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## The goring ox again

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## THE GORING OX AGAIN

The Biblical laws concerning goring oxen (*Exod.* 21: 28—32, 35—6) raise some important historical and comparative problems, which have attracted new interest since the publication of the Laws of Eshnunna (LE). For the most part, the meaning of the Biblical text is not in dispute. But in debating its significance, scholars give expression to widely divergent approaches, which raise questions of general importance.

### I

*Exod.* 21:28 provides that if an ox goes to death a man or a woman, the ox is to be stoned, and its flesh may not be eaten, but its owner is (otherwise) free. The stoning of the ox is required also in vv. 29 and 32, and by implication in v. 31. It thus applies whatever the status of the human being killed, whether male or female, adult or minor, free or slave. It may be noted in passing that in this respect the drafting is more explicit and comprehensive than is that of either of the two comparable ancient Near Eastern passages, LE 54—5 and LH 250—252. But it is a difference in substance that has attracted the attention of the commentators. For neither LE nor LH requires the death of the ox which has gored a human being to death.

G o e t z e, it is true, has suggested that the sale presupposed by LE 53 is a sale for slaughter, in order to safeguard the community against a repetition of the mishap.<sup>1</sup> But LE 53 deals with an ox which gores another ox to death. No sale or slaughter is mentioned where the victim is a human being. It might be argued that in the latter case, where the special procedure of LE 53 is inappropriate, it is still open to the owner to put the ox to death, and thus avoid the likelihood of further monetary liability. But that discretion would be merely a matter of the owner's interest (as the sale in LE 53 is a matter of convenience to both parties), and not a measure to safeguard the community. The fact that there is no mandatory killing of the ox which has caused the death of a human being suggests strongly that any slaughter there may have been under LE 53 was not in order to safeguard the community. But in fact there

<sup>1</sup> *The Laws of Eshnunna* (1956), p. 138 (AASOR 31). Cf. M. M u h l, *Untersuchungen zur altorientalischen und althellenischen Gesetzgebung* (1963 ed.), pp. 116f.

is nothing in the text of LE 53 to suggest that the sale there was for slaughter.<sup>2</sup> Nor is there any reason to suspect that there existed an unstated penalty in LH, comparable to the stoning of *Exod.* 21:28 and the sale of LE 53.<sup>3</sup> The latter text is hardly relevant to our problem, unless the sale is a preliminary to slaughter, and unless such a slaughter is assumed to have been required also when the victim was human.

The dichotomy between the Biblical and the Babylonian sources thus remains. According to the Bible, the animal is to be stoned. In LE and LH no mandatory penalty is mentioned. The fact that in practice the Babylonian owner would probably kill the beast eventually does little to remove this difference.

But what is its significance? Here, the commentators have expressed widely divided opinions. To some, the Bible regarded the ox as criminally liable, and executed it as a murderer, while the Mesopotamian sources are viewed as having advanced beyond such "archaic" conceptions.<sup>4</sup> Cases of trial and punishment of animals have been cited from many diverse cultures, ancient and quite modern.<sup>5</sup> Not all of them, it may be noted, involve the notion that the animal possesses the necessary mental capacity to justify criminal liability. Some rely upon a belief that the animal is possessed by a magical or demoniac power, and that the destruction or exclusion of the animal is necessary in order to rid the community of that power.<sup>6</sup>

Another school of thought rejects this interpretation. It asserts that the

<sup>2</sup> Cf. W. Moran, *Review of Goetze, Biblica* 38 (1957), p. 221; R. Haase, *Die Behandlung von Tierschäden in den Keilschriftrechten, RIDA* 14 (1967), p. 14.

<sup>3</sup> A. Jepsen, *Untersuchungen zum Bundesbuch* (1927), p. 63. See Haase, *op. cit.*, pp. 23—4.

<sup>4</sup> H. Cazelles, *Études sur le Code de l'Alliance* (1946), p. 57; Goetze, *op. cit.*, p. 139; G. R. Driver, J. C. Miles, *The Babylonian Laws* (1952—5), i, 444. Cf. Z. W. Falk, *Elements of the Jewish Law of Torts, Studi Grosso* (1968), ii, 166, referring the law to the "anthropomorphic thinking of the primitive mind".

<sup>5</sup> S. Pufendorf, *De iure naturae et gentium* (1688), ii, 3.3; M. Kalisch, *A Historical and Critical Commentary on the Old Testament, Exodus* (1855), p. 409; A. Knobel, *Exodus und Leviticus erklärt* (1857), pp. 220—21 (*Kurzgef. exeg. Handb. z. alt. Test.*); T. H. Gaster, *Myth, Legend and Custom in the Old Testament* (1969, from Frazer, *Folklore* (1918), pp. 245—7); V. Aptowitzer, *The Rewarding and Punishing of Animals and Inanimate Objects, HUCA* 3 (1926), p. 137; E. Suys, *A Propos d'un Conte Égyptien, Biblica* 12 (1931), pp. 357—8; Muhl, *Untersuchungen*, pp. 37—40; P. Dykan (Dikshstein), *Dinei Onshin* (1938—62), ii, 382—5; Falk, *Studi Grosso*, ii, 166 n. 7. See in general O. W. Holmes, *The Common Law* (1881), *Lecture I*; K. v. Amira, *Tierstrafen und Tierprozesse, Mit. d. Inst. f. oster. Gesch.* 12 (1891), pp. 545—601; R. Düll, *Archaische Sachprozesse und Losverfahren, ZSS* 61 (1941), pp. 1—13; D. Daube, *Roman Law* (1969), p. 168; M. Muhl, *Relikte der Tier- und Sachstrafe bei Homer, REG* 84 (1971), pp. 1—16. See further A, *infra*, p. 92.

<sup>6</sup> A. Jepsen, *Untersuchungen zum Bundesbuch* (1927), p. 35; L. T. Hobhouse, *Morals in Evolution* (1915), 3rd ed., pp. 86—7.

stoning is the result of a characteristically Israelite religious concept, which values human life so highly that it demands retribution even from an animal.<sup>7</sup> *Gen.* 9:5 is often cited as a direct expression of this religious principle.<sup>8</sup> Some go further, and interpret the absence of any comparable provision in the ancient Near East as a sign that Mesopotamian law was concerned only with economic considerations, unlike the religiously inspired Biblical law.<sup>9</sup> But it has also been suggested that the very absence of punishment of the ox in Babylonia is an expression of the animal's religious status.<sup>10</sup>

Neither of these views is historically accurate. Nowhere in the relatively full legal passages concerning homicide<sup>11</sup> do we find stoning as the required mode of execution. This is not fortuitous. The procedure of stoning, where it is found as a judicial execution, had features which rendered it quite unsuited to the crime of homicide. It was execution by the whole community,<sup>12</sup> not by an official or the injured party, and it was carried out in a public place.<sup>13</sup> Homicide, however, was not in Biblical times a wholly public affair.<sup>14</sup> It was left to the kin of the deceased, in the person of the *go'el hadam* to carry out the execution, and to do it as soon as he caught up with the killer, in the course of his pursuit.<sup>15</sup> Such a privilege was reasonable and necessary. Once the killer was judged guilty, the law relied upon the kinsman to impose the capital sanction, subject only to the limited sanctuary provided in appropriate cases by the cities of refuge.<sup>16</sup> If the kinsman successfully pursued the killer, he was not required to take him to a place of public execution, thereby affording unneces-

<sup>7</sup> D. H. Müller, *Die Gesetze Hammurabis* (1903), p. 165 n. 2; P. Heinisch, *Das Buch Exodus* (1934), p. 172; U. Cassuto, *Peirush al Sefer Shemot* (1965), 4th ed., p. 194; M. Greenberg, *Some Postulates of Biblical Criminal Law, Yehezkel Kaufmann Jubilee Volume* (1960), pp. 15—16; S. M. Paul, *Studies in the Book of the Covenant* (1970), pp. 81, 83; Finkelstein, *op. cit.*, pp. 180 f., describing the goring of a person to death as "a variety of 'high treason' against the divinely ordained hierarchy of creation, wherein man is the lord of terrestrial life". See also the different religious interpretation of A. Van Selms, *The Goring Ox in Babylonian and Biblical Law, Ar. Or.* 18/4 (1950), pp. 327—9.

<sup>8</sup> Also by those who adduce comparative evidence. See Pufendorf, *op. cit.*; Knobel, Dillman, and Driver, *ad loc.*; Suys, *Biblica* 12 (1931), p. 357; Driver, Miles, *The Babylonian Laws*, i, 443—4 n.4.

<sup>9</sup> See Loewenstamm, *IEJ* 7 (1957), p. 196; Greenberg, and Paul, cited *supra*, n. 7. On this aspect see Jackson, *Reflections on Biblical Criminal Law, JJS* 24 (1973), pp. 26—9.

<sup>10</sup> Dykan, *Dinei Onshin*, ii, 375—6.

<sup>11</sup> *Exod.* 21:12—14; *Nus.* 35:10—34; *Deut.* 19:1—13.

<sup>12</sup> *Lev.* 24:14, 16, 23; *Nus.* 15:35—6; *Deut.* 13:10, 17:7, 21:21, 22:21; *Josh.* 7:25.

<sup>13</sup> *Deut.* 17:5, 22:21, 22:24.

<sup>14</sup> See Jackson, *JJS* 24 (1973), pp. 21ff., 30f. Cf. *Attic Law: Mühl*, pp. 11—18; H. J. Wolff, *Beiträge zur Rechtsgeschichte* (1961), p. 64 ff.

<sup>15</sup> *Nus.* 35:19,27; *Deut.* 19:6.

<sup>16</sup> Even where pursuit of a murderer was unnecessary, since he had placed himself in the power of the authorities, the execution was still carried out by the *go'el hadam*. This was required



sary opportunities for escape. He was allowed — indeed he was expected — to execute him on the spot. Stoning would have been by far the least effective way of attempting to do this. The particular method of execution was left to the kinsman.<sup>17</sup> No doubt it would normally have been by the sword.

Of course, it may be argued that the goring ox was considered to be a murderer, but for practical purposes a mode of execution different from the normal was provided. It would not be necessary to prove that intention could be imputed to an animal, since there is good reason to believe that there was an early stage when homicidal intention was irrelevant. All homicide was capital, but at the same time was compoundable.<sup>18</sup> However, nowhere else in the capital offences of the *Mishpatim*,<sup>19</sup> is the manner of execution prescribed. In almost every case the formula *mot yumat*, lit. “dying he shall be put to death” or a variant thereof, is used.<sup>20</sup> The only passage which is more specific is *Exod.* 22:20—23, which prohibits oppression of widows and orphans. But the sanction there is divine: “I will slay you with the sword, and your wives will be widows, and your children orphans”. God threatens to implement his justice through warfare. The offence is not one for human jurisdiction. Thus one must hesitate to regard the stoning in our passage as a required form of judicial death penalty, if some other explanation is available.

It is even less likely that some form of trial of the animal took place. There is no suggestion of it in the text. Indeed, it is highly doubtful that regular, formal court procedures were in existence at the period reflected by the *Mishpatim*, which, unlike the texts of *Deuteronomy* which require stoning, make no mention of them.<sup>21</sup> Nor is there any sign of a court procedure in the only other law which requires the death of an animal, *Lev.* 20:15—16.

The solution to our problem is to be found in a number of narrative texts, in which the same verb for stoning, *sakeil*, is used. For stoning was not limited to the judicial execution found several times in the Deuteronomic laws. There, its public nature accords well with the shame culture of *Deuteronomy*.<sup>22</sup> It was used for offences of a sexual<sup>23</sup> and idolatrous<sup>24</sup> nature. But it was not because

even if it involved the necessity of removing the killer back to his (and the deceased’s) home town. See *Deut.* 19:12.

<sup>17</sup> Cf. R. de Vaux, *Ancient Israel* (1965), 2nd ed., p. 159.

<sup>18</sup> See Jackson, *The Problem of Exodus 21:22—5 (Ius Talionis)*, *VT* 23 (1973), pp. 289f. and at *JJS* 24 (1973), pp. 22ff.

<sup>19</sup> *Exod.* 21:12, 14, 15, 16, 17, 20(?), 23(?), 29; 22:2, 17, 18, 19.

<sup>20</sup> *Exod.* 22:17 and 19 are the only exceptions.

<sup>21</sup> Cf. Jackson, *Theft in Early Jewish Law* (1972), pp. 225—6. On *Exod.* 21:22, see *VT* 23 (1973), pp. 277—9.

<sup>22</sup> D. Daube, *The Culture of Deuteronomy*, *ORITA* 3 (1969), pp. 27—52.

<sup>23</sup> *Deut.* 22:13—21, 23—24.

<sup>24</sup> *Deut.* 13:7—12, 17:2—7. This too often involved fornication, whether actual or figurative, as the usage of the verb *zanah* shows. See *BDB ad loc.*

of the shame element that *Deuteronomy* demanded community participation in the stoning. Stoning anyway required the cooperation of a number of people for its efficacy, and was, moreover, the natural method where the members of a group each wanted a sense of personal involvement. The collective element in stoning predates *Deuteronomy's* particular motive for using it.

Stoning was, in fact, the early method of lynching. It was used outside the judicial machinery, and was not restricted to occasions where infringement of the law was in issue. The narratives in which it occurs concern the Egyptian captivity, the journey through the desert, the covenant at Sinai, and the reigns of David and Rehoboam.<sup>25</sup> Judicial stoning occurs, on the other hand, in the execution of Naboth (1 K. 21:10) and perhaps of Akhan.<sup>26</sup> It is probable that stoning as lynching was the direct ancestor of stoning as judicial execution, and that it was not yet used for the latter purpose in the period represented by the *Mishpatim*. But even if this is not so, the case of the goring ox is far more akin to those involving lynching than to those involving judicial execution.

In the first place, every one of the sources in which stoning appears as judicial execution involves the commission of an intentional offence. In *Deuteronomy* they are pre-marital unchastity by a woman (22:21), adultery with a betrothed virgin (22:24), idolatry (17:5) and incitement thereto (13:11). Akhan did not act in ignorance of the *heirem*, as his attempt at concealment shows (*Josh.* 7:21). Naboth's alleged offence, blasphemy and cursing the king (1 K. 21:10) was necessarily intentional. The offence is always intentional also in those sources where the judicial stoning is expressed by the later verb *ragam*: the stubborn and rebellious son (*Deut.* 21:21); Molech worship (*Lev.* 20:2); sorcery (*Lev.* 20:27); and the incident of the blasphemer (*Lev.* 24:10—23). Only the story of the sabbath breaker (*Nus.* 15:32—36) raises a doubt. But it may well be that the reason a special divine consultation was deemed necessary in that case (a long-standing puzzle)<sup>27</sup> was that the act itself raised no presumption as to the offender's intention. He may have known that it was the sabbath, or he may not. God alone knew whether he acted under a mistake.<sup>28</sup> The human authorities hesitated to pass sentence because they did not know whether the offence was committed intentionally or not.

