

## Chapter 23: Eye for an eye

An eye for an eye, tooth for tooth, hand for hand, foot for foot, burn for burn, wound for wound, bruise for bruise: in concrete and brutal symmetry, the text insists, as Leviticus explicitly glosses, “as he has done so shall it be done to him.” The poetry raises but does not resolve basic arguments about punishment, the purposes of criminal and tort law, and the nature of justice itself.

“As he has done so shall it be done to him,” could pass for an abstract epitome of justice that could motivate a criminal law system. Aristotle taught that justice is treating equals equally; Maimonides states that punishment should be exactly the same as the offense. By doing to the offender as he has done, we restore precisely the balance of the status quo ante; equals have been treated equally and justice is done.

But the claim undermines itself. If an eye for an eye is justice, it is justice of the poets, not the justice of law in our world.

We are mere humans, not God. For us, restoration is impossible; as the Kuzari emphasizes, cutting off an offender’s hand does nothing to restore the victim’s. Nor is the equality of balance any easier. If justice is founded on equal treatment of equals, the problem is that--as R. Dosthai b. Yehudah and R. Shimon bar Yohai point out in the Bava Kamma excerpt--eyes and limbs are never equal. Some eyes are highly trained, others see little; destroying the eye of a one-eyed man is vastly different from removing the eye of a two eyed or blind man. And there is the Shylock problem, explicated by both Abbaye and the Kuzari: the principle is “an eye for an eye,” not “an eye and a life for an eye.” It is almost as difficult to extract an eye as a pound of flesh without collateral damage. Mere humans can never attain the level of precision of an eye for an eye; the wound we make in retribution will always be different from the one it is meant to offset. Our punishment will never truly fit the crime.

Justice requires justice. If what is done to the criminal is not “as he has done,” then judicial violence is just violence. The criminal has been wronged, and this version of the eye for an eye principle suggests that yet more violence is necessary to restore the balance. Indeed, the Bible itself is aware of this problem, as we see in the very first instance where the “life for a life” rule is mentioned. After Cain murders Abel, God’s punishment fits his crime in a symbolic, not literal, way: Cain, the settled farmer, is condemned to wander in place of his murdered brother the shepherd. Cain, however, immediately assumes that people will apply the Lex Talonis more literally: “anyone who finds me will kill me.” Violence, that is, will beget violence in a never ending cycle, made worse by God’s proposed solution, “if anyone slays Cain, he shall be avenged seven times.” Five generations later, Lemekh understands the full logic of this system: he kills a man for wounding him, a child for his bruise--and vows that if anyone responds in kind he shall be avenged 77 fold. This route leads to war without end, the world that could be cleansed only by the Flood.

But the post-biblical argument does not focus on the instability of regimes of retaliation. Instead, the later texts assume a state or state-like adjudicator whose actions, just or unjust, do not demand revenge. Private revenge has been transformed into a communal system of mixed criminal and tort law.

In this state-like system, the central problem is not violence without end but hubris: humans pretending to be gods. A criminal law meant to restore the cosmic balance of a mythological status quo ante, to achieve justice by doing to the offender what he sought to do to his victim, or to appease vengeful victims by allowing them to take what they lost, is basically beyond the capacity of a human legal system. To be fair, it must restore what cannot be restored and measure the incommensurable.

Punishment, in short, raises exactly the same problems as criminal law generally: a just system of adjudication requires a level of knowledge, empathy, and moral certainty not possible in human systems. Sanhedrin describes the requirements for an ideal criminal law system: 80 wise judges, speaking every language in the world so they will not be tripped up by translations, able to prove that a “sheretz” is pure despite Leviticus 18:29 so they know the limits of legal logic, parents so they empathize with the frailties of flesh, speaking in reverse order of seniority to avoid peer pressure, waiting overnight before conviction to allow arguments to ripen, ready to revisit any conviction at any time over any new evidence so that procedural finality does not interfere with the pursuit of truth, acquitting on a unanimous vote of conviction since such agreement must indicate a failure of independent thought, requiring two reliable and religiously observant eye witnesses for each crime without inferences or circumstantial evidence, duly warned of the gravity of the enterprise, making sure that the accused had acknowledged the wrongfulness of his action immediately before doing it, and so on.

But this is a system for poets, not attorneys. If it is law, it can only work as law administered directly by the Court Above. As the Sanhedrin discussion concludes, this system will never generate human convictions or human punishment. It must rely, instead, on “snake bites” or the King’s less just law to punish the guilty. Only God can enforce his rules.

