12 *The monetization and demonetization of the human body: the case of compensatory payments for bodily injuries and homicide in ancient Near Eastern and ancient Israelite law books*

KONRAD SCHMID

I

The legal requirement to pay compensation for injuries and homicide has a long tradition, even longer than the *ius talionis*, which is generally understood as more archaic. Until the middle of the twentieth century, an almost canonical perspective reigned about the development of "primitive law" regarding injuries and homicide. According to this line of thinking, the development started with the concept of unlimited revenge (see Gen. 4:23f.), proceeded then to the *lex talionis*, which limited the extent of the revenge to the extent of the crime ("an eye for an eye"), and concluded with the system of compensatory payments.[1] While a number of law historians in the first half of the twentieth century were uncomfortable with this linear development,[2] the 1948 publication of various cuneiform law books, especially the Code of Ešnunna and the Code of Ur-Nammu[3] provided the means to empirically falsify this theory.[4]

[1] See the examles provided by R. Yaron, *The Laws of Eshnunna*, Jerusalem: Magness, and Leiden: E. J. Brill, 1988, 263 n. 20; E. Otto, "Zur Geschichte des Talions im Alten Orient und Israel," in: *Ernten, was man sät: Festschrift Klaus Koch*, ed. D. Roger Daniels et al., Neukirchen-Vluyn: Neukirchener, 1991, 109.

[2] A. S. Diamond, "An Eye for an Eye," *Iraq* 19 (1957); see also idem, *Primitive Law: Past and Present*, London: Methuen, 1971, pp. 97–102, 142f., 398–9.

[3] A. Goetze, "The Laws of Eshnunna Discovered at Tell Harmal," *Sumer* 4 (1948); F. Rue Steele, "The Lipit-Ishtar Law Code," *AJA* 52 (1948); S. N. Kramer, "Ur-Nammu Law Code," *Or*. 23 (1954); Yaron, *Laws*; M. T. Roth, *Law Collections from Mesopotamia and Asia Minor*, Atlanta: SBL, 1997.

[4] Otto, "Geschichte des Talions," 108f. Remarkably, the speech of Diodotus formulated by Thucydides (3.45.3) regarding the execution of the Mytilenaeans because of their revolt against Athens already exhibits an early detractor from this common misunderstanding: "All men are by nature prone to err, both in private

The Code of Ešnunna (CE)[5] and the Code of Ur-Nammu (CU)[6] are both older than the Code of Hammurabi (CH)[7] and these older codices provide many more regulations regarding compensatory payments than the later CH, which is famous for its extensive use of the *lex talionis*. Of course, the consequence of these discoveries cannot be just to turn the old linear development scheme of the early history of law upside down. Rather, they show the need to be cautious about simplistic interpretations.

At any rate, it is safe to assume that these law books were not written in complete and splendid isolation from one another, despite different historical and geographical origins. They participate in a shared scribal law culture, and their changes and accentuations can therefore be compared.

Some comments on the legal status of these codices may prove helpful at this point. Although there has been an extended discussion on the function of ancient Near Eastern law collections,[8] there is a growing consensus that these collections had primarily a *descriptive* rather than a *normative* status. They do not contain rules for every life situation. Instead, they seem to be products of learned scribal traditions that dealt primarily with complicated and extraordinary cases. Everyday conflicts were usually solved according to the customary legal traditions, which did not need to be fixed in writing, but were part of a legal "common sense."

and in public life, and there is no law which will prevent them; in fact, mankind has run the whole gamut of penalties, making them more and more severe in the hope that the transgression of the evil-doers might be abated. It is probable that in ancient times the penalties prescribed for the greatest offences were relatively mild, but as transgressions still occurred, in course of time the penalty was seldom less than death. But even so there is still transgression."

[5] CE, ca. 1770 BCE; Roth, *Law Collections*, 57; Yaron, *Laws*, 19–20.

[6] CU, written in Sumerian, ca. 2100 BCE; Roth, *Law Collections*, 13.

[7] CH, ca. 1750 BCE; Roth, *Law Collections*, 71; M. E. J. Richardson, *Hammurabi's Law: Text, Translation and Glossary*. BiSe 73, Sheffield: Sheffield Academic Press, 2000; copies of the CH have been known since the discovery of Ashurbanipal's library in Nineveh in the mid-19th century; the well-known stela was excavated in Susa in 1901; for variant readings see Richardson, *Hammurabi's Law*, 15–19.

[8] See e.g. Roth, *Law Collections*, 4–7; E. Otto, "Recht/Rechtstheologie/ Rechtsphilosophie I," TRE 28, Berlin and New York: de Gruyter, 1997; idem, "Recht und Ethos in der ost- und westmediterranen Antike: Entwurf eines Gesamtbildes," in *Gott und Mensch im Dialog: Festschrift Otto Kaiser*. BZAW 345/I, ed. M. Witte, Berlin/New York: Walter de Gruyter 2004.

Therefore, the common designation of ancient Near Eastern law collections as "code" (e.g. "Code of Ur-Nammu," "Code of Lipit-Ishtar," etc.) is rather misleading.[9] The notion of a "code" implies normativity and completeness, but these texts are collections of exemplary cases rather than "normative law." It is more suitable to call them "law books."[10] They provide "help, but not rules in the finding of justice."[11] Their language is *informative* rather than *performative*. If these codices were authoritative, their authority was not rooted in their character as codified texts. Rather, it was dependent on the authority of the king, who repeatedly re-enacted these laws. The case of pre-Demotic ancient Egypt, where no written laws at all are extant,[12] is therefore not an exception in the history of ancient Near Eastern law, but only a very poignant example: the legislative authority was the king and not a text.[13]

The CH usually differentiates between three classes of persons: the free person (*awilum*), including men, women, and minors; the "commoner" (*muškenu*), who is hard to define in a specific way, but is certainly inferior to the *awilum*;[14] and finally, the slaves, both male

9 K.-J. Hölkeskamp, *Schiedsrichter, Gesetzgeber und Gesetzgebung im archaischen Griechenland*. Historia Einzelschriften 13, Stuttgart: Franz Steiner, 1999, 16; S. Greengus, "Law. Biblical and ANE Law," AncBD 4, New York: Doubleday, 1992, 243; S. Greengus, "Legal and Social Institutions of Ancient Mesopotamia," in *Civilizations of the Ancient Near East II*, ed. J. M. Sasson, Peabody, MA: Hendrickson, 2000, 471–2.

