

JUSTICE IN THE CITY

New Perspectives in Post-Rabbinic Judaism

JUSTICE IN THE CITY

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Chapter 7

Restorative Justice

This is what justice can look like.

Veronica (not her real name) is a seventeen-year-old from a solid working-class Mexican American family. She has never been in trouble with the law. The very idea that she would be in trouble with the law is foreign to her parents. In her senior year in high school, Veronica finds out that she is failing a class that she needs to graduate. When she gets the notice, Veronica fears that her life is ruined. If she doesn't graduate, she will not be able to go to college. If she doesn't go to college, she won't be able to get a job and so on. She hides the notice in her room and doesn't tell her parents.

The next morning on her way to school, Veronica passes one of the department stores in the neighborhood. She wanders into the store and then she walks from department to department aimlessly. As she moves through the store, she begins putting items in her shoulder bag: a music CD, a bottle of inexpensive perfume, tissues, a T-shirt. It is not clear if there was a specific moment when she formulated the intention to steal these items, and yet there she was leaving the store without paying. As she leaves the store, she is stopped by security. Her bag is opened, the stolen items are found, she is arrested, and her parents are called to take her home.

I am now, months later, sitting with Veronica, her parents and the loss-prevention officer for the department store chain in an upstairs office at the store. Under California law, certain juvenile offenses can be resolved under "diversion programs." I am a mediator for one such program—the Jewish Community Justice Program.

Over the next two hours, I facilitate a conversation between Veronica and Frank (not his real name), the loss-prevention officer. Veronica tells her story first, starting with failing her course and

ending with her parents picking her up. I prompt her with, “And then what happened?” and “And how did that feel?” When she describes her arrest and her mother having to take off from work to retrieve her at the police station, her embarrassment and regret are palpable and her tears flow.

When she is done, Frank tells his story. He talks about the responsibility of being a loss-prevention officer. He tells of the hardship that a wave of shoplifting could potentially cause to a community if a store is convinced that it is losing too much money. He talks about the potential of lost jobs and lost opportunities.

When Frank finishes, I ask Veronica if she wants to make the situation right and what she is prepared to do to facilitate that. Veronica suggests that she could perhaps do some community service, perhaps write a letter of apology. I ask Frank if this sounds appropriate or if he has something else in mind. Frank says that he wants three things. He wants a letter from Veronica telling him that she has enrolled in a Graduate Equivalency Degree (GED) course. He wants another letter telling him that she has reached the half-way mark in the course, and finally he wants a letter from Veronica when she completes her GED.

The room is silent. Finally, Veronica—crying—agrees and says thank you. I draw up a contract which Veronica, her parents, and Frank sign. Veronica walked into the room thinking her life was over and walks out feeling that she is a member of a community that actually cares about her and is interested in enabling her to further her ambitions. In turn, I am sure, she walks away with a feeling of love for and commitment to the community.

That is what justice could look like.

Atonement and Justice

Mishnah Yoma says the following about Yom Hakipurim, the Day of Atonement:

Transgressions that are between a person and God, the Day of Atonement atones¹ for. Transgressions that are between a person and his fellow, the Day of Atonement does not atone for, until that person appeases his fellow.

This Mishnaic statement, especially the second half of this statement, has been the grist for many sermonic mills from the time it was inscribed in the Jewish textual memory. What are the implications of the claim that Yom Hakipurim does not affect forgiveness for sins between people until there is reconciliation between the parties? What is “reconciliation?”

To answer the second question first, the Palestinian Talmud attributes the following to the Babylonian sage of the late second and early third century, Samuel.²

The one who has transgressed against his fellow, must say to him: ‘I have sinned against you.’ If he accepts [the apology], it is well. If not, he brings people and apologizes in front of them. This is what is written: “He looks upon³ [*yashor*] men,” he should make a row [*shurah*] of men. “And he says: ‘I have sinned; I have perverted what was right; But I was not paid back for it.’” About him Scripture states: “He redeemed him from passing into the Pit; He will enjoy the light.”⁴

A similar procedure is outlined in the Babylonian Talmud⁵ and is subsequently codified as law.⁶ a direct interaction between the offender and the one against whom the offender has transgressed is prescribed. In that interaction, the offender must state clearly that he has sinned. If his apology is not accepted, he must raise the stakes and apologize before a group of people.⁷ If this procedure is not followed, the person does not obtain atonement.

Is the implication here that the reason a person should ask forgiveness for transgressions from the injured party, is only to obtain atonement from God? What is the connection, if any, between atonement, forgiveness, and the legal system or the judiciary?

In this chapter, I will argue that asking forgiveness is not incidental to the legal process of redress, nor does it take its place. Asking forgiveness in a face-to-face encounter is the end goal of the judicial process, whose purpose is to restore or repair the community.⁸ This claim about repairing the community itself stands on two other claims: The first is that human character is corrigible and not immutable. The mutability of human character is based on a belief in free will. The second claim is that justice

is dependent on recognizing the dignity of everyone in the community.

Restorative vs. Punitive Justice

There are two different notions of systemic justice.⁹ One is restorative or reparative, and the other is punitive. The goal of a punitive justice system is to inflict punishment on the wrongdoer. The goal of the punishment is either deterrence—in which scenario the potential transgressors will be made aware that there is a price to pay for their transgression and that, therefore, “crime does not pay.”¹⁰ The other possible goal of the punishment is vengeance in which the society is given the opportunity to avenge itself upon the wrongdoer and in that doing restore its lost honor or erase its shame.¹¹

The goal of restorative justice is to restore the community to its state prior to the disruption or tear that resulted from the transgression.¹² The model for restorative justice is that the offender and the victim meet face-to-face (or sometimes, at the discretion of the victim through a mediator) so that the offender realizes the real harm caused to a real person, and the person transgressed against realizes that the offender is also a human being.¹³

The irony of the punitive approach is that while it claims to be operating on behalf of the victim, the truth is that the victim is almost totally left out of the equation. The state pursues a prosecution against the offender. However, in the restorative paradigm, the victim is involved at every stage.