Paradoxically, the argument from the pursuit of justice leads to the inescapable conclusion that we should, instead, pursue something less. Perhaps, prefiguring later liberal arguments, human institutions ought to be based on the lesser virtue of peace--preventing men from “eating each other alive.”

Still, even if the goal is civil order, not absolute justice, ideals remain critical. Systems based merely on deterrence--simple fear of negative consequences--are likely to be both violent and ineffective. People react quite differently to negative consequences depending on whether they interpret them as hostile oppression or deserved punishment. The norms of the oppressor we resist if we are brave and subvert if we are not.

Accordingly, the first task of a criminal justice system is to convince the population to adopt a particular understanding of what is right and what is wrong: that murder is wrong, and so is beating women into miscarriage, beating slaves to death, killing for family honor, warring on neighbors to steal their property. Only if the criminal accepts that his action was a crime will he agree that the state's violence is punishment rather than oppression or mere random fate. So, while an actual criminal law system need not be absolutely just, if it is to be effective it must persuade its subjects that it is at least reasonably legitimate.

Thus, the unenforceable, uninstitutionalized, system of poetic justice exists to educate, to structure debates about how people should act that will help those of moderate good will conform their behavior to social expectations. That educational system is the primary source of social control. Only when it fails do we move to more conventional criminal law. There, instead of justice, the first goal should be reducing crime; punishments should be judged by whether they in fact reduce crime. Creating superegos or deterring violence, not restoring balance, is the primary point.

This seems to be Maimonides' view in our excerpt. He begins by giving a straightforward philosophic account of the principle of proportionality. But at the point marked "introduction," he switches mode entirely. Discussing appropriate penalties, he abandons the equality principle and, instead, gives an account of punishment that would be familiar to any Benthamite: punishment should be calibrated to prevent crime, with harsher punishments for more common, more highly motivated, or more easily concealed crimes regardless of exact fit or abstract justice.

Our Talmudic text, on the other hand, does not discuss deterrence at all. The Mishnah lists the types of injuries that must be compensated to make a victim whole. The focus is on redress of injury, not with Maimonides' concerns of keeping the peace or deterrence or the eye for an eye principal's goals of restoring cosmic balance or retribution. In modern terms, this is tort, not criminal law (although some medieval commentators blur the distinction by treating the Mishnah's compensation as a sort of fine, just as some modern lawyers construe tort liability as stigmatizing rather than compensatory). As R. Papa points out, the eye for an eye principle would reject compensating a victim for the costs of medical care if the offender will also need (after retribution) care as well.

The Gemara seeks to reconcile the Mishnah with the biblical text through its discussion of how to monetize eyes. Consider the last paragraph of our excerpt. The immediate question is what Eliezer could have meant by contending that "eye for an eye" means "actually" an eye for an eye. All the commentators agree that he couldn't have meant actually poking eyes out. Although perhaps that is exactly what he meant, the Gemara's commentators are committed to the Mishnah's position that simple literalism won't do: multiplying blindness would require ignoring the biblical text's basic emphasis on recreating balance in the world. Raba contends, instead, that Eliezer's disagreement was over the issue of valuing a freeman based on the slave market. The measure of a free man (or his body parts) is not merely his price in the resale

market. Abayeh counters that this could not explain Eliezer's dissent: everyone agrees that free men are not for sale. R. Ashi gives us the solution: Eliezer must have agreed that compensation is the basic remedy and compensation must be based on the slave market, since there is no other way to price eyes. But even if it is reasonable to equate the value of an eye with the marginal market price of slaves, the problem of varying eyes remains. Eliezer's disagreed with the Rabbis only about whether the eye that should be compared to the slave market was the victim's or the perpetrator's. **In any event, in non-standard markets like the market for eyes, there may not be a single market clearing price. All tort lawyers understand, implicitly if not explicitly, that the price a tort victim would pay to restore his lost eye is far lower than the price he'd have demanded to sell it in a voluntary contract, and neither is likely to be closely related to the increment in wage earning capacity associated with a working eye.**

But the Gemara seems to overlook an important analytic distinction. The biblical eye for an eye principal is a criminal law concept. The simplest resolution of its seeming tension with the Mishnah's compensation principles is to limit the eye for an eye principal to the heavenly criminal justice system where it originated, leaving the Mishnah's compensatory rules free to govern in tort and even the King's deterrence-based criminal law. Can we learn something from the Gemara's expansive view of the biblical rule as applying even to a tort context where the focus is on the victim rather than the offender?