10 Cf. C. Houtman, *Das Bundesbuch: Ein Kommentar*. DMOA 24, Leiden: E. J. Brill, 1997, 18; J. Assmann, *Herrschaft und Heil: Politische Theologie in Ägypten, Israel und Europa*, Munich: Beck, 2000, 178–89; R. Rothenbusch, *Die kasuistische Rechtssammlung im "Bundesbuch" (Ex 21, 2–22.18–22, 16) und ihr literarischer Kontext im Licht altorientalischer Parallelen*. AOAT 259, Münster: Ugarit, 2000, 408–73.

11 Assmann, *Herrschaft*, 179 (translation mine); for the "Code of Hammurabi" as "memorial"/"commemorative inscription" see H.-J. Gehrke, ed., *Rechtskodifizierung und soziale Normen im interkulturellen Vergleich*. ScriptOralia 66, Tübingen: Narr, 1994, 27–59; Assmann, *Herrschaft*, 179–80.

12 With the one exception of a decree of 18th dynasty King Haremhab; see Otto, "Recht und Ethos," 105.

13 Greengus, "Law," 244; as the Greeks and Romans later put it: the king as *nomos empsychos* or *lex animata*, see J. Assmann, "Gottesbilder – Menschenbilder: anthropologische Konsequenzen des Monotheismus," in: *Gottesbilder – Götterbilder – Weltbilder: Polytheismus und Monotheismus in der Welt der Antike, Band II: Griechenland und Rom, Judentum, Christentum und Islam*. FAT II/18, ed. R. G. Kratz and H. Spieckermann, Tübingen: Mohr Siebeck, 2006, 321.

14 See the discussion in Yaron, *Laws*, 132–46, especially 139; in German often rendered as "Palasthöriger."

(*wardu*) and female.[15] It is noteworthy that legal regulations concerning bodily injuries to slaves are not treated among the laws concerning damage of objects or injuries of animals, but among injuries to persons. Furthermore, injuries caused by slaves are separated from injuries caused by animals.[16]

When looking at the CH alone, it already suggests that the *lex talionis* is only extant within the *awilum* class:

§ 196: If a man (*awilum*) puts out the eye of another man, his eye shall be put out.

§ 197: If he breaks another man's (*awilum*) bone, his bone shall be broken.

§ 200: If a man (*awilum*) knocks out the teeth of his equal, his teeth shall be knocked out.

Furthermore, CH § 200 shows that there are also social differentiations within the *awilum* class, in that the talion as for knocking out teeth is only applicable for peers (*awilim meḫrišu*).[17]

The application of the talion further seems to be dependent on the amount of intent. CH §§ 206 and 207 regulate the case where injuries or homicide occur "during a brawl" (*ina riṣbatim*), which is the common wording for acts without intention:

§ 206: If during a brawl one man (*awilum*) strikes another man (*awilum*) and wounds him, then that man (*awilum*) shall swear, "I did not strike intentionally," and pay the physician.

§ 207: If he dies of his wound, he shall swear similarly, and if he (the deceased) was an *awilum*, he shall pay 30 shekels of silver.

The redactional juxtaposition of these regulations in §§ 206–7 in the literary vicinity of those in §§ 196, 197, and 200 implies that the extremely severe punishments in §§ 196, 197, and 200 are limited to actions committed intentionally as well (which in these cases seems to be rather self-evident, anyway).

In dealing with criminal actions committed by an *awilum* ("free man") which harm a member of the lower *muškenu* class ("commoner") or a slave, the CH provides regulations for compensatory payments:

[15] *amtu*; see Yaron, *Laws*, 161–5.
[16] G. Ries, "Körperverletzung," RLA 6, Berlin and New York: de Gruyter, 1980–1983, 174.
[17] Ries, "Körperverletzung," 174.

§ 198: If he puts out the eye of a commoner (*muškenum*), or breaks the bone of a commoner (*muškenum*), he shall pay 60 shekels of silver.
§ 199: If he puts out the eye of a man's (*awilum*) slave, or breaks the bone of a man's slave, he shall pay one-half of its value.
§ 200: If a man (*awilum*) knocks out the teeth of his equal, his teeth shall be knocked out.
§ 201: If he knocks out the teeth of a commoner (*muškenum*), he shall pay 20 shekels of silver.

Several problems arise when trying to determine the economic status of such a fine.

Firstly, it is difficult to determine the monetary value of a shekel of silver[18] because there are regional and temporal differences in the exact weight of a shekel (usually 8.3 grams = 0.28 oz in Old Babylonian times, but e.g. 11.3 grams = 0.38 oz in monarchic Israel according to weight stones).[19] Furthermore, for comprehensible reasons the shekel of the dealer when selling was often a little heavier than the shekel used when buying. Finally, the prices could vary significantly in different time periods.[20] For example, Sin-Gashid from Uruk (*c*.2200 BCE) stated that during his reign, 3 Kur of grain, 12 minas of wool, 10 minas of copper, or 30 sila of oil could be bought for 1 shekel of silver (1 Kur = 180–300 sila (72–120 liters = 19–31 gallons); 1 mina = 60 shekels). Meanwhile, under Shamshi-Adad I (*c*.1800 BCE), 1 shekel of silver bought 2 Kur of grain, 12 minas of wool, or 20 sila of oil.[21] However, these prices are probably propagandistically low. In Old Babylonian times, the usual price for grain was 1 Kur of grain for 1 shekel (362), and a day laborer could earn 6 shekels in one year (163). An idea of the value of silver can also be deduced from exchange rates with bronze, tin or gold:[22]