<sup>25</sup> *Exod.* 8:22, 17:4, 19:13; 1 *Sam.* 30:6; 1 *K.* 12:18 (*ragam*).

<sup>26</sup> On the conflated traditions here, see Jackson, *Theft*, pp. 61—2.

<sup>27</sup> *Sanh.* 78b. For other approaches, see recently J. Weingreen, *The Case of the Woodgatherer* (*Numbers XV 32—36*), *VT* 16 (1966), pp. 361—4; M. Noth, *Numbers* (1968), p. 117; A. Phillips, *The Case of the Woodgatherer Reconsidered*, *VT* 19 (1969), pp. 127—8. In the case of the blasphemer, on the other hand, the question arose as a result of the offender's doubtful status, *Lev.* 24:10. Note the emphasis on the extent of jurisdiction in vv. 15—16.

<sup>28</sup> Cf. divine jurisdiction in cases of mere intention. See Jackson, *Liability for Mere Intention in Early Jewish Law*, *HUCA* 42 (1971), pp. 206—7.

But where the stoning was extra-judicial, intention was not always required. The closest parallel to the law of the goring ox is *Exod.* 19:12—13. God commands Moses to sanctify the people in preparation for the Sinaitic revelation: "And you shall set the people within limits round about, saying 'Guard yourselves from ascending the mountain or touching its edges. Everyone touching the mountain shall surely be put to death. A hand shall not touch him. But he shall surely be stoned or he shall surely be shot. Whether beast or man, he shall not live...'"

There is no suggestion here that mercy would be shown to anyone who touched the forbidden area by accident, or strayed on it by mistake. "Everyone touching the mountain shall surely be put to death" is in formal terms comparable to *Exod.* 21:12, 15—17, of the *Mishpatim*, and in *Exod.* 21:12 too intention is not relevant.<sup>29</sup> Death is required because of contact with the holy mountain, and so there is no distinction between man and beast. It is demanded in order to prevent the further spread of contagion, as appears from the prohibition of secondary contact, with the offending man or beast. The same verb is used of the prohibited contact both with the offender and with the mountain. The motive of prevention of the spread of a religious contagion also underlies the destruction of Akhan's animals (*Josh.* 7:24—25). In *Exod.* 19:13 we also have the purpose of stoning stated explicitly. It was used in order to avoid physical contact with the offending man or beast. This would appear to lend support to Gaster's view, that the goring ox was stoned in order to avoid approaching the beast too closely.<sup>30</sup>

The stoning of an animal is thus contemplated in *Exod.* 19:12—13 as an extra-judicial measure of self-protection by the community. It was against the danger of a religious contagion that protection was required. A religious motive for stoning also appears in *Exod.* 8:22. Under the pressure of the plague of flies, the Pharaoh offered to allow the Israelites to sacrifice to God on condition that they did not leave Egypt to do so. Moses replied that this was impossible. The animal to be sacrificed was "an abomination" to the Egyptians. "Shall we sacrifice the abomination of the Egyptians before their eyes, and will they not stone us?" Elsewhere, however, it was physical danger which provoked the threat of community stoning. At Rephidim Moses complained to God that the people might stone him because they feared they would die of thirst (*Exod.* 17:4). A similar fate appeared imminent for Moses and his few faithful followers following the adverse report of the spies (*Nus.* 14:10). When the Philistines captured the women and children of Ziklag, the men threatened to stone David (*I Sam.* 30:6). In none of these cases was a trial contemplated. In all of them, the stoning was primarily a measure of community

<sup>29</sup> *Supra*, p. 58.

<sup>30</sup> *Myth, Legend and Custom* (1969), p. 250.

protection, rather than a punishment. That was the early function of stoning, and that, it is suggested, was the reason for the stoning of the goring ox.

But problems remain. Surprisingly, we cannot be certain that the goring ox was stoned *to death*. In each one of the five Deuteronomic laws where stoning is required (four of them using *sakeil*) it is stated explicitly that the offender is to be stoned to death. But in *Exod.* 21:28ff. only the verb *sakeil* is used.<sup>31</sup> Naturally, one is hesitant to attach significance to this omission. The narrative sources, whether directly or by implication, show that stoning was normally mortal. But there is one exception. In one of his campaigns, David and his entourage were stoned by a single man, Shimi, son of Gera, a member of the family of Saul. This can hardly have represented a serious attempt to kill David. Shimi threw, we are told, almost at random (2 *Sam.* 16:6). His motive, rather, was to drive David, the object of his detestation, away from his territory (v. 7). No doubt, he would have been happy enough had he succeeded in killing or injuring the king, but this was not his primary object.

Such a purpose may well have been served, originally at least, by the stoning of the goring ox. I do not suppose that anything short of death was contemplated in the law as understood by the settled community. But a semi-nomadic community might be satisfied by driving the animal away into the desert. If, in the process, the animal was killed, well and good. If not, it did not matter. In fact, such a situation is reported by Musil to be the practice of some Arab groups.<sup>32</sup> This may help to explain the absence of a comparable provision in the Babylonian sources. The population of a permanently settled community is more dispersed than that of a semi-nomadic group. The threat to human life posed by a vicious animal is thus proportionately less. The wild ox becomes a menace to agriculture (*Nus.* 22:4) rather than to life. The provisions of the *Mishpatim* may reflect greater proximity to semi-nomadic conditions. To this it may be objected that when Israel became settled, the sanction should have disappeared. We do not, of course, know whether it was actually in use throughout Biblical times. If it was, the reason may have been either penal or religious. Both interpretations are to be found in the course of time. But they are later interpretations. The origin of the stoning law was utilitarian.

Evidence of the working of a religious postulate concerning the value of human life is, however, seen by some in another requirement of *Exod.* 21:28 itself, the prohibition of eating the flesh of the beast. To Greenberg, this is because "the beast is laden with guilt and is therefore an object of

<sup>31</sup> The clause "and its flesh shall not be eaten" may well be interpolated. But such a view is not essential to this argument. For its inclusion is understandable even if the death of the animal is merely one of two possible results of the stoning. On the other hand, *vegam* in *Exod.* 21:29 does imply that the draftsman understood the stoning to lead to the ox's death.

<sup>32</sup> A. Musil, *Arabia Petraea* (1907—8), iii, 368.



horror".<sup>33</sup> Others call the animal "tabu"<sup>34</sup> or "unclean".<sup>35</sup> Differing reasons for this are offered. Some suggest that blood-guilt rests upon the animal, and is transferable to anyone who partakes of it<sup>36</sup> — a curious blend of the anthropomorphic and the sacramental. Others refer to the doctrine that homicide pollutes the earth.<sup>37</sup> That, however, is a later development.<sup>38</sup> The interdiction against eating the flesh of the goring ox has nothing to do with the reason for the ox's death. Rather, it derives from the manner of its passing. For *Exod.* 22:30 forbids the consumption of animal flesh torn in the field. Certainly, the prohibition there relates to *tereifah*, which normally denotes tearing by wild animals. But the difference between this and stoning is not substantial, and a carcass would soon attract the attentions of predators. That stoning in itself rendered the animal unfit for consumption is implied by the *Mekhilta* (*ad loc.*), which asks why the words "and its flesh shall not be eaten" were required at all. "Do I not know this from the fact that it is to be stoned?"

But it is *Gen.* 9:5 above all else that is taken to show that a religious principle underlies the stoning of the goring ox. In the aftermath of the flood, God blessed Noah with mastery of the animal kingdom. Man could now eat animal flesh — but not animal blood (*vv.* 3—4). But a balance was to be struck. "And your (i. e. human) life-blood too I (God) will demand. From the hand of every living thing I will demand it." The standard translations here<sup>39</sup> miss the point by using terms such as "satisfaction" and "reckoning". From them, one reads a rather banal sequence of thought: man may kill the animals, but the animals may not kill man. The true meaning is more subtle. Man may not take the blood of animals. In return, his own will be protected against them. There was

<sup>33</sup> *Yehezkel Kaufmann Jubilee Volume* (1960), p.15.

<sup>34</sup> M. Noth, *Exodus* (1962), p. 182; Paul, *Studies in the Book of the Covenant* (1970), p. 78.

<sup>35</sup> Commentaries of Knobel, Dillmann, Keil, and Delitzsch, *ad loc.*

<sup>36</sup> Driver, *ad loc.*; Driver, Miles, *The Babylonian Laws*, i, 443—4 n. 4. Heinisch, *Das Buch Exodus* (1934), p. 173.

<sup>37</sup> Holzinger, in Marti's *Kurzer Hand-Commentar*, *ad loc.*

<sup>38</sup> *Nus.* 35:33, usually regarded as (P). A. R. S. Kennedy, *Leviticus and Numbers* (Century Bible), p. 386, takes the idea as characteristic of H, citing *Lev.* 18:25. Adumbrations may be found in *Deut.* 19:10 and *Gen.* 4:10, although in neither is the land said to be unclean. *Deut.* 21:1—9 is not relevant to this doctrine. The elders of the city wash their hands of the blood (*v.* 6). There is no suggestion that the land is polluted by it.

For the late dating of the theory as it appears in Greece, see G. Calhoun, *The Growth of Criminal Law in Ancient Greece* (1927), pp. 26—30; R. J. Bonner, G. Smith, *The Administration of Justice from Homer to Aristotle* (1930), i, 15—16, 53—5, ii, 192—5, 199—203; D. M. Macdowell, *Athenian Homicide Law in the Age of the Orators* (1963), ch. xiv, esp. pp. 149—50. See also A. S. Diamond, *Primitive Law* (1935), ch. 15.

<sup>39</sup> RSV: *For your lifeblood I will surely require a reckoning*, and Cf. JPSA. Jerusalem: *I will demand an account of your life-blood*. NEB: *For your life-blood I will demand satisfaction*. The LXX, Vulgate and AV, on the other hand, translate the Hebrew literally.



a common Biblical belief that a murderer conquered the blood of the deceased, and that one purpose of the law of homicide was to secure the return of that blood to the family.<sup>40</sup> In this passage we find the same conception applied to animals. Man may not conquer their blood (although he may eat their flesh), nor will God allow them to conquer the blood of man. The fact that God promises to seek man's blood "from the hand of every living thing" (*miyad kol hayah*) shows that an animal, like a man, which killed a human being was here thought to take possession<sup>41</sup> of his blood. God's promise was needed because man would often be unable to secure return of the blood by killing the wild animal (*hayah* also has this more specific connotation). Because he is bound to obey God's command to refrain from animal blood, God guarantees that no animal will be allowed a permanent conquest of his blood. At some later stage, it may be noted, a guarantee against conquest by fellow humans was added to the verse. The reason is not difficult to find. God had promised, in effect, to remedy the problem which arose when man was unable to kill the offending beast. But it could also frequently happen that a murderer could escape from the kin of the deceased. Was his blood to remain permanently conquered? Someone at a later stage rejected this apparent inconsistency, and extended God's promise. But it has no connection with the original context, which involves a delicate balance of interests, to which the threat to human life from fellow humans is irrelevant.

The precise relationship of *Gen.* 9:5 and comparable sources to *Exod.* 21:28 is a complex matter. The motive for *Exod.* 21:28 does not appear to have been that of reconquest of the blood. Stoning is nowhere found in such a context, partly because it was a communal act, whereas reconquest of blood was a matter for the family. Certainly, stoning is used where life is at stake. But there it is a preventive measure, as the threats against Moses show (*Exod.* 17:4; *Nus.* 14:10). The threatened stoning of David (1 *Sam.* 30:6) followed the capture, not the death, of the women and children of Ziklag, and resulted from the fear that David's policies would cause still worse disasters in the future.

In only one case is stoning associated with murder. Shimi accused David of the murder of Saul and his household. But Shimi's primary purpose was not, as we have seen, the death of David. And the theological conception reflected in his abuse is very different to that of reconquest of the blood. "The Lord has returned upon you all the blood of the house of Saul, in whose place you have reigned, and the Lord has given the kingship into the hand of Absalom, your son. So here you are, in your evil state, for you are a man of blood" (2 *Sam.* 16:8). Shimi is not taking the part of the *go'el* for Saul's family, since he proclaims that God has punished David already. Moreover, that punishment took the

<sup>40</sup> D. Daube, *Studies in Biblical Law* (1947), pp. 121-4.

<sup>41</sup> On the term *yad*, see Jackson, *Theft*, pp. 46, 92-3.

form (theologically) of heaping more blood upon him in return, not of taking back the blood of the slain.

The stoning of the goring ox may well have been the parent, rather than the child, of the idea of divine punishment of animals. I do not place *Gen. 9:5* in this latter category, since there punishment is a very subsidiary object. God's punishment of the serpent (*Gen. 3:14*) is more in point. In that narrative, stress is laid upon the wilful wrongdoing of the serpent, and so the penal character of God's measures is very pronounced — far more so than is that concerning the goring ox. But it is not unusual to find that an idea when transferred from one context to another will emerge with a somewhat different connotation. But once the concept of divine punishment of animals became established, it could then be transferred back to the legal sphere<sup>42</sup> as a primarily penal notion. Hence the one other Biblical law requiring the killing of an animal which has been involved in a sexual act with a man or woman, *Lev. 20:15—16*. The motive for its inclusion in Leviticus can hardly have been to safeguard the community against a reoccurrence of the offence, as in *Exod. 21:28*. The animal was here the victim, not the initiator. Nor is it described as an "abomination" (Cf. *Lev. 20:13*) or the like, which might involve the danger of contagion, comparable to the destruction of Akhan's beasts (*Josh. 7:24—5*) or the animal which touched the mountain (*Exod. 19:13*). The *Mishnah* (*Sanh. 7:4*) was, however, uneasy about regarding the animal as having "sinned". Its preferred explanation for this anomaly was that the animal was the instrument through which the human came to sin.<sup>43</sup> Thus the animal was judged guilty on the basis of *sine qua non* causation. That particular offence would not have occurred had the animal not been available, even though its mere availability could not in itself have caused the offence.

