

## Course Reading

Greenberg, Moshe. "Some Postulates of Biblical Criminal Law." In *Studies in the Bible and Jewish Thought*, 25-41. Philadelphia: Jewish Publication Society, 1995 [1960].

### Restrictions on Copyrighted Material

The copyright law of the United States (Title 17, United States Code) governs the making of photocopies or other reproductions of copyrighted material. Under certain conditions specified in the law, libraries and archives are authorized to furnish a photocopy or other reproduction. One of these specified conditions is that the photocopy or reproduction is not to be used for any purpose other than private study, scholarship or research. If electronic transmission of reserve material is used for purposes in excess of what constitutes "fair use" that user may be liable for copyright infringement.

No Further Transmission or distribution of this material is permitted.

ence" (566) is not the laws but the understanding of God's laws already in hand (Levenson seems to confuse the two). It is these given laws of God that he constantly rehearses, and that he asks to be taught and to understand. In verses 99–100 he says, not that "he receives the laws from his teachers and elders" rather than from the Moses book (566), but that the study of God's Torah makes him wiser than his teachers and his elders, just as in verse 98 he says that it made him wiser than his enemies (מ of comparison, not of source). The absence of reference to a book agrees quite well with the speeches of Moses in the first part of Deuteronomy, where the very specific commandments of God are to be taught not from a book but by hearing them from parents (4:9; 6:7; 11:19) and (exactly as in Psalm 119) by repeating them again and again. The absence of allusion to the covenant anticipates the situation in talmudic Judaism where the terminology of laws and commandments virtually excludes the term ברית; where it does not refer to a biblical passage, the term normally signifies circumcision ("the covenant of father Abraham").

17. Discussed by R. E. Friedman, "The Biblical Expression *mastir panim*," HAR 1 (1977):139–47.

18. See entry "Academy on High" in EncJud, vol. 1:208.

*Additional note:*

V.A. Hurowitz argues in his forthcoming monograph, "Inu Anum sirum: Literary Structures in the Non-Judicial Sections of Codex Hammurabi," that the unclear expression in Code V 20–21 means "Truth and justice (= my laws) I taught the people of the land" (note 39). This in turn he takes to mean oral alongside written publication. If he is right, the idea of the law as a means of public education has its first appearance here. How, when, and where such publication took place is not said, and there is no evidence outside the Code to support such a singular claim. In note 52 Hurowitz quotes G. Bottero with respect to an educative intent of the Code, but Bottero does not say that the Code was aimed at the public at large. He says, rather, that it was meant to have "the value of a model—instructive, educative, in the judicial order . . . a treatise on the exercise of judicial power by example." The passage from the Epilogue, to which I refer, in which a wronged citizen is invited to find the just verdict in this case on the stele is not consonant with the claim that the public had been taught the laws orally. I thank Dr. Hurowitz for putting his work at my disposal.

Shalom Paul noted (JBL 88 [1969] 73f.) that an inscription of Sargon (Luckenbill, *Ancient Records of Assyria and Babylonia*, II, 122) tells of his "teaching" the foreign settlers in his newly founded capital "correct instruction in serving god and king." He correctly sees in this a measure of forced Assyrianization and religious homogenization. Comparison of this policy with the publication of the laws of the Pentateuch seems remote—whether with respect to content, intent, or mode of effectuation (yet such a comparison has been made by John Welch in E.B. Firmage, et al., *Religion and Law*, Winona Lake: Eisenbrauns, 1990, 118).

## Some Postulates of Biblical Criminal Law\*

1960

Among the chief merits of Professor Kaufmann's work is the tremendous impetus it has given to the study of the postulates of biblical thought. The debt that the present paper owes to this stimulus and to the lines of investigation laid down by Professor Kaufmann is patent. It is a privilege to have the occasion to offer it to him in grateful tribute.

The study of biblical law has been a stepchild of the historical-critical approach to the Bible. While the law had been a major preoccupation of ancient and medieval scholars, in modern times it has largely been replaced by, or made to serve, other interests. No longer studied for itself, it is now investigated for the reflexes it harbors of stages in Israel's social development, or it is analyzed by literary-historical criticism into strata, each synchronized with a given stage in the evolution of Hebrew religion and culture. The main interest is no longer in the law as an autonomous discipline, but in what the laws can yield to the social or religious historian. It is a remarkable fact that the last comprehensive juristic treatment of biblical law was made over a century ago.<sup>1</sup>

The sociological and literary-historical approaches have, of course, yielded permanent insights, yet it cannot be said that they have exhausted all the laws have to tell about the life and thought of Israel. Too often they have been characterized by theorizing that ignores the

\*From M. Haran, ed., *Yehezkel Kaufmann Jubilee Volume*, Jerusalem, Magnes Press, The Hebrew University, 1960, 5–28.

realities of early law and society as we know them at first hand from the written records of the ancient Near East. Severities in biblical law are alleged to reflect archaic notions that in fact have no echo in either ancient civilized, or modern Bedouin law. Humane features are declared the product of urbanization, though they have no parallels in the urban codes of Mesopotamia. Inconsistencies have been discovered and arranged in patterns of historic evolution where a proper discrimination would have revealed that the laws in question dealt with altogether separate realms.

The corrective to these errors is readily available. It is that considerable body of cuneiform law—especially the law collections<sup>2</sup>—which lends itself admirably to elucidate the meaning and background of the biblical law corpora. The detailed studies of these cuneiform collections, made chiefly by European scholars, furnish the student of the Bible with models of legal analysis, conducted without the prejudgments that frequently mar discussions of biblical law.

