

# The Israel Koschitzky Virtual Beit Midrash

Parashat Hashavua  
Yeshivat Har Etzion

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This parasha series is dedicated  
Le-zekher Nishmat HaRabanit Chana bat HaRav Yehuda Zelig zt"l.

## PARASHAT KI TETZE

This shiur is dedicated in memory of  
Dr. William Major z"l.

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Dedicated by Craig Lubner in honour of the first Yahrtzeit of Avi mori  
Shimon ben David Moshe Lubner

PARASHAT KI TETZE  
"You Shall Cut Off Her Hand" and "An Eye for an Eye"  
By Rav Yehuda Rock

### The Problem

The law that "You shall cut off her hand" that appears in our parasha (25:12) is similar to the law of "An eye for an eye, a tooth for a tooth, an arm for an arm, a leg for a leg, a burn for a burn, a wound for a wound, a bruise for a bruise" (Shemot 21:24-25) – or, as formulated elsewhere, "If a person maims his neighbor, then as he has done, so shall be done to him: a breach for a breach, an eye for an eye, a tooth for a tooth. As he has maimed someone else, so shall be done to him" (Vayikra 24:19-20). The similarity between the two laws lies in the fact that in both cases the plain meaning of the text in the Written Law indicates corporal punishment for maiming or wounding another person, while the Oral Law establishes that the offender pays only a monetary fine, with no corporal punishment administered.

The Oral Law stipulates that "One who maims his fellow owes him (monetary compensation) on five accounts: 1. damage; 2. pain; 3. medical treatment; 4. incapacitation; 5. shame" (Mishna, Bava Kama 83b).

The yardstick for the first obligation – "damage" – is the extent to which the person's value is diminished by the injury. This is measured by the change in his sale value on the slave market. This obligation is derived from the above verses – "an eye for an eye..." and other parallel sources.

The compensation for incapacitation (i.e., losses incurred by the injured party as a result of his inability to work during the period of recuperation), as well as for medical expenses, is set down explicitly in parashat Mishpatim (Shemot 21:19): "He shall pay only for his incapacitation, and he shall surely be healed."

The obligation to compensate the victim for "shame" accounts for the humiliation and mental anguish that accompany the physical pain caused by the injury. This obligation is derived from our parasha, where we read:

"If two people strive together with one another, and the wife of one of them comes to save her husband from the hand of him that strikes him, and she puts forth her hand and grasps him by his private parts, then you shall cut off her hand; your eye shall not pity her" (Devarim 25:11-12).

The Gemara (Bava Kama 84) derives the obligation of "pain" – i.e., the value of the pain entailed by the injury – from one of the verses cited above: "a burn for a burn; a wound for a wound." However, the Rambam (Hilkhot Chovel U-mazzik 1:7) deduces this obligation from a different unit in our parasha, namely, the verses addressing a case of rape, where the fine is imposed "Because he has caused her to suffer" (Devarim 22:29).

As noted, the halakhic tradition, based on the Oral Law, supplants the corporal punishments set forth in the Written Law for wounding a fellow human being with monetary payment, which is an uncommonly blatant discrepancy between the Written Law and the Oral Law. The commentators grapple with this challenge, reinterpreting the verses so as to resolve them with normative halakha. For example, Rashbam (Shemot 21:24 s.v. ayin) and Rav Sa'adia Gaon (as cited by Ibn Ezra Ha-arokh ad loc s.v. ayin) explain the word "tachat" ("in place of," as in the expression "an eye in place of an eye") as referring to monetary payment, and the expression "As he has maimed someone else, so shall be done to him" as meaning "So (accordingly) shall (a fine) be imposed on him." Ibn Ezra himself understands the verses as indicating that the perpetrator deserves to forfeit "an eye for an eye" if he fails to pay the proper compensation.

Aside from the enormous textual and linguistic difficulty with the claim that these words in the Torah refer to monetary payment, it is clear that if the Torah had sought to indicate the obligation of monetary compensation, it could have done so in a far simpler and clearer manner. Indeed, nowhere do these verses so much as mention money or a fine. Clearly, then, the plain meaning indicates a corporal punishment.