It appears likely that the execution of the animal in *Lev. 20:15—16* is a late development. In the earlier formulation of the law, *Exod. 22:18*, no sanction against the animal is provided. The contrary ruling absolving the betrothed virgin raped in the field (*Deut. 22:25—7*) provides further support. The concern of the text to provide legal justification for this might be thought to show that the Deuteronomic law was a reform, directed against an earlier liability comparable to *Lev. 20:15—16*. But the reasoning given makes this unlikely. *Deut. 22:26* provides: "But to the virgin you shall do nothing. The virgin has no capital sin, for just as a man may rise up against his neighbour and take his life, such is this case". The virgin is thus compared to the victim of murder. Her role as victim of the offence is stressed. Had *Lev. 20: 15—16* already existed,

<sup>42</sup> This phenomenon has been demonstrated in another context by D. Daube, *The Exodus Pattern in the Bible* (1963), pp. 16f. *et pass.*

<sup>43</sup> For other reasons see the *Mishnah*, *loc. cit.*; Philo, *DSL* iii, 49—50. See also Aptowitzer, *HUCA* 3 (1926), pp. 138—9; S. Belkin, *Philo and the Oral Law* (1940), p. 128; S. Albeck, *Pesher dinei hanezikin batalmud* (1965), p. 129.

it might have been objected that in an even more similar case than that of murder the victim *was* punished. Indeed, we seem to have a reflection of such a view in the very existence of a further reason for the law of *Deut. 22:26*. The next verse adds: "for it was in the field that he found her. The betrothed virgin cried out, but there was none to help her". Legal (as opposed to religious) motive clauses are rare in Biblical law. When we find two appended to the same law, we may be sure that there was some special reason. In this case, it seems that the initial reason, the analogy with murder, was found inadequate once an even closer analogy, with *Lev. 20:15—16*, developed, and was found to lead to an opposite result. But the law of the betrothed virgin was upheld by the addition of a further reason. The girl had resisted. She had called — or at least was deemed to have called — for help. Thus her role was not passive, like that of the animal in *Lev. 20:15—16* (which, according to one rabbinic view, derived enjoyment from the offence).<sup>44</sup> The betrothed virgin had resisted, and thus was entirely guiltless.

It thus seems likely that the law of the goring ox, in origin an utilitarian measure designed to protect the community, was instrumental in the creation, within the Biblical period, both of the idea of the divine accountability of animals, and thence of the idea of their punishment at human hands. But it is in the tannaitic sources that we find *Exod. 21:28* itself regarded as a fully judicial procedure. One tradition attests that a cock which had killed was stoned in Jerusalem in the mid 1st century A.D.<sup>45</sup> Jurisdiction belonged to the courts of 23, which dealt with capital cases.<sup>46</sup> The Tosefta compares the procedural rules with those where the accused was a man.<sup>47</sup> The problem of intention was not ignored. For the purposes of the law, it was assumed that the beast was capable of homicidal intention, but where on the facts it appeared that the necessary *mens rea* was absent, the animal was acquitted. Thus, if the ox rubbed against a wall, to scratch itself, but fell on a man and killed him, it was acquitted. So too where it intended to kill a member of one class of victims, but instead killed a member of another group, by analogy with the ordinary law of murder.<sup>48</sup>

But Jewish tradition was not unanimous about the nature of *Exod. 21:28* and the reasons for it, even in early postbiblical times. R. Eliezer refused to accept that a trial before a court of 23 was necessary for any animal other

<sup>44</sup> Raba at *Sanh. 55a*. But at B.K.40b it is stressed that the animal is executed even if it was compelled. Cf. *Tos.B.K.4.10*.

<sup>45</sup> M. Eduy. 6: 1; Mekhilta deRab Shimon ad *Exod. 21: 29* (R. Yehudah ben Baba).

<sup>46</sup> *M. Sanh. 1: 4*; *Tos. Sanh. 3: 1—2*.

<sup>47</sup> *Tos. Sanh. 3: 3*, pointing out that in several respects the normal procedural safeguards were not applied to the ox.

<sup>48</sup> M.B.K.4:6. Cf. *M. Sanh. 9.2*, on which see *VT 23* (1973), p. 286. See further Aptowitzer, *HUCA 3* (1926), pp. 136f.; Albeck, *Pesher*, pp. 128ff.

than an ox, relying on the specific formulation of *Exod.* 21:28, and contrasting the more general formulation of *Lev.* 20:15—16, which he took to permit, and indeed encourage, any extra-judicial execution of the animal (*Tos. Sanh.* 3:1). But whether his view involved a rejection of the notion of judicial process against animals, or was prompted purely by exegetical considerations, is not clear. Some later Jewish commentators certainly rejected the second commonwealth and tannaitic conception, which long since had become obsolete in practice. The view was expressed that the stoning was a punishment not of the ox but of its owner,<sup>49</sup> and Maimonides suggested that his loss was designed to make him take more care of it.<sup>50</sup> Nahmanides was uneasy even about *Gen.* 9:5, and denied outright that an animal had any mental capacity, such as to justify punishment (impliedly even by God) or reward. That and *Exod.* 21:28 could only be regarded as *gezerat melekh*, a divine decree which was not susceptible to human understanding.<sup>51</sup>

## II

*Exod.* 21:29 proceeds to distinguish a special case, where greater severity is required: "But if that ox was a gorer from times past, and this had been notified against its owner, but he had not guarded (?) it, and it kills a man or a woman, the ox shall be stoned, and its owner too shall be put to death". Difficult questions arise, *inter alia*, as to the exact duty imposed on the owner of such an ox, the type of liability attaching to that duty, and the nature of and reasons for the capital sanction.

The omission of the owner, which leads indirectly to the death of the ox's victim, is expressed in the words *velo yishmerenu*. The AV, followed by the RSV, gave this a specific connotation: "and he hath not kept him in". But *shamar* certainly does not carry this meaning elsewhere in the *Mishpatim*, where a shepherd or herdsman is entrusted with animals (an ox being specifically mentioned) *lishmor* (*Exod.* 22:9), or, indeed, where silver or vessels are given *lishmor* (*Exod.* 22:6). Moreover, restriction of the animal to its quarters can hardly have been a practical proposition.<sup>52</sup> The value of an ox so confined would be virtually lost to its owner. He might not even want to

<sup>49</sup> See Albeck, p. 129. *Contra*, Finkelstein, *op. cit.*, p. 252.

<sup>50</sup> *Guide to the Perplexed*, iii, 40. See the translation of S. Pines, *The Guide of the Perplexed* (1963), pp. 555—6. See also Dykan, *Dinei Onshin*, ii, 377—8, comparing S. Pufendorf, *De iure naturae et gentium* (1688), ii, 3.3. Pufendorf gives as the reason *non quod peccasset sed partim ne in posterum aliis similem noxam inferret, partim ut puniretur dominus in re sua, quia eam negligenter custodisset*. But according to the *halachah*, proceedings take place even if the animal was ownerless at the time of the incident. See Maimonides, *Damage by Chat els* 10:6.

<sup>51</sup> Commentary ad *Gen.* 9:5.

<sup>52</sup> Cf. Van Selms, *Ar. Or.* 18/4 (1950), p. 323.



use it for breeding purposes, for fear of producing yet more vicious beasts. In practice he would slaughter it for its flesh and its hide, rather than maintain it in idleness. Another possible translation of *velo yishmerenu* is "and he has not watched it". This permits a consistent rendering of *shamar* in the two passages of the *Mishpatim* where it is used of oxen. But it, too, is unlikely. A single guard is unlikely to prove a match for a vicious ox, and it would hardly be worthwhile to employ more than one in such a task.<sup>53</sup>

Of course, the law as here formulated does not make it mandatory either to slaughter the ox, keep it in, or set a guard over it. The owner may choose to work it in the fields regardless, accepting the risk of a reoccurrence of its vicious disposition. It is most unlikely that he is penalised for disregarding the duty (whatever its precise nature) implied in *v. 29*, if his disregard does not result in someone's death. Even if it does, he may calculate, he may be able to redeem his life by ransom (*v. 30*). But *kofer* in *v. 30* was in the discretion of the victim's kin.<sup>54</sup> The offender could not rely on it. It is, then, unlikely that he would take the risk.

Van Selms suggests "and he has not kept him under control" for *velo yishmerenu*,<sup>55</sup> and *JPSA* translates "has failed to guard it". Guarding is certainly a well-attested meaning of *shamar*, but the English term includes two very different meanings. "To guard" may be "to preserve", i.e. to ensure that the object is kept safe, either for its own intrinsic value, or in the interests of its owner. But "to guard" may also be "to guard against", to prevent the object from interfering with the interests of others. It is in this latter sense that *JPSA* translates *velo yishmerenu*. I do not suggest that there are no traces of such a meaning in the Biblical use of *shamar*. The derived noun *mishmar*, place of confinement, is certainly one. But such connotations are relatively rare.<sup>56</sup> There appears to be no other source where it is so used of animals, and the verb elsewhere in the *Mishpatim* unambiguously means "to preserve". The evidence of LE 53 and LH 251, for both of which similar translations have been offered, is far from compelling, since in LE the text is not certain,<sup>57</sup> and in

<sup>53</sup> The same may be said of the rendering "he has not watched over him" for *la usannigma* (LH 251), suggested by Paul, *Studies*, p. 81 n. 6.

<sup>54</sup> The formulation, which, unlike *Exod. 21: 22*, does not mention the kinsman *expressis verbis*, has been taken by some modern commentators, as well as by rabbinic exegesis, to refer to a court judgment. But there would be little point in saying, in effect, "if the court orders payment of a ransom, the owner is to redeem his life by paying the full sum fixed by the court". On the other hand, if *kofer* was a matter between the parties (as it was) the words can be given a real meaning. The owner is not allowed to bargain in this case. He must pay the full demand.

<sup>55</sup> *Ibid* Cf. *NEB*.

<sup>56</sup> The nearest example seems to be the guarding of the captive in 1 K. 20: 39.

<sup>57</sup> See Haase, *RIDA* 14 (1967), pp. 18—19; Yaron, *The Laws of Eshnunna* (1969), p. 197 n. 106.



LH the translation may still be open to doubt.<sup>58</sup> Later Jewish interpretations vary on this point. Josephus (*A. iv.* 281) regards the owner who fails to kill the ox as convicted of having failed to guard it (*μη φυλαξάμενος*), but Philo (DSL iii, 145) is more specific in seeing the offence as failure to tie the ox up or keep it shut in under guard (*μητε καταδήση μητε κατακλεισας φυλάττη*). These two measures are also mentioned in the *Mishnah* (B.K. 4:9), and the close parallel with Philo<sup>59</sup> makes it unlikely that the Mishnaic formulation adopts random examples. Nevertheless, these were not the original measures contemplated.

The considerable difficulties of *velo yishmerenu*, whether it is given a specific or a general meaning, may be avoided by accepting the LXX text *καὶ μὴ ἀφάνισση*,<sup>60</sup> representing an original Hebrew *velo yashmidenu*, which differs in only one letter from the MT. According to the LXX, the owner is liable if he has not destroyed the animal.<sup>61</sup> The Vulgate follows this slightly ambiguous terminology with *nec recluserit eum*. Josephus commences his account with the statement "An ox that goreth with its horns shall be slaughtered by its owner", *ὁ δεσπότης ἀποσφατέτω* (*A. iv.* 281). Of course, both the *Vulgate* and *Josephus* may well be dependent on the LXX. But the same interpretation<sup>62</sup> is accepted by one Tannaite (and one known to be a transmitter of ancient traditions), R. E l i e z e r. He accepts the MT *shamar*, but asserts that the only acceptable form of guarding is the slaughterer's knife (M.B.K. 4:9; *Mekhilta ad loc.*).

The reading *velo yashmidenu* accords well with the object of the law, as seen from our discussion of the reason for the stoning. The object was the safeguarding of the community from any further threat from that animal. Once an ox gored someone to death, the community would ultimately take collective measures to remove the possibility of any further danger. We may surmise that the owner himself might obviate the necessity for such action, by killing

<sup>58</sup> See Driver, Miles, *BL I*, 442; Goetze, *The Laws of Eshnunna* (1956), pp. 136—7; Haase, *loc. cit.*; Paul, *Studies*, p. 81 n. 6.

<sup>59</sup> Noted and discussed by B. Ritter, *Philo und die Halacha* (1879), p. 50; I. Heinenmann, *Philons griechische und jüdische Bildung* (1932), p. 407.

<sup>60</sup> *Aliter*, Cazelles, *Études sur le Code de l'Alliance* (1946), p. 58, partly on the basis of comparative evidence.

<sup>61</sup> The usage of ἀφανίζω is not uniform, as may be seen from the variety of MT verbs which it translates (See Hatch, Redpath, *ad loc.*). But the dominant notion is that of ridding oneself of something, and often, more specifically, of destruction. One of its commonest usages is as a translation of *shamad*. Colson, *Philo*, vii, 567 n.c. (Loeb ed.), in discussing Philo's relationship to this aspect of the LXX text, comes near to suggesting that ἀφάνισση, which he translates "removed" or "kept him out of the way", is an interpretation of the MT, not a different textual tradition. But the fact that ἀφανίζω commonly translates *shamad* in the LXX makes this unlikely.

<sup>62</sup> Cf. B. Ritter, *Philo und die Halacha* (1879), p. 51; H. Weyl, *Die jüdischen Strafgesetze bei Flavius Josephus* (1900), pp. 70f. D. Daube, *Zur frühalmudischen Rechtspraxis*, *ZAW* 51 (N.F. 9) (1932), p. 153.

the beast himself, thereby retaining both its flesh and its carcass.<sup>63</sup> But on other occasions the owner may have thought himself powerful enough to resist the communal demand for the beast's destruction. In such cases communal self-help was the natural resort. Where, however, the ox was known to be a gorer, but had not yet caused anyone's death, no collective action was yet deemed necessary. Despite the rabbinic interpretation,<sup>64</sup> it is unlikely that only an ox which had gored a man was contemplated in v. 29. Once the owner was put on notice that his beast was prone to gore man or beast, he was expected to remove the menace. The danger was not yet sufficient to necessitate collective action, nor was there yet any reason to deprive the owner of the flesh and the hide. But if the owner did not act in the interests of the community, he himself became personally liable, and in addition he lost the value of the flesh, which he would have if he slaughtered the beast himself.