[18] See M. A. Powell, "Weights and Measures," AncBD 6, New York et al.: Doubleday, 1992, 904–8; CAD 17, 96–9 s.v. *šiqlu*.
[19] See R. Kletter, *Economic Keystones: The Weight System of the Kingdom of Judah*. JSOT.S 276, Sheffield: Sheffield Academic Press, 1998; for changes during the history of Judah, see Y. Ronen, "The Enigma of the Shekel Weights of the Judean Kingdom," *BA* 59 (1996).
[20] F. Joannès, "Metalle und Metallurgie. A. I.," RLA 8, Berlin and New York: de Gruyter, 1993–1997.
[21] B. Meissner, *Babylonien und Assyrien*. Kulturgeschichtliche Bibliothek 3, Heidelberg: Carl Winter, 1920, 361.
[22] Joannès, "Metalle und Metallurgie," 99–100.

Table 12.1 ***Exchange rates between 1 shekel of silver and corresponding quantities of bronze, copper, tin, and gold (in shekels)***

	Bronze	Copper	Tin	Gold
Mari (*c.*1800 BCE)	120	150	8–15	1/4, 1/6
Old Babylonian (18th–12th century BCE)	360	180	8–16	1/3, 1/6
Neo-Babylonian (7th–5th century BCE)	?	180–200	20–100	1/5

Secondly, it is not completely clear whether these fines were really applied or rather, whether they were conceived as *maximum amounts*. There is only one document concerning bodily injuries extant from Old Babylonian times.[23] In this document, the offender, who slapped the cheek of another man, is sentenced to pay a sum of 3⅓ shekels of silver, which is significantly less than CE § 42 (10 shekels) or CH § 203 (60 shekels among members of the *awilum* class, 10 shekels among the *muškenum* class) allot for this case.

It is striking that there are hardly any regulations affecting commoners (*muškenum*) or slaves who commit crimes causing injury or homicide. The only instances are related to offending a person's honor, which is a bagatelle physically, but socially a very severe crime:[24]

CH § 202: If a man (*awilum*) strikes the cheek of a man (*let awilim imtaḫaṣ*) higher in rank than he, he shall receive sixty blows with an ox-whip in public.

CH § 203: If a man (*awilum*) strikes the cheek of another man (*let awilim imtaḫaṣ*) of equal rank, he shall pay 60 shekels of silver.

CH § 204: If a commoner (*muškenum*) strikes the cheek of another commoner (*let muškenim imtaḫaṣ*), he shall pay 10 shekels of silver.

CH § 205: If the slave of a man strikes the cheek of a man (*let awilim imtaḫaṣ*), his ear shall be cut off.

[23] UCBC 756, see Ries, "Körperverletzung," 177.

[24] E. Otto, *Körperverletzungen in den Keilschriftrechten und im Alten Testament: Studien zum Rechtstransfer im Alten Orient*. AOAT 226, Kevelaer: Butzon & Bercker and Neukirchen-Vluyn: Neukirchener, 1991, 67.

The non-specific formulation of § 195, which also concerns a specific instance of offending a person's honor – namely, one's father's – can be added here:

CH § 195: If a son strikes his father, his hand shall be cut off.
The punishment of "cutting off a hand" seems to be applied especially when a specific action is not to be repeated, as becomes clear from the following examples:

CH § 218: If a physician performs major surgery with a bronze lancet upon an *awilum* and thus causes the *awilum*'s death, or opens an *awilum*'s temple with a bronze lancet and thus blinds the *awilum*'s eye, *they shall cut off his hand* (emphasis added).

CH § 226: If a barber shaves off the slave-hairlock of a slave not belonging to him without the consent of the slave's owner, *they shall cut off that barber's hand* (emphasis added).

CH § 253: If a man hires another man to care for his field ... if that man steals the seed or fodder and it is then discovered in his possession, *they shall cut off his hand* (emphasis added).

To sum up this first glance at the CH, the *lex talionis* is specifically and exclusively valid among the *awilum* class. Assaults perpetrated by members of the *awilum* class on lower classes are always punished by payments, while assaults by lower classes (like slaves) on members of the *awilum* class are penalized by punishments above the equality ratio of the *lex talionis*, illustrated by looking again at CH § 205: if the slave of a man strikes the cheek of a man, his ear shall be cut off.

In the older law books like the CE and CU, the *lex talionis* plays nothing more than a marginal role. If the case of the death penalty for murder is excluded from the definition of talion, then it is completely absent.[25] Be this as it may, only CU § 1 provides a tit-for-tat punishment, i.e. the death penalty, for homicide.[26]

[25] See B. S. Jackson, "The Problem of Exod. XXI 22–25," *VT* 23 (1973): 281 n. 1: "(T)he term talion is rightly applied only when non-fatal bodily injuries are involved, and where the offender is punished by suffering the same injury as he inflicted. Thus the death penalty for murder is not an example of talion," followed by Yaron, *Laws*, 263.

[26] On CU § 1 see Yaron, *Laws*, 263 n. 22; as for R. Westbrook, *Studies in Biblical and Cuneiform Law*. CRB 26, Paris: Gabalda, 1988, 39–83, see the objections of Otto, *Körperverletzungen*, 66 n. 1.

Table 12.2 ***Fines and punishments for injuries and homicide in the CH***

	Free man (*awilum*)	Commoner (*muškenu*)	Slave (*wardu*)
eye	eye	60 shekels	50% of slave's value
bone	bone	60 shekels	
teeth	teeth	20 shekels	
slap on cheek	60 shekels		
homicide without intent	30 shekels	20 shekels	

If a man commits a homicide, they shall kill that man.

