

Retribution: Change in the Unchanging Law

1. Exodus 21:22-25.

וְכִי יִנְצוּ אֲנָשִׁים וְנִגְפוּ אִשָּׁה הָרָה וְיֵצְאוּ יְלָדֶיהָ וְלֹא יִהְיֶה אִסּוֹן עָנֹשׁ יַעֲנֹשׁ כְּאִשֶּׁר יִשִּׁית עָלָיו בְּעַל הָאִשָּׁה וְנָתַן בְּמַלְלִים: וְאִם־אִסּוֹן יִהְיֶה וְנִתְּתָה נַפְשׁ תַּחַת נַפְשׁ: עֵין תַּחַת עֵין שֵׁן תַּחַת שֵׁן יָד תַּחַת יָד רֶגֶל תַּחַת רֶגֶל: כּוּיָה תַחַת כּוּיָה פָצַע תַּחַת פָּצַע חֲבוּרָה תַחַת חֲבוּרָה:

And if two people shall struggle and they hit a pregnant woman and her children shall go out, and there is no disaster, punish they will be punished as the woman's husband will raise on him and he shall give by means of fines. And if there shall be a disaster, he

shall give life/spirit under life/spirit. Eye under eye, tooth under tooth, hand under hand, leg under leg. Burning under burning, wound under wound, whipping under whipping.

2. Leviticus 24:19-20.

וּמִכָּה נַפְשׁ־בְּהֵמָה יִשְׁלַמְנָה נַפְשׁ תַּחַת נַפְשׁ: וְאִישׁ כִּרְיֹתָן מוֹם בְּעַמִּיתוֹ כְּאִשֶּׁר עָשָׂה כֵן יַעֲשֶׂה לוֹ: שֹׁבֵר תַּחַת שֹׁבֵר עֵין תַּחַת עֵין שֵׁן תַּחַת שֵׁן כְּאִשֶּׁר יָתַן מוֹם בְּאָדָם כֵּן יִתְּנוּ לוֹ: ^{מִשְׁטֵי}

And one who gives a mortal blow to cattle shall pay a life/spirit for a life/spirit. And a person who gives a deformity to/for his colleague, as he did so will be done to him. Break [broken bone] under break, eye under eye, tooth under tooth -- as he gave a deformity to/for/in a human, so will be done to him. And he that hits a beast shall pay,

and he that hits a person shall die. One law you shall have, the same for the stranger and the citizen it shall be, for I am Adonai your God.

3. Deut. 19:18-21.

וְ: וְדָרְשׁוּ הַשֹּׁפְטִים הַיָּטִב וְהֵגֵה עַד־שֹׁקֵר הַעֵד שֹׁקֵר עֲנָה בְּאֶחָיו: וְעִשְׂתֶּם לוֹ כְּאִשֶּׁר זָמַם לַעֲשׂוֹת לְאֶחָיו וּבְעֵדֵת הָרָע בְּקִרְבָּנָה: וְהַנְּשָׂאִים יִשְׁמְעוּ וְיִדְאוּ וְלֹא־יִסְפוּ לַעֲשׂוֹת עוֹד כְּדָבָר:

וְ: הָרָע הַזֶּה בְּקִרְבָּנָה: וְלֹא תִחֹס עֵינֶיךָ נַפְשׁ בְּנַפְשׁ עֵין בְּעֵין שֵׁן כֵּן בְּשֵׁן יָד בְּיָד רֶגֶל בְּרֶגֶל:

And the judges shall inquire well and behold — a lying witness is the witness, a lie he answered for/to/by means of his brother. And you shall do to him as he intended to do to his brother and you burnt out the evil from your midst.

And those who remain shall hear and fear, and they will not continue to do more like this evil in your midst. And don't take mercy in your eyes. Life/spirit for/by means of life/spirit, eye for/by means of eye, tooth for/by means of tooth, hand for/by means of hand, leg for/by means of leg.

I. Interpretation

4. Mishnah Bava Kama 8:1

One who [assaults and] injures his fellow is liable on his account for five things: for damage, for pain, for healing, for loss of time, and for humiliation. How [is] "damage" [appraised]? If he blinded his eye, cut off his hand, or broke his leg – [the victim] is deemed as a slave put up for sale: How much was he worth, and how much is he worth [now]? How is "pain" [appraised]? If he burned him with a skewer or [stabbed him] with a nail, even upon his fingernail where no wound is produced – an appraisal is made: How much would a person like this agree to receive in order to suffer such pain?...