If, as I have argued in the first part of this book, the model of a city that emerges from the rabbinic textual tradition is that of a community of obligation, we would expect the texts to support a restorative justice model. At the heart of a community of obligation is the web of relationships that engenders obligations between residents who are otherwise anonymous to each other. The tearing of this web can lead to serious repercussions in the vitality of the community.¹⁴ It would thus be appropriate for the textual tradition that nurtures this model to also further a restorative and reparative justice system. This, in fact, is what we find.

Forgiveness and Justice

Mishnah Baba Kamma 8:7

Even though [the offender] gives [the victim] [monetary compensation for the damage, medical expenses, time lost from working, pain and suffering and humiliation], he is not forgiven until he asks for forgiveness from the victim.

For it says: "Therefore, restore the man's wife—since he is a prophet, he will intercede for you—to save your life" (Gen. 20:7).

From where do we know that the forgiver should not be cruel?

For it says: "Abraham then prayed to God, and God healed Abimelech . . ." (Gen. 20:17)

This Mishnah describes an interaction which includes a number of steps. First, there was an offense. The specific context of this Mishnah in Baba Kama is physical injury, but it is not necessarily limited to physical injury.¹⁵ There is a judgment rendered against the tortfeasor which must be paid. This, however, is not the end of the process. The tortfeasor must then approach the victim and ask for forgiveness. It is only at this stage of the process that the wrong can be righted—and it is only in a face-to-face interaction. At the same time, "the forgiver should not be cruel." When approached, the injured party should (in a reasonable period of time) forgive the offender.¹⁶

There is an ideology, and possibly even a theology, which undergirds this legal approach. People choose to act in certain ways. They can act well or poorly, yet they are not defined by their actions. A person is not incorrigibly evil. A person has done something bad. This bad action can be atoned for and the victim of the action can, and should, help in this process of atoning, at the end of which the offender is no longer an "offender," the victim is no longer a "victim," and the community has been restored. This understanding of human action is at the very heart of any concept of repentance and free will in the Jewish textual tradition.

This understanding of the mutability of human character is articulated in a story in Babylonian Talmud Berachot 10a.

The Sage, Her Husband, and the Ruffians

The story is part of a longer text which begins by discussing how differentiation might be quantified in the context of the earliest time for the recitation of the *sh'ma* prayer.¹⁷ The heroes of the story are the Palestinian sage R. Meir and his wife Bruria, with a strong supporting role played by a group of ruffians. In its own way, the story touches upon issues of essentialism and nonessentialism, polysemy and midrash, the gendered boundaries of interpretation.

The first line of the *story* might well be seen as its title:

There were these rebels/ruffians/thugs [*biryony*] who were in Rabbi Meir's neighborhood.

The scene is set, the protagonists are named, the dramatic conflict is imminent. The great sage R. Meir has the misfortune of gaining a band of ruffians for neighbors. Who were these *biryony*? The only *biryony* of whom we have some knowledge are the group who, in the collection of Aggadot about the destruction of the Temple in Bavli Gittin (56a), forced the Jews under siege in Jerusalem to fight by not allowing anyone to leave and by burning the grain stores. One of the *biryony* is identified as Abba Sikra, a name that is tantalizingly close to the Greek term *sikarios* or assassins. There is some ambiguity as to the etymology of the word *biryony*. Urbach has suggested that it might be a negatively tinged diminutive of *briyah*, creature.¹⁸ Sokoloff defines it as "outlaw," related to the Akkadian *baranu*, rebel.¹⁹

One is tempted to apply a hermeneutics of suspicion to the Talmudic naming of the *biryony* and see them as a group not under the sway of the rabbis. Or, perhaps, they were just ruffians.

It is also unclear from this first line what the relationship between R. Meir and the ruffians is. Is there merely a geographic proximity? Are they engaged in some manner of social intercourse? The next line in the story seems to supply an answer:

They would annoy [*metza'aru*] him greatly.

The verb that the *aggadist* chose here "annoy" "*metza'aru*" is interesting. It is ambiguous to the point of incomprehension. Did the

mere presence of the ruffians annoy R. Meir? Were they chucking (Late Antique) beer bottles at him as he was on his way to the study hall? Usages in the Bavli of the verb *metza'ar* when it is an action that one does to another, run a rather large gamut: "annoy," "torture," "make physically uncomfortable."²⁰ It is also used to mark either an intergroup polemical attack (as with a Sadducee) or an intragroup polemical attack (as with R. Yehoshua and R. Eliezer). Further, whose voice is represented in this line? Is it the omniscient narrator who is then giving the imprimatur of truth to R. Meir's feelings: "They really were annoying him. They were bad." Or, perhaps, is this a representation of R. Meir's opinion through a fallible narrator, thereby reinforcing the subjective nature of *metza'aru*, annoying. Are we observing a scene from a neutral vantage point, or are we inside R. Meir's head?

The next line is R. Meir's response to his situation:

Rabbi Meir prayed for them, that they should die.

This line is striking. As we read the line we think, "Oh, R. Meir is going to pray for them. That's good." Then we are hit with the purpose of R. Meir's prayer: "that they should die." The reader's expectations are reinforced by the literal translation of the phrase here rendered as "prayed for them"—*ka ba'iy rahmy*/he requested mercy or love—and then completely frustrated. Additionally, R. Meir presents a very straightforward theology of prayer: one prays and God fulfills the prayer.²¹

At this point the second protagonist enters.

Bruria, his wife, said to him: "What are you thinking?"