These law books exclusively treat the bodily injuries of the *awilum* [in the Sumerian CU: *lú*] class[27] and always provide for compensatory payments. These payments are measured primarily in accordance with the extent of the damage, while the question of guilt plays hardly any role:[28]

CU § 18: If [a man] cuts off the foot of [another man with . . .], he shall weigh and deliver 10 shekels of silver.
CU § 19: If a man (*lú*) shatters the . . . bone of another man (*lú*) with a club, he shall weigh and deliver 60 shekels of silver.
CU § 20: If a man (*lú*) cuts of the nose of another man (*lú*) with [. . .], he shall weigh and deliver 40 shekels of silver.
CU § 22: If [a man knocks out another man's] tooth with [. . .], he shall weigh and deliver 2 shekels of silver.

The CE does not treat homicide in general, mentioning only unintentional homicide (CE § 47, see below). It does, however, provide a broad passage on injuries:

§ 42: If a man (*awilum*) bites the nose of another man (*awilum*) and thus cuts it off, he shall weigh and deliver 60 shekels of silver; an eye – 60 shekels; a tooth – 30 shekels; an ear – 30 shekels; a slap to the cheek – he shall weigh and deliver 10 shekels of silver.
§ 43: If a man (*awilum*) should cut off the finger of another man (*awilum*), he shall weigh and deliver 20 shekels of silver.

[27] Yaron, *Laws*, 286, thinks that the CE makes no legal distinction between *awilum* and *muškenum* for these cases, but this does not seem completely convincing.
[28] Ries, "Körperverletzung," 176.

Table 12.3 ***Fines and punishments for injuries and homicide in the CU***

Homicide	Death penalty
Foot	10 shekels
Bone	60 shekels
Nose	40 shekels
Tooth	2 shekels

§ 44: If a man (*awilum*) knocks down another man (*awilum*) in the street (?) and thereby breaks his hand, he shall weigh and deliver 30 shekels of silver.

§ 45: If he should break his foot, he shall weigh and deliver 30 shekels of silver.

§ 46: If a man (*awilum*) strikes another man (*awilum*) and thus breaks his collarbone, he shall weigh and deliver 20 shekels of silver.

These regulations do not differentiate explicitly between intentional and unintentional actions. It is unclear what role premeditation plays in these cases, although it is very hard to imagine some of the referred injuries happening unintentionally.[29] At any rate, these regulations are conceived according to *Erfolgshaftung* rather than guilt, although it is very difficult to determine the rationale of the specific amounts of payments allotted to the different injuries. Is it the loss of working power that is compensated? Or is the loss of a body part, as such, compensated? The fines for knocking out a tooth or biting the nose which, at least for most professions, do not constitute a diminution of working power, suggest that, at least in part, the second option is more probable.

The presence or lack of intention seems to be fully relevant for the case of homicide:

CE § 47: If a man (*awilum*), in the course of a brawl (*ina riṣbatim*), should cause the death of another man (*awilum*), he shall weigh and deliver 40 shekels of silver.

CE § 48: And for a case involving a penalty in silver in amounts ranging from 20 shekels to 60 shekels, the judges shall decide his case; however, a capital case is only for the king.

[29] E.g. "biting the nose," see the discussion in Yaron, *Laws*, 264–7.

Table 12.4 ***Fines for injuries and unintentional homicide in the CE***

Nose	60 shekels
Eye	60 shekels
Tooth	30 shekels
Ear	30 shekels
Slap to cheek	10 shekels
Finger	20 shekels
Hand	30 shekels
Foot	30 shekels
Collarbone	20 shekels
Homicide without intent	40 shekels

By means of an *argumentum e silentio*, it is possible to conclude from CE § 47 that the crime of *intentional* homicide was expected to be punished by the death penalty. As a self-evident case, this might not have needed to be mentioned explicitly in the CE. However, there was obviously a need to state that capital punishment can only be proclaimed by the king, which seems to be an innovation over CU § 1.

So far one can say that the stress on the *lex talionis* for injuries among members of the *awilum* class in the CH is more of an innovation than a traditional element, at least as far as the written sources are concerned. Especially the CU, but also the CE witness an earlier legal order that punishes deliberate injuries with compensatory payments rather than in a tit-for-tat mode.

The introduction of the talion for the *awilum* class in the CH is therefore not the result of the domestication of unlimited revenge, but instead develops out of regulations providing compensatory payments. The talion seems especially designed to protect the members of the *awilum* class from injuries,[30] and therefore may be interpreted as a legal element privileging a certain social class, since assaults by these members on other classes were regulated by payments.

When comparing the fines for bodily injuries in the CU, CE, and CH, it becomes evident that the fines are generally *higher* in the *later* law books. This may be partly explained by the inflation of silver due to the

[30] Otto, *Körperverletzungen*, 74.

increase in silver circulation in the Mesopotamian economies between 2100 and 1750 BCE. However, three observations problematize any explanation based on economic history alone.

Firstly, the increases of the fines is not linear: a broken nose costs 40 shekels according to the CU, 60 shekels according to the CE (60 shekels (= 1 mina, *c*. 0.5kg) according to § 48 is probably the maximum fine in the CE), which is an increase of 50 percent. A knocked-out tooth is 2 shekels according to the CU, 30 shekels according to the CE, which means an increase of 1,500 percent. A broken foot is compensated by 10 shekels according to the CU and by 30 shekels according to the CE, which is an increase of 300 percent. Therefore, the higher fines cannot be explained by referring to economic changes alone. Apparently, the rise of the fines is due to other, conceptual reasons as well.

This might also be corroborated by the introduction of the talion in the CH, which can be interpreted as a drastic intensification of the fine compared with the payments provided in the CU and the CE. Apparently the fines take on additional functions beyond merely covering the damage in terms of *Erfolgshaftung*.