No clearer demonstration of the limits of literary-historical criticism can be found, for example, than that afforded by the studies made upon the laws of Hammurabi. Inconsistencies no less glaring than those that serve as the basis of analyzing strata in the Bible are found in this greatest corpus of Mesopotamian law. In this case, however, we know when, where, and by whom the laws were promulgated. We know, as we do not in the case of the Bible, that the code as we now have it was published as a whole, and intended—at the very least—as a statement of guiding legal principles for the realm of the king. When like discrepancies were pointed out in biblical laws it had been possible to defend stopping short with a literary-historical analysis by arguing that the discrepancies and inconsistencies of the present text were not found in the original documents that went into it. Attempts to interpret the biblical laws as a coherent whole were regarded as naive and unscholarly. It was not possible to argue this way in the case of Hammurabi's laws. The discrepancies were there from the beginning, and though, to be sure, they may well have originated in earlier collections, the fact remained that there they were, incorporated side by side in one law. Two attitudes have been taken toward this problem in the Code of Hammurabi. One, represented best by Paul Koschaker, is historical-critical. It aims at reconstructing the original laws that have gone into the present text and have caused the discrepancy. Having attained this aim, its work is done. The other, represented by Sir John Miles, is that of the commentator, whose purpose is to attempt "to imagine how this section as it stands can have been interpreted by a Babylonian court."<sup>3</sup> The commentator is compelled in the interest of coherence to look for distinctions of a finer degree than those made by the literary historian. Such distinctions are

not merely the recourse of a modern harmonist to escape the contradictions of the text; they are, it would seem, necessary for understanding how an ancient jurist, how the draftsman himself, understood the law.<sup>4</sup> It must be assumed that the laws of Hammurabi were intended as a consistent guide to judges, and had to be interpreted as they stand in as consistent a manner as possible.

The realization that careful discrimination between apparently contradictory laws is needed for this most carefully drafted ancient law corpus is highly pertinent for an understanding of biblical law. The literary-historical aim leads all too readily to a disregard of distinctions in favor of establishing a pattern of development. Only by endeavoring to interpret the laws as they now stand does one guard oneself against excessive zeal in finding discrepancies that involve totally different subjects rather than a historical development. Adopting the method of the commentator, then, we are thrown back much more directly upon the laws themselves. Recourse to literary-critical surgery is resisted until all efforts at making distinctions have failed.

Another virtue of the commentator is the insistence on understanding a given body of law in its own terms before leaping into comparisons with other law systems. To do so, however, means to go beyond the individual rules; for it is not possible to comprehend the law of any culture without an awareness of its key concepts, its value judgments.<sup>5</sup> Yet much of the comparative work done in Israelite-Near Eastern law has been content with comparing individual laws rather than law systems or law ideologies. But until the values that the law embodies are understood, it is a question whether any individual law can be properly appreciated, let alone profitably compared with another in a foreign system.

In the sequel I shall attempt to indicate some instances of the gain accruing to the study of biblical law from the application of these two considerations: the insistence, first, upon proper discriminations, and second, upon viewing the law as an expression of underlying postulates or values of culture. The limitations of the sociological and literary-historical approaches will emerge from the discussion. My remarks are confined to the criminal law, an area that lends itself well to comparative treatment, and in which the values of a civilization come into expression with unmatched clarity.

Underlying the differing conceptions of certain crimes in biblical and cuneiform law is a divergence, subtle though crucial, in the ideas concerning the origin and sanction of the law.

In Mesopotamia the law was conceived of as the embodiment of cosmic truths (*kinatum*, singular *kittum*). Not the originator, but the

divine custodian of justice was Shamash, "the magistrate of gods and men, whose lot is justice and to whom truths have been granted for dispensation."<sup>6</sup> The Mesopotamian king was called by the gods to establish justice in his realm, and to enable him to do so, Shamash inspired him with "truths."<sup>7</sup> In theory, then, the final source of the law, the ideal with which the law had to conform was above the gods as well as humans; in this sense "the Mesopotamian king . . . was not the source of the law but only its agent."<sup>8</sup>

However, the actual authorship of the laws, the embodying of the cosmic ideal in statutes of the realm, is claimed by the king. Hammurabi repeatedly refers to his laws as "my words which I have inscribed on my monument"; they are his "precious" or "choice" words, "the judgment . . . that I have judged (and) the decisions . . . which I have decided."<sup>9</sup> This claim is established by the name inscribed on the stele, and Hammurabi invokes curses upon the man who should presume to erase his name.<sup>10</sup> Similarly, in the case of the laws of Lipit-Ishtar: Lipit-Ishtar has been called by the gods to establish justice in the land. The laws are his, the stele on which they are inscribed is called by his name. The epilogue curses him "who will damage my handiwork . . . who will erase its inscription, who will write his own name upon it."<sup>11</sup> While the ideal is cosmic and impersonal, and the gods manifest great concern for the establishment and enforcement of justice, the immediate sanction of the laws is by the authority of the king. Their formulation is his, and his too, as we shall presently see, is the final decision as to their applicability.

In accord with the royal origin of these laws is their purpose: "to establish justice," "that the strong might not oppress the weak," "to give good government," "stable government," "to prosper the people," "abolish enmity and rebellion"<sup>12</sup>—in sum, those political benefits that the constitution of the United States epitomizes in the phrases, "to establish justice, ensure domestic tranquillity, promote the general welfare."

In the biblical theory the idea of the transcendence of the law receives a more thoroughgoing expression. Here God is not merely the custodian of justice or the dispenser of "truth" to man, he is the fountainhead of the law, and the law is a statement of his will. The very formulation is God's; frequently laws are couched in the first person, and they are always referred to as "words of God," never of humankind. Not only is Moses denied any part in the formulation of the Pentateuchal laws; no Israelite king is said to have authored a law code, nor is any king censured for so doing.<sup>13</sup> The only legislator the Bible knows of is God; the only legislation is that mediated by prophets (Moses and Ezekiel). This conception accounts for the commingling in the law corpora of religious and civil law, and—even more distinctively bibli-

cal—of legal enactments and moral exhortations. The entire normative realm, whether in law or morality, pertains to God alone. So far as the law corpora are concerned there is no source of norm-fixing outside of him. Conformably, the purpose of the laws is stated in somewhat different terms in the Bible than in Babylonia. To be sure, observance is a guarantee of well-being and prosperity (Exod. 23:20ff.; Lev. 26; Deut. 11:13ff., etc.), but it is more: it sanctifies (Exod. 19:5f.; Lev. 19) and is accounted as righteousness (Deut. 6:25). There is a distinctively religious tone here, fundamentally different in quality from the political benefits guaranteed in the cuneiform law collections.