### The Written Law and the Oral Law

Among the commentators there are different approaches as to the relationship between the Written Law and the rabbinical halakhic teachings. Ibn Ezra's consistent approach is that the halakha accords with the meaning of the verses; he therefore always tries to interpret the verses in accordance with the halakha as he understands it. At the opposite extreme we find the approach of Rashbam, who accepts with equanimity the possibility that there may be discrepancies between the Written Law and the Oral Law. In such instances Rashbam will not necessarily even address the relationship between the Written Law and the halakha.

Other commentators, most notably the Rambam and Ramban, take a more moderate approach to this question. These Rishonim certainly accept the possibility of discrepancies between the Written Law and the Oral Law, but feel that such instances must be understood and explained. According to their view, these two levels of Torah are not identical, but there is a direct relationship and connection between them.

Concerning the extent of possible discrepancies and the types of relationships between the Written Law and halakha, opinions are obviously divided.

The deviation of halakha from the plain meaning of biblical verses tends to operate according to the following three guiding principles: formalization, concretization and synthesis.

### 1. Formalization

The Written Law describes the laws circumstantially, in particular instances and actions as they occur within the Torah's given social reality, or they are formulated such that they convey the underlying meaning of the halakha's demands upon the person. In contrast, the Oral Law provides sharply defined laws and precise definitions, establishing the laws based on their precise fundamental obligations. The Oral Law converts the practical, exemplary description into a formal, legal entity.

As an example of the formalization provided by the Oral Law, let us consider the laws of guardianship.

In Shemot 22, the Torah describes two instances of a pledge being stolen from a guardian. One is, "If a person gives his neighbor money, or vessels, to watch over, and they are stolen from [the guardian's] house..." (verse 6). The other is, "If a person gives his neighbor a donkey or an ox or a sheep, or any other animal, to watch over... and if it is stolen from him..." (9-11). In the first instance, the guardian can exempt himself from paying by taking an oath, while in the second instance he is obligated to pay. The Torah's description in each case focuses on the type of pledge: movable property as opposed to an animal. In contrast, the halakha makes the obligation of compensation, in the event that the pledge is stolen, dependent on the category of guardianship: an unpaid guardian can exempt himself by swearing, while a paid guardian is obligated to pay.

Rashbam, commenting on these verses (22:6, s.v. ki), proposes an explanation for the distinction between movable property and livestock, and, while citing the traditional understanding, he makes no attempt to bridge the gap between the verses and the halakha as set down in the Oral Law (despite the feasibility of connecting the two). Ramban (22:6, s.v. ki), in contrast, explains that movable property is usually guarded for free, while animals are given over to shepherds, who tend them for a fee. Accordingly, the case of "money or vessels" is depicted, in the familiar social context, as an instance of free guardianship, while the case of "any animal" is depicted as an example of paid guardianship. In other words, the Torah describes familiar scenes from the existing social reality, without noting explicitly the legal characteristic that is relevant to each case. The Oral Law establishes the laws on the relevant formal, legal foundations.

### 2. Concretization

The Written Law presents lofty principles and demands that are designed to sanctify and elevate the mundane reality of the world by suffusing it with Divine values. At times, they are presented as broad, abstract values and principles. The Oral Law applies and translates the theoretical aspiration into concrete reality, drawing out the concrete form of the law.

An example of halakhic concretization is to be found in the laws that I addressed in my shiur on parashat Re'eh: the prohibitions on erasing God's Name and destroying any part of the Temple. Chazal derive these prohibitions from the verse, "You shall not do thus to the Lord your God" (Devarim 12:4), explaining that the word "thus" refers to the destruction of idolatry described in verses 2-3 (hence the prohibition of destroying the Sanctuary and its courtyards), and to the command, "You shall destroy their name from that place," understood literally as meaning their written name. However, as I explained in that shiur (based on the Rambam and Ramban), Chazal understood the "thus" as referring to the destruction of

the name of idolatry, with "name" here representing the presence, effect and influence of idolatry on the world. Hence, the command, "You shall not do thus to the Lord your God" means not to negate, violate or conflict with God's Presence and His influence in the world. Halakha, however, applies this principle to defined, concrete expressions of "God's Name": His written Name, and the place of the Divine Presence – the Sanctuary and its surrounding areas.

Regarding each of these first two principles – formalization and concretization – halakha maintains the fundamental, existential nature of the theoretical aspiration expressed in the Written Law, while broadening or altering its external form.

