly, because it is most unjust to make use of a single witness against more than one or even against one; against more than one because they are more worthy of victory than one, against one because the witness has no preponderance in respect of number, but the equal is compatible with advantage. For why should one agree with the witness who details a case against somebody else rather than with the accused who speaks about himself? It is best, it would seem, to suspend judgment when neither side lacks or excels in anything.

Josephus, Jewish Antiquities

- 4.8.15.219: A single witness let not be trusted but three or at least two, whose testimony their past lives shall prove true. Of women let there be no testimony on account of the levity and boldness of their sex. Neither let slaves bear testimony on account of the baseness of their soul; whether for gain or for fear it is likely that they will not testify to the truth. But if a false witness has been believed, let him be convicted and suffer what he against whom testimony was borne was about to suffer.
- 10.7.2.106: Zedekiah disbelieved the prophecies of Jeremiah and Ezekiel for this reason, that though they turned out to agree in all other points, Ezekiel,

by saying that Zedekiah would not see Babylon, differed from Jeremiah who affirmed to him that the king of Babylon would take him there fettered.

10.8.2.141: And there befell him what both Jeremiah and Ezekiel had prophesied.

Mishnah Rosh-Hashanah

1.8: These are the unfit ones: a dice-player and a userer and pigeon-flyers and traffickers in Seventh Year produce and slaves. This is the general rule: Any evidence which the woman is not fit for these also are not fit for.

Mishnah Yebamoth

15.4: One witness says, He (the husband) is dead, and she (the wife) marries, and another comes and says, He is not dead, in this case she need not be put away; one witness says, He is dead, and two say, He is not dead, even if she married (before the second testimony) she must be put away. Two say, He is dead, and one witness says, He is not dead, even if she did not remarry (before the second testimony), she may marry.

Mishnah Sotah

1.1: He who gives the jealousy warning to his wife, R. Eliezer says, he warns her at the mouth of two witnesses and he makes her drink (the water of bitterness of Numbers 5.14) at the mouth of one witness or at his own mouth; R. Judah says, he warns her at the mouth of two and he makes her drink at the mouth of two.

1.2: How does he warn her? He says to her before two witnesses, Do not speak with such-a-one, and she spoke with him, she is still allowed for marital relationship and allowed to eat of heave-offering (if her husband is a priest). If she went with him to a secret house and stayed with him long enough for defilement, she is forbidden for marital relationship and forbidden to eat of heave-offering.

Mishnah Baba Qamma

7.4: He stole (an ox) at the mouth of two witnesses and slaughtered or sold it at the mouth of one witness or at his own mouth, he pays twofold restitution and he does not pay fourfold or fivefold restitution.

Mishnah Makkoth

1.6: False witnesses are not slain till the sentence (against the accused) is delivered. For behold, the Sadducees say, not till he (the accused) is slain, for it is said (Deuteronomy 19.21), Life for life. The Sages said to them, And is it not indeed said (Deuteronomy 19.19), And you shall do unto him as he had thought to do unto his brother—and behold, his brother is alive (at the time of the false witness's punishment)? And if so, why is it said, Life for life? One might perhaps hold that they (the false witnesses) should be slain from the moment that their testimony was received. But there is a teaching in Scripture when it says, Life for life: they are not indeed to be slain till the sentence (against the accused) is delivered.

Mishnah Eduyoth

1.3: Hillel says, One *hin* of drawn water renders the immersion-pool unfit ... and Shammai says, Nine *kabs*. And the Sages say, It is not according to

the words of this one and not according to the words of that one; but (the controversy existed only) till the two weavers came from the Dung Gate in Jerusalem and testified in the name of Shemaiah and Abtalion, Three *logs* of drawn water render the immersion-pool unfit, and the Sages upheld their words.

- 7.1: There testified R. Joshua and R. Zadok with respect 'to the redemption-lamb for the firstborn of an ass, if it died, that the priest has no more claim in it.
- 7.9: There testified R. Nehunya ben Gudgada with respect to a deaf-mute woman whom her father gave in marriage, that she may be put away by a bill of divorce.
- 8.4: There testified Jose ben Joezer of Zereda with respect to the ram-locust that it is clean, and with respect to the liquid in the slaughterhouse (of the Templeyard) that it is not susceptible to uncleanness, and that only he who does touch a corpse becomes unclean; and they called him 'Jose the Permitter'.

Mishnah Aboth

- 1.9: Simeon ben Shetah said: Examine the witnesses diligently and be cautious in your words, lest from them they learn to swear falsely.

Baraita of R. Ishmael

at opening of *Siphra on Leviticus*:

R. Ishmael says, By means of thirteen canons is the Torah expounded ... And so, lastly, two passages which contradict one another, till a third passage comes and tips the balance between them.

Siphre on Deuteronomy

- 19.17: One might perhaps hold that a woman also is fit to bear testimony. But it is said here, Two (The two men shall stand), and it is said above, Two (in 19.15, At the mouth of two witnesses): as the two said here refers to men, so the two said above refers to men and not to women.

Babylonian Shabbath

- 39b: For R. Tanhum said, R. Johanan said, R. Jannai said, Rabbi (Judah the Prince) said, Wherever you find two (scholars) differing and a third one tipping the balance (in favour of one of them), the Halakhah is according to the words of the one tipping the balance.

Babylonian Baba Qamma

- 24a: Two testified to a first attack by an ox and two to a second one and two to a third one, there are here three separate testimonies, but they are one testimony for the purpose of conviction. The first set is found false, there are still two separate testimonies, and he (the owner of the ox) is free (since the first attack is disproved) and they (the first set) are free (since for the purpose of conviction they belong together with the remaining two sets). The second set is found false, there is still one separate testimony, and he is free and they are free. The third set is found false, they (the three sets) are all liable, and with regard to this case it is said (Deuteronomy 19.19), And you shall do unto him as he thought etc.

Babylonian Makkoth

5b: An eminent disciple says, They (the false witnesses) have not slain, they are to be slain; they have slain, they are not to be slain. His master said, My son, is there not an *a fortiori* (if they are to be put to death for attempt, they should all the more be put to death for the completed crime)? He said to him, You yourself, our Rabbi, have taught us that one inflicts no punishment on the basis of a deduction.

Discussion

1. False testimony as attempt

Deuteronomy knows no government sponsored prosecution, and in the case of some offences it is the witness who prosecutes. The statute against a 'witness of lie' contemplates this situation. It speaks of 'the two men between whom the controversy is', clearly, the witness-accuser and the accused.

The false witness is represented as guilty of an attempted crime: he is to suffer 'what he devised to do unto his brother'. In general, attempt is not punishable in Biblical law. Yet there are two more instances in Deuteronomy. A false prophet must die 'because he spoke rebellion against the Lord ... to thrust you from the way the Lord commanded you';¹ and a person inviting you to join him in pagan worship is to be put to death 'because he thought to thrust you from the Lord'.²

There is no inherent necessity of conceiving of the three cases in this fashion. In many other systems false testimony figures as a crime complete in itself, with no explicit reference to the planning involved.³ Similarly, the false prophet's preaching and even the seducer's summons could be legislated on without declaring the purpose to be the basis for retribution. In Deuteronomy itself, a bridegroom's untrue report that his bride was not a virgin appears simply as a vicious slander, not as an attempt to do her in.⁴ Defamation is a completed crime also, e.g., in Hammurabi.⁵

What accounts for the emergence of punishable attempt is, above all, an increase in state power, leading to an increase in state interest in deviant behaviour. In addition, Deuteronomy's link with wisdom must stimulate preoccupation with the motivation and object of a deed. 'Design not evil

1. Deuteronomy 13.5.
2. Deuteronomy 13.10.
3. E.g. Code of Hammurabi 1 ff.
4. Deuteronomy 22.13 ff. See David Daube, *Orita*, vol. 8, 1969, pp. 30 ff.
5. 127, 161.

against your neighbour',⁶ 'He who causes the righteous to go astray in an evil way shall fall himself into his pit',⁷ 'An evil man seeks only obstreperousness'.⁸

The selection, however, is remarkable. A major reason early law does not come to grips with attempt is the difficulty of proof. In the case of a false witness this difficulty does not exist: his crime is committed right in front of the public authority. But in the other two cases, of a false prophet and an advocate of defection, proof would not be easy to obtain. Indeed, the latter affair is depicted as exceptionally intimate: a dear relative or friend approaches you secretly with his ideas. If punishability is nonetheless ordained, it is because of the very particular horror with which Deuteronomy views this danger.

2. *False testimony in respect of utterances*

The provision concerning a would-be enticer into heathenism evidently dates from before the time when the minimum number of witnesses was two. They had no bugging devices in those days, so there can be only the man he tried to win over to act as witness-accuser. The same is probably true of the paragraph about a pseudo-prophet: he may address himself to a small circle and be denounced by a single scandalized listener. There are several other Deuteronomic statutes preceding the requirement of more than one witness,⁹ among them, indeed, that dealing with a false witness. He is throughout referred to in the singular, and we have already seen that he and the accused are described as 'the two men between whom the controversy is'. He is—as a rule at least—on his own, unsupported.

Actually, this law seems to have been first promulgated with a view to preventing abuse of those against a pseudo-prophet and a counsellor of apostasy. History shows that, where the mere verbal presentation of certain opinions is a crime, the risk of malicious informing is considerable; it is enormous if you can be convicted though you expressed the opinion before one person only. The initial aim of the statute against a false witness was to mitigate this risk. He is said to bring a charge of *sara*. The word recurs in six more texts, signifying 'rebellion'—scil. against God—in all of them.¹⁰ Indeed, one of them is the very verse imposing the death penalty on a false prophet 'because he spoke rebellion'. The original meaning in the statute under consideration must have been the same: the witness alleges that the accused committed 'rebellion' as a false prophet or an inciter to idolatry.