5. Babylonian Talmud Bava Kama 83b-84a

Really? It is "eye for eye" that God stated (Exod. 21:24; Lev 24:20), [so] I say [he must lose] an actual eye! One cannot suppose so, for it was taught:

(A) "Can it be that, if a person blinded [his fellow's] eye, his eye is blinded; if he cut off his hand, his hand is cut off, or if he broke his leg, his leg is broken? We learn [otherwise] from what is written, 'One who strikes [a person]' and 'One who strikes [a beast]': just as one who strikes a beast [makes] monetary payment, so too one who strikes a person [makes] monetary payment.

(B) "Or if you prefer, it can be argued [thus]: [Scripture] states, 'You may not accept ransom for the life of a murderer who is guilty of a capital crime' (Num. 35:31), [implying that] it is [only] for the life of a murderer that you may not accept ransom, whereas you may accept ransom for principal limbs, [though] they do not grow back"

(C) What [is the reason for the statement], "Or if you prefer, it can be argued..."? The Tanna's difficulty [with the first argument] was as follows: What [is the sense in] drawing [an association] from [the law governing] the striking of a beast? It should [rather] be drawn from [the law governing] the striking of a person [i.e., homicide]! [Well,] it is appropriate to compare damages to damages, rather than damages to a fatality. -- On the contrary, it is appropriate to compare human [victim] to human [victim], rather than human to beast! -- This was [indeed the point of the alternative argument introduced by] the statement "Or if you prefer, it can be argued".

(D) Since it was written, "You may not accept ransom [for the life of a murderer]" (Numbers 35:31), [with the said implication], what need is there for the proof [by association of] "striking" and "striking"? – From the [said implication alone], I might have said that [it is optional:] if he wishes his eye will be taken, whereas if he wishes the value of his eye [will be taken]. [This therefore] is precluded by "One who strikes [a person]" and "one who strikes [a beast]" – just as one who strikes a beast [makes] monetary payment, so too one who strikes a person [makes] monetary payment.

(E) It was taught, Rabbi Dostai b. Yehudah says: "Eye for eye" [means] money [payment]. You say money [payment], but perhaps it [means] actually an eye? – Indeed? Then suppose the eye of one was large and the eye of the other small; How can I apply here "eye for eye"? That would contradict the Torah, which stated, "You shall have one standard" (Lev. 24:22), [implying that] the law should be equal for all.

(F) I say: What is the difficulty? Perhaps [in exchange for the] eyesight [that was] taken [from the victim,] God said eyesight is to be taken from [the offender]! For otherwise, how could capital punishment be applied in the case of a large person who killed a small person? ... [Thus "life for life" must mean that in exchange for] the life that was taken [from the victim,] God said life is to be taken from [the offender]. Here too, [in exchange for] eyesight taken [from the victim], God said eyesight is to be taken from [the offender].

(G) R. Shimon bar Yohai says: "Eye for an eye" means monetary compensation for damages. You say monetary compensation, but perhaps it refers to actual retaliation by putting out the eye of the offender? What then will you say if a blind man puts out the eye of a sighted man, or if a cripple cuts off part of the body of a man who is not crippled in that way, or if a lame man breaks off the leg of one who is not? How can I apply "eye for an eye?" After all, the Torah said, "You shall have one standard," (Lev. 24.22) implying that the standard should be the same in all cases.

(H) I might respond: what is the difficulty in this case? Why not say that it is only where it is possible to carry out the principle of retaliation that it is to be carried out, but where it is impossible, it is impossible, and the offender will have to be released altogether? For if you do not say this, what could we do if a person with a fatal, organic disease kills a healthy person?

(I) It was taught: R. Eliezer stated: "eye for an eye" literally refers to the eye of the offender. You say literally? Could R. Eliezer be disagreeing with all the other Tannaim? Raba thereupon said: It only means to say that the injured person would not be valued as if he were a slave. Abayeh said to him: How else could he be valued? As a freeman? Could the bodily value of a freeman be ascertained by itself? Rav Ashi therefore said: It means to say that the valuation will be made not of the eye of the injured person but of that of the offender.