In the sphere of the criminal law, the effect of this divine authorship of all law is to make crimes sins, a violation of the will of God. "He who acts willfully (against the law) whether he belongs to the native-born or the aliens, is reviling the Lord" (Num. 15:30). God is directly involved as legislator and sovereign; the offense does not flout a humanly authored safeguard of cosmic truth but an explicit utterance of the divine will. The way is thus prepared to regard offenses as absolute wrongs, transcending the power of men to pardon or expunge. This would seem to underlie the refusal of biblical law to admit of pardon or mitigation of punishment in certain cases where cuneiform law allows it. The laws of adultery and murder are cases in point. Among the Babylonians, Assyrians, and Hittites the procedure in the case of adultery is basically the same. It is left to the discretion of the husband to punish his wife or pardon her. If he punishes his wife, her paramour also is punished; if he pardons her, the paramour goes free too. The purpose of the law is to defend the right of the husband and provide him with redress for the wrong done to him. If the husband, however, is willing to forgo his right, and chooses to overlook the wrong done to him, there is no need for redress. The pardon of the husband wipes out the crime.<sup>14</sup>

In biblical law it is otherwise: "If a man commits adultery with the wife of another man, both the adulterer and the adulteress must be put to death" (Lev. 20:10; cf. Deut. 22:22, 23–24)—in all events. There is no question of permitting the husband to mitigate or cancel the punishment. For adultery is not merely a wrong against the husband, it is a sin against God, an absolute wrong. To what extent this view prevailed may be seen in a few extra-legal passages: Abimelech is providentially kept from violating Abraham's wife, Sarah, and thereby "sinning against God"—not a word is said about wronging Abraham (Gen. 20:6). Joseph repels the advances of Potiphar's wife with the argument that such a breach of faith with his master would be a "sin against God" (39:8f.). The author of the ascription of Psalm 51—"A psalm of David, when Nathan the prophet came to him after he had gone in to Bath-sheba"—finds it no difficulty that verse 6 says,

"Against thee only have I sinned." To be sure the law also recognizes that adultery is a breach of faith with the husband (Num. 5:12), yet the offense as such is absolute, against God. Punishment is not designed to redress an injured husband for violation of his rights; the offended party is God, whose injury no human can pardon or mitigate.

The right of pardon in capital cases that Near Eastern law gives to the king<sup>15</sup> is unknown to biblical law (the right of the king to grant asylum to homicides in extraordinary cases [cf. 2 Sam. 14] is not the same). This would seem to be another indication of the literalness with which the doctrine of the divine authorship of the law was held in Israel. Only the author of the law has the power to waive it: in Mesopotamia he is the king; in Israel, no man.

Divergent underlying principles alone can account for the differences between Israelite and Near Eastern laws of homicide. The unexampled severity of biblical law on the subject has been considered primitive, archaic, or a reflex of Bedouin vendetta customs. But precisely the law of homicide cannot be accounted for on any such grounds.

In the earliest law collection, the Covenant Code of Exodus, it is laid down that murder is punishable by death (Exod. 21:12ff.). If homicide is committed by a beast—a goring ox is spoken of—the beast must be stoned, and its flesh may not be eaten. If it was known to be vicious and its owner was criminally negligent in failing to keep it in, the owner is subject to death as well as the ox, though here the law allows the owner to ransom himself with a sum fixed by the slain person's family (vv. 28ff.). This is the sole degree of culpability in which the early law allows a ransom. It is thus fully in accord with a later law of Numbers (35:31) which states, "You shall not take a ransom for the life of a murderer who is guilty of death, but he shall be surely put to death." A ransom may be accepted only for a homicide not committed personally and with intent to harm. For murder, however, there is only the death penalty.

These provisions contrast sharply with the other Near Eastern laws on homicide. Outside of the Bible, there is no parallel to the absolute ban on composition between the murderer and the next of kin. All Near Eastern law recognizes the right of the slain person's family to agree to accept a settlement in lieu of the death of the slayer, Hittite law going so far as to regulate this settlement minutely in terms of the number of souls that must be surrendered as compensation.<sup>16</sup> Bedouin law is no different: among the Bedouin of Sinai, murder is compensated for by a tariff reckoned in camels for any life destroyed.<sup>17</sup> The Qur'an is equally tolerant of composition: "Believers," it reads (2:178), "retaliation is decreed for you in bloodshed: a free man for a free man,

a slave for a slave, and a female for a female. He who is pardoned by his aggrieved brother shall be prosecuted according to usage and shall pay him a liberal fine." In the Babylonian law of the goring ox, otherwise closely paralleling that of the Bible, no punishment is prescribed for the ox.<sup>18</sup>

On both of these counts biblical law has been regarded as exhibiting archaic features.<sup>19</sup> To speak in terms of legal lag and progress, however, is to assume that the biblical and nonbiblical laws are stages in a single line of historical development, a line in which acceptance of composition is the stage after strict talion. This is not only incapable of being demonstrated; the actual history of the biblical law of homicide shows that it followed an altogether different principle of development from that governing Near Eastern law.