6. Proverbs 3.29.

7. Proverbs 28.10.

8. Proverbs 17.11.

9. E.g. Deuteronomy 22.22 ff.

10. Deuteronomy 13.6, Isaiah 1.5, 31.6, 59.13, Jeremiah 28.16, 29.32.

Subsequently, the regulation was extended to false testimony in other cases, a move reflected in the appended general formula of retaliation. Exactly how inclusive the law was intended to be at the moment Deuteronomy was redacted is not easy to determine. As remarked above, the bridegroom who slanders his bride does not fall under it. There are, of course, good reasons. For one thing, his execution would be of no help to her and her family; for another, he is not strictly 'a witness of lie', he is presumably a paranoiac convinced of her corruption. A further case surely outside the regulation would be parents unjustly branding their son as incorrigible.¹¹ It is significant that in the famous case of false testimony instigated by Jezebel, with two witnesses, the crime is a verbal one, a cursing of the king.¹² The false testimony before the Sanhedrin towards the end of Matthew and Mark,¹³ with two or more witnesses, also concerns an utterance, as does that against Stephen in Acts.¹⁴

3. Two Witnesses

The threat of punishment would not deter a calumniator who thought he could get away with his scheme. The lawgiver's next step was to insist on several witnesses. To begin with, no doubt they were needed in certain cases only—where the crime was capital and of a nature that made a treacherous accusation relatively easy. A provision in connection with murder¹⁵ and one in connection with worshipping the sun or moon¹⁶ are survivals from that period. Then came the comprehensive formulation now prefixed to the statute against false testimony.

Not surprisingly, the requirement always remained most important in the old area. Jezebel got two scoundrels to attest a cursing of the king,¹⁷ and a number of people had been able to attest a cursing of God in the desert.¹⁸ But even far later incidents are of a comparable character: Susannah, for example, was faced by two depraved Elders claiming that she had committed adultery,¹⁹ and the utterances to which false witness is borne according to Matthew, Mark and Acts are thought of as capital crimes.

11. Deuteronomy 21.18 ff.

12. I Kings 21.8 ff.

13. Matthew 26.59 ff., Mark 14.55 ff.

14. Acts 6.11 ff.

15. Numbers 35.20.

16. Deuteronomy 17.6.

17. See above, section 2, text with note 12.

18. Leviticus 24.10 ff.

19. See below, section 6.

One of the factors accounting for the measure²⁰ may well have been the viewing of the relation between witness and accused as a sort of single combat, duel, ordeal. When the witness is represented as 'standing up', this seems here to denote not only a getting up in the assembly but also a rising to do battle. Hence a solitary witness is not enough: a man—the accused—will hold his own attacked by one, he will be defeated by two or more.

Even apart from this archaic notion, there is something commonsensical in suspending judgment—which means preservation of the *status quo*—as long as it is one man's word against another's; and ordinarily, any system will expect the party that wants a change to have something extra in his favour. Philo writes²¹ that the Bible treats the accused as equivalent to one witness. The equation is adumbrated in the Mishnah dealing with a thief who killed or sold the stolen beast 'at the mouth of one witness or at his own mouth'.²² (According to R. Eliezer, a husband may make his wife undergo the jealousy ordeal if her disregard of his warnings is proved 'at the mouth of one witness or at his own mouth';²³ here, however, 'at his own mouth' refers to the party alleging an outrage.)

By Talmudic times, the principle that, to upset the *status quo*, one against one does not suffice while two against one does, governs even testimony outside trials. The Mishnah lays down²⁴ that if one witness testifies to a husband's death and the wife remarries, the second union is not affected by the contrary testimony of one other witness but it is by that of two.

4. Pharisees and Sadducees

According to the Pharisees, false testimony is punishable only if it failed, according to the Sadducees only if it succeeded. The former rely on the words 'as he devised to do', the latter on the proclamation 'life for life, eye for eye'.²⁵ It is the former who interpret the law correctly.

For scholars thinking in terms of modern data and values, it makes no sense to let a calumniator go scot-free if his victim suffered death or

20. See David Daube, *The Jewish Journal of Sociology*, vol. 3, 1961, pp. 10 f., and (written after the present piece) *Journal of the Near Eastern Society of Columbia University*, vol. 5, Gaster Festschrift, 1973, p. 91.

21. *Special Laws* 4.54.

22. Mishnah Baba Qamma 7.4. See (after the present piece) B. Jackson, *Theft in Early Jewish Law*, 1972, p. 195.

23. Mishnah Sotah 1.1; see below, section 7, text with note 57.

24. Mishnah Yebamoth 15.4.

25. Mishnah Makkoth 1.6, Babylonian Makkoth 5b ff.

mutilation while exacting retribution if no harm ensued. A. Geiger²⁶ finds this position so impossible that he believes the Rabbinic sources to be faulty in their reporting: the Pharisees must have punished in both cases. L. Finkelstein agrees²⁷ and concludes that the Sadducees, punishing only if disaster materialized, represent the original meaning of the law and that the Pharisees harshly extend punishment to mere attempt as well. However, as for faulty reporting, the Rabbinic account is confirmed by Josephus: a false witness is to suffer 'what the wrongly accused was about to suffer'.²⁸ Moreover, while in the Pharisaic legend of Susannah²⁹ the accusers are put to death as their plot has miscarried, there is no record anywhere of false witnesses being called to account after achieving their end; and it may not be irrelevant that failure to prosecute the false witnesses who brought about Stephen's death is not criticised in Acts.³⁰ When it comes to the question which of the two doctrines conforms to the original purport of the law, a comparison with other Oriental systems³¹ decisively favours the Pharisees: retribution is invariably restricted to false testimony that collapsed, or rather, the case where an innocent person has actually been executed or deprived of eyes or hands is simply not considered.

To understand, it is necessary to empathize with conditions at the time of Deuteronomy. As just observed, the contest between witness and accused partakes of the quality of ordeal by combat: according to which of them is right, either one or the other will be overwhelmed—but not one after the other. Furthermore, the legislator shrinks from an open admission that a court might go wrong in so serious a matter. In an age when it is urgently desired to curb self-help by interposing a public sentence, it would not be politic to lay down detailed rules in the event the sentence is mistaken. Again, once a penalty is carried out, it is no longer only the parties who are involved but also the judges and indeed all members of the community having taken part in the proceedings. At that stage in history, to devise a plan of action should the testimony now prove to have been false, and yet not engulf the whole community in strife, would be a superhuman task. The medieval Spanish commentators showed insight when they explained the law as resting on the consideration that if a court, having first executed the accused, were then to proceed to execute the witnesses, respect for justice

26. *Urschrift und Übersetzungen der Bibel*, 2nd ed., 1928, p. 140.

27. *The Pharisees*, 1940, vol. 1, p. 144.

28. *Jewish Antiquities* 4.8.15.219.

29. See above, section 3, text with note 19, and below, section 6.

30. Admittedly, the events include so many illogical components that no reliable conclusions can be drawn.

31. E.g. Code of Hammurabi 1ff.

and its administration would decline.³² It is not as if this kind of dilemma were found easy today.

The Biblical statute, then, refers solely to testimony exposed before being acted on. The Sadducees, averse both to a handling of attempt out of line with the norm and to the exemption from punishment of a false witness who succeeded, re-read it as envisaging solely exposure after the sentence is carried out. By this time, the ancient obstacles in the way of such a regulation have lost much of their weight. The Pharisees continue adhering to the genuine sense.

Here, however, an important reservation is to be made. The Pharisees no less than the Sadducees dislike inflicting severe punishment on a person in the absence of actual harm. So they construe 'life for life' as indicating that false testimony does not become punishable till the accused has been condemned. This confines punishment to testimony unmasked between sentence and execution. Maybe they got the idea from the narrative of Judah and Tamar³³ which, in a sense, provides a precedent: she proves her innocence after he—in good faith—has ordered her to be burnt. But, generally speaking, it is a most unlikely contingency. Under this ruling, moreover, an accused and his friends, if quite sure of being able to refute the testimony, had best do so after sentencing in order to have their vengeance. Plainly, the purpose is a *de facto* abrogation of the old law.

It is a very early reform. In all probability, it goes back to the era of the legend of Susannah who is already marching to execution when her accusers turn out to be liars; though, just conceivably, it may be for dramatic effect rather than with a view to a legal point that she is saved in the nick of time. (During the first part culminating in the sentence, the narrator represents the people as ignorant of the proper method of hearing witnesses, i.e. apart from one another. Its revelation in the second part shows most effectively what terrible miscarriages of justice may result from its neglect.) Josephus is certainly aware of the regulation: he defines as punishable him who 'having borne false testimony was believed'. It should also be noted that no proceedings appear to have been instituted against the false witnesses towards the end of Matthew and Mark, nor is there any complaint about their escape: their charges had led to no verdict.

The Pharisees, far from harshly extending retribution from the completed crime to attempt, restrict retribution even for the latter to vanishing point. The Sadducees, generally 'more savage',³⁴ render punishable the completed crime and the completed crime only. It remains to

32. See D. Hoffman, *Magazin für die Wissenschaft des Judentums*, vol. 5, 1878, pp. 12 f.

33. Genesis 38.24ff.

34. Josephus, *Jewish Antiquities* 20.9.1.199; cp. 13.10.6.294.

add that the Pharisaic restriction does not cover monetary affairs. If my ox hurts yours and two men groundlessly affirm that it misbehaved previously (which would increase my liability), they may be fined, though rebutted before the court has pronounced against me on the basis of their allegation.³⁵

5. Women

Under the Biblical regime, though certain charges may be preferred by a woman,³⁶ quite likely the rule is that she cannot be a witness-accuser in a criminal trial. The case of the rebellious son, whose mother acts in conjunction with the father, is rather special.³⁷ As to her role as a witness generally, we can only speculate.³⁸

In the Rabbinic system, except for a few particular areas, female testimony is definitely unacceptable.³⁹ B. Cohen considers⁴⁰ that in early Biblical law it may have been different. But this is implausible. Josephus mentions that women are not suitable as witnesses because of their unreliability. As he lived amidst a culture where, in general, they were recognized, his mention of the contrary Jewish practice is to be accorded exceptional weight.⁴¹ That practice must have been firmly established. He skilfully defends it by an argument with which many readers would sympathize. *Levitas animi* was attributed to women by the early Roman jurists.⁴²

In the Mishnic section concerning damage to property⁴³ we are told that the courts will decide 'at the mouth of witnesses that are free and sons of the covenant'. This statement, Cohen holds, in its original meaning probably covered women as well as men. This is hard to believe. The Mishnah goes on to say that 'women fall within the general law of damage to property'.

35. Babylonian Baba Qamma 24a f.

36. Deuteronomy 25.7 ff., for instance.

37. Deuteronomy 21.19; see above, section 2, text with note 11, and (written after the present piece) David Daube, *Sons and Strangers*, 1984, pp. 13 ff.

38. Should any weight be given to the occurrence of 'edha, 'she-witness'? It denotes an inanimate, feminine object—e.g. an 'ebhen, 'stone'—which serves as a permanent reminder of a treaty or the like: Genesis 21.30, 31.52, Joshua 24.27.