### 3. Synthesis of Contradiction

The Written Law, in presenting the law in its purest form, will sometimes disregard other principles and laws which conflict, in reality, with the law in question. The Oral Law bridges and interprets these seemingly contradictory or conflicting principles, so as to provide each with its proper place.

The first two principles (formalization and concretization) are implemented at times by the Ramban and other commentators. The third principle, synthesis, was invoked by my rabbi and teacher, Rav Mordekhai Breuer z"l, in numerous contexts (for example, in his article on the Hebrew maidservant, in Megadim 16).

#### Justice and Mercy

Let us return to the matters of "An eye for an eye" and "You shall cut off her hand."

One way of explaining the discrepancy between the plain meaning of the verses, according to which a person who injures his fellow is deserving of corporal punishment, and the halakha, which obligates only monetary compensation, is to suggest that the Written Law is expressing the attribute of strict justice, focusing on the punishment that is appropriate in accordance with the severity of the sin, while the Oral Law introduces the attribute of mercy, which "sweetens" the verdict such that the perpetrator does not suffer the full measure of punishment. According to this view, the perpetrator does, indeed, deserve corporal punishment, but such punishment is too cruel, and therefore it is not actually carried out.

This theory views the law obligating monetary compensation as a sort of synthesis between the corporal punishment that is required by the Written Law and the attribute of mercy. However, this synthesis is quite innovative, since the second element of the synthesis (we might even say the "antithesis") is not a conflicting source that deals with a person who injures his fellow, nor even an alternate source that deals with mitigation of punishment in general, but rather with the general attribute of mercy. Hence, the explanation already deviates from the synthetic model that exists elsewhere, in which the synthesis is between two sources that relate to the same issue.

Rav Breuer addresses the above theory in his article, "Ayin Tachat Ayin, An Eye for an Eye," in Megadim 24, and rejects it for the following reasons:

1. We find no halakhic expressions elsewhere of mitigation of punishment arising from the attribute of mercy. On the contrary, we find expressions in the opposite vein: "Let the law pierce through the mountain" (Sanhedrin 6b); "There is no room for mercy in judgment" (Ketubbot 84a).
2. The Oral Law does, admittedly, include a system that limits corporal punishment, in reality: not in the form of a sweeping replacement by another form of punishment, but rather by placing limitations on the scope of its application. We refer here to the formal, legal

requirements for implementation of other corporal punishments (death penalty and lashes), the need for clear testimony, a warning, and acceptance of the warning. Clearly, then, if the halakha in principle were "An eye for an eye" in the literal sense, then, in order for this punishment to be implemented, we would once again require clear testimony, a warning, and acceptance of the warning. This being the case, it is difficult to regard this form of corporal punishment as being any crueller than lashes or the death penalty.

### The Injurer and the Injured

Rav Breuer proposes a new explanation for the law of damages pertaining to one who injures his fellow. In his view, the halakha does in fact represent a synthesis, or compromise, between two considerations: the need to punish the injurer for his act, and the need to compensate the injured party for the damage caused to him. Corporal punishment represents the most appropriate punishment for the injurer, but it leaves the injured party with no compensation for his suffering. A monetary fine, on the other hand, provides compensation while at the same time punishing the injurer – albeit in an imperfect manner.

Clearly, it is not possible to implement both corporal punishment and a monetary fine, for this would be an injustice insofar as the punishment meted out to the perpetrator would exceed the extent of his transgression. Thus we are left with the contradictory values of punishing the injurer and compensating the victim. The Oral Law mediates and determines the resolution to this conundrum. The decision is in favor of a monetary fine, since corporal punishment would negate the value of compensation to the victim, while monetary compensation still punishes the injurer – even if, as noted, only partially.

According to this explanation, the Written Law focuses, in the aforementioned verses, only on the value of punishing the injurer. This value would be fulfilled in the most appropriate way through corporal punishment, and for this reason the Torah indeed prescribes corporal punishment. The Oral Law, on the other hand, also incorporates the value of compensation to the victim, and for this reason concludes that only a monetary fine should be imposed.

Rav Breuer's explanation solves both problems that he had raised against the alternative explanation. It should be noted, though, that his explanation, too – like the first one that we discussed – introduces something new, in that the synthesis that is proposed is not based on a contradiction between two parallel sources that treat the same subject, but rather between that which appears in the Written Law and another value, without noting any defined source for this other value.