The acceptance of *velo yashmidenu* removes part of the need to speculate on whether the owner's liability was here based upon *Erfolgshaftung*.<sup>65</sup> Had the owner's duty been to tie up the beast, dehorn him, set a guard over him, or the like, it would be necessary to decide whether he was liable if the death occurred despite these precautions. Yaron suggests<sup>66</sup> that postbiblical Jewish law's answer to that question is found in M.B.K. 4:9, but that is not absolutely certain. The case posed is that of an ox which had been duly tied or shut in, but emerged and caused damage. Although the ransom (*kofer*) of v. 30 came to be thought of as compensation for the lost life,<sup>67</sup> it is unlikely that that loss would be referred to by the Mishnah's verb *vehiyzik*. The problem rather is posed under *Exod.* 21:36. We must not assume that liability for death and liability for damage were in every respect based on the same principles. As for Biblical law, death could never occur once the owner had complied with his duty to slaughter the beast. Nevertheless, some difficult cases might arise. Suppose the owner tried to slaughter the beast, but it escaped and killed a human being. He could argue that his failure to kill it was not attributable to any fault on his part. Would the law not take account of this? There can be no certain answer, but it would seem unreasonable to suppose that such a mitigating factor would not be taken into consideration, especially when capital

<sup>63</sup> The importance of the cadaver appears also from *Exod.* 21:34—36.

<sup>64</sup> The rabbis developed the concept of *mu'ad lemiyno* (e.g. M.B.K. 4:2). See Albeck, *Pesher*, pp. 133—4.

<sup>65</sup> The recent discussion was anticipated by Daube, *ZAW* 9 (1932), p. 153. See also his *Roman Law* (1969), p. 160 n. 1.

<sup>66</sup> R. Yaron, *The Goring Ox in Near Eastern Laws*, *Israel Law Review* 1 (1966), p. 403. Yaron's article has been reprinted in H. H. Cohn, *Jewish Law in Ancient and Modern Israel* (1971), pp. 50—60, and is substantially incorporated in Yaron's, *The Laws of Eshnunna* (1969), pp. 192—200.

<sup>67</sup> Disputed at Mekhilta *Exod.* 21:29, and see Horowitz and Rabin's note, *ad loc.*

iability, not merely compensation, was in issue. That is not to say that the owner would necessarily go completely free. He would, in any case, lose his beast. He would probably also still be required to pay some *kofer*, as in cases of accidental homicide, though the amount would be less than otherwise. The same problem could have arisen in Eshnunna or Babylon, where the owner was not at fault in failing to take the required measures. There, too, a compromise in the amount of composition is likely.

Where, however, the owner took measures other than those required by the law, he was probably liable despite the fact that he had taken what he considered due care.<sup>68</sup> It is doubtful that the measures stated in the laws were intended as examples, or that a court could approve alternatives. The problem envisaged by the *Mishnah* might also occur. The required precautions are taken, but the animal still manages to kill. The owner complies with the law, and death occurs without fault on his part. He cannot be made liable without rendering the clauses concerning omissions virtually meaningless. How, then, could R a b b i M e i r hold the owner liable in M.B.K. 4:9? Only because the words *velo yishmerenu* in his text were ambiguous. The problem posed was that of an animal which had escaped and committed damage despite the fact that it had been tied or duly (*kerai*)<sup>69</sup> shut in. R. M e i r was able to make the owner liable because the animal had "come out" where Biblical law required him to "keep it in". R. J u d a h, on the other hand, translated *velo yishmerenu* "and did not guard it", and therefore found the owner not liable since "this one was 'guarded'". This does not appear clearly from the Mishnaic text, where only R. J u d a h relies upon *velo yishmerenu*.<sup>70</sup> But in the version at *Mekhilta* ad *Exod.* 21:29 both Tannaim rely upon the Biblical verb. It may be that underlying differences concerning *Erfolgshaftung* separate the two Tannaim. But R. M e i r could not have taken the position he did, imposing liability despite apparent compliance with the law and the absence of fault, had the Biblical text not been ambiguous. Finally, there is the case where the owner takes the required precautions, but death occurs because in some other respect he is at fault. Suppose he boxes the animal's horns or ties it up, but he allows a child

<sup>68</sup> Cf. Yaron, *Isr. L. Rev.* 1 (1966), p. 57. See also Haase, *RIDA* 14 (1967), pp. 47–52, on the Akkadian sources. E. S z l e c h t e r, *Les lois d'Eshnunna* (1954), p. 121, takes fault to be required by the form *uštami*. V a n S e l m s, *Ar. Or.* 184 (1950), p. 326 also sees here a requirement of "culpable neglect, *egum* in Babylonian", but *egum* does not appear in the texts concerning goring oxen.

<sup>69</sup> D a u b e, *The Civil Law of the Mishnah: The Arrangement of the Three Gates*, *Tulane Law Review* 18 (1943–4), pp. 368–70. On *kerai* see also D a u b e, *Negligence in the Early Talmudic Law of Contract (Peshi'ah)*, *Festschrift Fritz Schulz* (1951), i, 142–4.

<sup>70</sup> Only the *Mishnah* is discussed by D a u b e, *loc. cit.*, and Yaron, *Isr. L. Rev.* 1 (1966), p. 403. There are also other important differences between the forms of the tradition found in the *Mishnah* and the *Mekhilta*. Features of both appear in the version at *Mekhilta* deRab Shimon ad *Exod.* 21: 29.

into the enclosure, and the child is kicked to death. Can he possibly allege that he did all which the law required of him? It would seem unlikely.

It thus appears that no simple judgment as to the basis of liability is possible. The first question is always: Has there been literal compliance with the measures required by the law? If there has not, liability *prima facie* exists, even if it may be shown that the owner took other measures which he regarded as adequate. This may be categorised either as strict liability or as liability for fault, depending on whether fault consists in failure to take the measures stated in the law or failure to take measures considered reasonable by the owner. But there may be cases, as where an unsuccessful attempt to comply is made, where a compromise is effected, so that both notions are at play. The owner is liable because his failure to take the required precautions resulted in the death, but he is not fully liable because his failure so to do was not attributable to his fault. Where, on the other hand, the owner has literally complied, that may not be conclusive in his favour. If he has been otherwise at fault, he may still be liable. If a modern analogy is sought, the nearest may be that of breach of statutory duty.

If the owner failed to slaughter the ox, which then killed a human being, he was liable to two sanctions. The ox was to be killed, as a measure of communal protection. Even here it may well have been possible for him to obviate the necessity for stoning by slaughtering the beast, in which case the value of the carcass may not have been lost to him. But he was also personally liable to be killed, subject to acceptance of ransom by the kin of the deceased (v. 30). This personal capital liability is not an application of the principle "a life for a life" (v. 23). The death is far too remote from the owner for that. The restoration of *velo yashmidenu* permits a far more satisfactory explanation. The punishment mirrors the manner of commission of the offence. The owner has failed to kill an ox, as required. Therefore he shall be killed. The duty to kill which he omitted to perform shall be performed — on him. This brings liability far closer to the person of the offender. He is punished not for the act of his ox (vicarious liability) but for his own failure to kill.

The particular form which the owner's punishment takes is that of liability to blood vengeance by the kin of the deceased. This is shown by the subsidiary reference to ransom in v. 30.<sup>71</sup> It is also referred to in the final words of v. 28: *uva'al hashor naki*. This is commonly translated in such a way as to suggest that the owner is completely free from liability.<sup>72</sup> The Vulgate goes even further by its rendering *dominusque bovis innocens erit*. The guilt or innocence of the owner was not, however, in issue in v. 28. Though it may not have been thought

<sup>71</sup> On the admissibility of *kofer*, see Jackson, *JJS* 24 (1973), pp. 21–4; most recently, Finkelstein, *op. cit.*, p. 271 n. 313.

<sup>72</sup> LXX ἐθῶνος; AV "quit"; RSV "clear"; Jerusalem "not be liable"; JPSA "not to be punished"; NEB "free from liability". See also the different rabbinic views at Mekhilta *ad loc.*



that he was being "punished", he was still not free from liability. He was required to hand over his ox to be stoned, or, perhaps, to kill it himself. Thus, NEB's translation "free from liability" contradicts what precedes it. Rather, the meaning is that the owner is free from blood-guilt, which he does incur in v. 29. That is the meaning of the verb *venikah* in *Exod.* 21:19, its only other occurrence in the *Mishpatim*, and the adjectival form *naki* is found in the same sense in 2 *Sam.* 3:28. The common phrase *dam naki*<sup>73</sup> is a development of the same idea.

The difference between the treatment of the ox and that of its owner illustrates further the primary conception which lay behind the stoning of the ox. In v. 29 the owner is punished in respect of a specific offence. Someone has died through his failure to take the required measures, and he is therefore accountable to the kin. At the period reflected in the *Mishpatim*, this is still a matter solely between him and them.<sup>74</sup> The ox, on the other hand, is not punished in respect of an offence committed. It is not the object of the kinsmen's vengeance. It is destroyed because of the future threat it poses to the whole community, and the whole community will act, if necessary, to eliminate that threat.

It remains to consider the significance of the difference between the Biblical provision and its Semitic counterparts. LE 54/5 and LH 251/2 require the owner only to pay fixed sums in compensation. But it is to be noted that LE 58, which from its form and position seems to have been regarded as an analogous case, does threaten a capital sanction. The owner of a sagging wall has failed to strengthen it, despite a formal notification, and someone has been killed. The text concludes: *napištum simdat šarrim*, "(it is a case concerning) life: decree of the king". I need not enter into the question why this particular case was singled out for special treatment.<sup>75</sup> Whatever the immediate reason for the restriction of the reform to this particular case, an argument must have been advanced that a comparable rule should be enacted for LE 54 and 56. Previously, so it seems, all three cases had been treated on a par, and their similarity noted. But whether such an argument was ever successful in the subsequent history of legal development at Eshnunna is not known. As the evidence stands at present, the clear difference between *Exod.* 21:29 and its counterparts remains, and requires explanation.

Here, too, the special religious values reflected in the Bible have been ad-  
duced in explanation. Cassuto suggests<sup>76</sup> that the owner's liability is

<sup>73</sup> *Deut.* 19:10, 21:9, 1 *Sam.* 19:5, 2 *K.* 21:16, 24:4, etc. BDB note that it is first used in D.

<sup>74</sup> According to Philo, *DSL* iii. 145, the court decided not merely the amount of the ransom, but also whether the owner's life was to be ransomed or not.

<sup>75</sup> See Yaron, *The Laws of Eshnunna* (1969), pp. 199–200, discussing earlier views.

<sup>76</sup> Shemot (1965), p. 194.



here in conformity with *Gen.* 9:6. But that too, like *Gen.* 9:5, relates to God's justice.<sup>77</sup> At any rate, after the Second Commonwealth period, in which the imposition of the death penalty by the court appears to have been acceptable,<sup>78</sup> the practice certainly ceased, and the rabbis disposed of the Biblical requirement by transforming it into "death at the hands of heaven".<sup>79</sup> They justified this by pointing out, as have some modern commentators,<sup>80</sup> that *yumot* in v. 29 differs from the usual formula *mot yumot*. Frankel suggested that the LXX form *προσαποθανεῖται* implies the same interpretation.<sup>81</sup> But the LXX used an unusual form either because the Hebrew appeared to do so, or because it represents a variant reading *yamut*. Historically, the tannaitic interpretation is out of the question. *yumot* really creates no problem. Throughout the *Mishpatim* *mot yumot* occurs only in the participially formulated laws, sometimes regarded as "apodictic". The difference between it and *yumot* in v. 29 reflects a difference in sources, rather than one in meaning.<sup>82</sup> Moreover, the reference to ransom in v. 30 suggests strongly that this law was intended to be operated by man, not God. The Rabbis, for this and other reasons,<sup>83</sup> regarded even ransom (*kofer*) as an institution of divine justice, and were able to cite numerous Biblical texts in support.<sup>84</sup> But the concept of ransoming one's life from god is another example of the adaptation of legal institutions to theological purposes within the Biblical period.

There can be no certainty in attempts to explain the difference between the Biblical and Mesopotamian provisions. But two factors noted already may go some part of the way. First, the greater proximity of the *Mishpatim* to semi-nomadic conditions may account for the greater severity. Second, the capital sanction may be a mirroring penalty for the owner's failure to destroy the ox. The application of the same principle in Mesopotamia was either impossible,

<sup>77</sup> Jackson, *JJS* 24 (1973), pp. 24f.

<sup>78</sup> Philo, *DSL* iii, 145; Josephus *A.* iv, 281; *M. Sanh.* 1: 4. The story of Shimon b. Shetah and King Jannai, *Sanh.* 19a, as it stands reflects both earlier and later views. See Z. Frankel, *Ueber den Einfluss* (1851), pp. 93-4; A. Geiger, *Urschrift und Uebersetzungen der Bibel* (1857), pp. 448-9; B. Ritter, *Philo und die Halacha* (1879), pp. 51, 135-6. S. Belkin, *Philo and the Oral Law* (1940), pp. 125-7. Geiger and Belkin may well be correct in suggesting that the dispute as to whether *kofer* is based on the life of the accused or the life of deceased is related to the practical abolition of the death penalty. See further B *infra*.

<sup>79</sup> Mekhilta, Targum Yonatan, Ramban, Ibn Ezra, Rashi, *ad loc.* *Sanh.* 15a-b.

<sup>80</sup> A. Dillmann, *Die Bücher Exodus und Leviticus* (1880), p. 233; H. Holzinger, *Exodus erklärt* (1900), p. 87. G. Beer, *Exodus* (1939), p. 112. But see Cazelles, *Études*, p. 58.

<sup>81</sup> *Ueber den Einfluss* (1851), p. 93.

<sup>82</sup> See further, Jackson, *JJS* 24 (1973), pp. 33ff.

<sup>83</sup> Notably, the need to reconcile this passage with *Nus.* 35: 31-2.

<sup>84</sup> Mekhilta *ad Exod.* 21: 29, 30; *Ket.* 37 G. R. Ishmael cited *Exod.* 30: 12; 2 *K.* 12: 5, *Prov.* 13: 8, *Dan.* 4: 24, *Job* 33: 23-4.

where the requirement was to box or cut the beast's horns, or impractical, where it was to tie the animal up.

### III

When we turn our attention to oxen which gored other oxen (*Exod.* 21:35—6), it is a similarity rather than a difference which invites explanation. Only one surviving ancient Near Eastern provision, LE 53, deals with this situation, but it affords what is probably the closest single parallel to any Biblical law.<sup>85</sup>

*Exod.* 21:35 And when a man's ox butts the ox of his neighbour so that it dies, then they shall sell the living ox and divide its price, and they shall also divide the dead one.