Thirdly and finally, it can be seen that the *higher* fines in the CE for injuries remain within a significantly *smaller range* than in the CU. In the CE the range of fines for injuries is 20 to 60 shekels (a factor of

Tabel 12.5 ***Comparative Listing of fines and punishments for injuries and unintentional homicide in the CU, in the CE, and in the CH***

	CU 2100 BCE	CE 1770 BCE	CH 1750 BCE *awilum* (*muškenum*)
Nose	40 shekels	60 shekels	
Eye		60 shekels	(60 shekels)
Tooth	2 shekels	30 shekels	(20 shekels)
Ear		30 shekels	
Slap on cheek		10 shekels	60 shekels
Finger		20 shekels	
Hand		30 shekels	
Foot	10 shekels	30 shekels	
(Collar)bone	60 shekels	20 shekels	(60 shekels)
Homicide without intention		40 shekels	30 (20) shekels

3) – if we put the 10 shekel fine for the slap on the cheek aside for a moment, since it is not an injury but an offense against a person's honour. In the CU the range is much broader, reaching from 2 to 60 shekels (a factor of 30). This also may suggest that the fines are not just determined by the value of the loss.

How are these developments to be interpreted? As already mentioned, the fines in the CE, and especially in the CH, are apparently not only based on considerations regarding compensation, but also seem to fulfill the function of prohibition and deterrence. The fines are so high that crime is not only punished when having occurred, but virtually prohibited from being committed at all. In this respect, it is interesting to compare the fines for offending a man's honor ("slap to the cheek") in the CE ("10 shekels") and the CH ("60 shekels"): 60 shekels is not an adequate, but rather, a draconian fine for a bagatelle like a slap to the cheek. This is intended to make it an efficient medium to prevent such assaults. In the CE and especially the CH, it is therefore possible to observe a development from a compensatory law towards a criminal law, at least on the *awilum* level. As for the *muškenu* level, the law continues to be driven mainly by the principle of compensation.[31]

The preceding discussion suggests that despite the remarkable economic development between the time of the CU, the CE, and the CH – a bit less than four centuries – the perception of the value of the human body (at least, of the human body of an *awilum*) seems to have been de-economized, even de-monetized. This is supported by the prohibitively high fines for injuries in the CE, which are all within a relatively small range, and especially the abandonment of the compensatory payments in favor of the talion (among members of the *awilum* class) in the CH.

One might ask whether the execution of the talion in the CH or the high fines in the CE are the more severe punishment, as the raising of the compensatory payments must have equaled a life sentence, whereas the execution of the talion ended the case immediately. However, as in other cultures, the mutilation of a body is a very hard punishment that hardly overrides the economic "advantages" entailed in the execution of the talion.

[31] Otto, *Körperverletzungen*, 74.

II

How do the biblical legal regulations, especially in the so-called Covenant Code (CC, Exod. 20–23) relate to these findings?

When looking at the CC in the Hebrew Bible, a law book originating from the eighth to the sixth century BCE,[32] a more complicated picture emerges with regard to fines and punishments for bodily injuries and homicides. Nevertheless, as has often been noted, the CC shares many variously explained commonalities with ancient Near Eastern law books.[33] The ancient Near Eastern legal tradition was most likely handed down to and in ancient Israel within the framework of scribal education.[34] Therefore, it is only to be expected that the legislation of the CC shows similarities to its ancient Near Eastern predecessors, while providing its own interpretations and accentuations. Turning to the punishments for homicide and injuries, there is a strict regulation in the CC providing the death penalty for homicide.

Exod. 21:12 Whoever strikes (*mkh*) a person mortally shall be put to death.

Whether this homicide had been committed intentionally is not stated explicitly, although the action of “striking” in most cases is not really conceivable as an accident.[35] However, the following verses specify:

Exod. 21:13f: If it was not premeditated, but came about by an act of God (*wh'lhym 'nh lydw*), then I will appoint for you a place to which the killer may flee. But if someone willfully attacks and kills another by treachery, you shall take the killer from my altar for execution.

[32] Y. Osumi, *Die Kompositionsgeschichte des Bundesbuches Exodus 20, 22b-23, 33*. OBO 105, Fribourg: Universitätsverlag and Göttingen: Vandenhoeck & Ruprecht, 1991; F. Crüsemann, *Die Tora: Theologie und Sozialgeschichte des alttestamentlichen Gesetzes*, Munich: Kaiser, 1992, 132–8; Houtman, *Bundesbuch*; Rothenbusch, *Rechtssammlung*.

[33] Crüsemann, *Tora*, 170.

[34] L. Schwienhorst-Schönberger, *Das Bundesbuch (Ex 20, 22–23, 33): Studien zu seiner Entstehung und Theologie*. BZAW 188, Berlin and New York: de Gruyter, 1990, 260–8; K. van der Toorn, *Scribal Culture and the Making of the Bible*, Cambridge, MA and London: Harvard University Press, 2007.

[35] C. Houtman, *Exodus. Volume 3: Chapters 20–40*. HCOT, Leuven: Peeters, 2000, 135f.

According to this statement, offenders guilty of manslaughter do not have a legal guarantee to be spared the death penalty; however, they do have the chance to flee to a certain cultic place.[36] Exodus 21:12 therefore seems to be a general rule that may be applied to any homicide, be it committed on purpose or not. Yet for homicides resulting from an "act of God," there is the possibility legally to avoid the death penalty.

Furthermore, the CC extends the death penalty to other offenses:

Exod. 21:15: Whoever strikes (*mkh*) father or mother shall be put to death.
Exod. 21:16: Whoever kidnaps a person, whether that person has been sold or is still held in possession, shall be put to death.
Exod. 21:17: Whoever curses father or mother shall be put to death.

Like the older Mesopotamian law books, the CC also differentiates between different classes of humanity. In ancient Israel, however, there are only two classes – free and slave. Homicide of slaves is treated in Exodus 21:20, but the wording of this verse does not make immediately clear how the offender should be punished:

Exod. 21:20: When a slaveowner strikes a male or female slave with a rod and the slave dies immediately, the owner shall be punished (*nqm ynqm*).

The formulation rendered "he shall be punished" has led some scholars to conclude that a fine is in view, but this is not clearly stated. Moreover, to whom should such a compensatory payment be made? The slave was the owner's property and so, probably – at least in most cases – is his family.