A precise and adequate formulation of the jural postulate underlying the biblical law of homicide is found in Genesis 9:5f.: "For your lifeblood I shall require a reckoning; of every beast shall I require it. . . . Whoever sheds the blood of a man, by man shall his blood be shed; for in the image of God was man made." To be sure, this passage belongs to a stratum assigned to late times by current critical opinion; however that may be, the operation of the postulate is visible in the very earliest laws, as will be seen immediately. The meaning of the passage is clear enough: that humans were made in the image of God—the exact significance of the words is not necessary to decide here—is expressive of the peculiar and supreme worth of humankind. Of all creatures, Genesis 1 relates, humans alone possess this attribute, bringing them into closer relation to God than all the rest and conferring upon them the highest value. The first practical consequence of this supremacy is set forth in Genesis 9:3f.: Man may eat beasts. The establishment of a value hierarchy of human beings over beasts means that humans may kill them—for food and sacrifice only (cf. Lev. 17:4)—but the beasts may not kill humans. A beast that kills a human destroys the image of God and must give a reckoning for it. Now this is the law of the goring ox in Exodus: It must be stoned to death. The religious evaluation inherent in this law is further evidenced by the prohibition of eating the flesh of the stoned ox. The beast is laden with guilt and is therefore an object of horror.<sup>20</sup>

Babylonian law on the subject reflects no such theory as to the guilt the peculiar value of human life imposes on all who take it. Babylonian law is concerned with safeguarding rights in property and making losses good. It therefore deals only with the liability of the owner of the ox to pay for damages caused by the ox. The ox is of no concern to the law since no liabilities attach to it. Indeed, one could reasonably argue that from the viewpoint of property rights the biblical law is unjust: Is it not unduly hard on the ox owner to destroy his ox for its first

offense? Ought one to suffer for an accident he could in no way have foreseen and for which one therefore cannot be held responsible?

This view of the uniqueness and supremacy of human life has yet another consequence. It places life beyond the reach of other values. The idea that life may be measured in terms of money or other property, and *a fortiori* the idea that persons may be evaluated as equivalences of other persons, is excluded. Compensation of any kind is ruled out. The guilt of the murderer is infinite because the murdered life is invaluable; the kin of the slain person are not competent to say when that person has been paid for. An absolute wrong has been committed, a sin against God that is not subject to human discussion. The effect of this view is, to be sure, paradoxical: because human life is invaluable, to take it entails the death penalty.<sup>21</sup> Yet the paradox must not blind us to the judgment of value that the law sought to embody.

The sense of the invaluableness of human life underlies the divergence of the biblical treatment of the homicide from that of the other law systems of the Near East. There the law allows and at times fixes a value on lives, and leaves it to the kin of the slain to decide whether they will have revenge or receive compensation for their loss in money or property. Perhaps the baldest expression of the economic valuation of life occurs in those cases where punishment of a murderer takes the form of the surrender of other persons—a slave, a son, a wife, a brother—“instead of blood,” or “to wash out the blood,” or to “make good” the dead person, as the Assyrian phrases put it.<sup>22</sup> Equally expressive are the Hittite laws that prescribe that the killer has to “make amends” for the dead persons by “giving” persons in accord with the status of the slain and the degree of the homicide. The underlying motive in such forms of composition is the desire to make good the deficiency in the fighting or working strength of the community that has lost one of its members.<sup>23</sup> This seems to be the meaning of Hittite law 43: “If a man customarily fords a river with his ox, another man pushes him aside, seizes the tail of the ox and crosses the river, but the river carries the owner of the ox away, they (i.e., the authorities of the respective village or town) shall receive that very man.” The view of life as a replaceable economic value here reaches its ultimate expression. The moral guilt of the homicide is so far subordinated to the need of restoring the strength of the community that the culprit is not punished but incorporated;<sup>24</sup> this is the polar opposite of the biblical law that requires that not even the flesh of the stoned homicidal ox may be eaten.

That the divergence in law reflects a basic difference in judgments of value, rather than stages in a single line of evolution, would seem to be borne out by examining the reverse of the coin: the treatment of offenses against property. Both Assyrian and Babylonian law know of

offenses against property that entail the death penalty. In Babylonia, breaking and entering, looting at a fire, night trespass—presumably for theft—and theft from another’s possessions are punished by death; Assyrian law punishes theft committed by a wife against her husband with death.<sup>25</sup> In view of this, the leniency of biblical law in dealing with all types of property offenses is astonishing. No property offense is punishable with death. Breaking and entering, for which Babylonian law prescribes summary execution and hanging of the culprit at the breach, is punished in biblical law with double damages. If the house-breaking occurred at night, the householder is privileged to slay the culprit caught in the act, though this is not prescribed as a punishment (Exod. 22:1f.).<sup>26</sup>

This unparalleled leniency of biblical law in dealing with property offenses must be combined with its severity in the case of homicide, just as the leniency of nonbiblical law in dealing with homicide must be taken in conjunction with its severity in dealing with property offenses. The significance of the laws then emerges with full clarity: in biblical law life and property are incommensurable; taking of life cannot be made up for by any amount of property, nor can any property offense be considered as amounting to the value of a life. Elsewhere the two are commensurable: a given amount of property can make up for life, and a grave enough offense against property can necessitate forfeiting life. Not the archaicness of the biblical law of homicide relative to that of the cuneiform codes, nor the progressiveness of the biblical law of theft relative to that of Assyria and Babylonia, but a basic difference in the evaluation of life and property separates the one from the others. In the biblical law there is a religious evaluation; in nonbiblical law, an economic and political evaluation predominates.

Now it is true that in terms of each viewpoint one can speak of a more or a less thoroughgoing application of principle, and, in that sense, of advanced or archaic conceptions. Thus the Hittite laws would appear to represent a more consistent adherence to the economic-political yardstick than the law of Babylonia and Assyria. Here the principle of maintaining the political-economic equilibrium is applied in such a way that even homicides (not to speak of property offenses) are punished exclusively in terms of replacement. It is of interest, therefore, to note that within the Hittite system there are traces of an evolution from earlier to later conceptions. The Old Kingdom edict of Telepinus still permits the kin of a slain person to choose between retaliation or composition, while the later law of the code seems to recognize only replacement or composition.<sup>27</sup> And a law of theft in the code (par. 23) records that an earlier capital punishment has been replaced by a pecuniary one.