39. Siphre on Deuteronomy 19.17, Mishnah Shebuoth 4.1, Babylonian Shebuoth 30a, Palestinian Yoma 43b.

40. *Jewish and Roman Law*, 1966, vol. 1, pp. 128 f.

41. *Jewish Antiquities* 4.8.15.219, See Z. Frankel, *Der gerichtliche Beweis*, 1846, p. 256.

42. Gaius, Institutes 1.190.

43. Mishnah Baba Qamma 1.3.

Clearly, a distinction is made between the rules as to testimony and those as to substantive law: while women cannot be witnesses, they can be plaintiffs or defendants. The Tosephta⁴⁴ expands the Mishnic statement about testimony by adding: 'excluded are gentiles, slaves and those disqualified for bearing witness'. According to Cohen, this clause reflects the novel prohibition of testimony by women. But it would be too feeble an allusion: it appears to be little more than a clarification of the main statement. The gentiles and slaves are obviously just that, and 'those ineligible to bear witness' satisfy the desire for exactitude. In fact, it is doubtful whether the author, in putting this class, a sort of catch-the-remainder, was thinking of women at all and not merely of the exceptional debarment of a man otherwise qualified—a gambler or the like. The inadmissibility of women may well have been so taken for granted that no need for a special reference was felt. It is worth noting that one of the texts listing some of the exceptional rejects adds: 'Any testimony which a woman is incapable of these, too, are incapable of'.⁴⁵ Strongly suggesting that women were the standard case of unfitness, the others being worked out by analogy.

Josephus, writing for a wider public, does draw attention to their disability. Interestingly, while he also notes that of slaves, he says nothing about gentiles. They would not enjoy being placed among this company.

It should be added that the Rabbis find it far from easy to discover Scriptural support for women's exclusion from testimony. The mere silence of Scripture was, of course, not enough: positive authority had to be adduced. Several ways of obtaining it—highly forced constructions of Deuteronomic texts—are preserved.⁴⁶ It does corroborate the view that the law was firmly anchored in tradition, hence for many centuries nobody had bothered to provide it with a well-reasoned basis.

This is not to assert that there were no side-roads or off-shoots in Jewish legal history where more generous regulations prevailed. Moreover some Tannaites no doubt felt uneasy. In the course of their discussion, we find the remark, 'One might hold that a woman also is capable of witness', and then follows the refutation. This form, 'one might hold', is normally used with reference to an idea which was once accepted or which circumstances suggest should now be accepted, but which, for decisive reasons, must be rejected.⁴⁷ In the present case we have to do with a postulate which, though

44. Tosephta Baba Qamma 1.2.

45. Mishnah Rosh-Hashanah 1.8.

46. A hypothesis as to the relation between the various interpretations is propounded by A. Schwartz, *Die hermeneutische Analogie in der Talmudischen Litteratur*, 1897, pp. 179 ff.

47. See on argumentation of this kind David Daube, *The New Testament and Rabbinic Judaism*, 1956, repr. 1973, pp. 55 ff.

without root in native tradition, in the Hellenistic age would begin to exercise some attraction.

Though women could be parties to a law-suit, normally they were expected to litigate through others. That was so at Rome, too, and disregard of the etiquette by a forward lady had notable consequences.⁴⁸ A verse from the Psalms⁴⁹ is quoted in this connection, 'The king's daughter is all glorious within', interpreted as praising the reticence of the distinguished and well-brought-up woman: her great qualities are operating inside the home, not in public. No doubt this and similar lines⁵⁰ were invoked also to justify the debarring of women from testimony. In the end result, there would not, however, be much difference between those who expressed gallant feelings and those like Josephus who were openly contemptuous.

6. *Susannah*

The Book of *Susannah*, around 100 B.C.,⁵¹ like quite a few Biblical narratives, advocates a legal reform. More specifically, it extols an amendment of the traditional mode of hearing witnesses—representing it (as one would expect, considering the background of the work) as in truth, on proper interpretation, not a change at all, but the ruling intended by Moses himself. Traditionally, as is clear from Old Testament cases,⁵² the two or more witnesses had joined in the enunciation of the charge, leaning⁵³ their hands on the accused's head; and, to begin with, it was by using—abusing—this ceremonious machinery that the two wicked Elders of the tale got *Susannah* convicted of adultery. She was already being led out to be stoned when a heaven-inspired young man intervened to explain that what was being done was amiss: the right way was to carefully probe the witnesses in the absence of one another. His counsel was followed, and her detractors, questioned separately, differed as to vital details, turned out to be liars and were put to death in her place.

48. See David Daube, *Civil Disobedience in Antiquity* (written after the present piece), 1972, pp. 25 ff.

49. 45.14.

50. Such as Genesis 18.9.

51. Besides the articles cited above, section 3, note 20, see David Daube, *Revue Internationale des Droits de l'Antiquité*, vol. 2, 1949, pp. 200 ff.

52. Leviticus 24.14, I Kings 21.13.

53. Yes, leaning, not laying as in the translations. The different gestures involve different meanings. See David Daube, 'Neglected Nuances of Exposition in Luke-Acts', in *Aufstieg und Niedergang der römischen Welt*, ed. H. Temporini and W. Haase, II (Principat), vol. 25 (Religion), 1985, pp. 2355 f., with references to earlier publications.

In the criminal procedure of the Rabbis—and, gradually, in large parts of the civil—the separate interrogation is a must. Mark assumes its operation when he makes false testimony against Jesus, already mentioned, break down ‘because their witness did not agree together’. (Matthew omits the technical item.)⁵⁴ Of course, the point of the method was familiar elsewhere. The great conspiracy against Nero, for example, received its death-blow when—during investigation, prior to any trial—Scaevinus and Natalis ‘were questioned apart and gave conflicting answers’.⁵⁵ But separate examination never became a prescribed, sacrosanct element in Roman law.

7. Transfers

The precepts concerning witnesses had an extraordinary fascination for Rabbinic thought and were increasingly put to use outside their original domain.⁵⁶ Some extended applications are still fairly near the latter. Two were mentioned above: testimony as to whether a husband is alive or dead and testimony as to the ferocious character of an ox. Others might be added—for example, the two witnesses when a jealous husband gives warning to his wife⁵⁷ or, in Matthew,⁵⁸ when one member of the community asks another to abstain from misconduct. The innovation celebrated by the Book of Susannah is broadened in scope by an eminent sage of the time. It was not enough, he found, that accusers could no longer take cues from one another: the judge himself, when having one of them before him, singly, for scrutiny, must be careful to throw out no hint by his queries.⁵⁹ To be sure, whereas the physical isolation of witnesses from one another is an enforceable legal measure, Simeon ben Shetah’s admonition is not, and depends for its efficacy on the judge’s sense of responsibility and intelligence.

The influence of these laws, however, reaches into more distant areas. From the early Maccabean period on, people may ‘testify’ to rules and practices. Quite likely, if it is lay testimony, two witnesses are needed from the beginning.⁶⁰ If it is submitted by a scholar, at first a single witness is enough. No strict distinction is made between his independent function and his reporting: Jose ben Joezer receives the epithet ‘the Permitter’ for

54. Mark 14.56, 59, Matthew 26.60 ff.

55. Tacitus, *Annals* 15.56: *diversi interrogantur ... non congruentia responderant*.

56. See David Daube, *Gaster Festschrift* cited above, note 20, pp. 91 ff.

57. Mishnah Sotah 1.1 f.

58. 18.16.

59. Mishnah Aboth 1.9.

60. Mishnah Eduyoth 1.3 records an instance from the period of Hillel.

attesting to a number of lenient opinions.⁶¹ (Modern psychologists will approve, alive to memory's tendency to excel where a datum accords with one's attitude.) At Jabneh, in the first century A.D., a preference for two witnesses even in this case develops,⁶² though it never hardens into a definite requirement—one Rabbi's testimony remains acceptable.⁶³

Again, a Tannaitic directive for deciding controversies is that when two scholars differ and a third sides with one of them, the latter opinion prevails.⁶⁴ It surely owes something to the longstanding idea connected with evidence: victory goes to two versus one.

A very imaginative use of the idea is made in the thirteenth and last of R. Ishmael's rules of interpretation:⁶⁵ when two Scriptural verses contradict one another, we need a third which will tip the balance. The conflicting verses are placed in a trial situation: two witnesses will carry the day. The verb 'to contradict' is technical in the province of legal testimony,⁶⁶ and the verb 'to tip the balance' is occasionally met there too.⁶⁷ As often, the analogy between model and derivative is not perfect. While two witnesses invalidate the inferior evidence, the isolated verse is merely relegated to a subsidiary level: nothing in Scripture is ever simply void.⁶⁸ Take the antinomy 'the Lord came down on mount Sinai'⁶⁹ and God's statement 'I have talked with you from heaven'.⁷⁰ The latter verse, the Rabbis suggest,⁷¹ outweighs the former (which, in its literal sense, was no longer acceptable to many of them), since it is supported by a further one: 'Out of heaven he made you to hear his voice and upon earth he showed you his great fire'.⁷² So God did remain in heaven. Yet the reference to his descent is not totally discarded; it is seen as adding the detail that his activity above manifested itself down here.

61. E.g. Mishnah Eduyoth 8.4

62. E.g. Mishnah Eduyoth 7.1

63. E.g. Mishnah Eduyoth 7.9.

64. Babylonian Shabbath 39b.

65. Baraitha prefixed to Siphra on Leviticus.

66. Mishnah Sanhedrin 5.2, trial, Yebamoth 15.5, testimony outside trial.

67. Palestinian Yebamoth 10a, Ketuboth 26b.

68. This is evidently felt by S. Singer when (in *Authorised Daily Prayer Book*, 1890, p. 14) he translates, not that the third text 'will tip the balance between the two in conflict', but that it is 'capable of harmonising the two': a smoothing away of roughness, admittedly, but of a roughness which reveals a definite historical development.