It is also possible to interpret the regulation in Exodus 21:20 as a specification of the overall rule in Exodus 21:12: "Whoever strikes a person mortally, shall be put to death." Already the Samaritan Pentateuch reads "shall be put to death" instead of "shall be punished"[37] and thus clarifies the meaning.[38] Understood in this way, the intention of Exodus 21:20 seems to be the following: the death penalty applies even to cases *where the victim is a slave*.

However, this interpretation is contested. Houtman,[39] for example, thinks otherwise. He notices that Exodus 21:20 lacks the specific formulation *mot yumat* "shall be put to death." Nevertheless, the

[36] Houtman, *Exodus*, 140–1. [37] Houtman, *Exodus*, 157.
[38] B. Jacob, *The Second Book of the Bible. Exodus*, Hoboken: Ktav Publications, 1992, 648.
[39] Houtman, *Exodus*, 158–9.

semantics of *nqm* still point to the death penalty. Leviticus 26:25 interprets *nqm* with the expression "to bring the sword upon you," i.e. killing. Schwienhorst-Schönberger[40] and Westbrook[41] think of "vicarious punishment": "the appropriate member of the creditor's family is liable to be killed by way of revenge: if the victim were a son – his son; if a daughter – his daughter" (ibid.).

In sum, it seems more plausible to assume that Exodus 21:20 has the death penalty in mind, although this is not explicitly stated. When read in this way, the continuation in Exodus 21:21 also makes good sense:

Exod. 21:21: But if the slave survives a day or two, there is no punishment (*l'yqm*); for the slave is the owner's property.

A slaveowner is to be executed when intentionally and brutally he beats his slave so that he or she dies immediately. If the blow does not cause immediate death, then the owner goes free. Exodus 21:20f therefore seems to be a regulation protecting slaves – it is striking that there is no difference between male and female slaves – from excessive physical violence on the part of their owners. Furthermore, the specification "the slave is the owner's property" again suggests that the interpretation of Exodus 21:20 as a monetary payment is hardly possible.

Compensatory payments are only provided in the CC for cases involving injuries, but not intention (*yrybn* "quarrel") or homicide:

Exod. 21:18f: When individuals quarrel and one strikes the other with a stone or fist so that the injured party, though not dead, is confined to bed, but recovers and walks around outside with the help of a staff, then the assailant shall be free of liability, except to pay for the loss of time, and to arrange for full recovery.

The payment in this case covers only what has been lost; there is no additional fee. The payment has a purely compensatory function. Apparently this is sufficient because there are no lasting damages (*rp' yrph'* "full recovery").

For more complicated cases (where no "full recovery" is possible), the following regulation seems to provide a model for decisions:

[40] Schwienhorst-Schönberger, *Bundesbuch*, 70–4. [41] Westbrook, *Studies*, 91.

Exod. 21:22–25: When people who are fighting injure a pregnant woman so that there is a miscarriage, and yet no further harm (*’swn*) follows, the one responsible shall be fined what the woman’s husband demands, paying as much as the judges determine. If any harm (*’swn*) follows, then you shall give life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burn for burn, wound for wound, stripe for stripe.

This of course is rather a specific case, and it is unlikely that it happened very often. However, it may have served as a sample case that helped to decide similar matters.

The regulation includes the following premise: if a third party is injured in a fight (which again means unintentionally), then a judge may set a specific sum *which may be more* than merely the amount for covering the damage. The legitimation for this seems to lie in the fact that the pregnant woman is not involved in the fight and therefore carries no responsibility.

This is followed in Exodus 21:23–25 by the most prominent mention of the *lex talionis* in the Old Testament:[42] if there are further damages, “then you shall give life for life, eye for eye, tooth for tooth” and so forth. What does that mean?

First, one must ask about the meaning of the term *’swn*, often rendered as “harm.” Is it only a harm if death results, or also a harm in a wider sense?[43] The term *’swn* is used in the Hebrew Bible on only three other occasions, all within the Joseph story – in Genesis 42:4 (“But Jacob did not send Joseph’s brother Benjamin with his brothers, for he feared that *harm* might come to him”), 42:38 (“But he said, ‘My son shall not go down with you, for his brother is dead, and he alone is left. If *harm* should come to him on the journey that you are to make, you would bring down my gray hairs with sorrow to Sheol’”), and 44:29 (“If you take this one also from me, and *harm* comes to him, you will bring down my gray hairs in sorrow to Sheol”). These instances seem to

[42] See Otto, “Geschichte des Talions;” A. Graupner, “Vergeltung oder Schadensersatz? Erwägungen zur regulativen Idee alttestamentlichen Rechts am Beispiel des ius talionis und der mehrfachen Ersatzleistung im Bundesbuch,” *EvTh* 65 (2005), 459–77.

[43] See Schwienhorst-Schönberger, *Bundesbuch*, 89–94; Otto, *Körperverletzungen*, 119–20; Crüsemann, *Tora*, 190 n. 266; Houtman, *Exodus*, 163–4; Graupner, “Vergeltung,” 467.

reckon with the fact that *'swn* implies death. But *'swn* is also found in parts of the deuterocanonical book of Sirach (written around 180 BCE) preserved in Hebrew – in Sirach 38:18 ("Out of grief results harm [*'swn*]"); 41:9 ("if you increase, then for harm [*'swn*]") which witness to a broader understanding. However, these findings do not help much further, because the possibility cannot be excluded that the term *'swn* underwent some changes in meaning between the CC and the book of Sirach. It is not possible to decide about the meaning of the term *'swn* with certainty. Reading Exodus 21:22–25 in context, *'swn* seems to have a lasting, incurable injury to the mother or the future child in view, perhaps even death. It treats a counter-case to Exodus 21:18f, where "full recovery" is possible.