The Kuzari offers one possibility. Halevi contends that "cutting off his hand does not profit you." But this claim ignores the pleasures of schadenfreude, let alone revenge. Perhaps the Gemara is countering by misdirection the claim of an honor culture that destroying the offender's bodily parts reduces the victim's humiliation and thus is a form of "compensation." Its detailed debate over whose eye is to be valued, what valuation methods are appropriate, and whether the victim is entitled to medical costs seem too picayune to leave room for grand questions of revenge. In his discussion of prayer (III:19), the Kuzari contends that a prayer can be granted only if it "benefits the world without damaging it in any way." On this view, just as we know that oppressing our fellow man is wrong (Kuzari III:7), just as we doubt the justness of a God who makes the rabbit the carnivore's prey (Kuzari III:11), we should know that revenge for its own sake is wrong as well. The Kuzari's refusal to allow harm for the greater good is the core of his concept of divine justice, but it leaves criminal law in an awkward bind. If humans cannot restore the divine balance, and revenge and retribution do not "profit you," deterrence is an empty threat. An eye for an eye teaches that the criminal deserves punishment, but denies that a human court or family has the right actually to impose it. Not every wrong has a remedy.

Finally, a life for a life – as opposed to an eye for an eye – raises a distinct issue. The texts resist equating one eye with another: each eye's specificity gives it its own value. In contrast, they accept that, at least in principle, specific eyes can be priced in money. But none of our texts makes the analogous argument for lives.

No one suggests that the individuality of human beings means that some souls are worth more than others. Similarly, no one suggests pricing specific lives, although one could get prices as exact as the prices for eyes by looking to the slave market or a free man's earning power. Indeed, our Gemara passage goes so far as to quote Numbers to explicitly reject the usual revenge culture notion that money (*damim*) can atone for blood (*dam*, or in the Cain story, *damim*) as a synecdoche for life.<sup>1</sup> Life, it maintains, is incommensurable with money.

Conversely, all lives are treated as equally valuable. As Maimonides puts it: "Necessarily, there must be a soul for a soul--the young and the old, the slaves and the free, the men of knowledge and the ignorant being considered as equal." Equal in what?, Aristotle might have asked. After all, if eyes differ in their abilities and monetary value, so do lives. Or so one might imagine a believer in natural aristocracy and the inferiority of the barbarians arguing.

Genesis responds in one of the most important myths of the biblical corpus. Each child of Adam is a unique creation of a single God and equally a descendant of His creation Adam, "so that no man might say my father is better than yours" and the death of a single individual must be seen as the destruction of an entire world. We are equally humans, equally made in the image of God. Maimonides' pointed examples emphasize Genesis's egalitarian ethos: age and knowledge would be the markers of an Aristotelean natural aristocracy in a society that valued scholars above all.

The claim of fundamental equality regularly conflicts with convenient prejudices; its victory is never obvious or final. Leviticus applies it to foreigners--"one law you shall have for citizen and stranger for I am the Lord your God" (24:22)--even though it does not fully apply it to slaves, ruling that a master who beats his slave need not be treated as a murderer if the slave survives for a few days. But the principle ultimately is more powerful than the prejudice: slaves are also unique creations of a unique Creator. Impressively, Maimonides recognizes the contradiction, using the very same example of a man who is beaten and survives for a few days to illustrate the importance of actual capital punishment only a few lines away from his statement that slave souls are equal to free ones. The same logic should apply to require a fundamental equality of men and women, Jews and Gentiles, citizens and aliens, even criminals and victims.

Neither eye for eye nor life for life ultimately serves as a principle of vengeance or criminal law. In those spheres, the slogan reminds us that true justice is out of our reach; we have neither the knowledge nor the skill to match wound for wound, punishment for offense. Instead, we must temper our aspirations: real criminal law (the "law of the King") can be justified only by the more modest goal of actual effectiveness in reducing crime. Eye for an eye and life for life, then, are primarily rhetorical tropes to teach basic principles of fairness--turnabout is fair play, what's sauce for the goose is sauce for the gander--and equality. Our eyes may not be equal, but our

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<sup>1</sup> My dictionary indicates that the two *damim* are etymologically independent, and the use of *damim* for money is post-Biblical. Still, the pun cannot have gone unnoticed.

souls are, in the simple sense that we are all fellow humans, none of us more alive than the others. Basic decency requires that we respect this basic equality.