In the same way it is legitimate to speak of the law of the Bible as

archaic in comparison with postbiblical Jewish law. Here again the jural postulate of the biblical law of homicide reached its fullest expression only later: The invaluableness of life led to the virtual abolition of the death penalty. But what distinguishes this abolition from that just described in the Hittite laws, what shows it to be truly in accord with the peculiar inner reason of biblical law, is the fact that it was not accompanied by the institution of any sort of pecuniary compensation. The conditions that had to be met before the death penalty could be inflicted were made so numerous, that is to say, the concern for the life of the accused became so exaggerated, that in effect it was impossible to inflict capital punishment.<sup>28</sup> Nowhere in the account of this process, however, is there a hint that it was ever contemplated to substitute a pecuniary for capital punishment. The same reverence for human life that led to the virtual abolition of the death penalty also forbade setting a value on the life of the slain person. (This reluctance either to execute the culprit or to commute his or her penalty created a dilemma that Jewish law cannot be said to have coped with successfully.)<sup>29</sup>

Thus the divergences between the biblical and Near Eastern laws of homicide appear not as varying stages of progress or lag along a single line of evolution, but as reflections of differing underlying principles. Nor does the social-political explanation of the divergence seem to be adequate in view of the persistence of the peculiarities of biblical law throughout the monarchial, urbanized age of Israel on the one hand, and the survival of the ancient nonbiblical viewpoint in later Bedouin and Arab law on the other.

Another divergence in principle between biblical law and the non-biblical law of the ancient Near East is in the matter of vicarious punishment—the infliction of a penalty on the person of one other than the actual culprit. The principle of talion is carried out in cuneiform law to a degree that at times involves vicarious punishment. A creditor who has so maltreated the distrained son of his debtor that he dies, must lose his own son.<sup>30</sup> If a man struck the pregnant daughter of another so that she miscarried and died, his own daughter must be put to death.<sup>31</sup> If through faulty construction a house collapses, killing the householder's son, the son of the builder who built the house must be put to death.<sup>32</sup> A seducer must deliver his wife to the seduced girl's father for prostitution.<sup>33</sup> In another class are penalties that involve the substitution of a dependent for the offender—the Hittite laws compelling a slayer to deliver so many persons to the kin of the slain, or prescribing that a man who has pushed another into a fire must give over his son; the Assyrian penalties substituting a son, brother, wife, or

slave of the murderer “instead of blood.”<sup>34</sup> Crime and punishment are here defined from the standpoint of the *pater-familias*: Causing the death of a child is punished by the death of a child. At the same time the members of the family have no separate individuality vis-à-vis the head of the family. They are extensions of him and may be disposed of at his discretion. The person of the dependent has no independent footing.

As is well known, the biblical law of Deuteronomy 24:16 explicitly excludes this sort of vicarious punishment: “Parents shall not be put to death for children, nor children for parents; each shall be put to death for his own crime.” The proper understanding of this requires, first, that it be recognized as a judicial provision, not a theological dictum. It deals with an entirely different realm than Deuteronomy 5:9 and Exodus 20:5, which depict God as “holding children to account to the third and fourth generations for the sins of their parents.”<sup>35</sup> This is clear from the verb *יָמוּת*, “shall be put to death,” referring always to judicial execution and not to death at the hand of God.<sup>36</sup> To be sure, Jeremiah and Ezekiel transfer this judicial provision to the theological realm, the first promising that in the future, the second insisting that in the present, each person die for his or her own sin—but both change *יָמוּת* to *יָמוּת* (Jer. 31:29; Ezek. 18:4; and *passim*).

This law is almost universally considered late. On the one hand, it is supposed to reflect in law the theological dictum of Ezekiel; on the other, the dissolution of the family and the “weakening of the old patriarchal position of the house father” that attended the urbanization of Israel during the monarchy.<sup>37</sup> This latter reasoning, at any rate, receives no support from the law of the other highly urbanized cultures of the ancient Near East. Babylonian, Assyrian, and Hittite civilization was surely no less urbanized than that of monarchial Israel, yet the notion of family cohesiveness and the subjection of dependents to the family head was not abated by this fact.

A late dating of the Deuteronomic provision is shown to be altogether unnecessary from the simple fact that the principle of individual culpability in precisely the form taken in Deuteronomy 24:16 is operative in the earliest law collection of the Bible. What appears as a general principle in Deuteronomy is applied to a case in the Covenant Code law of the goring ox: After detailing the law of an ox who has slain a man or a woman, the last clause of the law goes on to say that if the victims are a son or a daughter the same law applies (Exod. 21:31). This clause is a specific repudiation of vicarious punishment in the manner familiar from cuneiform law. There a builder who, through negligence, caused the death of a householder's son must deliver up his own son; here the negligent owner of a vicious ox who has caused the death of another's son or daughter must be dealt with in the same

way as when he caused the death of a man or woman, to wit: the owner is to be punished, not his son or daughter.<sup>38</sup> This principle of individual culpability in fact governs all of biblical law. Nowhere does the criminal law of the Bible, in contrast to that of the rest of the Near East, punish secular offenses collectively or vicariously. Murder, negligent homicide, seduction, and so forth, are punishable solely on the person of the actual culprit.

What heightens the significance of this departure is the fact that the Bible is not at all ignorant of collective or vicarious punishment. The narratives tell of the case of Achan who appropriated objects devoted to God from the booty of Jericho and buried them under his tent. The anger of God manifested itself in a defeat of Israel's army before Ai. When Achan was discovered, he and his entire household were put to death (Josh. 7). Saul's sons were put to death for their father's massacre of the Gibeonites in violation of an oath by YHWH (2 Sam. 21). Now these instances are not a matter of ordinary criminal law but touch the realm of the deity directly.<sup>38a</sup> The misappropriation of a devoted object—*חרם*—infects the culprit and all who come into contact with him with the taboo status of the *חרם* (Deut. 7:26; 13:16; cf. Josh. 6:18). This is wholly analogous to the contagiousness of the state of impurity, and a provision of the law of the impurity of a corpse is really the best commentary on the story of Achan's crime: "This is the law: when a man dies in a tent every one that comes into that tent, and every thing that is in the tent, shall be unclean" (Num. 19:14). Achan's misappropriated objects—the story tells us four times in three verses (Josh. 7:21, 22, 23)—were hidden in the ground under his tent. Therefore he, his family, his domestic animals, and his tent had to be destroyed, since all incurred the *חרם* status. This is not a case, then, of vicarious or collective punishment pure and simple, but a case of collective contagion of a taboo status. Each of the inhabitants of Achan's tent incurred the *חרם* status for which he was put to death, though, to be sure, the actual guilt of the misappropriation was Achan's alone.