69. Exodus 19.20.

70. Exodus 20.19. This is a haggadic illustration; a halakhic one would have entailed more explanation.

71. Mekhilta on Exodus 20.19.

72. Deuteronomy 4.36.

As this canon of interpretation is not contained in Hillel's catalogue,⁷³ it presumably came into existence in the first century A.D.—the same period when it became customary for two scholars to combine in verifying a tradition. Josephus avails himself of it.⁷⁴ Zedekiah, he claims, spurned the threats of Jeremiah and Ezekiel because, though they agreed in every other detail, the former predicted that Zedekiah 'would behold the king of Babylon', the latter that he 'would not see Babylon'.⁷⁵ The conflict, Josephus explains, is only a seeming one. A third passage⁷⁶ provides the solution. After the fall of Jerusalem, Zedekiah was brought for judgment before Nebuchadnezzar encamped at Riblah. So he did 'behold the king of Babylon': the main calamity, announced by Jeremiah. But Ezekiel's opposite message equally came about, as a secondary result: Zedekiah's eyes were put out and he was carried off to the victor's country—which, obviously, he 'did not see'. The elaborate manner in which this piece of harmonization is offered—the *prima facie* contradiction, for example, is not cleared up at once but we are promised that it will be in due course, so we are on tenterhooks⁷⁷—lends some slight support to the dating just proposed: Josephus is proud of displaying a method recently established. Another feature points the same way: behind the two Scriptural lines giving difficulty, there stand flesh-and-blood figures. The case, that is, involves not only a scholarly elucidation of texts but also a proving of the veracity of those spokesmen of God. Strictly, from Josephus's point of view, it is a textual question: how to smooth away the inconsistency in Scripture. But when he depicts Zedekiah's situation, things change. For Zedekiah, it was a question, not of Scripture, but of whether his warners witnessed truthfully in accordance with their mandate. Josephus actually uses the verb 'to testify' in this chapter: 'Jeremiah came to Zedekiah and testified solemnly'.⁷⁸ Nor ought we to overlook the pregnant phrasing—with one exception, the forecasts of the two prophets 'turned out', 'happened', fully to coincide. That is to say, without any consultation: there was independent, twofold testimony. Where, we might ask, in Josephus's eyes, did Zedekiah go wrong? After all, he had not the third, enlightening passage before him. Au fond, he went wrong in not extending the thirteenth rule from holy writ to

73. Following Ishmael's rules in the Baraitha at the opening of Siphra on Leviticus.

74. *Jewish Antiquities* 10.7.2.106 f., 10.8.2.141. This excursus on Josephus's treatment of Zedekiah dates from 1985.

75. Jeremiah 34.2, Ezekiel 12.13.

76. Jeremiah 39.5 ff., cp. II Kings 25.6 f.

77. 107i. f: 'as we shall reveal at a more opportune moment'.

78. *Jewish Antiquities* 10.7.2.104, *martyreo*. That 'solemnly' is here meant rather than 'frequently' (in Greek *pollakis*) is argued by R. Marcus, *Josephus with an English Translation* (Loeb Classical Library), vol. 6, 1951, p. 215 n. e.

life. His faith should have instructed him that the confusing oracles, if spurned, would be vindicated by some strange blend of events. A tall order.

It is that epoch, too, which produces some bold transfers of laws regarding witnesses to novel fields in the New Testament (such as I John's Spirit, water and blood⁷⁹) and, indeed, a striking description of the genesis of the Septuagint in terms of the requirement enjoined by the legend of Susannah. According to the Letter of Aristeas of the late third century B.C., the translators of the Scriptures met regularly to compare their ideas and thus arrived at an agreed rendering.⁸⁰ From the early first century A.D. on, however, we come across the notion that they worked each entirely on his own and that nonetheless one identical version resulted.⁸¹ The witnesses, that is, have been separated, and their absolute harmony ensures their truthfulness and accuracy: they satisfy the strict test of the courts.

It would be pleasant to end here; yet a caveat must be appended. Perhaps it is arguable that the traffic was the other way round or, at least, not one-way only; and that, actually, the legal reform itself had been indebted, greatly or somewhat, to philological doctrine. Such was the preoccupation with the latter in those days at a number of cultural centres that a drawing on it by the jurists cannot be ruled out. The savants of Alexandria had long recognized the importance, in producing a sound recension of a widely read classic, of using manuscripts not dependent on one another. As early as in the first half of the third century B.C., restorers of Homer were advised to rely on ancient copies not themselves emended. Timon of Phleius may have been the first to formulate the principle. We are told⁸² that he passed it on to Aratus, who was editing the *Odyssey* for Antigonus Gonatas of Macedonia. Timon also was connected with this king as well as, interestingly, with the very Ptolemy Philadelphus who commissioned the Septuagint.⁸³

79. 5.7 f.

80. 302.

81. Philo, *Moses* 2.37, Pseudo-Justin, *Exhortations to the Greeks* 13, Epiphanius, *Weights and Measures* 3 ff., Jerome, *Preface to the Pentateuch* (rejecting the notion), Babylonian Megilla 9a.

82. Diogenes Laertius, *Lives of Eminent Philosophers* 9.113.

83. Since this piece was written Bernard Jackson has dealt with witnesses in several publications: "Two or Three Witnesses" and "*Testes Singulares* in Early Jewish Law and the New Testament", *Essays in Jewish and Comparative Legal History* (Leiden, 1975), pp. 153–201; "Susanna and the Singular History of Singular Witnesses" in *Acta Juridica* (Cape Town, 1977), pp. 37–54; "Memorials in King's Advocate v. Hogg and Soutar", *Miscellany* Vol. II, Ed. W.D.H. Sellar (Edinburgh, 1984), pp. 221–60.

BIBLICAL LAWS OF TALION

Calum Carmichael

In order to make novel observations about the role assigned to talion in Exod 21:23–25, Deut 19:21, and Lev 24:18–20, I wish to address first some problems much discussed in the scholarly literature about the Deuteronomic law concerning false testimony (Deut 19:15–21). I shall claim that these problems are resolved on the basis of a straightforward, if sophisticated, approach. We must take seriously the fiction that Moses composed the law. As a prophet Moses anticipated Israel's future problems—for example, the false testimony that resulted in the death of the innocent Naboth, just as he anticipated the people's request for a king. What I am saying, of course, is that the Deuteronomist, living after these events, is Moses. Just as critics readily recognize the Deuteronomist's hand in the presentation of the account of Naboth's death, so we should go further and recognize that the Deuteronomic laws themselves are the collected judgments of the Deuteronomist upon events before Moses's life time, during it, and after it. Fictionally, in the book of Deuteronomy, Moses delivers a farewell address. In doing so, he proceeds in a way that is characteristic of this literary convention: he looks back both on his own life as Israel's leader and on Israel's life before he became leader, and he also anticipates Israel's future. Only those events in his life time are explicitly referred to in order to sustain the fiction.

When we evaluate a particular Deuteronomic law, for example, the one on false testimony, we should not try to relate it to some hypothetical historical background. Such reconstruction of the real world of the past is virtually impossible because of the limited nature of the biblical sources and the lack of extra-biblical corroboration. Instead we should assume that the Deuteronomist is well acquainted with a rule about false testimony, for example, the one in the *Book of the Covenant* (Exod 23:1) that in his time was already attributed to Moses. The same language about "a witness of violence" (*'ēd hāmās*) occurs in both Exod 23:1 and Deut 19:16. What the Deuteronomist has done is to reformulate an existing rule about false testimony in light of the incident about Naboth.

One problem about the Deuteronomic law is why it has to state that two or three witness-accusers and not one only are necessary in order to prosecute a wrong. For those scholars who recognize this problem of the unnecessary specification of the number of witnesses the solution lies in an historical approach. At some point in Israelite history one witness was sufficient to convict. The inherent injustice of this procedure was eventually

seen and at some point the more progressive requirement of a plurality of witnesses was inserted into the law's formulation. This addition to an original text is still manifest, it is claimed, because the law proceeds (in v. 16) to speak of the one man maliciously witnessing against another. Apart from the speculative character of this solution and the attribution of a lack of care to the law's formulator (whose accuracy is taken so seriously by critics when interpreting other matters), its major flaw is the claim that the inherent injustice of accepting one man's testimony without corroboration was not seen from the beginning.¹

The law's content can be viewed differently if we see it as a response to what occurred with Naboth. Jezebel, acting on behalf of her husband Ahab, came up with the idea of bringing a false charge against Naboth, namely, that he had cursed God and the king. She knew, however, that in order to make the charge stick she had to enlist the cooperation of two witnesses who would go along with her malicious charge. From a procedural point of view, she was conforming to proper judicial practice. Her motivation is evil, but her action is correct.² The Deuteronomic lawgiver, in order to indicate that her underlying lawlessness should not confuse the correctness of her procedure, responds to this particular aspect of the narrative. A single person, Jezebel or, as the biblical author perceives it, Jezebel acting for her husband, cannot proceed against a member of the community. Instead two witnesses or more are required, as Jezebel recognized. Her direction in this matter was in line with Israelite legal tradition, the origin of which would be traced to Moses. In stating the law as he does, the Deuteronomist could claim that he was making explicit Moses's judgment of what constituted valid testimony. When the law switches from specifying the number of witnesses required for testimony to a concern with a single false witness the law reflects—in the sense that it encapsulates at a more general level—the complex position in the narrative. We should think of a move by the lawgiver from observing the correctness of Jezebel's procedure to observing its underlying reality. One person, Jezebel, stands out as the leading conspirator, but her husband Ahab is held ultimately responsible for the offense against Naboth (1 Kgs 21:19). The dispute between the two men in the law is analogous to the clash between Ahab and Naboth over the latter's ancestral property. When the lawgiver refers to the single false witness, he is

1. In the Code of Hammurabi 1–4, some thousand years before the Deuteronomist's time, the need for corroboration is recognized. J. Morgenstern lays out the common view that the Deuteronomic law is confusing because a later addition modifies the earlier practice, "The Book of the Covenant", *Hebrew Union College Annual* 7 (1930), p. 75.

2. See David Daube's profound discussion of New Testament and Rabbinic responses to conduct that is externally proper but internally flawed: "Encomium Prudentiae", *Principat* 25 (Berlin, 1985), pp. 2329–46.

perfectly aware that the witness is not acting alone. The situation contemplated can be as devious and complex as the one involving Naboth.

A second problem that can be clarified by relating the law to the narrative is the use in the law of the term “defection” (*sārāh*) in reference to the accused: the false witness testifies against him “defection”. Elsewhere in biblical material the term has a religious sense: defecting, turning aside from, rebelling against God (Deut 13:5; Isa 1:5, 31:6, 59:13; Jer 28:16, 29:32). S. R. Driver points out that the Deuteronomic context appears to be an exception in that defection from law and right is the sense.³ Once we assume, however, that the law has been shaped in light of the Naboth incident the use of the term *sārāh* becomes intelligible. Naboth was accused of cursing God and the king. Such an offense can be accurately characterized as rebellion against God and, further, as a repudiation of this particular society’s constitutional structure. The Deuteronomist appears to have drawn out this basic sense when he speaks in his law of the offense as defection. It is nonetheless important to emphasize just how much a particular narrative influences a particular law, so that we should be careful before extending the meaning of *sārāh* in the way that Driver does.