LE 53 If an ox gored an ox and caused (it) to die, both ox owners shall divide the price of the live ox and the carcass<sup>86</sup> of the dead ox.

Three questions, common to both provisions, arise before the relationship between these sources is considered. First, do the references to the price of the surviving ox mean that a sale was mandatory? Second, is the cadaver to be physically divided, or is it to be sold and its price divided? Third, does the rule apply literally whatever the values of the respective oxen, or is it, as has been suggested of *Exod.* 21:35, "paradigmatic"?

It is clear from the literal meaning of both texts that an actual sale of the surviving ox is envisaged. The use by LE of *šimu*, price, and *zazu*, to divide, is unambiguous,<sup>87</sup> as is the Hebrew *makhar kesef* and *hatzah*.<sup>88</sup> Nevertheless, Yaron sees nothing to preclude an agreement between the parties, leaving the ox with its owner, providing he is willing to pay half its value.<sup>89</sup> But unless valuation is to be left to the discretion of one of the parties, which is hardly likely,<sup>90</sup> or the value is to be taken from a fixed tariff, which also appears unlikely,<sup>91</sup> recourse to some independent tribunal would have been necessary. This is less convenient than using the market. Moreover, in this case it is in the interests of both parties that the surviving ox be sold for the maximum possible

<sup>85</sup> See further *infra*, note C.

<sup>86</sup> For this reading, see Yaron, *Isr. L. Rev.* 1 (1966), p. 398 n. 3; Haase, *RIDA* 14 (1967), p. 16.

<sup>87</sup> Cf. Haase, 14—15.

<sup>88</sup> The idea of a physical division is present also in the related root *hatzav*.

<sup>89</sup> *The Laws of Eshnunna* (1969), p. 193 n. 93.

<sup>90</sup> The situation is quite different in *Exod.* 21:30, where the kin are entitled to demand what will appease them, from an offender responsible for a homicide.

<sup>91</sup> Though LH 268 regulates the hire of an ox, it is only in the Hittite Laws (178—81) that a price-list for domestic animals is found.

price, since the more it fetches the more each will receive. A valuation, on the other hand, would be appropriate only where the interests of the parties as to the price were conflicting. It may even be that the market price of the ox will be enhanced for some purposes by the evidence it had provided of its strength. Certainly, the texts, though they contemplate only an actual sale, do not exclude a payment of half value. But the situation itself makes a sale the most convenient solution.<sup>92</sup> It is not merely a matter of adjusting the loss between the parties. An attempt is made to recoup part of the loss through the use of the market.

A similar difference of opinion exists regarding the disposal of the cadaver. LE 53 certainly contemplates only a physical division,<sup>93</sup> and *Exod.* 21:35 is hardly less clear. Admittedly, the cadaver is retained by the offender in *Exod.* 21:34 and 36, but in both those cases there is an obligation to replace a live ox for the dead one.<sup>94</sup> It might be argued here too that sale of the cadaver intact is in the interests of both parties, since the price intact may exceed that of two separate halves. But the difference can hardly have been substantial. Whether solutions other than that explicitly mentioned were possible is a question which depends not upon the interpretation of the particular provisions but rather upon one's view of the nature and purpose of the drafting of these laws as a whole.

This wider problem recurs in an even more acute form when we consider the actual working of the division. It is widely held that its object was to divide the loss equally between two equally blameless owners.<sup>95</sup> No such principle is explicit in the text, and other examples of its application are difficult to find.<sup>96</sup> Moreover, both ancient and modern writers have pointed out that an equalisation of the loss will only be effected if the two beasts happen to be of equal value.<sup>97</sup> What happened if they were not? Greenberg asserts that *Exod.* 21:35 is paradigmatic. It assumes that the oxen are of equal value.

<sup>92</sup> Unless the gorer happens to be worth exactly half the plaintiff's loss, when it will be convenient to surrender it. See M.B.K.3.9; Tos.B.K.3.3; B.K.33a. B. Cohen, *Jewish and Roman Law* (1966), i. 17–18, compares the Roman noxal surrender of XII T.VIII.6. But the tannaitic sources consider a special situation. There is no suggestion that the owner of the gorer may surrender it in other cases.

<sup>93</sup> Haase, *RIDA* 14 (1967) pp. 17–18. Yaron, *Isr. L. Rev.* 1 (1966), p. 398, appears to favour division of the price of the carcass.

<sup>94</sup> On the interpolation in *Exod.* 21: 34, see Daube, *Studies in Biblical Law* (1947), pp. 138–9.

<sup>95</sup> S. R. Driver, *Exodus* (1911), pp. 222–3; Daube, *ZAW* 9 (1932), p. 153; Cazelles, *Études* (1946), p. 61; Goetze, *The Laws of Eshnunna* (1956), p. 138; Yaron, *Isr. L. Rev.* 1 (1966), p. 398; M. Greenberg, *Idealism and Practicality in Numbers 35: 4–5 and Ezekiel 48*, *JAOS* 88 (1968), pp. 60–61.

<sup>96</sup> *Infra*, pp. 80f.

<sup>97</sup> Mekhilta ad *Exod.* 21: 35; M.B.K.3.9; Rashi ad *Exod.* 21: 35; Kalisch, *Exodus* (1855), p. 413; Daube, *ZAW* 9 (1932), p. 159 n. 50; Yaron, *Isr. L. Rev.* 1 (1966), p. 400.

It is, therefore, an example of the principle of equal division of the loss. Where the oxen are not of equal value, the same principle is to be applied. But because a literal application of *Exod.* 21:35 would not conform to that principle, some other way of doing so must be found.<sup>98</sup>

There are two steps in this argument which ought, in my view, to be avoided when dealing with casuistic laws such as those in LE and the *Mishpatim*, unless there really is no alternative. First, a fact which is not stated or even implied, here the equal value of the two oxen, is assumed. Second, the law is regarded as an example of an implicit principle.<sup>99</sup> Here, by asserting its paradigmatic nature, Greenberg goes even further. He asserts that the law was consciously framed as an example, and that a non-literal application of it was intended to be conveyed where the two oxen were not of equal value.

Some of these difficulties need not arise. We are not compelled to assume that LE's *izuzzu* and the Biblical *vehatzu* require *equal* division of the price of every case. There is nothing explicit in either text to exclude an unequal division. Suppose the dead ox was worth 30 shekels alive, but only 2 shekels dead, and the living ox can be sold for 20 shekels. It would be possible to require the owner of the living ox to hand over 14.5 shekels, this representing one half of the other owner's loss (taking into account the division of the cadaver). If this is so, the text conforms to the principle of equal division of the loss without assuming either that it contemplates oxen of equal value or that it is paradigmatic. But even so the principle of the equal division of the loss would remain an assumption. Not even tannaitic law admitted such a position, since the liability was limited to the value of the live ox, which might possibly be less than half the loss.<sup>100</sup> Yaron, accepting *vehatzu* as equal division, points out that even the tannaitic limitation goes further than LE 53 and *Exod.* 21:35, where liability is limited to one half the price of the living ox.<sup>101</sup>

But let us accept the traditional understanding of *vehatzu* as equal division. The fact that liability is limited, so that in some cases less than half the loss may be paid, might not be regarded as a qualification sufficiently serious to throw the alleged principle of equalisation of loss into doubt. There is also the issue of fairness to the owner of the goring ox. But there are also cases where, despite the limitation to half the price, the owner of the dead ox will receive more than half his loss. If the victim was worth 20 shekels alive and 2 dead,

<sup>98</sup> *JAOS* 88 (1968), pp. 60-61.

<sup>99</sup> I have stated my objections to this approach at *JJS* 24 (1973), pp. 8ff.

<sup>100</sup> Cf. Yaron, *Isr. L. Rev.* 1 (1966), pp. 400-401, citing M.B.K. 1: 4.

<sup>101</sup> Some scholars have suggested that the tannaitic idea of payment "from the body of" the live ox is a survival of the feeling that the ox was personally liable. But the latter idea, as we have seen, does not belong to the original conception of the law. Nor is it by any means certain that the two ideas are connected in the postbiblical development. See also S. Albeck, "Avot nezikin" *Enc. Jud.* (1971), iii, 987.



so that the loss, allowing for division of the cadaver, is 19, and the gorer fetches 30 shekels, then the owner of the victim will receive 15 shekels, over three-quarters of his loss. Are we to say that there is anything grossly unfair in dividing the loss disproportionately in this way? The owner of the victim may do better than under the principle of equalisation of loss, but why should he not be compensated as fully as possible? The owner of the gorer may suffer more, although his loss is limited to half the price of the beast, but it was, after all, his beast that caused the loss.

Only in two types of case does a literal application of the rule (assuming an equal division of the price) appear to create injustice. One, posed by R a s h i,<sup>102</sup> is that where the value of the gorer is less than that of the cadaver, so that the division results in profit to the owner of the gorer, and considerable loss to the owner of the victim. Suppose the gorer was worth 10 shekels, the carcass 12, and the victim when alive 30. The owner of the gorer emerges with 5 shekels and 6 shekels worth of dead ox, a net profit of 1 shekel. But it is hardly conceivable that the value of the cadaver was ever higher than that of the living ox. A genuine difficulty does appear to arise, however, wherever the value of the gorer was less than that of its victim. The loss to the owner of the gorer is limited to half what it will fetch, but the victim receives less than one-half his loss. Where the difference in value is insubstantial, no great injustice results. Suppose the gorer was worth 20 shekels, the victim 22, and the cadaver 2. The net loss to the owner of the victim is 11, that to the owner of the gorer 9. But where the difference is substantial, the result does seem unjust. The gorer is worth 15, the victim 30, the cadaver 2. The net loss to the owner of the victim is 21.5, that to the owner of the gorer 6.5.

Nevertheless, the difficulty in this last case does not seem sufficient to reject the literal meaning, and substitute a principle of equalisation of loss. For one thing, the case where the gorer is worth less than the victim is less likely to occur than the converse, since the ox of higher value is likely to have been the stronger. And against this possible disadvantage is to be set the more likely case, where the gorer was worth more than the victim. There, as we have seen, the literal application works more justly, if less equally, than the principle of equalisation of loss. Thus there seems to be no compelling case for taking *Exod.* 21:35 as paradigmatic.<sup>103</sup>

The question of the relationship between LE 53 and *Exod.* 21:35 also raises important problems of approach. In Y a r o n's view "the identity of the very peculiar ruling laid down in both the sources makes it virtually certain that they are connected with each other",<sup>104</sup> and L o e w e n s t a m m has also

<sup>102</sup> *Ad loc.* Greenberg, *JAOS* 88 (1968), p. 61, follows him when he also argues that where the gorer was worth double the value of the victim, the plaintiff would be enriched.

<sup>103</sup> See further *infra*, note D.

<sup>104</sup> *Isr. L. Rev.* 1 (1966), p. 398.



commented upon the "astonishing agreement" between them.<sup>105</sup> Others, however, are more hesitant.<sup>106</sup> Criteria by which foreign influence may be proved have been suggested on both sides, and deserve examination.<sup>107</sup>

It should be stressed from the outset that a considerable difference exists between proof of foreign influence and the likelihood of its existence. Usually it is right to proceed from the assumption that what cannot be proved did not exist. But the hesitancy of ancient sources to admit foreign influence<sup>108</sup> renders such an assumption inappropriate when dealing with problems of this type. Whenever there is a close similarity between rules of systems of law which came into contact with each other, a possibility (Diffusionists might say a *prima facie* case) of influence exists. I do not suggest that it is useful to search for such parallels, nor are any conclusions to be based upon them. But there are occasions when more evidence is available, and for which scientific criteria may be devised. Only when influence appears to be proved may conclusions be drawn. But the phenomena of influence are probably much more widespread.

It is difficult to lay down criteria for the recognition of close similarity between two provisions. This will always remain largely a subjective matter. But similarity in form may be more susceptible to objective examination than similarity in substance, and Yaron points out that the similarity between LE 53 and *Exod.* 21:35 comprehends the mode of formulation as well as the actual solution reached.<sup>109</sup> The sequence of clauses in the goring ox provisions is certainly similar in LE, LH, and the *Mishpatim*.<sup>110</sup> But the similarity chiefly concerns the protases. The apodoses, involving differences already discussed, are different in structure, and this difference extends even to LE 53 and *Exod.* 21:35, where the solution is the same. Whereas LE succeeds neatly in combining the division of the price and the division of the cadaver into a single clause, the Biblical draftsman requires two. Multi-clause apodoses are a feature of the *Mishpatim*,<sup>111</sup> but usually they are required for substantive reasons, since the law requires two quite different acts. If there was literary dependence, the Biblical draftsman nevertheless adapted his model to conform to his usual

<sup>105</sup> Review of Goetze, *IEJ* 7 (1957), p. 196.

<sup>106</sup> Recently, H a s e, *RIDA* 14 (1967), p. 17 n. 39.

<sup>107</sup> I have discussed this problem in other contexts in *Evolution and Foreign Influence in Ancient Law*, *Am. J. Comp. L.* 16 (1968), pp. 374–82; *Foreign Influence in the Early Jewish Law of Theft*, *RIDA* 18 (1971), pp. 25–42.

<sup>108</sup> Z. W. F a l k, Review of Yaron, *The Laws of Eshnunna*, *Biblica* 51 (1970), pp. 130–1, cites *Exod.* 18 and *Nus.* 27 to show that "the Bible did not refrain from mentioning the sources of a given norm, when received from outside". But in *Nus.* 27 (the case of the daughters of Zelophehad) the source is hardly an "outside" one. *Exod.* 18, relating the delegation of judicial functions at the suggestion of Jethro, deals with a purely administrative matter.

<sup>109</sup> *Isr. L. Rev.* 1 (1966), p. 398.

<sup>110</sup> P a u l, *Studies* (1970), pp. 80–81, on *Exod.* 21:29 and the parallels thereto.

<sup>111</sup> E.g. *Exod.* 21: 2, 4, 6, 19, 22(?), 28, 29, 30, 32, 34, 36.

style. Had he not done so, but combined the two divisions into a single clause, the argument for influence would be even stronger. But it does not, in my view, fail without it.