### The Solution

As we have seen, it is difficult to regard the obligation of monetary damages as either a formalization or concretization of the principle of corporal punishment. Hence, the solution must be sought in the realm of contradiction and synthesis. Rav Breuer adopts this direction, but in his explanation, as noted, the contrasting or contradictory element is not anchored in some other source in the Written Law. However, it seems that such a source can indeed be found. In the Rambam's explanation of the laws of injury (Chovel U-mazzik 1:5), we find the following:

From where do we know that what the Torah says concerning [punishment for harm to] limbs, "An eye for an eye" etc., refers to monetary payment?

For it is written [there]: "A wound for a wound." Yet, the Torah explicitly states, "If a person should strike his fellow with a stone or with a fist... he shall pay only for the loss of his time, and he shall surely be healed" (Shemot 21:19). We thus deduce that just as the expression "*tachat*" (in place of)

that is said in connection with a wound refers to monetary payment, so the same applies to the "*tachat*" that is mentioned in connection with an eye along with the other limbs.

In other words, the halakha concerning corporal punishment is not limited to cases where there is a loss of a limb, but includes also a "wound" which may heal. Concerning such wounds (and, according to halakha, also the loss of a limb), the Torah explicitly obligates payment for incapacitation and for medical expenses. The implicit contradiction between paying for incapacitation and medical expenses and being punished "a wound for a wound" is further clarified by the Ramban (21:24, s.v. ayin), who, on this point, follows the Rambam's approach:

The proof to the teaching of the Sages [that monetary payment, rather than corporal punishment, is demanded] comes in what we read previously (verse 19), "He [the attacker] shall pay only for his [the victim's] incapacitation, and he shall surely be healed." If we would "do to a person who injures his neighbor as he did" (Vayikra 24:19), then who will pay afterwards? After all, the attacker also suffers incapacitation and medical expenses.

In other words, if a person who has caused a wound to his fellow has not only a fine imposed on him for the incapacitation and medical expenses of the victim, but also corporal punishment (such that he himself is also incapacitated for some time and incurs medical expenses), then an injustice will have occurred. Aside from the physical wound (administered as punishment) and its attendant monetary losses, all of which equals that which he caused to the victim, he would also pay an unjustified additional amount as compensation.

The Rambam and Ramban formulate their explanations here as proof for the plain interpretation of the expression "*tachat*" as referring to money. However, based on our discussion above, we may use their words to explain the discrepancy between the plain meaning of the verses and the halakha as a synthesis. The verses of "An eye for an eye," "A wound for a wound," and "You shall cut off her hand," all set forth the punishment that is appropriate for the transgressor in accordance with the severity of his actions, but they do not take into consideration the needs of the injured party. The verse, "He shall pay only for his incapacitation, and he shall surely be healed," on the other hand, addresses compensation to the victim for the actual monetary losses incurred, but fails to take into account the need to punish the perpetrator in accordance with the severity of his actions. The Oral Law mediates this contradiction by exchanging the prescribed corporal punishment for monetary compensation for damage and shame, in addition to the compensation for incapacitation and medical expenses.

If the value of punishing the injurer were to be carried out to the fullest extent, then the obligation of paying for incapacitation and medical treatment would be cancelled, and the value of compensation to the victim for his losses would be altogether negated. For this reason, the Oral Law establishes that the value of compensation to the victim should be carried out in full, while the value of punishing the injurer is to be carried out only partially, in the form of a monetary fine rather than corporal punishment.

It seems that the Rambam, too, had this understanding in mind. Above, we cited his words from Hilkhot Chovel U-Mazzik, chapter 1, law 5. Let us now go back to his discussion of this topic starting from law 3:

(3) That which the Torah says, "As he maimed his fellow, so shall be done to him," does not mean that he should be injured in the same way that he injured his fellow, but rather that he is deserving of losing a limb, or being injured, as he caused. Therefore, he pays the corresponding damages.

For it is written (Bamidbar 35:31), "You shall take no ransom-payment for the life of a murderer": for a murderer alone there is no ransom payment, but for causing the loss of a limb, or for wounds, there is a ransom payment.