A third, major problem in the law yields a solution when the incident involving Naboth is again brought into association with the law. In the law a case that raises the issue of false testimony apparently bypasses the local courts and goes to the central authority for adjudication. Why is no attempt made at the local level? It cannot be that in the nature of things such a case is too difficult for the local elders to resolve.⁴ In any event, in the law about taking difficult cases to the central authority, the initial judgment that the matter is too complicated for local decision is made by the local public authority (Deut 17:8). In regard to a case of false testimony this initial step is not even hinted at: “If a false witness rise up against any man to testify against him defection; then both the men, between whom the controversy is, shall stand before Yahweh, before the priests and the judges, which shall be in those days” (Deut 19:16, 17). The institution referred to is the supreme authority assumed to be already in existence when Moses lays down directions for taking difficult cases to it (Deut 17:8–13). Those who constituted it, a judge, or judges, and levitical priests, were made its representatives, so the Deuteronomist understood, after Aaron’s failure to exercise supreme authority in the incident of the golden calf (Exodus 32).⁵

Illumination of the problem why local adjudication is lacking in the law is immediately forthcoming when we note that the local judiciary in

3. *Deuteronomy* ICC, 3rd edn. (Edinburgh, 1902), p. 235.

4. The solution of Driver, (*Deuteronomy*, p. 236), but he gives no reason why a case involving false witness is more problematic than any other type of case.

5. See C.M. Carmichael, *Law and Narrative in the Bible* (Ithaca, 1985), pp. 95–6.

Naboth's city, Jezreel, was also involved in the false testimony against him. Jezebel had sent to the elders and freemen of the city letters in Ahab's name enlisting their cooperation in the false charge against Naboth. In light of this local lawlessness it would appear that the Deuteronomic lawgiver judged that any case of false testimony against a man might involve such widespread local corruption. He consequently directed that the central court always handle any case involving false testimony. How realistic it is to think that many such cases might take on the complexion of the one involving Naboth is difficult to say. It may well be true that a false charge against someone, especially if he is viewed like Naboth (in 1 Kgs 21:6, 7) as awkward in conforming to an expanding governmental authority, requires a good deal of cooperation among those with power in a community. If so, what happened to Naboth presents a not untypical situation. The Deuteronomist's response to arrange for a hearing beyond one's local community would then provide a remedy not just for an incident that might parallel Naboth's, but for many other instances of false testimony too.

The Naboth incident concerns a completed crime, whereas in the law the focus is upon an attempted crime. This difference between the law and the narrative is accounted for precisely because of the relationship between them. Moses, we are to understand, could not possibly tolerate the judicial abomination perpetrated against Naboth. The foundation of his entire system of law is threatened by this particular form of injustice. In response to such a threat, he lays out his law providing for the impartial hearing at the supreme tribunal. He therefore assumes that, because of this safeguard, an instance of false testimony will never go beyond the stage of an attempted crime. The law is an ideal construction.

A problem that can also be illumined by relating law and narrative concerns the *jus talionis* that constitutes the penalty for false testimony. Because of the insidious nature of the offense, we might have expected one severe sanction for most or all forms of false prosecution. Alternatively, while we can see in theory the merit of a talionic sanction for a false accuser who threatens to bring upon someone a certain form of punishment depending upon the type of charge that is brought,⁶ we are left wondering why this principle of punishment is applied in this law and not in the law about the bridegroom who falsely claims that his new wife was not a virgin on her wedding night (Deut 22:13–19). If proved, that charge would have cost her her life, but the lawgiver opts not for a penalty of death but for lesser penalties. We have to wonder also why the talionic principle as a response to offenses themselves is not expressed in other Deuteronomic laws, although L. Eslinger may be right, but only up to a point, that the

6. The principle is expressed in other Near Eastern codes, for example, Code of Hammurabi 1–4.

woman who intervenes in a fight and grabs the genitals of her husband's assailant suffers some kind of talionic penalty (Deut 25:11, 12). She has her hand (*kappāh*) cut off, but this term, usually denoting palm, may be hinting at her own genitals.⁷ The outcome of the story about Ahab may account for the particular expression of the talionic principle in the Deuteronomistic law concerning false testimony.

In the story the deity makes his judgment known through his prophet Elijah, "a prophet like unto me [Moses]" in the Deuteronomistic view (Deut 18:15). Elijah holds Ahab responsible for the offense against Naboth: "Hast thou killed, and also taken possession [of the vineyard]" (1 Kgs 21:19). Jezebel herself is to experience death within Naboth's city for her role in his death. It is in regard to Ahab's penalty, however, that we first note that considerable attention is devoted to the principle of talion, and, significantly, the principle is applied to the false charge against Naboth. When we consider that the Deuteronomist is primarily responsible in the narrative histories for showing how retribution, often of a precise, mirroring kind, was visited upon those who offended the deity's requirements, we can readily appreciate that his law on false witness might incorporate similar notions of retribution.

Ahab appropriates Naboth's land. He meets his death attempting to appropriate land, the city of Ramoth-gilead that is in enemy hands (1 Kgs 22).⁸ Lies and deception were used against Naboth, whose avenger, Elijah, is referred to by Ahab in 1 Kgs 21:20 as his enemy, and they are similarly used in bringing about Ahab's death. The elders of Jezreel were involved in the deception against Naboth; so too are certain established prophets involved in the deception against Ahab. The actions in each case have a judicial setting, an earthly court trafficking in lies in the case of the elders, and a heavenly court in the case of the prophets who come under its influence in speaking lies to Ahab about the successful outcome of the battle. Both Naboth and Ahab are killed while playing uncharacteristic roles. "Proclaim a fast, and set Naboth on high among the people" (1 Kgs 21:9). While enjoying this high position Naboth is accused of cursing God and the king. He dies for this offense. Ahab dresses incognito as a common charioteer in going into battle. He chooses this low position with a view to escaping death, for it is known that the enemy will only go after the king (22:31). He should be safe, in a way perhaps that the honored Naboth should have been against the hostility within his community, but a stray

7. "The Case of the Immodest Lady Wrestler in Deuteronomy xxv 11-12", *Vetus Testamentum* 31 (1981), pp. 269-81.

8. Ramoth-gilead, a city of asylum (Deut 4:43), belongs to Israel and could be rightfully reclaimed. However, entitlement was not automatic but dependent upon Israel's, or its representative's, observance of the commandments (cp., e.g., Deut 19:9).

arrow strikes him. The certain man who drew his bow at a venture was deviating from orders, because the king alone was to be killed. We should recall the role of the witnesses against Naboth, sons of Belial as they are called, a description synonymous with deviant conduct: both they and the archer are in fact nameless individuals.⁹ The precise detail of the retribution visited upon Ahab for his offense seems to have inspired the Deuteronomic use of the formula of retaliation in the law.

The formula, it might be suggested, was inspired by the Deuteronomic lawgiver's concentration upon the fate of the dead victim of a corrupt court in 1 Kings 21. For his offense Naboth had been stoned to death: a lifeless body with damage to its diverse members. Taking up from the story with its interest in talion, but focusing, not upon Ahab, but upon the wronged man, the lawgiver has judged that that victim's life and limbs cried out for retribution.¹⁰ The innocence of the victim would all the more have inclined the lawgiver to contemplate the end result of the outrage perpetrated against him, especially when the execution was carried out under the direction of a court whose function it is to protect the innocent. In a code, for instance, in this very rule about false witness, that lays much emphasis upon examples of crimes that should be heard about and feared, it would be no surprise that the stoned body of Naboth presented a compelling example.¹¹ The story itself reveals this concentration upon his dead body.

In the story there is emphasis not just upon Ahab's death as a mirroring penalty for the slaying of Naboth, but upon his blood after death being consumed by dogs in a way that mirrors what happened to the blood of Naboth after his death (1 Kgs 21:19, 22:38). To paraphrase in language

9. Namelessness appears to indicate that the person functions as a means or a tool. See J. Bailey, "Initiation and the Primal Woman in Gilgamesh and Genesis 2-3", *Journal of Biblical Literature* 89 (1970), p. 141.

10. In 1 Kings 20 Ahab's life is to be taken because he let his prisoner, King Benhadad, escape. Twice in the story the talionic principle, "life in the place of life", is stated (vss 39, 42), further evidence that the narratives about Ahab reveal a special interest in talion. That in the histories Ahab's death is tied to the offense against Naboth and not to his leniency to Benhadad, I take as support for my view of the proper way to assess these histories. Literary critics understandably postulate different times and places of origin for the uneven accounts as well as an ill-fitting final arrangement of them. I suggest that such unevenness was of little concern to those who worked with the histories because the primary aim was to exercise their legal and moral judgment on certain issues that arose in them. Like the Deuteronomic laws themselves, the material was brought together not solely according to how one unit related to the one before or after, but because the exploration of a certain topic in a narrative had priority.

11. On the code's concern with the blemish left by wrongdoing, see D. Daube, "To be found doing wrong", *Studi in onore di Edoardo Volterra*, Pubblicazioni della Facolta di Giurisprudenza dell' Universita di Roma 41 (Milan, 1969), pp. 3-13.

similar to the Deuteronomic law: the penalty of life for life and blood for blood had been exacted.¹² The specific judgment in the story that Naboth's life and blood required precise expiation is readily seen to apply to his life and bodily members. Justice could equally have demanded "life for life [to be followed by], eye for eye, tooth for tooth, hand for hand, foot for foot" (Deut 19:21). The descriptive nature of this statement begins with the head and moves down to the feet and suggests more the model of a single victim like Naboth than, as is generally understood, different types of victim. The death of Jezebel is equally relevant to the use of the formula. When Jehu comes upon her to carry out retribution for what she has done to Naboth, much attention is devoted to her bodily parts. First she paints her eyes and adorns her head. Then after some words are bandied between them, Jehu orders that the eunuchs in her palace throw her down. Horses trample her, and when the command is given to bury her they "found no more of her than the skull and the feet and the palms of her hands" (2 Kgs 9:35). Her fate, we can infer, is intended to recall Naboth's ghastly end.