The execution of Saul's sons is a genuine case of vicarious punishment, though it too is altogether extraordinary. A national oath made in the name of God has been violated by a king. A drought interpreted as the wrath of God has struck at the whole nation. The injured party, the Gibeonites, demand life for life and expressly refuse to hear of composition. Since the offending king is dead, his children are delivered up.

These two cases—with Judges 21:10f. the only ones in which legitimate collective and vicarious punishments are recorded in the Bible<sup>39</sup>—show clearly in what area notions of family solidarity and collective guilt are still operative: the area of direct affronts to the maj-

esty of God. Crimes committed against the property, the exclusive rights, or the name of God may be held against the whole family, indeed the whole community of the offender. A principle that is rejected in the case of judicial punishment is yet recognized as operative in the divine realm. The same book of Deuteronomy that clears parents and children of each other's guilt still incorporates the dictum that God holds children to account for their parents' apostasy to the third and fourth generation (5:9). Moreover, it is Deuteronomy 13:16 that relates the law of the *חרם* of the apostate city, ordaining that every inhabitant be destroyed, including the cattle. For the final evidence of the concurrent validity of these divergent standards of judgment, the law of the Molech worshiper may be adduced (Lev. 20:1-5): a man who worships Molech is to be stoned by the people—he alone; but if the people overlook his sin, "Then I," says God, "will set my face against that man, and against his family. . . ." (This interpretation of Leviticus 20:5, understanding the guilt of the family before God as due merely to their association with the Molech-worshiper, is open to question. The intent of the text may rather be to ascribe the people's failure to prosecute the culprit to his family's covering up for him; see Rashi and Ibn Ezra. In that case "his family" of 5a is taken up again in "all who go astray after him" of 5b, and the family is guilty on its own.)

The belief in a dual standard of judgment persisted into late times. Not only Deuteronomy itself, but the literature composed after it continues to exhibit belief in God's dooming children and children's children for the sins of the parents. The prophetess Huldah, who confirms the warnings of Deuteronomy, promises that punishment for the sins of Judah will be deferred until after the time of the righteous king Josiah (2 Kings 22:19f.). Jeremiah, who is imbued with the ideology of Deuteronomy, and who is himself acutely aware of the imperfection of the standard of divine justice (Jer. 31:28f.), yet announces to his personal enemies a doom that involves them and their children (Jer. 11:22; 29:32). And both Jeremiah and the Deuteronomistic compiler of the Book of Kings ascribe the fall of Judah to the sin of Manasseh's age (Jer. 15:4; 2 Kings 23:26f.; 24:3f.). Even Job complains that God lets the children of the wicked live happily (21:7ff.). Thus there can be no question of an evolution during the biblical age from early to late concepts, from "holding children to account for the sins of parents" to "parents shall not be put to death for children," etc. There is rather a remarkable divergence between the way God may judge humans and the way humans must judge each other. The divergence goes back to the earliest legal and narrative texts and persists through the latest.

How anomalous the biblical position is can be appreciated when



set against its Near Eastern background. A telling expression of the parallel between human and divine conduct toward wrongdoing is the following Hittite soliloquy:

Is the disposition of men and of the gods at all different? No! Even in this matter somewhat different? No! But their disposition is quite the same. When a servant stands before his master . . . [and serves him] . . . his master . . . is relaxed in spirit and is favorably inclined (?) to him. If, however, he (the servant) is ever dilatory (?) or is not observant (?), there is a different disposition towards him. And if ever a servant vexes his master, either they kill him, or [mutilate him]; or he (the master) calls him to account (and also) his wife, his sons, his brothers, his sisters, his relatives by marriage, and his family . . . And if ever he dies, he does not die alone, but his family is included with him. If then anyone vexes the feeling of a god, does the god punish him alone for it? Does he not punish his wife, his children, his descendants, his family, his slaves male and female, his cattle, his sheep, and his harvest for it, and remove him utterly?<sup>40</sup>

To this striking statement it need only be added that not alone between master and servant was the principle of vicarious punishment applied in Hittite and Near Eastern law, but, as we have seen, between parents and children and husbands and wives as well.

In contrast, the biblical view asserts a difference between the power of God, and that of human, over human. Biblical criminal law foregoes entirely the right to punish any but the actual culprit in all civil cases; so far as humans are concerned all persons are individual, morally autonomous entities. In this too there is doubtless to be seen the effect of the heightened stress on the unique worth of each life brought about by the religious-legal postulate that human beings are made in the image of God. "All persons are mine, says the Lord, the person of the father as well as that of the son; the person that sins, he shall die" (Ezek. 18:4). By this assertion Ezekiel wished to make valid in the theological realm the individual autonomy that the law had acknowledged in the criminal realm centuries before. That God may impute responsibility and guilt to the whole circle of a person's family and descendants was a notion that biblical Israel shared with its neighbors. What was unique to Israel was its belief that this was exclusively the way of God; it was unlawful arrogation for humans to exercise this divine prerogative.

The study of biblical law, then, with careful attention to its own inner postulates, has as much to reveal about the values of Israelite culture as the study of Psalms and Prophets. For the appreciation of this vital aspect of the biblical world, the riches of cuneiform law offer a key that was unavailable to the two millennia of exegesis that pre-

ceded our time. The key is now available and the treasury yields a bountiful reward to those who use it.