Far more important is a second observation: it is crucial to see that *ntn*, "to give" (Exod. 21:23: "then you shall give life for life, eye for eye"), in the CC always refers to *paying* a specific sum (Exod. 21:19, 22, 30; in all these instances, the New Revised Standard Version renders *ntn* "to give" correctly with "to pay"), like the Akkadian equivalent *nadanu* in the corresponding contexts.[44] Where the CC envisions a refund, it uses *šlm* "to refund" (see Exod. 21:36, 37; 22:4). But lost "health" cannot be "refunded" as such; therefore, there is a payment for the lost value.

The specific formulation in Exodus 21:23 therefore seems to point quite clearly to a metaphorical interpretation of the *lex talionis* as an accordingly assigned fine. Who should, otherwise, be the addressee of "then you shall give life for life" if this regulation should imply the death penalty? Is it the executor? But how should he "give" a life? The process of execution is, as Exodus 21:14 shows, formulated differently. Is it the offender? How shall he "give" his life? Shall he sacrifice himself?[45] The verbatim understanding of Exodus 21:23 does not make much sense. These observations suggest that the *lex talionis* here is conceived in a monetized way: you *shall pay* as much as a life is worth, you *shall pay* as much as an eye is worth, etc. But, of course, this interpretation of the *talio* as a *payment* shall still be recognizable *as an interpretation* to

[44] See D. Daube, *Studies in Biblical Law*, Cambridge: Cambridge University Press, 1947, repr. 1963, 137–8; H.-W. Jüngling, "'Auge für Auge, Zahn für Zahn': Bemerkungen zum Sinn und Geltung der alttestamentlichen Talionsformeln," *ThPh* 59 (1984), 19–20; Schwienhorst-Schönberger, *Bundesbuch*, 101–2; Graupner, "Vergeltung," 469–70.

[45] Schwienhorst-Schönberger, *Bundesbuch*, 99.

the reader, as the concrete formulation shows. Exodus 21:21–25 is both tradition and innovation; it relies on the old tradition of the talion, but interprets it in terms of monetary payments.

Interestingly, the Babylonian Talmud in its exegesis of this passage strongly insists on the interpretation of the talion as payment and provides several arguments for the conclusion that only payments are a just application of the talion. For example, if the offender has a small eye and the victim has a big eye, how can the small eye compensate for the big one? Or, what if the offender was already blind? Therefore, according to the Babylonian Talmud, the talion needs to be understood as referring to payments.

On the other hand, the Greek legislation of Zaleukos, according to Demosthenes, feels the need to exclude explicitly the possibility of a payment of the talion in replacement: "If someone puts out an eye, his own eye shall be put out, and there shall be no possibility of a material substitute."[46]

Moreover, such an interpretation of Exodus 21:23–25 in the sense of a payment would be in accordance with the preceding regulations. Especially the "life for life" sentence as understood literally contradicts Exodus 21:13 and 21:21. This collision can be avoided if "life for life" is conceived as a regulation including a compensatory payment.

Finally, this interpretation clarifies why the statements in Exodus 21:26f. follow these regulations:

Exod. 21:26f: When a slaveowner strikes the eye of a male or female slave, destroying it, the owner shall let the slave go, a free person, to compensate for the eye. If the owner knocks out a tooth of a male or female slave, the slave shall be let go, a free person, to compensate for the tooth.

Because slaves are not entitled to their own money, they cannot be compensated by payments. Instead they should be released if their owner destroys their eye or knocks out one of their teeth. Apparently Exodus 21:26f follows Exodus 21:22–25 in order to provide a sub-case.

Finally, the famous regulation about the "goring ox"[47] provides guidance on how to deal with unintentional homicide due to

[46] Crüsemann, *Tora*, 175 n. 203.

[47] Exod 21:28–32, see the corresponding paragraphs in CE §§ 53–5 and CH §§ 250–2; Schwienhorst-Schönberger, *Bundesbuch*, 129–62.

carelessness or negligence. Again, this case seems to be very specific, but it owes its explicit regulation in the CC to the fact that it provides guidelines for similar cases.

Exod. 21:28–32: When an ox gores a man or a woman to death, the ox shall be stoned, and its flesh shall not be eaten; but the owner of the ox shall not be liable. If the ox has been accustomed to gore in the past, and its owner has been warned but has not restrained it, and it kills a man or a woman, the ox shall be stoned, and its owner also shall be put to death. If a ransom (*kwpr*) is imposed on the owner, then the owner shall pay whatever is imposed for the redemption of the victim's life. If it gores a boy or a girl, the owner shall be dealt with according to this same rule. If the ox gores a male or female slave, the owner shall pay to the slave-owner thirty shekels of silver, and the ox shall be stoned.

Accidents resulting from a goring ox do not in and of themselves produce any liability for the owner. But if the owner knows that his ox gores, and proceeds to act carelessly, he is liable to the extent of the death penalty. In this case, the accident is not treated as a lethal accident, but as homicide. There is the possibility of a payment ("ransom"), but there is no guarantee of this. The more specific regulation, "If it gores a boy or a girl, the owner shall be dealt with according to this same rule," clarifies that a ransom shall *always* be imposed in the case of the death of a child (rather than a vicarious punishment). In contrast to the case of intentional homicide of a slave which is also punished by the death penalty (Exod. 21:20), the accidental killing of a slave due to carelessness and negligence does not result in the death penalty for the responsible person, but rather, in a payment of 30 shekels.

The "stoning of the ox" may sound atavistic,[48] but the practical sense of this measure is apparently to render impossible another such incident caused by this ox. Other instances of "stoning" in the Hebrew Bible (Exod. 8:22; 17:4; 19:12f; Josh. 7:24f; 1 Sam. 30:6) suggest that the meaning of "stoning" is not a punishment subsequent to a trial, but an immediate action designed to protect the community from a deadly danger. Nevertheless, there may be some religious overtones in Exodus 21:28–32, since the ban on eating the flesh of

[48] See the scholarly discussion in Schwienhorst-Schönberger, *Bundesbuch*, 132–6.

the ox is present as well. But this may also be understood as a fine – the owner is not allowed to take advantage of any benefits the dead ox might provide.