Once close similarity is identified — as it is here by the substance of the solution alone — tests of a negative nature are applied. Yaron would ask whether what is common is also “truly peculiar and extraordinary”. Such a test is required in order to exclude the alternative explanation of independent parallel development.<sup>112</sup> The fact that another example of the same phenomenon is found within the same geographical and historical area, does not negate the hypothesis, since it too may have been produced by the same influence. In this context it is to be noted that Doughty reported the solution of LE and the *Mishpatim* to be the “custom of the desert”.<sup>113</sup> Whether this is to be viewed as an example from the same culture area, despite the chronological difference, is a matter for discussion. Yaron, contrasting Rome and Gortyn, finds no comparable law, and is satisfied that the solution under discussion is “truly peculiar and extraordinary”. Whether he has looked far enough afield is questionable,<sup>114</sup> but the very formulation of the test appears to me to be capable of improvement. If “truly peculiar and extraordinary” means that no other example must be found outside the culture area in question, then one doubts whether influence can ever be proved. But there must be a point below which the incidence of the custom outside is not yet sufficiently high to make independent parallel development the more likely solution. It is beyond my statistical capacity to formulate exactly what that incidence is. It must, no doubt, take into account the distribution of the parallels outside, for a high incidence of the same custom in a single outside culture area would have a different significance from a low incidence in a number of outside culture areas. Even where the incidence of the custom outside exceeds the point at which independent parallel development becomes likely, influence may still exist. The actual cause of a cultural development may be foreign influence even when we expect that that development would have been produced independently anyway. But where this is so, influence is no longer provable, unless it is openly admitted.

Whereas Yaron requires the parallel to be “truly peculiar and extraordinary”, Falk would have us ask if it is “exceptional and inexplicable in

<sup>112</sup> *Isr. L. Rev.* 1 (1966), p. 399. Cf. M. David, *The Codex Hammurabi and its Relation to the Provisions of Law in Exodus*, *Oudt. St.* 7 (1950), pp. 153–4.

<sup>113</sup> *Travels in Arabia Deserta* (1888), i, 351, cited Driver, *Exodus*, p. 223. His formulation of the law, apparently intended as a paraphrase of *Exod.* 21: 35, is: “if any man’s beast hurts the beast of another man, the loss shall be divided”.

<sup>114</sup> See Doughty, *loc. cit.* Division of losses resulting from accident is found elsewhere, but I have not seen any exact parallel, involving sale of an animal and division of its price.

its context".<sup>115</sup> But this supposes a false antithesis between influence and independent parallel development. For a rule which really is exceptional and inexplicable in its context (implying that it could never have developed independently) would not have been received.<sup>116</sup> Much stress is laid in modern anthropology on the function of a received norm in its new context,<sup>117</sup> and though it would not be true to say that only such a norm as would have been developed independently anyway will be received, it is doubtful that a norm which could never have been developed independently will be received. Falk also requires us to ask before accepting foreign influence, whether the similarity in social structure is not to be credited with the creation of the common solution.<sup>118</sup> This too raises difficulties. It is not uncommon to find social conditions inferred from laws, which are then explained in terms of the social conditions so found. But even where social conditions are independently evidenced, the conclusion that they *caused* the law in question is not readily reached.<sup>119</sup> Similarity in social conditions is another notion which is often all too hazily established. Nor is it always true that the same social conditions produce the same laws in two different societies.

Falk rightly requires that "Biblical law should be interpreted in the light of the ideas and the social development of Israel; only where this does not provide a solution, should one have recourse to the results of comparative material from adjoining societies".<sup>120</sup> Again, foreign influence *may* have been the occasion for the Biblical development even where it is explicable in wholly Israelite terms. Even the religious ideas found elsewhere in the Bible may, as we have seen,<sup>121</sup> sometimes be taken from the legal sphere. But we should not regard influence as proved in such cases, unless there is some explicit indication of it. Falk does identify other Biblical examples of the idea underlying *Exod.* 21:35.<sup>122</sup> He cites as further applications of "Solomonic kadi justice"<sup>123</sup> *Nus.* 31:27 and *1 Sam.* 30:24, both concerning equal division of booty between warriors who participated in a campaign and those who did not. *Nus.* 31:27 uses the same verb, *hatzah*, as *Exod.* 21:35. But the parallel is not close, even disregarding the fact that in the one case it is a loss, in the

<sup>115</sup> *Biblica* 51 (1970), p. 131. See also his *Zur fremden Einfluss auf das jüdische Recht*, *RIDA* 18 (1971), p. 12.

<sup>116</sup> But this is taken to unjustified extremes by David, *Oudt. St.* 7 (1950), p. 154.

<sup>117</sup> E. E. Evans-Pritchard, *Social Anthropology* (1951), pp. 47-9; I. M. Lewis, *History and Social Anthropology* (1970), pp. xii-xiii; E. R. Wolf, *The Study of Evolution*, in: *Readings in Social Evolution and Development*, (ed. S. N. Eisenstadt, 1970), pp. 179-81.

<sup>118</sup> *Ibidem.*

<sup>119</sup> Jackson, *JJS* 24 (1973), pp. 26f.

<sup>120</sup> *Ibidem.*

<sup>121</sup> *Supra*, pp. 64f., 73.

<sup>122</sup> *Hebrew Legal Terms: III*, *JSS* 14 (1969), p. 39.

<sup>123</sup> Yaron's term, *Isr. L. Rev.* 1 (1966), p. 398.

other a reward, that is to be apportioned. For the whole object of the booty law was to include those who had not participated in the campaign. It was not to make an equal division between those who had participated in the fight, because of the difficulty of establishing who had earned what — comparable, one might say, to the law which apportioned the loss between the owners of two fighting oxen, because of the difficulty in establishing which had attacked the other. In the booty law, some are rewarded who clearly had done nothing. Less comparable still, in my view, is the judgment of Solomon.<sup>124</sup> Falk, though conceding that the sentence had a psychological rather than a legal *ratio*, suggests that “it was based on the general norm providing in certain cases for division. It was only on this assumption that the parties believed in the threat and thus underwent the test”.<sup>125</sup> But a contrary argument is possible. Had there been a general understanding that the disputed child would be divided by the court, the true mother would never have allowed the proceedings to reach that stage. She could not have relied upon being allowed to concede the case in the course of proceedings, thereby avoiding the child’s death. Nor is it necessary that the parties believed in the legality of the threat. Would the true mother, not so believing, still have taken the risk that the king was not bluffing? Of course, Solomon’s device was a method of obtaining the truth, a kind of trial by ordeal. Division because of competing claims in the absence of evidence was not the object. Interestingly, however, such a view does appear to have been taken by Josephus, who, apparently with *Exod.* 21:35 in mind, records that Solomon ordered the division of both children, the living and the dead.<sup>126</sup>

Other arguments for the independence of the Biblical law of goring oxen are voiced by Van Selms.<sup>127</sup> But they do not appear to be weighty. The fact that differences also exist does not seem to me to render significantly less likely the hypothesis that the similarities are due to influence. That effects the extent of influence, not its existence in one particular respect.<sup>128</sup> Nor does it seem to me that differences in what are regarded as “fundamental conceptions” necessarily exclude influence elsewhere.<sup>129</sup> Even less credible is the argument that the more primitive cannot be influenced by the more advanced,<sup>130</sup> both because of the dangerous assumption of unilinear evolution which such classifications often imply, and because of actual evidence to the contrary.

<sup>124</sup> 1 K.3: 16—28. Greenberg, *JAOS* 88 (1968), p. 61 n. 12, also considers *Exod.* 21:35 as reminiscent of Solomon’s judgment.

<sup>125</sup> *JSS* 14 (1969), p. 40.

<sup>126</sup> *A.* viii, 31, noted by D. W. Amram, *Chapters from the Biblical Law V. The Judgment of Solomon, The Green Bag* 12 (1900), p. 485.

<sup>127</sup> *Ar. Or.* 18/4 (1950), pp. 322—5.

<sup>128</sup> Assuming always that channels of communication existed. Falk requires in addition “‘corroboration’ to prove the flow of ideas”, *Biblica* 51 (1970), p. 131.

<sup>129</sup> Implied by Van Selms, *Ar. Or.* 18/4 (1950), p. 330.

<sup>130</sup> *Ibid.* p. 325; Driver, Miles, *The Babylonian Laws*, i, 444.



We may be confident that there is a connection between *Exod.* 21:35 and LE 53. The similarity is sufficiently specific<sup>131</sup> to create a basis for investigation. The rule is, if not unique, sufficiently unusual to make independent parallel development less plausible. It does not appear to be readily explicable in terms of other Israelite ideas. Had these two latter criteria not been fulfilled, the possibility of influence would have remained, but we would not have been entitled to take account of it for scientific purposes.

Difficult problems remain, however, in deciding the nature of the connection. Yaron suggests that both borrowed from a common fount, Oriental legal practice.<sup>132</sup> I do not know exactly what implication the phrase "legal practice" is intended to bear in this context. But the suggestion that the rule reflects a custom common to a number of Semitic peoples derives support from the account of Doughty.<sup>133</sup> Much may depend upon the significance attached to this evidence. Another possibility, that we have here the workings of a common literary tradition, is suggested by the similarity in the formulation of the other laws in the group.<sup>134</sup> On the other hand, if a common literary tradition was at work, the absence of provisions on oxen goring other oxen from LH may require an explanation. I refrain from expressing any view on the matter, since its solution requires consideration of a far wider range of evidence than is afforded by a single parallel.

#### IV

Finally, some literary and historical problems arising from vv. 35—6.

v. 35 is followed by a qualification which has no parallel in LE or LH. If it was known that the ox was a gorer but its owner did not take preventive measures,<sup>135</sup> the owner of the gorer must make good the loss by paying ox for ox, but he is entitled to take the cadaver.<sup>136</sup>

<sup>131</sup> Cf. A. Goetze, *Mesopotamian Laws and the Historian*, *JAOS* 69 (1949), p. 117, requiring "very specific coincidences". P. Vinogradoff, *Outlines of Historical Jurisprudence* (1920), i, 170 writes: "It is clear that the more artificial and complicated the affinities between compared cases come to be, the more likelihood there is that the resemblance has been reached by influence or transmission". While this may be true, it is not every specific coincidence that is attributable to influence. See Jackson, *RIDA* 18 (1971), pp. 35—39.

<sup>132</sup> *Isr. L. Rev.* 1 (1966), p. 398.

<sup>133</sup> *Supra*, n. 113.

<sup>134</sup> Acknowledged also by Cassuto, *Shemot*, p. 194, though he stresses that the penalties (where a human being is the victim) are determined by Biblical principles. Cf. Paul, *Studies*, p. 81.

<sup>135</sup> MT *yishmerenu*, LXX ἀφαινήσῃ. The conclusion reached concerning the text of v. 29 (*supra*, pp. 66ff.) applies equally here. The Vulgate, however, is eclectic, using *recluserit* in v. 29, *custodivit* in v. 36.

<sup>136</sup> Two questions have been raised concerning the nature of the sanction. E. R. Goddough, *The Jurisprudence of the Jewish Courts in Egypt* (1929), p. 127, took the verse to

D a u b e, writing before the publication of LE, maintained that the two rules concerning the goring of oxen, vv. 35 and 36, are a supplement to the *Mishpatim*, representing a less urgent case.<sup>137</sup> He noted, but did not rely upon, the fact that LH deals only with the ox which gores a human being. Reliance would have been misplaced, for LE does regulate the goring of an ox,<sup>138</sup> as we have seen. D a u b e nevertheless maintains his view,<sup>139</sup> on the evidence of the Biblical text itself. He points to two differences in substance — that between *nagah* in vv. 28 ff. and *nagaph* in v. 35, and that between *hu'ad* in v. 29 and *noda* in v. 36. Two formal features are also adduced. First, v. 36 uses the unusual opening formula 'or' (*ow*). Second, the arrangement also suggests an addition. The whole passage from v. 28 falls into three paragraphs, but the third, vv. 35—6, ought logically to have followed the first, which also deals with the goring ox. A single legislator would not have separated them by the case of the pit. Addition at the end (*clausula finalis*) was, however, the technique used by a later hand, as may be seen from other passages in the *Mishpatim*. Each of these arguments requires careful consideration.

First, the verbs *nagaph* and *nagah*. They represent, in D a u b e's view, not merely different sources,<sup>140</sup> but different historical stages of development. According to vv. 28—32, where *nagah* is used, the law regards the offence as committed only by goring, and "no condemnation would take place unless, for example, the marks of a horn were visible on the body of the victim".<sup>141</sup> The charge could be established only through the "strictest, most formal proofs". On the other hand, v. 35, by using *nagaph*, extends liability to cases where the ox causes death in any physical manner. D a u b e cites the laws of theft as another example of the gradual loosening of the laws of evidence.<sup>142</sup>

It is true that *nagah* suggests strongly the use of the animal's horns,<sup>143</sup> and it would be wrong to assume that any act other than this was in the mind

require exchange of the animals, so that the plaintiff always received the gorer. But this does not seem to be required. The definite article is not used of the ox to be delivered, though it is used of the object in exchange for which it is delivered, and of the cadaver. Moreover, if *yashmidenu* is correct, the gorer will now be slaughtered. A second issue concerns the destination of the cadaver. The Rabbis reinterpreted this (and also the identical clause in v. 34) to mean that the plaintiff retained it. See *Mekhilta ad loc*; D a u b e, *Studies in Biblical Law*, pp. 139—40.

<sup>137</sup> *Ibid.*, pp. 85—8.

<sup>138</sup> Cf. L o e w e n s t a m m, *IEJ* 7 (1957), p. 196 n. 10.

<sup>139</sup> *Direct and Indirect Causation in Biblical Law*, *VT* 11 (1961), pp. 260—1.

<sup>140</sup> P a u l, *Studies*, p. 84 n. 1.

<sup>141</sup> *Studies in Biblical Law*, p. 86.

<sup>142</sup> *Ibid.*, pp. 90—6. See my *Theft in Early Jewish Law* (1972), pp. 41—8, for a discussion.

<sup>143</sup> Cf. *Deut.* 33: 17, 1 *K.* 22: 11, 2 *Chr.* 18: 10, *Eze.* 34: 21. The LXX translates by *κερατίση*, and Jerome by *cornu petierit* (reminiscent of D.9.1.4, Ulp. 18 ad Ed., *bos cornu petere solitus petierit*, Josephus (*A.* iv, 281) is also explicit τοῖς κέρασι πλήττοντα, as is Bar. B.K.2b *eyn negi'haela bekeren*. Similarly, Philoh (*DSL* iii, 144) uses ἀναπέρας, on which see also R i t t e r, *Philo und die Halacha* (1879), p. 49 n. 1.

of the legislator. But that does not necessarily mean that no other case would have been regulated in the same manner. If an ox bit someone to death, we cannot be sure that the law of *Exod.* 21:28ff. applied. The casuistic form, as found in the *Mishpatim*, was not intended as an example. But we may not conclude from this that only the case stated could have been regulated as there prescribed, and that the remedy in any other case must have been different. "Goring" is mentioned here merely because it is the common case. The suggestion that it involves stricter, more formal proof than *nagaph* is open to doubt. The marks of a tooth are as likely to have remained evident as those of a horn, and we do not know that reliance upon the word of a witness was excluded in either case.