This intervention on the part of Bruria should be read with the force of the colloquial English "What were you thinking?" Apparently Bruria found out, heard or intuited that R. Meir was praying for the demise of the ruffians and was, at the least, disturbed. R. Meir, not to be swayed, answers:

"For it is written: Let sinners (*hata'im*) cease [out of the earth, and let the wicked be no more.]" (Ps. 104:35)

To paraphrase R. Meir—and I do think that the story works better literarily if we assign this line to R. Meir even though it can be understood as either R. Meir or Bruria—“I am merely following the explicit precedent of King David who articulated this very prayer: ‘Let sinners cease. . . .’ What else might that mean aside from let them die?!”

Bruria responds sharply:

“Is it written: ‘Sinners (*hot'im*)’? Rather, ‘sins (*hata'im*)’ is written.

And further, continue to the end of the verse ‘and the wicked be no more.’

Since sins will cease the evil will be evil no more.

Bruria challenges R. Meir’s reading of the verse. This is not, however, a challenge to R. Meir’s ability to decode biblical Hebrew. R. Meir is, of course, right that contextually *hata'im* means sinners. Bruria’s challenge is of a different nature. She is challenging R. Meir’s method of reading or method of interpretation. R. Meir is reading the verse in a literalist fashion. That is, on a strict philological analysis the word as spelled, pointed, and contextualized “means” sinners. Bruria’s claim is for polysemy, for a wider semantic spectrum, for a different reading methodology, ultimately for midrash.

To channel Bruria for a moment, she would make the following claim: the right way to read a verse, or understand a word in a verse is not merely through its local context, but rather to see its full semantic field as contextualized in the largest context of what we might call Judaism. While in biblical Hebrew *hata'im* means sinners, in Rabbinic Hebrew *hata'im* as a rule is used to mean sins. This part of the semantic field is then open to us as midrashic readers. The resulting reading of *sins* will cease is reinforced by the latter part of the verse. As is well known, one of the axioms of midrash is that there are no redundancies in the Torah. If the second half of the verse in Psalms was merely meant as a poetic repetition, what use might it have?²² It should therefore be read, “*Sins* will cease from the land, and the wicked will be not [wicked] anymore.” Since there will be no sins, there will be no sinners.

Bruria is making a claim about midrash at the same time that she is making a claim about human nature. Analogously to midrash, people are not static. Sometimes they do good things and sometimes bad. If a person sins, that person is not then necessarily a “sinner,” rather a person who has sinned. To paraphrase another late antique tradition from Christianity: hate the sin and love the sinner.²³

Bruria continues with a statement that is also, ultimately, a competing claim about prayer:

“Rather, pray for them to return in repentance, and [they will be] evil no more.”

Bruria redirects R. Meir’s prayer. R. Meir should pray for these *biryonny* to repent. If they repent, they will no longer be wicked since they will no longer be sinning. What might it mean for R. Meir to pray for these folks to repent? Repentance is a result of choice and intent. Can R. Meir pray that his annoying neighbors repent, and as a result of his prayer they repent in the same way as a prayer, for rain brings rain or a prayer for a little red wagon brings a little red wagon? Even within a simplistically causal theology in which prayers are answered by divine fiat, repentance doesn’t quite fit. To repent, one must exercise will, make choices, exhibit intent. How can one “repent” as a result of divine intercession? How can one be said to have chosen freely to have repented if that was a result of an intercession which short-circuited that very expression of free choice? Bruria was actually telling R. Meir that he should just pray for them. This prayer was a prayer for R. Meir. This prayer was the concretization of R. Meir’s realization that his neighbors were not essentially evil. The continuation and ending of the *story* play out this narrative arc.

He prayed for them.
They returned in repentance.

There are two actions here that occur serially. R. Meir prays, and they repent. One might say that it was R. Meir letting go of the essentialist definition of his neighbors as *biryonny* and sinners who should be killed that allowed them to see themselves as able

to repent and change. Ultimately, though, it is R. Meir who has changed. Bruria has introduced him to a midrashic understanding of text, prayer, and the world. She has also introduced him to a way of reading: Texts are polysemic, not static. Prayer is, in large part, for oneself. People are not essentially but only contingently defined by their actions.

This is at the heart of the restorative justice claim. People are responsible for their actions but are not defined by their actions. The interaction between a person who transgressed and the person who suffered the injury is a healing one.²⁴ The transgressor is afforded the opportunity to realize both the hurt that was caused by their action and also that they are not eternally defined by that transgression. The injured party can come to understand that the offender is a full human being beyond the offense and in that realization enable the offender to re-enter the community. Therefore, people must make restitution for their misdeeds, and then they must have a way to repair the fabric of the community, and the community must reintegrate them.²⁵

The other principle on which the ideology of reparative restorative justice rests is the recognition of the “victim” as an Other—that is, a person with full humanity. This is discussed in one of the more famous discussions in Talmudic literature, that concerning the biblical law of “eye for an eye.”

Lex Talionis

“An eye for an eye makes the whole world blind.” This sentiment, attributed to Mahatma Gandhi and Martin Luther King, Jr., neatly sums up contemporary rhetoric about the principle known as *lex talionis*, or the law of the talion, defined in the OED as “the principle of exacting compensation, ‘eye for eye, tooth for tooth.’”²⁶ The law, whose origin is in Exodus 21:23–26,²⁷ is commonly understood as an extreme response to violence. The Torah writes,

But if other damage ensues, the penalty shall be life for life,
eye for eye, tooth for tooth, hand for hand, foot for foot,
burn for burn, wound for wound, bruise for bruise.