## NOTES

1. J. L. Saalschütz, *Das Mosaiche Recht, mit Berücksichtigung des spätern Jüdischen*, 2 vols. (Berlin, 1848).

2. The following law collections are pertinent to the discussion of the criminal law of the Bible: the laws of Eshnunna (LE), from the first half of the nineteenth century B.C.E.; the code of Hammurabi (CH), from the beginning of the eighteenth century; the Middle Assyrian laws (MAL), 14th-11th centuries; and the Hittite laws (HL), latter half of the second millennium. All are translated in J. B. Pritchard, ed., *Ancient Near Eastern Texts Relating to the Old Testament* (Princeton, 1955), 159ff. Henceforth this work will be referred to as ANET.

3. G. R. Driver and J. C. Miles, *The Babylonian Laws*, 2 vols. (Oxford, 1952, 1955), henceforth cited as BL. The citation is from I:99; cf. also p. 275, where Koschaker's approach is characterized and Miles' approach contrasted.

4. Contrast, the historical explanation of the discrepancies in the laws of theft given by Meek in ANET, 166, note 45, with Miles's suggestions in BL I:80ff. The historical explanation does not help us understand how the draftsman of the law of Hammurabi conceived of the law of theft.

5. The point is made and expertly illustrated in E. A. Hoebel, *The Law of Primitive Man* (Harvard, 1954); cf. especially chapter 1.

6. Inscription of Yahdun-lim of Mari, *Syria* 32 (1955):4, lines 1ff. I owe this reference and its interpretation to Professor E. A. Speiser, whose critique of this part of my discussion has done much to clarify the matter in my mind; cf. his contribution to *Authority and Law in the Ancient Orient* (Supplement to JAOS, No. 17 [1954]), especially 11ff.

7. Cf. CH xxvb:95ff.: "I am Hammurabi, the just king, to whom Shamash has granted truths." We are to understand the laws of Hammurabi as an attempt to embody this cosmic ideal in laws and statutes. (After writing the above I received a communication from Professor J. J. Finkelstein interpreting this passage as follows: "What the god 'gives' the king is not 'laws' but the gift of the perception of kittum, by virtue of which the king, in distinction from any other individual, becomes capable of promulgating laws that are in accord or harmony with the cosmic principle of kittum.")

8. Speiser, op.cit., 12; this Mesopotamian conception of cosmic truth is a noteworthy illustration of Professor Kaufmann's thesis that "Paganism conceives of morality not as an expression of the supreme, free will of the deity, but as one of the forces of the transcendent, primordial realm which governs the deity as well" (תולדות האמונה הישראלית, I/2:345).

9. CH xxivb:76f., 81; xxvb:12f., 64ff., 78ff., 99; xxvib:3f., 19ff.

10. *Ibid.*, xxvib:33f. It is not clear, in the face of this plain evidence, how it can still be maintained that the relief at the top of the law stele depicts Shamash dictating or giving the code to Hammurabi (E. Dhorme, *Les religions de Babylon et d'Assyrie* [Paris, 1949], 62; S. H. Hooke, *Babylonian and Assyrian Religion* [London, 1953], 29). The picture is nothing more than a traditional presentation scene in which a worshiper in an attitude of adoration stands before, or is led by another deity into, the presence of a god; it may be inferred from the context (i.e., the position of the picture above the code) that the figures of this highly conventionalized scene represent Hammurabi and Shamash. See the discussion in H. Frankfort, *The Art and Architecture of the Ancient Orient* (1954), 59 (note that Frankfort does not even go so far as Meek who sees in the scene "Hammurabi in the act of receiving the commission to write the law-book from . . . Shamash" [ANET, 163]). For this and similar representations see J. B. Pritchard, ANET (Princeton, 1954), numbers 514, 515, 529, 533, 535, 707. Miles aptly sums up the matter of the authorship of the laws thus (BL, 39): "Although [Shamash and Marduk] . . . are mentioned a number of times, they are not said to be the authors of the Laws;

Hammurabi himself claims to have written them. Their general character, too, is completely secular, and in this respect they are strongly to be contrasted with the Hebrew laws; they are not a divine pronouncement nor in any sense a religious document."

11. Epilogue to the laws of Lipit-Ishtar, ANET, 161.
12. See the prologue and epilogue of the laws of Lipit-Ishtar and Hammurabi.
13. The point is made in Kaufmann, op. cit., 1/1:67.
14. CH 129; MAL 14-16; HL 198; cf. W. Kornfield, "L'adultère dans l'orient antique," RB 57 (1950):92ff.; E. Neufeld, *Ancient Hebrew Marriage Laws* (London, 1944), 172ff.
15. HL 187, 188, 198, 199; cf. LE 48.
16. HL 1-4.
17. A. Kennett, *Bedouin Justice* (Cambridge, 1925), 49ff.
18. LE 54; CH 250, 251.
19. Strict retaliation of life for life is "primitive," a "desert principle"; cf. Th. J. Meek, *Hebrew Origins* (New York, 1936), 66-8; A. Alt, *Die Ursprünge des israelitischen Rechts*, in *Kleine Schriften zur Geschichte des Volkes Israel* (München, 1953), 305ff.; A. Kennett, op. cit., 49; on the goring ox, cf. BL I, 444; M. Weber, *Ancient Judaism* (Glencoe, 1952), 62. For the widely held theory of the development of punishment that underlies this view see BL I, 500.
20. The peculiarities that distinguish this biblical law from the Babylonian are set forth fully by A. van Selms, "The Goring Ox in Babylonian and Biblical Law," AO 18 (1950):321ff., though he has strangely missed the true motive for stoning the ox and ta-booning its flesh.
21. From the comment of Sifre to Deuteronomy 19:13a, it is clear that this paradox was already felt in antiquity.
22. Driver-Miles, *The Assyrian Laws* (Oxford, 1935), 35.
23. *Ibid.*, 36; Kennett, op. cit., 26f., 54f.
24. This interpretation follows Goetze's translation (ANET, 191, cf. especially note 9). Since no specific punishment is mentioned, and in view of the recognition by Hittite law of the principle of replacing life by life (cf. HL 44) there does not seem to be any ground for assuming that any further punishment beyond forced incorporation into the injured community was contemplated (E. Neufeld, *The Hittite Laws* [London, 1951], 158).
25. CH 21, 25; LE 13 (cf. A. Goetze, *The Laws of Eshnunna*, Annual of the American Schools of Oriental Research 31 [New Haven, 1956]:53); CH 6-10; MAL 3. Inasmuch as our present interest is in the theoretical postulates of the law systems under consideration, the widely held opinion that these penalties were not enforced in practice, while interesting in itself, is not relevant to our discussion.
26. The action of verse 1 occurs at night; cf. verse 2 and Job 24:16. Verse 2 is to be rendered: "If it occurred after dawn, there is bloodguilt for (killing) him; he must make payment only (and is not subject to death); if he can not, then he is to be sold for his theft" (but he is still not subject to death—contrast CH 8). For the correct interpretation see Ibn Ezra and U. Cassuto, *Commentary on Exodus* (Jerusalem, 1951), ad loc. (Hebrew); Cassuto points out (*ibid.*, 196) that this law is an amendment to the custom reflected in CH's laws of theft—a fact that is entirely obscured by the transposition of verses in the Chicago Bible and the Revised Standard Version. Later jurists doubtless correctly interpreted the householder's privilege as the result of presumption against the burglar that he would not shrink from murder; the privilege, then, is subsumed under the right of self-defense (Mechilta, ad loc.).
27. O. Gurney, *The Hittites* (London, 1952), 98.
28. Mishnah Sanhedrin 5.1ff., Gemara, *ibid.*, 40b bottom; cf. Mishnah Makkoth 1.10.
29. To deal with practical exigencies it became necessary to invest the court with extraordinary powers that permitted suspension of all the elaborate safeguards that the law provided the accused; cf. J. Ginzberg, *Mishpatim Le-israel, A Study in Jewish Criminal Law* (Jerusalem, 1956), part I, chap. 2; part II, chap 4 (Hebrew).
30. CH 116.
31. CH 209-210; cf. MAL 50.