One alternative explanation might be based upon the fact that *nagah* in all its usages refers to an intentional act. *nagaph*, on the other hand, though predominantly intentional, is sometimes used of stumbling.<sup>144</sup> It might be argued that an accidental killing of a human being should not result in the sanctions detailed in vv. 28—32, whereas accident might well be the context of v. 35, which contains no penal element. Such a solution is, however, unlikely. *Exod.* 21:35 is the only Biblical source where *nagaph* is used of damage committed by animals, and the verb is by no means a rare one. Its one other occurrence in the *Mishpatim*, *Exod.* 21:22, relates to injury committed by man. *nagah*, on the other hand, is attested outside the *Mishpatim* in reference to animals,<sup>145</sup> and its extension to human military activity is by express analogy.<sup>146</sup> On the whole, I incline to the view that *yigof* in v. 35 is a mistake for *yigah*. The LXX makes no distinction between the two verbs, rendering both by *κερατίση*. Similarly, Josephus, who refers to the homicidal ox as *τοῖς κέρασι πλήττοντα* (goring, lit. striking with its horns), describes the dead ox in v. 35 as *οὕτως πληγείς* (*A.* iv. 281—2). Philo, too, uses *ἀναπείρω* for both (*DSL* iii. 144—5), though he omits reference to v. 35, where *yigof* occurs. Against this (probably single) tradition may be set the use by LE and LH of *nakapum* for the act of the animal. But the likely explanation of the relationship is that suggested by Driver. The Akkadian and both Biblical verbs derive from the same biliteral root NG/K.<sup>147</sup> Akkadian developed *nakapum* both for goring and for usages such as stubbing a finger.<sup>148</sup> Biblical Hebrew differentiated. Only *nagah* was used for goring. For stumbling, and (usually fatal) injuries committed by man and God, *nagaph* was employed.

<sup>144</sup> *Jer.* 13: 16, *Ps.* 91: 12, *Prov.* 2: 23, Cf. *negeph* in *Isa.* 8: 14.

<sup>145</sup> *Eze.* 34: 21, *Dan.* 8: 4.

<sup>146</sup> *Deut.* 33: 17, 1 *K.* 22: 11, 2 *Chr.* 18: 10. Cf. *Ps.* 44: 6, *Dan.* 11: 40.

<sup>147</sup> *The Babylonian Laws*, ii, 263.

<sup>148</sup> F. W. Geers, *A Babylonian Omen Text*, *AJSL* 43 (1926—7), p. 24, Obv. lines 4—5, cited Driver, *loc. cit.*

D a u b e's formal argument from the use of *ow*, and his explanation of the difference between *hu'ad* and *noda*, relate only to v. 36. The only remaining argument in support of the contention that the whole of vv. 35—6 is a later addition is that concerning the arrangement of the passage.<sup>149</sup> I have no quarrel with the general theory of the *clausula finalis*. Indeed, it is a most significant discovery. But once the argument from *nagaph* is rejected, there is no substantive development in v. 35 to support the formal argument. Moreover, I believe that in this case the order of the provisions admits of an alternative explanation.

This is not the place to attempt a full examination of the arrangement of the *Mishpatim*, and of the various schemes suggested by modern writers.<sup>150</sup> But one element not sufficiently noticed thus far is the group of two in which the second element is distinguished (sometimes along with another factor) by a change of status, whether of the offender, or of the victim. Such groups may be observed in LH,<sup>151</sup> which also contains larger groupings based on the same principle, such as the sequence *avilum*, *muškenum*, *wardum*.<sup>152</sup> In the *Mishpatim* it may account, *inter alia*, for the odd internal arrangement of the participial passage, *Exod.* 21:12—17, where the sequence runs: killing a (free) man (*ish*), v. 12; striking (the same verb, *makeh*, as in v. 12) a parent, v. 15; kidnapping a (free) man (*ish*), v. 16; cursing a parent, v. 17. vv. 18—19 then deal in more detail with striking a free man; vv. 20—21 follow with striking a slave. In the first half of the next couplet the victim is again free (vv. 22—3). The couplet concludes with another injury to a slave (vv. 26—7).<sup>153</sup>

We now reach the passage of the goring ox. It commences with provisions concerning the goring to death of a free man or woman (vv. 28—30). D a u b e himself maintains that v. 31 is, at least in part, interpolated. I agree, but explain it differently.<sup>154</sup> The second half of the first couplet consists of v. 32, where the ox kills a slave. At this point the passage turns to injuries suffered by oxen (though an ass also appears in v. 33). It comprises a second couplet, in which the offender is first a man, who fails to cover a pit (vv. 33—4), and then an ox, which kills another ox (v. 35).

It may still be argued that such an arrangement, in two couplets, could have been achieved without the separation of vv. 35—6 from vv. 28—32. If the second couplet had been inverted the whole law of the goring ox would have

<sup>149</sup> Note that the more logical arrangement is adopted by Philo and Josephus, who both treat vv. 35—6 along with vv. 28—32, and only then consider vv. 33—4 (*DSL* iii, 144—8, *A.* iv, 281—4).

<sup>150</sup> Recently, V. W a g n e r, *Zur Systematik in dem Codex Exod.* 21: 2—22: 16, *ZAW* 81 (1969), pp. 176—82; P a u l, *Studies* (1970), Appendix I.

<sup>151</sup> E.g. LH 200—1, 207—8, 218—19/20.

<sup>152</sup> E.g. LH 196—9, 209—14, 215—7, 221—3.

<sup>153</sup> On the interpolation of vv. 24—5, see J a c k s o n, *The Problem of Exod.* xxi, 22—5 (*Ius Talionis*), *VT* 23 (1973), 273—304.

<sup>154</sup> *Infra*, pp. 90f.



been kept intact, while at the same time maintaining the structure of couplets. But there are two reasons why this was not possible. First, the commencement of the second couplet would have been partially obscured. Its first half would have appeared to be joined to what preceded it, in a sequence based on the status of the victim, free adult, free minor (v. 31, if original), slave, ox.<sup>155</sup> Second, the order of the second couplet would have been that of ascending status, placing the ox before the man.<sup>156</sup>

But though v. 35 may be regarded as original (a conclusion which derives some very mild support from LE 53), the formal characteristics of v. 36 in themselves appear to me sufficient to establish a later addition. The particle *ow* appears only once elsewhere in the *Mishpatim*, in v. 31, itself part of the goring ox section. There too it appears to be an addition, and for a similar purpose.<sup>157</sup> One is tempted to point out that Josephus omits both v. 31 and v. 36, the two provisions introduced by the particle *ow*. Certainly, Josephus does not attempt an accurate verse by verse account, and he also omits v. 30, regulating ransom. Elsewhere, however, what at first sight might be thought merely a hasty oversight in Josephus appears on investigation to accord with an old tradition.<sup>158</sup> It must also be noted that LE 53, the equivalent of *Exod.* 21:35, is not followed by a qualification distinguishing the known gorer, although it does draw such a distinction where the victim is a human being (LE 54).

But before we accept the formal argument, we are obliged to offer a reason for the addition. Daube demands, in these cases, a substantive legal reason,<sup>159</sup> a development in the law which made the addition necessary, since, without it, the passage would have been misleading. His suggestion is that the supplement was designed to stress, by the use of *noda* instead of *hu'ad* (v. 29), that there had occurred "some advance on the road from archaic rigid evidence to a modern flexible system". Whereas under v. 29 the sole question to be asked was whether the announcement was made, the supplement extended liability to cases where no formal announcement was made, but the owner was judged (perhaps on other, wider "objective" grounds) to have been aware of the ox's vicious nature.<sup>160</sup>

It is certainly noticeable — whether an addition is favoured or not — that the formulation of v. 36 differs in this respect from that of v. 29.<sup>161</sup> This is

<sup>155</sup> Cf. LH 229—32.

<sup>156</sup> An ascending order occurs in none of the casuistic couplets, either of LH or the *Mishpatim*. A case for its occurrence in the participial provisions (*Exod.* 21:12—17) is possible, if father and mother is taken as a higher status than *ish*. But such a view is by no means compelling. Nor would it greatly affect the argument as to the casuistic provisions.

<sup>157</sup> *Infra*, pp. 90f.

<sup>158</sup> Jackson, *Theft in Early Jewish Law* (1972), pp. 69—70, 221.

<sup>159</sup> *Studies in Biblical Law*, pp. 97—8.

<sup>160</sup> *Ibid.*, pp. 86—8.

<sup>161</sup> On the form *hu'ad*, see Cazelles, *Études*, p. 58. Daube's view has been seen to derive support from LE 54 and LH 251. See further *infra* n. 167.

especially striking since so many other elements in the protasis are repeated *verbatim* from v. 29: *shor nagah hu*;<sup>162</sup> *mitmol shilshom*;<sup>163</sup> *velo yishmerenu* (*sic*). But the difference does not provide a firm basis for the theory of a supplement. Such an argument involves the view that the standards of proof applicable to both cases were, at least early on, of the same degree of objectivity, so that if a strict, formal proof, by formal announcement, was required where the ox killed a man, the same kind of proof was required where an ox killed another ox. But it does not seem unreasonable that a less formal proof should be demanded in a case where the defendant is liable, at the most, to repay another ox than in one where his life may be at stake. I see no reason to assume that the same rules were applied in both cases. We shall see, rather, that their gradual harmonisation was a notable feature of the subsequent development.

It is the distinction between oxen of different dispositions which, I suggest, is the new element in v. 36. Unlike the penal, homicide provisions, the compensatory rules applying to the killing of another ox do not require this distinction. The matter has been discussed in the context of LE 53, where the existence of a rule comparable to *Exod.* 21:36 has been asserted, despite its absence from the text. Yaron accounts for this by reference to the general absence from the ancient Near East of any (literary) attempt to provide comprehensive solutions for all the problems which can easily be envisaged as arising.<sup>164</sup> There is no doubt about the existence of such a phenomenon, but it requires proof that it extended to the omission of one element in an important distinction, when the other element, stated on its own, contains no hint of the distinction.<sup>165</sup> Yaron accepts the Laws of Eshnunna as having been officially promulgated.<sup>166</sup> One does not have to regard them as a statute, intended for judicial interpretation, to see the considerable difficulties which the juxtaposition of these two positions involves. Where an official warning<sup>167</sup> has been given, the owner of an ox which has been killed will claim that he is entitled to another ox. The defendant will reply that the official statement of the law fully covers this case, and that the procedure of division applies.

<sup>162</sup> Acceptance of the LXX *καρτίση* in v. 35 makes it unnecessary to explain, as does D a u b e, *Studies*, p. 100 n. 21, why a wider phrase, corresponding to *yigof*, was not adopted.

<sup>163</sup> But note the different spelling of *mitmol* in v. 36.

<sup>164</sup> *Isr. L. Rev.* 1 (1966), p. 401.

<sup>165</sup> Thus, by the same process, it might be argued that LH 21 applies only to one who breaks in by night, in the light of LE 12–13 and *Exod.* 22: 1–2.

<sup>166</sup> *The Laws of Eshnunna*, p. 8.

<sup>167</sup> G o e t z e, *The Laws of Eshnunna*, p. 136, suggests that there is an "official" warning in LE, LH and the *Mishpatim*. Cf. Y a r o n, *Isr. L. Rev.* 1 (1966), p. 402, speaking of "formal knowledge". But there is no equivalent to the role of the *babtum* in the *Mishpatim*, where we do not know who was to warn the owner. Cf. H a a s e, *RIDA* 14 (1967), p. 25; P a u l, *Studies*, p. 80 n. 4. Moreover, D r i v e r, Miles, *The Babylonian Laws* i, 442, argue that LH 251 itself refers to an informal notification from neighbours, not a formal notice from the court.

A conflict between *ius scriptum* and *ius non scriptum* is thereby created. Such a view is to be avoided if at all possible.

That a distinction between supposedly vicious and nonvicious oxen was unnecessary where the victim was also an ox follows in part from the view that the division in *Exod.* 21:35 and LE 53 was intended literally, and not paradigmatically. For we have seen that in the most common case, where the stronger and more valuable beast killed the weaker, the remedy will often have not fallen very substantially short of compensation. From the point of view of the victim, of course, a rule requiring full compensation where the killer was known to be an habitual offender was more advantageous, and, one might say, more just. But we must note that v. 36 does not speak explicitly in terms of compensation, just as v. 35 contains no mention of equal division of the loss. According to v. 36, the defendant must "surely make good an ox in place of the (deceased) ox". We are not told that the replacement must be of the same value as the victim. We may conjecture that if the defendant attempted to deliver an obviously sick or defective beast, the plaintiff might object. But if a sound beast was offered, it is far from clear that the plaintiff could claim that this did not compensate his loss. The law speaks not of "loss" but of "the ox", and the defendant could justifiably claim that he had "made good an ox for the ox".

A considerable advantage accrues to the legal system from applying a rule such as *Exod.* 21:35 in all cases where one beast kills another. It removes the need for what might well be a tiresome adjudication, as to whether, in terms of *Exod.* 21:36, the animal's disposition was (or ought to have been) known to the owner. The only area left to dispute was whether the defendant's ox did kill the ox of the plaintiff, and this will often have been beyond doubt. Thus, the omission of *Exod.* 21:36 will have meant that in most cases no adjudication was called for. Nor does the omission of a special sanction make it any the more tempting for the owner of an animal to be careless about its supervision once he has been warned of its disposition. For he runs the risk of capital punishment if it kills a human being (v. 29). Moreover, if, as here suggested, the reading presupposed by the LXX, *yashmidenu*, is correct, it will not often have happened that a known gorer killed another ox. The known gorer will in most cases have been slaughtered by its owner, in view of the sanction of v. 29.