(J) Abbaye said: [That "eye for eye" means money] can be derived from the teaching of the School of Hezekiah. For the School of Hezekiah taught: " 'Eye for eye', but not 'life and eye for eye' ". Now should you suppose [it means] actually an eye, sometimes [what is taken will be] life and eye for eye: while [the offender] is being blinded, his soul departs from him. [But] what is the difficulty? Perhaps [the court] must arrange an assessment: if the offender is [deemed] able to survive [the maiming], it is done to him, but if he is not [so deemed], it is not done. And if the assessment was that he is able to survive it, yet when it was done his spirit departed from him --if he dies, let him die. For was it not taught regarding lashes: "[If after] he was assessed... he died

under the hand [of the officer of the court, the officer is] exempt [from liability]" (Mishnah Makkot 3:11-14)?

6. Maimonides, Mishneh Torah, Law of Tortfeasors 1.5

How do we derive the rule that the phrase "eye for (*tahat*) an eye" (Ex. 21.24) dealing with the loss of a limb refers to monetary compensation? It is stated in the same context, "bruise for (*tahat*) a bruise" (Ex. 21.25). And it has been explicitly stated, "when men quarrel and one strikes the other with stone or fist, and he does not die but has to take to his bed . . . he must pay for his idleness and his cure." (Ex. 21.18-19) Hence we derive the term *tahat* (for) as used in connection with injuries to eyes and limbs also connotes compensation.

7. Maimonides, Guide 3:41 (Moses Maimonides, "The Guide of the Perplexed" Shlomo Pines (trans.), The University of Chicago Press (1963), pp. 558-560).

The punishment meted out to anyone who has done wrong to somebody else consists in general in his being given exactly the same treatment that he has given to somebody else. If he has injured the latter's body, he shall be injured in his body, and if he has injured him in his property, he shall be injured in his property. The owner of the property may be indulgent and forgive. To the murderer alone, however, because of the greatness of his wrongdoing, no indulgence shall be shown at all and no blood money shall be accepted from him: "And the land cannot be cleansed of the blood that is shed therein, but by the blood of him that shed it" (Num. 35:33). Hence even if the victim remains alive for an hour or for several days, speaks, and is in full possession of his mind and says: Let him who murdered me be dismissed; I have forgiven and pardoned him--this cannot be accepted from him. For 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. For among the crimes of man there is no greater than this.

And he who has deprived someone of a member, shall be deprived of a similar member: "As he hath maimed a man, so shall it be rendered unto him" (Lev. 24:20) He who has caused damage to property shall have inflicted upon him damage to his property up to exactly the same amount: "Whom the judges shall condemn, he shall pay double unto his neighbor" (Exod. 22:8). – that is, the thing taken by him and an equal amount taken from the property of the thief. . . .

Similarly the law concerning false witnesses is that the thing that they wished to be done unto another shall be done unto them: if they wished the one they bore witness against to be killed, they shall be killed; if they wished him to be flogged, they shall be flogged: and if they wished him to be fined, they shall have a similar fine imposed upon them. In all this the intention is to make the penalty equal to the crime, and this too is the meaning of the expression: righteous judgments. . . .

8. HaLevi, The Kuzari

III:46 The Kuzari said: "The punishment for one who damages another is quite explicit in the Torah, as it says, An eye for an eye. . . . Whatever would he inflicts

upon another man, so shall be done to him.” {quoting Bava Kamma 84a, which is source of following argument}

III:47: But it also says in the same paragraph: And he that kills a beast shall pay {Hebrew: } for it, life for life (nefesh tahat nefesh). Is this not the principle of ransom/restitution? It is not said “if one kills your horse, kill his horse”, but “take his horse,” for what use it is to kill his horse? Likewise, if anyone has cut off thy hand, take the value of his (or your?) hand, for cutting his hand off does not profit you.

The sentence “wound for wound, stripe for stripe” embodies ideas antagonistic to common sense. How can we determine such a thing? One person may die from a wound, while another person may recover from the same. How can we gauge whether it is the same? How can we take away the eye of a one-eyed person in order to do justice to a person with two eyes, when the former would be totally blind, the latter still have one eye? The Torah teaches: As he has caused a blemish in man, so shall be done to him. {Not more than that}

What further need is there to discuss these details, when we have just set out the necessity of tradition, the truthfulness, loftiness and religious zeal of traditionalists?