Popular opinion has it that this form of justice was done away with by the rabbis of the Mishnah and the Talmud, who all agreed that the biblical injunction is not to be taken literally but rather implies monetary compensation. The traditional opinion is well represented in this quote from Maimonides's Code of Jewish Law, the *Mishneh Torah*:

For if one cut off the hand or leg of his fellow, we evaluate [the victim] as if he was a slave sold in the market—[estimating] how much he was worth [before] and how much he is worth now—and [the offender] pays the depreciation, for it says “eye for [*tahat*] eye.” They learned from the tradition that the word *tahat* refers to monetary payment.²⁸

It is only in the case of “life for life” that the talion is retained.

The contemporary scholarly *vox populi* is well represented by David Novak's theoretical formulation of the justification for superseding the talion.

Monetary compensation is the best we can do under these imperfect circumstances. Money is the *tertium quid* [third thing AC] that introduces a standard whereby a just commensurate relation can be stipulated between the assailant and the assaulted.

To attempt to practice literal equality by physical means in cases of physical injury would result in real inequality in the end. As the examples brought in the Babylonian Talmud indicate, that would result in a legal assault on the human dignity of the assailant as serious as the original assault on his or her victim.²⁹

We will examine the examples brought by the Babylonian Talmud below to see if they actually accord with this understanding of them. For now, we note that the opposition to talion is that monetary compensation brings about a more “commensurate relation” which is therefore more “just.” Novak elsewhere states this as “money can be equalized in a way that body parts cannot be.”³⁰ We must ask, “Is this true?” That is, is monetary compensation equal to the injury in a way that the offender's body part is not?

I want to raise the possibility, following William Ian Miller,³¹ that this is not the case. Miller claims that the talion should be understood not as a liability claim (as it is in the popular imagination) or as punitive retribution, but as a property claim. This is to say that when I knock out your eye, by that act you own my eye. This is the starting point for negotiations. What would I pay to buy your eye—that is, to retain it in my head. In this situation you, the victim of my aggression, are in a much stronger position. If we were merely haggling over the loss of your sight and its impact on your life and so on, I, the offender, would be in the stronger position, arguing that there was not that much damage and you were not that handy with your eyes anyway (you were, for example, color-blind or astigmatic or didn't like reading). However, if I am faced with the prospect of surrendering my eye (which now belongs to you), I would not be so niggardly. I would be much more forthcoming if the actual choice were to be either payment or losing my own eye.³² In this sense, one could argue that the talion brings about a far more just outcome than the abstraction of equivalent compensation.³³ The purpose of the talion, understood in this way, is “getting to even” rather than our notion of “getting even.”³⁴

While I just said that the talion is more just and puts the victim in a stronger position, I am not claiming that this will necessarily bring us to a “correct” dollar amount for the assault. The insight that moves the talion, at least rabbinically, is that an assault upon the body is an assault upon the humanity of a person. This assault is rectified when a person's humanity is restored. For this reason, ultimately, Jewish law, halacha, does not follow the opinion that claims that “eye for eye” means just that. Jewish law substitutes compensation. However, we will see that the law is troubled by the fact that monetary compensation, based upon a liability structure (i.e., what is the depreciation in the victim's worth as an object of market value) falls into the trap of re-assaulting the victim.

The rest of this chapter will unfold by way of trying to retain this insight, while minimizing the possibility of actual bloodshed, allowing us to articulate a more powerful notion of restorative justice. The way forward is, of course, through the Bavli.

The Sugya³⁵

The question of whether the talion is understood as literal is discussed and seemingly decided in the Tannaitic midrashim recorded in the fifth and sixth century but seemingly pointing to an earlier time (second and third century CE) when the sages cited in the midrashim lived. Further, the Mishnah which generates this very sugya³⁶ does not even mention the possibility of the talion. The Mishnah only speaks the language of monetary compensation.³⁷ Finally, the first sugya on this Mishnah reaches the conclusion that an eye for eye must mean money.³⁸ It is surprising to the reader then, that the discussion is reopened in the next sugya, the text we are going to analyze now.³⁹ I will briefly review the structure of the entire sugya and then analyze parts of it in greater depth as necessary.

The sugya is comprised of four Tannaitic texts and four Amoraic texts, all making the same basic claim—that the biblical talion actually means monetary compensation. A discussion following each of these texts argues the opposite point—that the talion cannot mean monetary compensation which would then be unfair for one or another reason, but it must refer to the actual talion. The discussions following the first two Tannaitic texts and the first three Amoraic texts conclude with the proposition that “eye for eye” must be understood literally [*mamash*]. In other words, these discussions overturn the seemingly settled idea that “eye for eye” refers to monetary compensation. The discussion generated by the last two of the Tannaitic units and the last of the Amoraic units uphold the proposition that “eye for eye” actually refers to monetary compensation.

Here is the first unit. It follows the basic structure of all the units. a text is quoted which states (and sometimes, as in the first text, supports the statement with an argument) that “eye for eye” should be understood as monetary compensation. This statement is then challenged and either overthrown or supported. The first unit is generated by a Tannaitic text and is overthrown:

It is taught [in a baraita]:⁴⁰

R. Dosthai b. Yehudah says: “Eye for eye” — [this is] money.

You say money, or is it, in fact, an eye?

You stated, Behold if this one’s eye was larger, and this one’s eye was smaller — how can that be “eye for eye?”

And if you were to say that in these types of situation, [the victim] takes money from [the offender],⁴¹

The Torah says: “You shall have one law” — a law that is equal to all of you.

I say, what is the difficulty?

Perhaps [one should say] he took sight from him [the victim], the Merciful One [*Rahmana*] says we should take sight from him [the offender].

For if you are not to say thus, a small person who killed a large person, and a large person who kills a small person, how can you kill him.

Rather, he [the murderer] took a soul from him [the victim], the Merciful One [*Rahmana*] said take a soul from him [the murderer].