On the basis of the preceding discussion we can better approach the difficult problem of the occurrence of the talionic formula (with its addition "burning for burning, wound for wound, stripe for stripe") in Exod 21:22-25, the pregnant woman involved in an affray. Critics, dividing the rule into two parts—the first in which the mother is unhurt but something untoward happens to the fetuses (the plural is used), and the second in which the mother's fate is the focus—claim that the second part is an addition to the original compilation of rules (the *Mišpāṭîm*) in Exod 21:1-22:16(17). Some of their arguments carry weight, for example, the formula of talion represents a switch uncharacteristic of the *Mišpāṭîm* from the preceding third person form of address to the second person. The addition is attributed to the Deuteronomist.¹³ After all, he uses the *Mišpāṭîm* in formulating his rules in Deuteronomy, and might well at the same time have found it convenient simply to add on to the material that lay before him. I wish to present different arguments that the rule is Deuteronomic in formulation, but reject arguments such as: that the use of the formula is inconsistent with the pecuniary penalty for the assaulted man in Exod 21:18, 19, and that the formula conflicts with the fine levelled

12. The lawgiver's recognition of the need to do something about a slain body is found in Deut 21:1-9: its presence in the midst of the life-giving land requires expiation. The emphasis is upon the body after death—it causes a blemish—and not upon the fact that a life has been taken.

13. See B.S. Jackson, "The Problem of Exod. xxi 22-5 (*Jus Talionis*)" *Vetus Testamentum* 23 (1973), p. 303-4.

against the assailant in the first part of the rule because the blow to the fetuses is likely to have left a bruise at least on the woman.¹⁴

There are two Deuteronomic laws that merit attention because of the features they share with Exod 21:22–25: the law about false testimony, because it includes the *jus talionis* (Deut 19:15–21), and the law about the immodest woman, because it is about an affray and it involves the only concern in Deuteronomy with a mutilating punishment to a living person (Deut 25:11, 12). If it were a matter of comparing these two laws with the one in Exod 21:22–25, we could not say too much about any substantial links there might be despite the long recognized, tantalizing nature of the shared features. Once, however, we note the background histories underlying the presentation of the two Deuteronomic laws, we are able to advance beyond the frustrating stage of only comparing and contrasting the three laws in question.

I have argued elsewhere that just as the formulation of the Deuteronomic levirate law (Deut 25:5–10) is dependent upon a reading of the problems thrown up by the Tamar story in Genesis 38, so too the following rule (vv. 11, 12) about the immodest woman owes its bias to an issue raised in the story before Tamar became pregnant.¹⁵ I shall briefly sketch the link between the law and the narrative and then proceed to argue that the second part of the Exodus rule that includes the *jus talionis* is also inspired by the attention that has been given to, in this instance, the pregnant Tamar. Deut 25:11, 12 and Exod 21:22–25 share the same opening language (“If men strive”).

Tamar, acting on behalf of her dead husband against Judah’s failure to make provision to have her impregnated, took the matter into her own hands. Disguised as a prostitute she seduced Judah. From one point of view

14. For these arguments, see Jackson, “Exod. xxi 22–5”, pp. 279–83, 290. On the basis of his insistence that biblical laws must be interpreted in their context, J.K. Mikliszanski, “The Law of Retaliation and the Pentateuch” *Journal of Biblical Literature* 66 (1947), pp. 295–8, rejected a literal meaning of “life for life, eye for eye”, etc. He ran into the problem by noting the same conflict that Jackson notes. If he had wished to adhere to his principle, he should have tried to stay with the literal meaning of the formula and sought to reconcile the conflict. He would then have raised doubts about the unintentional character of the attack, and about the bodily mutilations as applied to a living person.

15. The two laws are intimately related, see C.M. Carmichael, “A Ceremonial Cruc: Removing a Man’s Scandal as a Female Gesture of Contempt”, *Journal of Biblical Literature* 96 (1977), p. 332; *Law and Narrative*, pp. 295–99; and L. Eslinger, “Immodest Lady”, pp. 269–81, although I cannot accept his argument about the tie to the tradition concerning Jacob’s struggle with the angel in Gen 32:25–33. It is worth pointing out that the levirate law is concerned with the particular instance of denial of progeny to a man, and in this regard is similar to Exod 21:22 about the loss of the fetuses.

Tamar was acting wrongfully; from another she was acting justifiably. The law on the immodest woman is interested in Tamar's initiative in the dispute; the law about the pregnant woman is concerned with the injustice almost meted out to the pregnant Tamar.

Her husband dead, Tamar took up and interfered in the struggle to obtain his right to an heir.¹⁶ Judah was bound by family loyalty to have the dead man's brother provide one. Avoiding an approach to the brother (Shelah), her interference took the form of deliberately going after Judah's genitals—to state the development crudely but accurately. In the law two men are engaged in a struggle and the wife of one of them helps her husband by grabbing his opponent's genitals. The Deuteronomist has produced a more conventional parallel to the situation in Genesis 38, but he nonetheless betrays the inspiration for his rule when he cites the particular form the woman's action took.

The puzzling second part of the rule in Exod 21:23–25, about the talionic punishment because of what happens to the pregnant woman, becomes less puzzling when we introduce as background the Deuteronomist's consideration of what almost happened to Tamar when it became known that she was pregnant. In Genesis 38 Tamar presents the example of a pregnant woman who, from Judah's eventually prevailing view that she was more righteous than he because he had failed to send Shelah into her (v. 26), turned out to be a potentially innocent victim of a capital sentence. Judah, apparently exercising his *judicium domesticum* but making no proper enquiry, had ordered that she be subject to burning.

The major question to be asked of the rule about the pregnant woman is why talionic punishment is laid down. Why, if she loses her life, is it not simply stated in keeping with preceding rules in the code that the person responsible be put to death (*môt yûmat*)? Or (although I shall reject this reading of the text), if physical injury be the harm, that a fine and medical expenses be paid in keeping with the rule in Exod 21:19? It is a bewildering problem—until we look at Tamar's potential fate, and how its parallel to the Naboth incident has inspired the same application of the talionic principle. If Tamar had been put to death, the issue, like the one prompted by the injustice to Naboth, would have arisen of avenging a woman with child burnt to death because she had rightfully conceived the child for her husband. She had been charged, not maliciously but in the end tantamount

16. The levirate law centres on the problem of the father, presumably dead, who is not available to insist that his son fulfill his levirate duty. Underlying both this law and the following law about the immodest woman are therefore the problems in Genesis 38, first, about a living person, Judah, who in terms of having the levirate custom observed, is "dead", and must be proceeded against; and, second, about a dead person, Er, who because of the levirate custom, is "alive", and must be fought for.

to a false charge, with disloyalty to the family she was still tied to despite the death of her husband. She had prostituted herself, it was claimed, to an outsider. The false charge against Naboth was that he had expressed disloyalty to God and the king. The developments that take place in each narrative arise from an initial struggle, a dead man continuing to claim a share in the family inheritance and Naboth resisting Ahab's acquisition of his ancestral property.

The stoning of Naboth brought about vengeance not just for his death, but also for his blood. In his law about a parallel instance of injustice, the Deuteronomist focused upon avenging the man's death and bodily members. In regard to outcome, Tamar's situation differs from Naboth's and the differences go a long way in accounting for the language and substance of Exod 21:23–25. The law states, "And if there be 'āsôn" ("harm" in RSV, "mischief" in AV, "death" in the *Mekhilta*). The reference is to the fate that might befall the woman. The term has proved to be a difficult one.¹⁷ It occurs only three times outside this law and, significantly now in light of the Deuteronomist's interest in the threat to the pregnant Tamar, all three occur in the context of the Joseph narrative in which the Judah-Tamar story is imbedded. Even more significantly, its meaning in the Joseph narrative has to do with a threat of disaster to a child, Jacob's youngest son Benjamin, a threat, moreover, that is intended to recall Judah's past action against Jacob's favorite son, Joseph.

If Benjamin were made to accompany his brothers to Egypt, as the disguised Joseph had requested, his father feared that 'āsôn might befall him (Gen 42:4, 38, 44:29). In Gen 44:29 Judah himself relays his father's fears to the disguised Joseph. Benjamin is indeed in Egypt at this point in time, and Judah is pleading with Joseph to let him replace Benjamin whom Joseph has ordered to remain in Egypt. Judah further asks to become a slave to Joseph (v. 33). The significance of this development is that Judah is being paid back in mirroring fashion for his primary role in selling Joseph as a slave to Egypt (Gen 37:26–28). The reason why the narrative about Tamar is inserted into the Joseph story is the same—Judah is made to experience what it is like to lose sons.¹⁸ Judah almost caused, such is heaven's way of working justice, his own children in Tamar's womb to experience (along with Tamar herself) 'āsôn. The meaning of the term is death (although it is

17. See Jackson's discussion of the various attempts to understand it, "Exod. xxi 22–25", pp. 274–76.

18. See C.M. Carmichael, *Women, Law, and the Genesis Traditions* (Edinburgh, 1979), pp. 57–65. Jacob's supposed blessing upon Judah in Gen 49:8–12 is by appearance only. Far from unqualified praise of Judah, the saying is heavily sarcastic and consequently condemnatory. Like Genesis 38 it concerns Judah's action against Joseph and the problems Judah had obtaining offspring to continue his line.

noteworthy that Tamar's potential demise is left similarly unstated), or what would be regarded as its equivalent in Benjamin's situation, slavery abroad. It is an outcome that is so disastrous as to warrant in Judah's words, "bringing down the gray hairs of thy servant our father with sorrow to the grave" (Gen 44:29). Its meaning is such as to rule out breaking up the talionic formula so that mutilation or injury without death is intended to be avenged by talion.