If, then, the situation envisaged in v. 36 is unlikely, and the remedy unnecessary, why did some later hand insert it? It was not, I suggest, for practical reasons. The practical situation demanded it no more at a later stage than it did originally. The addition is due to a factor which, I believe, deserves serious consideration in the history of Biblical law, the increasing scholasticism of its draftsmen. Someone noticed that a distinction which existed where an ox gored a man was absent where an ox gored another ox. He saw in this a logical

deficiency, despite the fact that it accorded with the practicalities of the situation. He sought to remedy this by adding an equivalent of v. 29 as a supplement to v. 35, using in the protasis the identical language, except that he required a less rigid test of the owner's knowledge. In this activity may be seen one aspect of the beginnings of legal science. Norms which developed independently, in response to purely practical necessity, came to be seen as parts of a system, and differences between them became subject to a process of harmonisation. From the law of ox goring man plus ox goring ox we advance to the law of goring oxen.<sup>168</sup>

This process of harmonisation is seen in a more advanced state in the Hellenistic sources. For the interpolator of v. 36, though he introduced the distinction between the tame ox and the known gorer into the law relating to the death of an animal, did not shrink from varying the test from *hu'ad* to *noda*. But from Hellenistic times also the test was harmonised. Philo rendered *hu'ad* of v. 29 simply by εἰδώς, "knowing", and παρ' ἐτέρων πεπυσμένος, and subsumed v. 36 under the same test (*DSL* iii. 145). Similarly, Josephus, possibly relying upon Philo, used προειδώς (*A. iv.* 281), though he omitted v. 36 completely. It may be that this further harmonisation, seen in Philo, went hand in hand with the disappearance of the formal test of v. 29. We may not assume that as soon as v. 36 was added to the Biblical text, the test of *noda* supplanted that of *hu'ad* even where the victim was a human. Indeed, the LXX attempts the same harmonisation from the opposite direction.<sup>169</sup> V. 36 is made to conform to v. 29, instead of *vice versa*. *hu'ad* is rendered διαμαρτύρωνται. *noda* is given a fairly literal translation γνωρίζεται, but an additional clause, completely missing from the MT, is added to show that the meaning harks back to v. 29: καὶ διαμεμαρτυρημένοι ὄσι τῷ κυρίῳ αὐτοῦ. This anticipates the tannaitic tradition, in which testimony given in court, was required.<sup>170</sup> By this time, the remaining justification for such formality, the capital liability of the owner under v. 29, had been removed.<sup>171</sup> It was replaced, in effect, by damages for the lost life, as *kofer* came to be understood.<sup>172</sup> Nevertheless, the formal rules of *shor mu'ad* persisted, and developed to an increasingly artificial extent.<sup>173</sup> The scholasticism of the interpolator of v. 36 was the beginning of a long tradition in this area of the law.

<sup>168</sup> For a similar (priestly) systematisation of laws relating to men and animals, see D. Daube, *Studies in Biblical Law*, p. 111.

<sup>169</sup> It might be argued that LXX κερᾶσι in v. 35 represents a similar attempt at harmonisation. But the possibility of a scribal error, *yigof* for *yigah*, in the MT is *per se* as likely, and receives support from the existence of a similar error underlying *yishmerenu* or *yashmidenu*. In this latter case, harmonisation of the MT cannot have been the motive.

<sup>170</sup> Bar. B.K.24a.

<sup>171</sup> *Supra*, p. 73.

<sup>172</sup> M.B.K.4:5; Bar.B.K.40a; B.K.41b; Albeck, *Pesher* (1965), pp. 134–5.

<sup>173</sup> The Biblical *mitmol shilshom* was taken to mean that three warnings must be



The interpolation of v. 36 was not the only scholastic addition to the Biblical text. A similar explanation accounts for *Exod.* 21:31, which, following on from the regulation of the vicious ox which killed a man or a woman, provides: "Or if it gores a son or a daughter, according to this judgment shall it be done to him". From Müller in 1903, many leading commentators have seen here a reaction against the possibility of vicarious *talio*, as seen in LH 116, 210, and 230.<sup>174</sup> Where this theory suggests that the Biblical legislator observed a foreign practice, and sought forcefully to exclude any possibility of its operation in Israel, it suffers from two defects. First, it is doubtful that the draftsman of the *Mishpatim* would trouble himself to comment upon a purely foreign practice. Second, such a view would not explain why the verse appears from its form to be an addition, unless the foreign practice only came within Israelite cognisance after the original compilation of the passage. Jepsen and Daube present the theory differently. The reaction is against an Israelite practice comparable to the Babylonian, and the additional clause actually replaces an original Israelite provision which required vicarious *talio*. But even in this form the theory is weak. There is no evidence that vicarious *talio* was ever envisaged in cases of damage by animals either in Israel or the ancient Near East. It might be argued that in LH 230 it is applied to the case of a builder, and that LE appears, from the form and arrangement of the relevant sections, to have regarded the sagging wall and the goring ox as analogous cases.<sup>175</sup> But LE does not apply vicarious *talio* in either of these cases.<sup>176</sup> Nor is it legitimate to assume that the practice applied in LH in any particular case other than those where it is expressly mentioned.<sup>177</sup>

The form of *Exod.* 21:31 is also inappropriate to the abrogation of a former given. But some considered that these must be given on three successive days. M.B.K.2.4; Tos.B.K.2.2; Bar.B.K.24a; Yer.B.K.2.6; Mekhilta and Mek.deRab Shimon, ad *Exod.* 21: 29; Albeck, *Pesher*, pp. 131-3. The owner was to be warned that his beast was vicious in a certain respect, and was not thereby put on notice that it was vicious in any other respect. R. Judah is reported to have accepted even that an ox might be *mu'ad* only for goring on the sabbath, M.B.K.4.2. See also Albeck, *op. cit.*, pp. 133-4.

<sup>174</sup> D. H. Müller, *Die Gesetze Hammurabis* (1903), pp. 166-7; J. Weiss, *Das Buch Exodus* (1911), p. 182; A. Jepsen, *Untersuchungen zum Bundesbuch* (1927), p. 64; M. Mühl, *Untersuchungen zur altorientalischen und althellenischen Gesetzgebung* (1933), pp. 36-7 n. 3; Daube, *Studies in Biblical Law* (1947), pp. 105-6, 166-8; P. Verdram, *On ne fera point mourir les enfants pour les pères*, *RIDA* 3 (1949), pp. 414-5; M. Greenberg, *Some Postulates of Biblical Criminal Law*, *Yehezkel Kaufmann Jubilee Volume* (1960), pp. 22-3; Cassuto, *Shemot* (1965), pp. 194-5; Paul, *Studies* (1970), p. 83; A. Phillips, *Ancient Israel's Criminal Law* (1970), p. 91. But see Cazelles, *Études*, p. 59, and S. E. Loewenstamm, *Midah keneged Midah*, *Enzyklopediah Mikra'it* (1962), iv, 844.

<sup>175</sup> LE 54-8.

<sup>176</sup> Unless *napištum* in LE 58 may be applied vicariously.

<sup>177</sup> Weiss, *Das Buch Exodus* (1911), p. 182, recognised that there is no evidence of such a punishment in LH's regulation of the goring ox, but suggested that it had existed earlier.

custom. We are not told that "the son or daughter of the owner of the ox shall not be put to death", or "you shall not execute the son or daughter", or the like. Rather, the text merely adopts what precedes it by a form of shorthand incorporation: "According to this (same) judgment shall it be done to him". A similar use of *kamishpat* is found in the priestly legislation, in *Lev.* 5:10 and *Nus.* 15:24, and it is possible that the scholastic circles responsible for both v. 31 and v. 36 were priestly.<sup>178</sup>

But why, it may be asked, should the type of scholastic elaboration found in v. 31 have been regarded as necessary in this context? K a l i s c h, long ago, attempted to answer this question by suggesting that v. 31 was intended to exclude the argument that the fault lay upon the parents for failing to keep their child out of the animal's way.<sup>179</sup> The suggestion is not without merit. The *Mekhilta* (*ad loc.*) explains it as necessary because the terms *ish* and *ishah* (vv. 28—9), man and woman, refer only to adults, and it was necessary to include minors expressly. Such a view of the drafting of the *Mishpatim* is not impossible, if one excludes the participial *Exod.* 21:12 and 16. Nevertheless, it is probable that the supplement was not really necessary. It was, in one sense, an "empty phrase".<sup>180</sup> The interpolator had before him a passage in which the victim followed a descending order of status: free man or woman (vv. 28—30), slave (v. 32), animals (vv. 33—5). He added one more, the (free) minor, in the appropriate place. He has left traces of his activity by the unusual opening particle *ow* and the shorthand device, *kamishpat*, found later in the priestly legislation.

A very similar use of an *ow* clause (but without the shorthand device) is found in *Nus.* 35:17—18. First, a rule is stated that if a blow is struck with a stone capable of causing death, and death results, the striker is guilty of murder. *Nus.* 35:18, introduced by *ow*, repeats the rule *verbatim*, but for a single variation. Instead of a stone capable of causing death, the rule is now stated for a wooden implement capable of causing death. No new principle is introduced. The verse is, in one sense "an empty phrase". But that did not prevent the draftsman from including it.

Remarkably similar to the apodosis of *Exod.* 21:31 is that of *Exod.* 21:9, *kemishpat habanot ya'aseh lah*. This, too, appears to be a supplement to the original text. The passage concerns the relationship between a master and a slave-concubine obtained from her father, probably in satisfaction of debt. V. 8 provides that if the master had designated her for himself, but found her displeasing, he may allow her to be redeemed, but may not sell her to foreigners. Vv. 10—11 continue this line of thought. The master, though finding the girl

<sup>178</sup> See also n. 168, *supra*.

<sup>179</sup> *Exodus* (1855), p. 411.

<sup>180</sup> The conclusion which D a u b e, *Studies*, p. 167, seeks to avoid.

displeasing, has nevertheless retained her, but has taken another woman in addition. The law requires him to continue to provide her with food, clothing, and oils,<sup>181</sup> and, should he fail to do so, to emancipate her. V. 9 interjects a rather different case. The master has bought her for his son, not for himself, and her rights are defined by a shorthand formulation: he shall treat her according to the law of daughters-in-law. The verse is a scholastic addition, designed not to change the law, but merely to state it more completely.

There are, however, some differences between these various supplements to the *Mishpatim*. *Exod.* 21:9 poses a situation substantially different from what precedes it, whereas *Exod.* 21:31 introduces only a variation in the status of the victim. *Exod.* 21:9 commences with *ve'im*, whereas *Exod.* 21:31 and *Exod.* 21:36 are introduced by *ow*. Nevertheless, all three are scholastic in the sense that they add for the sake of completeness (and, in v. 36, harmonisation), rather than in order to effect a real change in the law. It seems likely that similar circles were responsible, but not the same hand.

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#### SUPPLEMENTARY NOTES

A. Since this paper was written, J. J. Finkelstein has published *The Goring Ox*, *Temple Law Quarterly* 46 (1973), pp. 169—290. See pp. 215 f., 220, for twentieth century American formulations of the “guilty *res*” concept. Finkelstein considers the trial and punishment of animals and inanimate objects as a phenomenon entirely peculiar to Western civilization, deriving its moral categories from the Bible (p. 229) — a judgment which is likely to provoke lively discussion.

B. For a detailed discussion, disputing Geiger’s conclusions, see H. Weyl, *Die jüdischen Strafgesetze bei Flavius Josephus* (1900), pp. 144—56.

C. Other aspects of these laws have also been regarded as exhibiting striking similarity. A. Watson, *Legal Transplants* (1974), p. 23, stresses the official notification required in LH, LE, and Exodus to make the animal “warned”, and contrasts this with the *scienter* rule of English common law. But the official nature of the notification in Exodus, especially that envisaged in v. 36, is open to doubt (*supra*, pp. 83, 87 n. 167, 89, and D a u b e, *Studies in Biblical Law*, pp. 85ff.). The distinction between the tame and (known to be) vicious animal is often cited as a significant parallel between Biblical and ancient Near Eastern Laws. We may note that the existence of a comparable principle in English law, embodied in the old *scienter* action and substantially retained in the 1971 *Animals Act*, does not necessarily detract from the significance of the parallel between Exodus and the ancient Near East, since knowledge of the *scienter* principle survived in early Canon law sources, which were known in England at the time *scienter* developed. Demonstration of this point must await a later occasion.

Less striking, but perhaps even more significant, is a parallel to which Professor Loewenstamm has kindly drawn my attention. *Exod.* 21:32 is the only Biblical law which deals with injuries inflicted upon *another man’s* slave. *Exod.* 21:20—21 and 26—7 deal with injuries to

<sup>181</sup> See P a u l, *Studies*, pp. 59—60.

one's own slave. In the ancient Near Eastern sources it is the former, not the latter, situation which characteristically attracts the draftsman's attention, e.g. LE 55, 57; LH 199, 213—4, 217, 219—20, 223, 231, 252.

D. What *Exod.* 21:35 and LE 53 boil down to is a rule of thumb whereunder the extent of liability may be limited where the standard of liability is strict. In my view, the rule operates with a degree of arbitrariness, depending upon the relative values of the two animals. In the Roman *actio de pauperie*, noxal surrender acted as a (functionally) comparable limitation of strict liability. There, the owner was liable to compensate in full for damage committed *contra naturam* (D. 9.1.1.7, akin, in practice, to the distinction between *keren*, on the one hand, and *shen* and *regel* on the other), whether he knew of any vicious propensity or not. But his liability might be limited by noxal surrender (D. 9.1.1.12—16), a limitation which, like that of LE 53 and *Exod.* 21:35, operated arbitrarily, depending upon the relative values of the animal and the loss. The victim might, in Roman law, recoup the whole of his loss, if it happened to amount to less than the value of the animal; or he might recover only a small proportion, if the loss far exceeded the animal's value. We may further note that this limitation did not apply where the owner was held liable for fault, under the *actio legis Aquiliae*, just as rabbinic law did not apply the limitation based on *Exod.* 21:35 where the animal was *mu'ad*, and fault was proved. But the workings of noxal surrender as a limitation of strict liability show that even in a more advanced stage of legal development than that of LE and *Exod.*, a rule of thumb capable of working arbitrarily may be preferred to a general principle which involves special calculations in each case. Rabbinic law, on the other hand, preferred the latter alternative. Professor Finkelstein, *op. cit.*, p. 261 n. 286, though adhering substantially to the common view of *Exod.* 21:35, does appear to accept a margin of arbitrariness: "It is to be assumed that the biblical case is illustrative, and for this reason exemplifies the principle by choosing a case where the two animals must be presumed to be about equal in value; where one of the animals was of significantly higher value than the other, it is to be assumed that the distribution of the proceeds would have taken account of it in appropriate proportion".