Here too, he took sight from him, the Merciful One said, we should take sight from him [the offender].⁴²

The unit opens with the baraita. R. Dosthai b. Yehudah claims an “eye for eye” refers to monetary compensation. This principle is challenged by the rhetorical question: perhaps it does actually mean what it says, that is an eye for an eye. This rhetorical challenge is fought off with the possibility that going down this road would lead to absurdities. What if the attacker had a large eye but he put out the victim’s small eye? How, if we then put out the attacker’s eye, would this constitute “eye for eye?”⁴³ The *stam* (the anonymous voice in the *sugya*) raises the possibility that in some cases where actual and equal retribution is impossible, the court would fall back on monetary compensation. This, however, is dismissed since it would abrogate the principle derived midrashically from Exodus 24 that justice need be applied equally to every case. There could not, then, be one case of physical retribution and another of monetary compensation.

The *stam* then saves the possibility of physical talion by recasting the injury. It is not a specific eye that was lost, but sight. In that case, appropriate and equal retaliation would be to cause

the attacker's sight to be lost. The principle of "eye for eye" is then saved. An interesting aspect of this argument is that it draws on the argument which no authority contradicts, which is "life for life." For the editorial voice of this sugya, capital punishment is a given. If we are going to get all tangled up in the minute physicality of the exchange of a life for a life, we would not be able to execute a three-hundred-pound murderer for killing a one-hundred-fifty-pound victim—or vice versa.⁴⁴ This *reductio ad absurdum* argument allows the stam to recover the talion by analogy to "life for life" rather than "body for body."

And so it goes. The next unit is generated by a baraita which cites Rabbi Shimon b. Yohai as the avatar of "'eye for eye'—[this is] money." His statement is challenged in the baraita with the argument that if a blind man blinded someone, or an amputee cut off another's limb, how would the court be able to carry out the judgment of "eye for eye"? The alternative that in those specific cases monetary compensation could be paid is dismissed as, again, it would not fit the rule for equal application of the law.

Talion is rescued again by analogy with capital punishment. What of the case that a terminally ill person (who is considered legally dead⁴⁵) were to kill another? He is already legally dead, and therefore, we are not able to fulfill the precept of "eye for eye." However, we do not therefore revert to saying that the murderer in that case should compensate the victim monetarily. Rather we rely on the understanding that where it is possible to execute the judgment of "eye for eye," we do; and where it is impossible, we do not. This need not undermine the system.

We will not review the entire sugya which consists of arguments pro and con all based on statements which support the idea of monetary compensation for physical injury. Some of the arguments result in sustaining a challenge to this statement—that is, they support the idea of physical talion. Some beat back the challenge and support monetary compensation. The final movement of the sugya⁴⁶ returns to Tannaitic material. For the first time in the sugya, it is a Tanna who claims that talion means actual physical retribution.

It is taught [in a baraita]:

R. Eliezer says: “Eye for eye” — actually [an eye].

Can you imagine [that he thinks] an actual [eye]?!

R. Eliezer does not hold of all these Tannaim?

Raba said: This is to say that they don’t assess him as a slave.

Abbaye said to him: Rather like whom [do they assess him]?

As a free man.

Do free men have a price?

Rather said R. Ashi: This is to say that they do not assess according to the injured party but according to the offender.

R. Eliezer claims that “eye for eye” means equal talion. This claim is scandalous for the *stam*, both on its own and in light of the fact that every other Tanna holds that “eye for eye” refers to monetary compensation. Raba and Abbaye are deployed to domesticate R. Eliezer’s claim. There is no intention for an eye to be removed to compensate for the eye already damaged. However, the performance of the talion is retained in R. Eliezer’s statement as mediated through Abbaye and Raba. It is the *offender* who is assessed as a slave to see what damage a similar injury would cause *him*. R. Ashi’s claim is that R. Eliezer retains the original intent of the verse (and the original content of the talion) by moving the focus of the compensation from victim to offender. It is the offender’s arm, eye, etc., which must be assessed to arrive at the appropriate compensation.

I would like to push this further. The exchange between Raba and Abbaye is very illuminating for our concerns. Raba comments on the party line (originally inscribed in the Mishnah that generates this entire discourse) that we assess the victim as a slave to ascertain the differential between his prior value and his current value. According to Raba, R. Eliezer’s position is different since he does not demand that the victim be assessed as a slave. To this, Abbaye responds, what choice do we have? A free person cannot be assessed, since a free person has no price. The essential characteristic, Abbaye claims, of a free person is that they are not chattel, while the essential characteristic of a slave is that they are chattel. The only way to assess a person—or perhaps the very act of

a monetary valuation of a person—assumes that the person would be a slave in the transaction.

Abbaye's claim is not only an economic claim; it is also a moral claim, a claim based on values. Abbaye's objection to Raba admits that the operation of assessment *as a slave* is an assault on the humanity of the person assessed—since the assessment imputes slavery to a free person. R. Ashi's concluding statement accords with this insight. We have no desire to again assault the humanity of the injured party. We would only assault the offender. The structure of the talion enables us to not recreate the assault when we are supposed to be offering relief.

This insight is brought to life in the actual conclusion to this sugya—a story of a father, a son, a donkey, and a court.

The Father, the Son, the Donkey, and the Court

Here then is the story:

There was a [*hamara*] donkey driver⁴⁷ who cut off the hand of a child.

He⁴⁸ came before R. Papa b. Samuel.

He [R. Papa b. Samuel] said to them: "Go assess him according to the four categories [of damage]."⁴⁹

Raba said to him: "We however teach that there are five [categories of damage]."

He said to them: "I was speaking [of the categories] excluding 'damage.'"

Abbaye said to him: "Behold it is a donkey [*hamor*] and a donkey is considered as a bull, and a bull only pays 'damage.'"

He said to them: "Go assess his damage."

He said to him: "Behold he must be assessed as a slave."

He said to them: "Go assess him as a slave."

The father of the child said to him: "Since [he will be assessed] as a slave, I do not want it as the matter will humiliate him."