The application of the *jus talionis* in the rule about the pregnant woman differs from its application in the rule about a potential victim of false testimony in at least three respects. Each of the differences is illuminated by taking account of the influence of the Tamar story. First is the difference between avenging a death sentence that a court might impose, because of the nature of the false charge against a man, and avenging a fatal assault upon a pregnant woman. In considering a parallel to Tamar's case, the Deuteronomist does not opt for a wrong that results from some house trial such as Judah's but, continuing the example of the struggle from the first part of the rule, concentrates on an attack upon a pregnant woman.¹⁹ In opting for talionic punishment, however, he is influenced by the nature of the injustice Tamar almost experienced because of the house trial. From one angle, her situation is comparable to Naboth's. Not only his life but his blood also had to be avenged in a precise way. Likewise with Tamar if she had died: the added bodily members, the fetuses, would have had to be avenged along with her dead body. In other words, the talionic formula in Exod 21:23–25 is like the formula in Deut 19:21—it applies to the victim in question and not to types of victim who differ according to the injuries sustained. What also stands out as reminiscent of Naboth is Tamar's innocence of the offense she was accused of. The horror of what happens to

19. Interpreters, assuming that the rule focuses upon an ordinary brawl with an innocent woman bystander, have understandable difficulty in accepting that the attack on the woman is anything other than unintended. See, for example, U. Cassuto, *A Commentary on the Book of Exodus* (Jerusalem, 1967), pp. 174–75, J. Morgenstern, "Book of the Covenant", p. 67, S.M. Paul, *Studies in the Book of the Covenant in the Light of Cuneiform and Biblical Law* (Leiden, 1970), p. 74. Yet why should we assume the less complicated situation, especially in legal material? Moreover, D. Daube's observation (*Studies in Biblical Law* [Cambridge, 1947], pp. 107–8), that whenever *nāgap* is used with the accusative it refers to a deliberate act is, as B.S. Jackson notes ("Exod. xxi 22–5", pp. 287–8), telling evidence of the intended nature of the assault. The influence of the Tamar story in shaping the law is further evidence that an intended attack is to be understood. Little wonder that the common view, for example, Cassuto's, p. 276, sees a conflict with Exod 21:13, "It is incomprehensible why one who hurts a pregnant woman accidentally should be liable to the death penalty in the case of a fatality, although earlier, in. v. 13, it was stated that whoever killed a person unintentionally is not to be put to death." Scholars, such as Cassuto, have created the problem themselves.

an innocent victim is, as already suggested, more likely to evoke a desire for intensified vengeance than if the victim had been partly to blame for a dispute. A further parallel is to be recalled. Naboth lost his God given inheritance, his vineyard. If a true Israelite woman lost her life and child in the way that Tamar almost lost hers, the consequence could be the disappearance of an Israelite's name in the land, in effect, the loss of his God given inheritance, his estate.²⁰ This aspect of the offense might also highlight why the punishment in the law is intensified. The obliteration of a man's name by causing the death of his wife and child invites obliteration by way of punishment.

The application of talion in Exod 21:23–25 also reflects the role of talion in the Tamar story itself, just as the role of talion in the Naboth story influenced its application in the law on false testimony. As already indicated, the insertion of the story about Tamar into the Joseph narrative is motivated by this very principle: Judah was bringing upon himself the loss of offspring because he had been behind the “death” of Joseph, Jacob's favorite son. We noted too that Judah's later request to Joseph to substitute himself for Benjamin is intended by the narrator to bring out the notion of exact retribution. Judah, having sold Joseph into slavery, was offering himself as a slave to Joseph. The puzzling mode of execution, burning, that Judah ordered for Tamar may well be intended to mirror her offense, her supposed sexual passion.²¹ The association between sexual passion and burning is well brought out in Prov. 6:27–29, “Can a man take fire in his bosom, and his clothes not be burned? Can one go upon hot coals, and his feet not be burned? So he that goeth in to his neighbour's wife; whosoever toucheth her shall not be innocent.”²² The link between lust and its punishment in the Tamar story would add to Eslinger's claim that the punishment of the immodest woman in Deut 25:11, 12 similarly mirrors her offense, genitals for genitals.²³ However, it is the punishment that Judah

20. The rules about exemption from military conscription couple the man who has just acquired his vineyard in the land and the one who is about to acquire a wife for the purpose of producing his heir (Deut 20:6, 7, cp., Deut 24:5).

21. M. Astour argues that the burning is to be explained by appeal to an original Canaanite version of the story before it was transformed to fit Israelite tradition. Tamar was a cult prostitute, and as a sacred type who prostituted herself outside the sacred order of things burning by fire was the appropriate method of removing her (at least in Babylonian and Assyrian practice, he infers). See, “Tamar the Hierodule”, *Journal of Biblical Literature* 85 (1966), pp. 193–95.

22. For the affinity in language between Jacob's remarks about Judah's lovemaking in Gen 49:12 and the bridegroom's description of the bride in Song of Songs, see C.M. Carmichael, *Women*, pp. 64–5.

23. “Immodest Lady”, p. 273. If we are to assume that the rule is intended for societal ends, then we have to think, as Eslinger does, about how such a penalty is to

deserved, if he had proceeded with his execution of Tamar, that is pertinent to the penalty in the law about the pregnant woman. The only approach to this hypothetical issue is to note that Judah would have done to Er what he appeared to have done to Jacob, namely, destroyed his son. Joseph, in his father's eyes, had been torn to pieces (*tārōp tōrap*, Gen 37:33). Indeed, on his death-bed Jacob identified Judah as the supposed wild beast, a lion, responsible for "coming up from the prey of my son [*miṭṭerep beni 'ālītā*]" (Gen 49:9). The penalty in the law would result in a similar tearing to pieces of the offender.

A second difference between the talionic formula in Deut 19:21 and Exod 21:23, 24 is the amplification in the latter: "burning for burning, wound for wound, stripe for stripe." Again, what almost happened to Tamar may provide illumination. If the formula refers, as I have argued, to a single victim of injustice, then Tamar's potential fate involving fire may have prompted the amplification: all the gruesome injuries that affected Naboth's body because of stoning plus burns, wounds and stripes.²⁴ If the use of fire in the story is meant to mirror her lust, then we need not think of execution being accomplished solely by fire, but by other physical means also so that the variety of injuries to her body would outnumber those to Naboth's. In any event, because the law provides but a parallel to Tamar's situation, it contemplates a variety of injuries that occur before or after death.

A third difference is that the formula in Exodus uses the preposition *taḥat* ("in place of") and not *b* ("for") as in Deuteronomy. It is again noteworthy that the narrative about Tamar, because it is dominated by the levirate custom, is concerned with notions of replacement. Onan stands in for Er, and when Onan is struck down, Tamar tricks Judah into being a replacement because he had been reluctant to let Shelah replace Onan. If the pregnant Tamar had been put to death for her activity the attempt to have

be carried out. If my thesis has merit, no such consideration arises. The rule (in part) is a legal exercise, a hypothetical construction inspired by the attempt to produce a more conventional set of circumstances to those underlying the Tamar incident. The clever use of language is one indication that such rules are not designed to serve practical ends.

24. *kāwā*, the uncommon word in the law, in Prov 6:28 (the scorching of the adulterer's feet) is a parallel to *sārap* in Prov 6:27 (the burning of his clothes). *sārap* is used in reference to the harlot Tamar's punishment. In Isa 3:24 the harlots, the daughters of Jerusalem, will experience burning (*kē*) instead of beauty. *pesa'* ("wound") is not a common word either. It is used of the troubles, for example, enticement by harlots, that befall those who imbibe drink (Prov 24:29, 33). In Song of Songs 5:7 the watchmen of the city wound the woman as she searches for her lover, possibly because they regard her as a harlot.

her child take the place of her dead husband would have failed.²⁵ In redressing the wrong done to any pregnant woman, the punishment should mirror the offense by somehow bringing in the notion of substitution. The narrative about the wrong done to Naboth does not raise the same notions of substitution.

The discussion of the occurrence of the talionic formula in Exod 21:22–25 might be summarized. It is typical of the Deuteronomist to pursue, in a fashion reminiscent of the sage's counsel in the book of Proverbs, contrasting issues.²⁶ Aside from presenting (in Deut 25:11, 12) an offense by a woman that might parallel Tamar's method of fighting for the rights of her dead husband, he has also been interested in the contrasting aspect: an offense that parallels the wrong that was almost done to the pregnant Tamar. In that the Deuteronomist uses the rules in the *Book of the Covenant* in formulating his, it is quite possible that he added to them also and that these additions are to be found in the *Book of the Covenant*. In other words, only a rule (Exod 21:22) about damage to a fetus is ultimately pre-Deuteronomic because at that stage the focus was partly upon injuries to non-persons, slaves in Exod 21:20, 21, fetuses in Exod 21:22, and slaves again in Exod 21:26, 27. A concern with the mother is out of place in this context, even though it is easily seen how the question of calamity befalling her might arise (cp. Code of Hammurabi para. 209, the death of a fetus, followed by para. 210, the death of the mother). It was the Deuteronomist who took the topic about the fetus further, because in characteristic fashion the narrative about Tamar encouraged him to do so, and he consequently raised the issue of death to the mother. The Tamar story—scrutinized, we might imagine, in a school setting for legal, instructional purposes—would explain the very real puzzle as to why a rule about a pregnant woman should include the punishment of talion. The similarity the Deuteronomist found between what occurred with Naboth and what might have happened to Tamar is the link. This link was further encouraged because the Tamar story had in another context prompted a rule that required a mutilating penalty.

Before turning to Lev 24:19, 20, I wish to indicate that even the first part of the rule about the fetuses in Exod 21:22 may owe a good deal also to the typical Deuteronomic process of formulating a law by bringing it into connection with a narrative. It is beyond the scope of this article to indicate why the topic of a blow to a pregnant woman first arose in the context of the *Book of the Covenant*. Obviously, an enquiry into the rules concerning

25. There is a sense in which the birth of a male child has this significance independent of the special circumstances of the levirate situation.

26. On this aspect of setting down instruction, see C.M. Carmichael, *Law and Narrative*, pp. 213, 297–98, 301.

assault that precede it, for example the immediately preceding one about a blow to a slave, is relevant, as is perhaps the recognition that had to be given to Moses's role as a judge of quarrels in Exod 2:11–14. However the topic arose, the influence of the Tamar story upon a rule on the subject is again observable.

If Tamar had died, her death would have been the consequence of the peculiar struggle between Er and his father and brother. Er pressured Judah from his grave to exercise his *patriapotestas* to ensure that another of his sons fulfilled the levirate duty. Onan acted against his dead brother (and against his father also). Judah, failing to replace Onan with Shelah, was in turn also acting against Er. It was at this stage that Tamar intervened in the struggle on behalf of her dead husband. She became pregnant with twins, survived the trauma of the judgment against her, and gave birth, but with difficulty. An exploration of this set of circumstances, for the purpose of pursuing a legal topic in a hypothetical fashion, illuminates the text of Exod 21:22 in which the pregnant mother is unhurt but “her children come out.” Interpreters have been puzzled by this reference to children rather than to a single child. They have been puzzled too by the details of the struggle: it is not necessarily confined to two men, who are described as having struck her, although only one of them is held accountable.²⁷ The conflict involving three men in Genesis 38, one of whom in the end directly moved against Tamar, and Tamar's twin children would explain the puzzling references in the rule. We might also point out that the Tamar incident would also solve a puzzle noted by many interpreters as to how it could be known that, in the event of a fatal assault to the woman, she was pregnant at the time. Tamar was at least three months advanced in pregnancy when Judah judged that she had played the harlot (Gen 38:24).