32. CH 230.
33. MAL 55.
34. HL 1-4, 44; see also note 22 above.
35. Ibn Ezra in his commentary to Deuteronomy 24:16 already inveighs against the erroneous combination of the two dicta; the error has persisted through the centuries (cf. B. D. Eerdmans, *The Religion of Israel* [Leiden, 1947], 94).
36. Later jurists differed with regard to but one case חרם (Num. 1:51; 3:10; 18:7) according to Gemara Sanhedrin 84a (cf. Mishnah Sanhedrin 9.6); but the scholar to whom the Gemara ascribes the opinion that יומת חקרב here means by an act of God (R. Ishmael) is quoted in the Sifre to Numbers 18:7 as of the opinion that a judicial execution is intended (so Ibn Ezra at Num. 1:51). The unanimous opinion of the rabbis that Exodus 21:29 refers to death by an act of God (Mechilta) is a liberalizing exegesis; see the ground given in Gemara Sanhedrin, 15b.
37. J. M. Powis Smith, *The Origin and History of Hebrew Law* (Chicago, 1931), 66; Weber, op. cit., 66.
38. Cassuto, commentary ad loc.; P. J. Verdam, "On ne fera point mourir les enfants pour les pères en droit biblique," *Revue internationale des droits de l'antiquité* 2/3 (1949):393ff. Professor I. L. Seeligmann calls my attention to the fact that this interpretation was earlier advanced by D. H. Müller, *Die Gesetze Hammurabis* (Wien, 1903), 166ff. A. B. Ehrlich's interpretation (in his *Randglossen*, ad loc.) taking בן and בת to mean "free man" and "free woman" in contrast with עבד, אמה of verse 32 may now be set aside, ingenious as it is (though forced as well: the suggested parallels John 8:35 and Proverbs 17:2 [Seeligmann] deal with matters of inheritance and ownership where son [not "free man"] and slave are apt contrasts; not so here. Note also the particle ו in Exodus 21:31, indicating the verse to be an appendix to the foregoing, rather than connecting it with the new clause, verse 32, beginning with ו).  
38a. Recognized by Verdam, op. cit., 408, and already by S. R. Driver in his commentary to Deuteronomy (ICC, 1909), 277.
39. The massacre of the priestly clan at Nob (1 Sam. 22:19) and the execution of Naboth's sons (2 Kings 9:26) are not represented as lawful. Both cases involve treason, for which it appears to have been customary to execute the whole family of the offender. This custom, by no means confined to ancient Israel (cf. Jos. Antiq. 13.14.2), is not to be assumed to have had legal sanction, though it was so common that Amaziah's departure from it deserved to be singled out for praise (2 Kings 14:6).
40. Gurney, op. cit., 70f.

#### Additional note:

This essay was subjected to extensive criticism by B.S. Jackson, "Reflections on Biblical Criminal Law," JJS 24 (1973) 8-38; revised in his *Essays in Jewish and Comparative Legal History* Leiden: Brill, (1975), 25-63. I replied to his and others' criticism in "More Reflections on Biblical Criminal Law," in S. Japhet, ed., *Studies in Bible: 1986*, Scripta Hierosolymitana 31 (Jerusalem: Magnes Press, 1986), 1-17. Some lines were mistakenly omitted from the text of my reply:

Page 5, line 2, after "can," read: make up for loss of life, and a grave enough offense against property can.

Page 11, before line 1 insert: committed by his ox"; and for one liable only to Heaven the alternative of.

Recently Dale Patrick has called attention to the unfinished business of biblical scholarship respecting the conceptual coherence of biblical law in "Studying Biblical Law as a Humanities," in *Thinking Biblical Law*, Semeia 45 (1989), 27-47. After noting that my essay set an agenda, he singles out David Daube, J.J. Finkelstein, Shalom Paul, Y. Muffs and Jacob Milgrom as "exemplary practitioners of conceptual interpretation" (29f.) It is not accidental that Jewish scholars should have taken the lead in seeking out the ideas and values embodied in biblical law.