They said to him: "Behold you are obligated to the child."

He said to them: "When he grows up, I will compensate him from my pocket."

This story has two major scenes.

In the first scene, the action is centered on the judge. The case comes before the judge. The judge is the one who is acting and who is garnering responses and corrections. He starts by quoting black letter law: "Go assess him according to the four categories of damage." He is questioned, and he clarifies that he is referring to the categories in addition to "damage" which is understood. He is once again questioned, and here it becomes obvious that he is working from a written account rather than from a living person standing before him. Abbaye corrects his teacher's perception of the case (in essence, his reading of the word *hamara*) and informs him that it is a donkey. R. Papa b. Samuel, the judge, changes course and says that the victim need only be assessed for "damage." The assessment is accomplished by finding out how much he might be worth if he was sold as a slave.

This leads to the second scene. At this moment, the father of the boy intervenes. This—assessing his son as a slave—he says, is not acceptable. The father's intervention stops the proceedings. It is now the father who is the center of the action. He is questioned, and he answers. The judge is irrelevant from here on in.

The intervention of the father forces the court to confront the child as another person. Prior to the intervention of the father, the judge was not dealing with the case in terms of actual people, but rather as another text. He even misjudged as a result of an actual misreading of the case. The father forced the case off the page and into the world. At that moment, the judge was shunted off to the side. It was the father who recognized his son as a person who brought these proceedings to a halt. At the moment that the court attempted to assess the boy—that is, to regard him as an object (a "totality")—the father intervenes and points out that this is humiliating because the boy is not an object (he is an "infinity").

This story is also a corrective to the immediately preceding discussion. The purely theoretical conversation about "eye for eye" consistently treated people as objects to be compared with one another, to be assessed, to be measured, to be retaliated against. Only in the final movement in which Raba says that free men have no price is there a recognition that one cannot actually assess another person without assaulting the person's humanity. The father in the

story pushes this one step further and states that one *should not* assess another person.

I want to suggest that the reason that this sugya is so troubled is that there is unease with the very notion of objectifying, thereby totalizing, the victim of an assault through treating her as a slave. This seems to duplicate the original assault which did not respect her humanity. Retaining the structure of the talion places the focus on the offender, and compensates or balances the assault on the victim with a similar assault.

While the law is settled that an offender compensates their victim with monetary compensation, this text reinforces the unease that the rabbis have with this outcome as it does not necessarily do its work to bring the victim “back to even” or to make him whole—making the victim whole in this case is recognizing her full humanity, that she is not an object.

Restorative Justice

Rabbinic justice is thus premised on two principles. First, that the goal of the judicial process is to repair that which was damaged by the offense—the property damage and the physical suffering, but also the damage to the community in the fraying of the web of relationships which constitutes the community of obligation. Second, the way to justice is by respecting the humanity of both the offender *and* the victim. Bringing the victim and the offender into engagement with each other needs result in restoring the dignity of both. Treating the victim as an object—either by assessing him as one as in the Talmudic example, or by sidelining her in the judicial proceedings as in a contemporary state prosecution—reenacts the original offense against her humanity. A justice system which respects these two principles is a restorative system.

A punitive justice system is a system, like the one that is currently operating in the United States, in which the state prosecutes an offender with the end goal being punishment, for reasons of either deterrence or vengeance. This is a system which does not seem to be working. According to Department of Justice statistics, as of June 30, 2009, there were 1,617,478 prisoners in the

U.S. prison system. This means that “about 1 in every 198 U.S. residents was imprisoned with a sentence of more than 1 year, a rate of 504 prisoners per 100,000 U.S. residents.”⁵⁰ The recidivism rate for some categories of crime are in the fifty- to sixty-percent range.⁵¹ It is hard to argue that this is an efficient way to deter crime and, furthermore, warehousing this number of prisoners is an enormous drain on the economy.

From the point of view argued in this book, where the goal is to create a community of obligation, a society that is more righteous and more just, it is hard to argue that the way from here to there runs through the incarceration of one in every hundred and ninety-eight residents of the United States.

Restorative justice projects such as the one that Veronica benefited from are far too rare in the United States, though where they exist they are effective.⁵² If we are going to move our cities on to the path toward reconnecting all residents, the path on which Veronica is not alienated from her community, we must begin with rethinking the way we “do” justice. We must keep in mind that the goal of the system should be restoration of the community, not vengeance.

Notes

¹ This is not the place to pursue either of two interesting possibilities of this line: (1) that the day itself (without repentance or other activity) might affect atonement; (2) what exactly *lehkaper*, here translated as *atonement*, means. For the former, see M Yoma 8:7, T Yoma 4:5–9 (ed. Lieberman, 251–2) and the discussions in the Palestinian Talmud Yoma 8:8–9 (45b) and the Babylonian Talmud Yoma 85b, Shevuot 13a; for the latter, see Jacob Milgrom, *Leviticus 1–16: a New Translation with Introduction and Commentary*, 1st ed., the Anchor Bible (Doubleday, 1991), 708 where he famously interprets the verb *k-p-r* as purging rather than atoning.

² Yoma 8:9, 45c. Cf. PT Yoma 8:7, 6c.

³ Translating here with the King James Version to keep the midrashic sense.

⁴ The verses are Job 33:26–27.

⁵ Yoma 87a. In the Bavli, a statement similar to the first part of Samuel's statement is attributed to a Palestinian sage of the fourth century, R. Yitzhak, while a procedure similar to the second half of Samuel's statement is attributed to R. Hisda, a Babylonian sage of the fourth century. R. Hisda also uses a midrashic reading of Job 33:26–27 as his prooftext.

⁶ Maimonides, *Mishneh Torah*, Laws of Repentance, 2:9.

⁷ There are further steps in both Talmuds in which if the victim has died (not as a result of the offense), the offender must bring ten people to his graveside and apologize there. Finally, the Babylonian Talmud limits the number of apology attempts that are obligatory to three.