(4) Likewise, that which the Torah says concerning one who injures his fellow or causes him harm, "Your eye shall not show pity," means that you shall not have pity and impose less than the proper amount for payment. Lest you say, "He is a poor man, and he did not injure him intentionally; I shall therefore have pity on him," therefore the Torah says, "Your eye shall not pity."

(5) From where do we know that what the Torah says concerning [punishment for harm to] limbs, "An eye for an eye" etc., refers to monetary payment?

For it is written: "A wound for a wound." Yet, the Torah explicitly states, "If a person should strike his fellow with a stone or with a fist... he shall pay only for the loss of his time, and he shall surely be healed" (Shemot 21:19). We deduce that just as the expression "*tachat*" (in place of) that is said in connection with a bruise refers to monetary payment, so the same applies to the "*tachat*" that is mentioned in connection with an eye or other limbs.

In law 3, the Rambam's presentation of the monetary fine as a ransom that replaces corporal punishment is based on the beraita in Bava Kama 83b, and on the Ibn Ezra's aforementioned interpretation. However, whereas in the beraita this is formulated as a proof, Rambam does not use it as a proof; only later on, in law 5, does he ask, "And from where do we know that what the Torah says concerning [punishment for harm to] limbs, 'an eye for an eye' etc., refers to monetary payment?" Hence, law 3 comes only to describe the nature of the obligation, while law 5 concerns the proof for this from the verses themselves.

In the teachings of Chazal (especially Bava Kama 83-84) and the Rishonim (especially Rav Sa'adia Gaon), we find various proofs that the Torah does not literally mean "An eye for an eye." However, the only proof from the Gemara that is cited by the Rambam is not used by the Rambam as a proof, as we have seen. He chooses to bring his own original proof, which exists nowhere in the Gemara or in the earlier Rishonim: the proof based on incapacitation and medical expenses. Why? Apparently, because the Rambam understood the halakha as we have explained it here, but formulated this understanding in the form of a proof.

In Moreh Nevukhim (III, 41), the Rambam writes:

As a general rule, any person who sins against his fellow man is punished by having the same damage inflicted on himself. If the damage is bodily harm, then he suffers bodily harm; if he harmed his fellow monetarily, then he suffers monetary loss... and one who causes the loss of a limb, should lose a limb; "As he has maimed his fellow, so shall be done to him." And do not be troubled by the fact that these punishments are effected in the form of monetary fines, for the intention herein is to provide an explanation for the verses, and not an explanation for the words of the Talmud.

Nevertheless, I have an explanation also for that which the Sages teach in the Talmud; this knowledge can be conveyed only orally.

The injuries which cannot be reproduced to an equal extent, are punishable by monetary fines: "He shall pay only for his incapacitation, and he shall surely be healed."

The Rambam states here explicitly that monetary payment is not the literal interpretation of the words, "An eye for an eye." Otherwise, the Rambam's assertion that he is explaining the verses rather than the law as set down by the Sages in the Talmud would be meaningless. Clearly, then, the Rambam understood that there is a discrepancy between the true meaning of the verses and the halakha.

The Rambam notes that his main intention in explaining the reasons for the commandments is to explain biblical verses, rather than normative halakha; he has an explanation for halakha, too, but he will convey this explanation only orally, not in writing. In other words, the Rambam accepts that there is a discrepancy between the verses and the halakha, but he has an explanation for the halakha – one which, apparently, holds some danger, causing the Rambam to conceal it. According to what we have said above, this is quite understandable: in an instance where the halakha deviates from the meaning of the verses, it is specifically the verses which express the halakhic principles and values in their pure state. For this reason, the reasons for the commandments are expressed more directly in the biblical verses than they are in the halakha, and therefore the Rambam chooses to discuss the reasons for the verses. Apparently, the Rambam explains the discrepancy between the verses and the halakha in our case as explained above. However, the Rambam understands that any explanation of the principles directing the discrepancies between the Written Law and the Oral Law can be dangerous, since it may come out sounding as though Chazal changed the halakha willfully and purposefully. For this reason, in *Moreh Nevukhim*, the Rambam merely notes that he has an explanation, and then immediately goes on to mention "incapacitation and medical expenses," while in the *Mishneh Torah* he hints at his explanation by bringing, as proof of Chazal's interpretation of the halakha, the contradiction between the obligation of a fine for incapacitation and medical expenses, on one hand, and corporal punishment, on the other.

(Translated by Kaeren Fish)