Another major crux in the rule is resolved if we consider the influence of the narrative. Should the children be the only ones to suffer, the man responsible is liable to monetary damages “according as the woman's husband lays upon him”. The rule then continues, *venātan biplīlīm*, and interpreters have viewed this statement about the involvement of judges to be at odds with the preceding one that gives the husband an unfettered right to obtain the sum of money he claims as compensation. Jackson lays out the

27. As Jackson points out (“Exod. xxi 22–25”, pp. 287–88), it is the Septuagint and Syriac versions that contemplate a fight between two men. The Masoretic has no such restriction and Jackson thinks of a number of men as participants. Cassuto implausibly claims that we are dealing with a generic plural in each instance to indicate that one or other of the combatants hurt her and that the fetus may be male or female, *Exodus*, p. 275. Morgenstern, noting that the Samaritan and Septuagint versions read the singular, took the Masoretic as original and wondered whether, because the text was legal writing, the assumption is not in fact that the woman might have been carrying twins, “Book of the Covenant”, p. 67.

many attempts to resolve the conflict and finds them all suspect, except for Daube's solution.²⁸ Daube claims that the clause is an interpolation belonging to a time when private disputes were attracting public interest, because the aim was to curtail the resort to self-remedies. No problem in the text exists, however, once we observe that the rule also takes into account a situation that might parallel the hypothetical one suggested by the Tamar story. In other words, the rule first states the normal position in which the husband is alive and can make his claim. It then turns to the exceptional situation where the husband is dead and requires the claim to be made with judges. The text therefore reads, "And if men strive and strike a pregnant woman and her children come out, and death [to the mother] does not ensue, he [the one who struck her] shall be strictly fined according as the woman's husband shall lay upon him, or he shall pay through judges." In *venātan bīplīlīm* the *vav* connects an alternative case as in, for example, Exod 21:16; the *bēth* has the sense of instrument or means by which the payment is made.

The two texts, Exod 21:23–25 and Deut 19:15–21, that contain the talionic formula are not about talion as generally understood. Rather they are about intensified vengeance or the intensification of the death sentence, "*eine Verschärfung der Todesstrafe*."²⁹ A parallel instance would be the practice recognized in Deut 21:22 where a man is first put to death and his body incurs disgrace by being then hung up for public gaze. Only in Lev 24:19, 20 does the formula truly refer to talionic punishments. The relationship between the Deuteronomic and Levitical laws is complex. Detailed examination of similar material proves conclusively, however, that the Levitical laws, or at least their formulations, are later.³⁰

In explaining the occurrence of the talionic formula in Deut 19:15–21 by appeal to the Naboth incident, we can go further and claim that the formula as such is original to the Deuteronomic law about false testimony.³¹ This claim is based on the observation that the detailed concern with what happened to the bodies of Ahab and Jezebel is the primary inspiration for its composition. If we assume, as we are encouraged to do by the often

28. See Jackson, "Exod. xxi 22–25", pp. 277–79, and Daube, *Studies*, pp. 108, 149 n. 14.

29. The expression of C.F. Keil and F. Delitzsch, *Commentar über das Alte Testament* 2.1 (2nd edn, Leipzig, 1870), p. 510, in regard to the law about the hanged man (Deut 21:22, 23).

30. See C.M. Carmichael, "Forbidden Mixtures", *Vetus Testamentum* 32 (1982), pp. 411–12, and, "The Law of the Forgotten Sheaf", *Society of Biblical Literature Seminar Papers* 20 (1981), pp. 35–37; also, B.S. Jackson, "Exod. xxi 22–25", pp. 303–4.

31. As Jackson notes ("Exod. xxi 22–25", p. 300), no ancient Near Eastern source formulates the law of bodily injuries by the use of maxims.

striking nature of the parallel material, that the Levitical writer knew the Deuteronomic material, then Lev 24:10–23 provides a further example of such parallelism.

After the initial, unresolved dispute between Ahab and Naboth, there followed the false accusation that Naboth had reviled God and the king. The false charge of blasphemy led to a capital sentence from the corrupt judicial authorities. Out of this complex context, because the sentence in fact constituted murder, comes the Deuteronomist's rule about the application of talion. In Lev 24:10–23 the issue is also about an unresolved quarrel between two men, and one of them, a non-Israelite, proceeds to revile God. Then into the context of a judicial enquiry that pronounces a death sentence upon the blasphemer comes the statement of an apparently existing rule, presumably one that applied to Israelites previously, about the punishment for a blasphemer and, most puzzling, a rule about murder, which in turn, just as in Deuteronomy, leads to rules about the application of talion.³² If we were to set out the Deuteronomist's procedure as comparable to the priestly writer's we would have: the dispute between Ahab and Naboth that led to the alleged offense of blasphemy; the trial to determine the offender's fate, namely, death for the blasphemer; a rule about false testimony, because the death sentence was tantamount to the crime of murder; and the application of talion. The intricate nature of the two parallel contexts is such as to rule out coincidence and to assign precedence to the Deuteronomic sequence.

The Levitical writer covers ground similar to the Deuteronomist's, but in his own terms and partly with an eye to generalization and systematization. In doing so, he may be reacting negatively to the Deuteronomist's narrow application of the talionic principle. What might motivate his reaction is difficult to say. Possibly he first reacts to the complexity of the Deuteronomist's procedure, because it deals with a fabricated offense, by setting down a corresponding account of a true case of blasphemy. He then

32. Although M. Noth regards the rules about murder, killing a beast, and bodily injuries as insertions from elsewhere, he gives no reason why it is these rules that are inserted and not others. He indicates, without any argumentation, that they were already attached to a rule about blasphemy and that the latter's insertion drew the others along with it. Should this observation be correct, we would still wish to know why a prohibition about blasphemy is followed by the prohibition against murder. See *Leviticus* (Philadelphia, 1965), p. 180. During a summer seminar for College teachers that I directed for the National Endowment for the Humanities in 1985, Professor Walter Renaud, William Woods College, Fulton, Missouri, suggested that the topic of murder and bodily injuries might arise in the context of Lev 24:10–23 because of the initial quarrel between the two men. However, as he also pointed out, the inclusion of a rule about causing the death of an animal would not fit this explanation.

proceeds to oppose the Deuteronomist's concern with a criminal after his death, perhaps because of priestly opposition to too much involvement with a dead body. In any event, we can claim that the Levitical writer sets down the rule against murder after the pronouncement of the death sentence upon the blasphemer because the Deuteronomist's procedure determines his.³³

In the Deuteronomist's case of blasphemy the true offender turned out to be the one who murdered Naboth, Ahab being explicitly condemned for the murder in 1 Kgs 21:19. It was Ahab's death, and his wife's, that raised the topic of talion both in the episode and in a legal context (the law about false testimony). The priestly writer takes up the topic of talion but not as it applies to the dead body of a criminal. Thus he does not apply the phrase "life for life" in regard to murder. Instead he separates it from any link with murder and gives it an application that requires a living creature: one who causes the death of an animal has to provide a live one in its place.³⁴ He then applies the principle of talion, for which he had a Deuteronomic precedent in Deut 25:11, 12 (the immodest woman), to living persons who have suffered bodily mutilations. Repeating the two rules (only in reverse order this time) about murder and the death of an animal, he relates the actual stoning of the blasphemer.

We have then the sequence in Lev 24:13–23: a blasphemer is to be stoned, he is to be put to death; a murderer is to be put to death; one who kills another's animal is to give a live animal, life for life; one who disfigures someone is to be disfigured himself, fracture for fracture, eye for eye, tooth for tooth; one who kills an animal is to make it good; the murderer is to be put to death; the blasphemer is stoned to death. There may be a deliberate attempt to break up the unitary character of the Deuteronomic formula. Not only is "life for life" separated from bodily mutilations, but it is also no longer linked to murder. Indeed, in the repeated statement about the death

33. To be sure, he pursues other aims also, in particular, the application to an alien as well as to an Israelite of the law about cursing the name of the Israelite god. In this regard, a typical Deuteronomic procedure is worth recalling: laws are formulated in response to problems that arose between Israelites and non-Israelites (e.g. Simeon and Levi and the Shechemites in Genesis 34), or problems involving half-Israelites (Er, Onan, and Shelah have a Canaanite mother). For this procedure, see C.M. Carmichael, *Law and Narrative*, pp. 185–205.

34. It is thus the attention given to the talionic principle that determines why a rule about causing the death of an animal should follow one about murder. The juxtaposition of the two rules is, in the absence of some such consideration, strange. J. Morgenstern, "Book of the Covenant", pp. 78, 79, thinks it is "sheer nonsense" to apply "life for life" to the repayment of a living animal for a dead one. "Animal for animal" should have been used, he asserts. He has a point, but all the more is the question raised why "life for life" was used. Its use suggests that the Levitical writer was reacting against its previous use.

of an animal the phrase is not repeated. The omission could be an indication of the Levitical writer's intention to remove the talionic formula from its association with death, the Deuteronomist's sole use of it.

I have argued that in the Old Testament the four legal texts (Exod 21:22–25; Deut 19:15–21, 25:11, 12; Lev 24:18–20) concerning talion prove to be closely related to one another. That this may be a surprising result is perhaps indicated by the scattered nature of the texts in question and the different contexts in which they are found.³⁵ Aside, however, from the far from insignificant talionic element, another indication that there might be more in common than would appear is that each text concerns a dispute, and obviously the question of talion need not arise solely in regard to conflicts: “If men strive” (Exod 21:22 and Deut 25:11, 12); “The men between whom the controversy is” (Deut 19:17); and “This son of the Israelitish woman and a man of Israel strove in the camp” (Lev 24:10). The interest in talion comes from narrative accounts, as we might possibly expect, because narrative so often provides scope for expressing the universal and ageless concern with retaliation that is of a precisely mirroring kind.³⁶

35. It is certainly a result far removed from the assessment of a recent critic who, representing a common view, states in regard to Exod 21:23–25, Deut 19:15–21, and Lev 24:18–20 that the formula of talion “is a quotation in all three passages with no essential connection with its context” (A.D.H. Mayes, *Deuteronomy* (Grand Rapids, 1981), p. 291). Underlying such a judgment is a demeaning view of the abilities of the supposed interpolators.

36. Just how extensive a feature talion in different senses is, see D. Daube, “Fraud on Law for Fraud on Law”, *Oxford Journal of Legal Studies* 7 (1981), pp. 51–60.