⁸ Not only asking forgiveness but also granting forgiveness. See Babylonian Talmud Yoma 86b; Maimonides, *Mishneh Torah*, Laws of Repentance, 2:10. On the face-to-face encounter of forgiveness, cf. "Apology, in which the I at the same time asserts itself and inclines before the transcendent, belongs to the essence of conversation (*discours*)." Emmanuel Levinas, *Totality and Infinity: An Essay on Exteriority*, 40.

⁹ In addition, a third theory which is a somewhat psychological theory might be called the *closure theory*. This claim (especially in capital cases) is that a punishment must be meted out so that the victim's family can have "closure." Many writers have pointed out the especially slippery and undefined nature of "closure" and therefore its potential for abuse. See Susan Bandes, "Victims, 'Closure,' and the Sociology of Emotion," *Law and Contemporary Problems* 72 (2):1–26.

¹⁰ "Punishment." Encyclopædia Britannica. Encyclopædia Britannica Online. Encyclopædia Britannica, 2010 (August 11, 2010), <http://www.search.eb.com/eb/article-272339>.

¹¹ Cf. William Ian Miller, *Eye for an Eye* (Cambridge University Press, 2006) especially chapter 5.

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¹² “Restorative justice emphasizes the humanity of both offender and victim, and repair of social connections and peace as more important than retribution.” Martha Minow, “Between Vengeance and Forgiveness: Feminist Responses to Violent Injustice,” 32 *New Eng. L. Rev.* 969.

¹³ Since the locus of my thinking in this book is the city, in this chapter, I will not be discussing restorative justice in the aftermath of genocide; however, that is one of the very significant directions that it has taken with, for example, the Truth and Reconciliation Commissions in South Africa. On this, see Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Boston, MA: Beacon Press, 1998); Ariel Dorfman, “Whose Memory? Whose Justice? a Meditation on How and When and If to Reconcile,” The 8th Mandela Lecture (July 31, 2010) Web. August 11, 2010, http://www.nelsonmandela.org/images/uploads/WHOSE_MEMORY_WHOSE_JUSTICE_final_version_july_2010_for_publication_purposes.pdf.

¹⁴ Cf. Maimonides’s explanation for the seriousness of murder (and why, even if a murderer could get off with a technicality, the rabbis created an alternative form of capital punishment): “for even though there are crimes that are worse than murder, none of them have the potential for destroying civilization (*yishuv shel ‘olam*) as murder does.” *Hilkhot Rotzeach* 4:7.

¹⁵ Maimonides in *Laws of Repentance* writes, “However, transgressions between individuals, such as one who physically damages his fellow or curses his fellow or steals from him, he is not forgiven until he compensates his fellow and appeases him.” In *Laws of Torts*, Maimonides writes, “There is no comparison between the one who injures his fellow bodily to the one who damages his money [or belongings]. One who damages his fellow’s money, once he has paid him that which he owes him he is forgiven. However, one who injures his fellow bodily, even though he gives him the five categories of compensation, he is not forgiven. . . . until he asks for forgiveness from the injured party and [the injured party] grants forgiveness.” The commentaries to Maimonides take up this contradiction and attempt to smooth it over. See, *inter alia*, Rabbi Abraham de Bouton, *Lehem Mishneh* at *Laws of Torts* 5:9.

¹⁶ The Babylonian Talmud says that the victim can demand that the offender return three times.

¹⁷ See *Mishnah Berachot* 1:2.

¹⁸ Efraim Elimelech Urbach, *The Sages: Their Concepts and Beliefs*, (Magnes Press, 1969), p. 534 n. 16.

¹⁹ Michael Sokoloff, *a Dictionary of Jewish Babylonian Aramaic of the Talmudic and Geonic Periods*, vol. 3, *Dictionaries of Talmud, Midrash, and Targum* (Johns Hopkins University Press, 2002), 245.

²⁰ See the sources cited in Sokoloff, p. 969.

²¹ There is an interesting variant reading in two MSS (Munich 95 and Paris 176). These manuscripts don’t have this line and instead have: *shamtinhu b’a l’ovdinhul*

he excommunicated them and sought to destroy them. This, of course, changes the narrative in important ways. According to this narrative, Bruria teaches R. Meir about the proper way to relate to evildoers, i.e., to pray for their well-being, rather than teaching him that evildoers are not essentially evil. My reading therefore is of the story according to the scribal tradition represented by the Florence MS and the *editio princeps*, without making any decision about which, if either, is an “original” version.

²² “Parallelism is perhaps the most familiar characteristic of Hebrew poetry.” Leland Ryken Tremper Longman III, *The Complete Literary Guide to the Bible* (Zondervan, 1993) p. 251.

²³ This popular quote was originally coined by Augustine of Hippo as “he should hate the fault, but love the man,” in Book XIV:6 of *The City of God*.

²⁴ I do not intend this metaphor in a psychological sense, but in the sense of rebuilding relationships and reestablishing the fabric of the community.

²⁵ See, for example, John O. Haley, “Comment on Using Criminal Punishment to Serve Both Victim and Social Needs,” *Law and Contemporary Problems*, vol. 72 (Spring 2009): 219–225. There is a story in BT Yoma 87a which graphically describes the result of not reintegrating the offender. In that story, the putative offender ends up with a meat cleaver in his head.

²⁶ There is no written example of Gandhi’s having used the quote, though it is popularly attributed to him. Martin Luther King Jr. used the quote in his 1958 book, *Stride Toward Freedom: The Montgomery Story* (<http://quoteinvestigator.com/2010/12/27/eye-for-eye-blind/>; accessed February 23, 2011).

²⁷ There are two other biblical sources for the Talion: Leviticus 24:18 and Deuteronomy 19:18. It also appears in Roman Law.