II. Change in the law

9. Philo of Alexandria (1st Century C.E.), The Special Laws, III, 181-182

Those legislators deserve censure who prescribe for malefactors punishments which do not resemble the crime, such as monetary fines for assaults, disenfranchisement for wounding or maiming another, expulsion from the country and perpetual banishment for willful murder, or imprisonment for theft. For inequality and unevenness is repugnant to the commonwealth which pursues truth. Our law exhorts us to equality when it ordains that the penalties inflicted on offenders should correspond to their actions, that their property should suffer if the wrongdoing affected their neighbor's property, and their bodies if the offense was a bodily injury, the penalty being determined according to the limb, part, or sense affected, while if his malice extended to taking another's life his own life should be forfeit. For to tolerate a system in which the crime and the punishment do not correspond, have no common ground, and belong to different categories is to subvert rather than uphold legality.

10. Flavius Josephus, Antiquities of the Jews, IV, 8.35.280

He who maims a man shall undergo the same, being deprived of that limb whereof he deprived the other, unless indeed the maimed man be willing to accept money; for the law empowers the victim himself to assess the damage that has befallen him and makes this concession, unless he would show himself too severe.

11. Maimonides, Introduction to the Mishnah, Ch. 4

You must fully understand this basic point. And that is, the explanations [*perushim*] that were received from Moses are never disputed. Indeed, from the time of Moses to now, we have never found a dispute, in any era from the days of Moses to those of Rav Ashi, among the sages in which one sage says that someone who takes out the eye of his fellow has his eye removed as an observance of the verse, "an eye in place of (*b'*) an eye" (Deut. 19:21), and another sage says that he need only pay monetary compensation. And, similarly, we find no disputes over [various other rules]. ...

There is no dispute about these commandments (*mitzvot*), because they are all explanations received from Moses. About them, and about similar ones, the Rabbis stated, "The general rules, the details, and the particulars [of the Torah] are from Sinai." However, even though they are received tradition and there are no disputes about them among the sages, we can extract this Torah and these explanations out from the written Torah by means of the [various interpretative methods known as] "explanation", "proofs", "demonstrations", and "hints".

Thus, when you find the Rabbis of the Talmud analyzing and disputing with one another in analytical debate and bringing proofs for any of these explanations or similar ones, such as, for example [examples omitted], they are not disputing the explanation [since we see that there is no disagreement about the practice]. ... Rather they were investigating the hint found in the verse that supports that supports the received explanation [*perush*]. [That is, they were arguing over which verse in the written Torah best supports a known law, not over the content of the law.]

12. Maimonides, Guide to the Perplexed (omitted portion from # 7 above)

And he who has deprived someone of a member, shall be deprived of a similar member: "the injury he inflicted on another shall be inflicted on him." (Lev. 24.20) You should not engage in cogitation concerning the fact that in such a case we punish by imposing a fine. For at present my purpose is to give reasons for the biblical texts and not for the pronouncements of the legal science. Withal I have an opinion regarding this provision of legal science, which should only be expressed by word of mouth. A fine was imposed in the case of wounds in requital of which exactly similar wounds could not be inflicted: ". . . except that he must pay for his idleness and his cure."

13. Maimonides, Introduction to Commentary on the Mishnah

If someone should assert that the verse in the Torah, "you shall cut off her hand" (Deut. 25:12) is to be construed literally, and not as payment of a fine, as under the traditional interpretation, and he relates the same to a prophetic revelation, and asserts that God has revealed to him that such verse is to be interpreted literally, he is subject to the death penalty as a false prophet, since he attributes to God that which He has not commanded.

14. Abraham ben Moses, on Guide to the Perplexed

My father, in the Guide, hinted as to a wondrous resolution between the oral tradition and the literal meaning of the text, which he had transmitted orally, but it is impossible to reveal the same, since he concealed it.

15. Shem Tov, on Guide to the Perplexed

I am filled with wonderment at the statement of Maimonides that his intention was to give the purpose of the verses, and not to explain the purpose of that which is stated in the Talmud, for the verses are not true in and of themselves, either in whole or in part, except under the tradition as accepted by our Rabbis, and in accordance with the interpretation afforded them by our Rabbis in the Talmud. And this Maimonides taught us: that if the Messiah came and taught that the meaning of the verse was according to its literal meaning, “eye for an eye,” he is worthy of the death penalty, for he thereby contradicts the Talmud.