²⁸ *Hilchot Hovel U-mazik* 1:3. Maimonides is relying *inter alia* on the discussion in Bavli Baba Kama 83bff.

²⁹ David Novak, “Lex Talionis: a Maimonidean Perspective on Scripture, Tradition and Reason,” *S’vara: a Journal of Philosophy and Judaism*, vol. 2, no. 1 (1991): 64. See also David Novak, *Covenantal Rights: a Study in Jewish Political Theory* (Princeton University Press: 2000): 161–162.

³⁰ *Covenantal Rights*, 162.

³¹ William Ian Miller, *Eye for an Eye* (Cambridge University Press, 2006).

³² Cf. “The talion works some quick magic: as soon as you take my eye, in that instant your eye becomes mine; I now possess the entitlement to it. And that entitlement is protected by a property rule. I get to set the price, and you will have to accede to my terms to keep me from extracting it” (Miller, *Eye for an Eye*, p. 50).

³³ I will be arguing in a minute that this is actually what is troubling the discussion in the Bavli. For now, I will note that this is the exact conversation in the Bavli regarding payment for pain. In that case, the formula for arriving at the

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correct payment is how much would the offender pay not to experience the pain he or she had inflicted on the victim (Bavli Baba Kama 85a).

³⁴ Cf. Miller, 15. Though as Miller points out, the fact is that the possibility of talion has a threatening aspect to it (I *could* take your eye) and “[t]hat is worth something; it makes the compensatory regime of the talion one that cannot help but keep honor firmly in its sights, for fear is bound up in some nontrivial way with respect and the talionic principle is above all a principle of just compensation” (50).

³⁵ The classical discussion of *lex talionis*, discussed here, is in the Babylonian Talmud Baba Kama 83b-84a.

³⁶ M Baba Kama 8:1.

³⁷ The Mishnah itself is not of a piece and also seems to refer to earlier texts, though here is not the place to lay out the source-critical work. See David Weiss-Halivni, *Mekorot ‘U-Masorot: Be’urim Ba-Talmud: Masekhet Bava Kama* (Jerusalem: Magnes Press, Hebrew University, 1993).

³⁸ It is obvious, structurally and by content, that the first *sugya* ends before the introduction of the *baraita* quoting R. Dosthai b. Yehudah. In the special issue of *S’vara*, this *baraita* is mistakenly included in the first *sugya*. The translators were probably led astray by following the printed editions in which the mark for the end of a *sugya* “:” was mistakenly placed after the discussion of R. Dosthai b. Yehudah’s *baraita*, as is obvious from the manuscripts.

³⁹ This whole issue has been exhaustively written about. See David Charles Kraemer, *Reading the Rabbis: The Talmud as Literature* (Oxford University Press, 1996) especially chapter 3. Kraemer’s reading of the steps of the argument is consistent with mine; however, he does not fully appreciate the implication of this reading, as his interest is in merely using this *sugya* as another proof-text for his larger argument that “the rabbinic authors want to demonstrate their fundamental independence from scripture” (48).

⁴⁰ The language of R. Dosthai b. Yehudah’s statement gives the impression that it is a *midrash halakhah*. We don’t however have this midrash in any of the extant collections. (In order to distinguish between the textual layers, I am indenting the *stammaitic* or anonymous editorial statements.)

⁴¹ This line which is obviously an editorial statement interpolated into a Tannaitic text—the Tannaitic text is Hebrew and the interpolation is Aramaic—is missing in the Hamburg manuscript.

⁴² Baba Kama 83b–84a.

⁴³ This is the argument that Novak thinks is “more rational, revealing deeper philosophic implications.” He sees this argument as a convincing Rabbinic blow against *lex talionis* because of these “deeper philosophic implications.” However, the very next lines in the *sugya* (lines that Novak doesn’t deal with) argues against these deeper philosophic implications. See Novak, “Lex Talionis: a Maimonidean Perspective on Scripture, Tradition and Reason,” p.63.

Notes

⁴⁴ It is obvious from this and the next unit that the editor of this discussion raised, challenged, and dismissed the very arguments that Novak think decisively defeat the talionic side (*ibid.*).

⁴⁵ *Treifah* is one who has some manner of terminal or mortal wound or illness. This is analogous to a *treifah* in an animal (Yiddish: *treif*), which makes the animal *unkosher* since it was “already dead.” See Babylonian Talmud Tractate Sanhedrin 78a; *Encyclopedia Talmudit*, s.v. *treifah (adam)*.

⁴⁶ Which, I will argue in a moment, is actually the penultimate movement.

⁴⁷ The Aramaic word *hamara* can mean either donkey or donkey driver.

⁴⁸ Or the case.

⁴⁹ This whole discussion is generated by the five categories of damages discussed in the first Mishnah of the eighth chapter of Baba Kama: (1) damage, (2) pain and suffering, (3) healing, (4) compensation for labor lost, and (5) humiliation.

⁵⁰ Heather C. West, PhD, “Prison Inmates at Midyear 2009—Statistical Tables” (Bureau of Justice Statistics, 2010).

⁵¹ For example, robbery—53%; receiving stolen property—67%; second-degree burglary—62%. “One and Two Year Follow-up Recidivism Rates for All Paroled Felons Released from Prison for the First Time in 2005 under the Supervision of the California Department of Corrections and Rehabilitation” (California Department of Corrections and Rehabilitation Adult Research Branch, 2008).

⁵² The Jewish Community Justice Project itself is no longer operating in Los Angeles. For an overview of the current state of restorative justice programs in North America, see Mark S. Umbreit, Betty Vos, Robert B. Coates, Elizabeth Lightfoot, “Restorative Justice in the Twenty-first Century: a Social Movement Full of Opportunities and Pitfalls,” *Marquette Law Review* 89:251–304.