III

What are the profile and the inner logic of these regulations in the CC, especially in light of the legal tradition witnessed by CU, CE, and CH?

Firstly, homicide is generally punishable by the death penalty even if the victim is a slave. The loss of a human life – be it of a free man or a slave – cannot be "compensated." In the legislation of the CC, the idea might have played a role that every slave – due to the law of the manumission of the slaves – is potentially a "free man." Even the lack of intention does not guarantee protection from prosecution and punishment. As mere exceptions, compensatory payments for homicide are only possible where a third party is affected and where no intention is given ("pregnant woman"). If the case involves carelessness or negligence ("goring ox"), then the death penalty applies, but the possibility of a ransom remains. It is interesting that the Hebrew Bible is reluctant to *guarantee* exceptions from the death penalty, even one providing the possibility of such exemptions.

Secondly, it is noteworthy that the CC rarely sets any fixed amounts for payments even when fines are allotted. The fine must be fixed by a judge, apparently taking into account the circumstances of the case (amount of intention and/or carelessness), the economic situation of the offender, and the needs of the victim. The only fixed price is the value of a slave (30 shekels). The mention of the talion in Exodus 21:23–25 (bodily injury or homicide of a third party without intention) should be understood as a monetized transformation, and therefore might be interpreted as a guideline for the amount of the compensatory payments in the following manner: to put out an eye entails a fine corresponding to the value of that eye, but this value cannot be fixed in an absolute, monetized way. The process of a systemic de-monetarizing of the human body conceived in the ancient Near Eastern law tradition continues into the Hebrew Bible, but the Hebrew Bible seeks solutions other than a verbatim executed talion in the case of bodily injuries. There are payments, but their amount is not fixed. (So, in another respect, one could also speak of a re-monetization.)

Thirdly, there are hardly any regulations extant for cases of bodily injuries among free persons. The CC is especially concerned with cases of injuries to slaves, which are also fined "draconically" in order to prevent mistreatment of slaves (Exod. 21:26f). An injured slave is rewarded by freedom, which at the same time means a loss of his or her value (30 shekels) to the owner.

When looking back over these findings in ancient Near Eastern and ancient Israelite law books, it is noteworthy that the developing economization of a society does not necessarily entail a thorough and consequent monetization of all of its parts. There are also counter-examples of processes of de-monetization, especially in the regulations on homicide and bodily injuries in these various law books.[49] Apparently monetization is not only a development to measure everything in terms of money, but seems to be capable of sharpening the perception of non-monetary values as well.

IV

When speaking of "monetization," "demonetization," etc., in the realm of ancient Israel and Judah, it needs to be kept in mind that the CC probably developed before "coined" money found its way to Palestine in the fifth century BCE.[50] Nevertheless, one has to acknowledge that the existence of a "monetized" economy *in a broader sense* in ancient Israel and Judah is older. The beginnings of an economy that exceeds the possibilities of a system based primarily on the non-pecuniary exchange of goods and services seems to have co-emerged with the formation of the "nation state" in ancient Israel.[51] It is, more or less, a shared assumption in recent Hebrew Bible scholarship that Israel became a "state" in the ninth century BCE. In Judah – which was politically and economically less significant than Israel – this

[49] These findings from the ancient world shed some new light on current discussions on comparable problems, see the contribution by Günter Thomas in this volume. On the stunningly high amount of sophistication in biblical discussions on "money," see M. Welker's article on Kohelet in this volume.

[50] U. Rappaport, "Numismatics," in: *The Cambridge History of Judaism 1*, ed. W. D. Davies and L. Finkelstein, Cambridge: Cambridge University Press, 1984, 25. See especially the article by U. Hübner in this volume.

[51] H. Weippert, "Geld," BRL, Tübingen: Mohr, 1977, 88.

happened about a century later.[52] Domestic (buildings: 2 Kings 12:5–15; 22:3–7; horses and chariots: 1 Kings 10:28) as well as foreign affairs (toll payments: 2 Kings 12:19; 14:14; 15:20; 16:8; 18:14) required the king to have certain amounts of "money" at his disposition; and this certainly contributed to the rise of a monetized economy.[53]

However, it is clear that "money," *in a narrower sense* of coins, does not appear in Judah before the Persian Period,[54] which is, of course, also true for the Mesopotamian cultures. Nevertheless, in earlier times there were already certain kinds of materials that could be used as "money" – rings, disks, bars, wedges (*tongues*, Josh. 7:21, 24), etc., as a number of biblical texts suggest. Since there were no standardized weights and measures for metals, one had to use scales to determine the value of merchandise in relation to the precious material that was used for payment. This preliminary form of "money" seems to be of Egyptian origin, whereas hacked precious metals (bullion) were used in Mesopotamia, but were also well known in Syria and Palestine: hack-silver has often been found in excavations[55] and is also attested in biblical texts (e.g. Isa. 46:6; Jer. 32:9–10). Moreover, one should keep in mind that there is no clear terminological distinction between "money" and "silver" in biblical Hebrew.[56]

This corresponds with the fact that coins in ancient Israel were never fully taken for their par value. Their value was also, or even mainly, dependent on their concrete weight and material, as traces of hacking on several coins and mixed finds of coins and bullions indicate.[57]

[52] D. W. Jamieson-Drake, *Scribes and Schools in Monarchic Judah: A Socio-Archaeological Approach*. JSOT.S 109 and SWBA 9, Sheffield: Sheffield Academic Press, 1991.

[53] For the pre-history of money before the state formations of Israel and Judah see K. Jaroš, "Geld," NBL 5, Zurich: Benziger, 1991, 773.

[54] Y. Meshorer, *Jewish Coins of the Second Temple Period*, Tel Aviv: Am Hassefer, 1967; G. Mayer, "*ksp*," ThWAT IV, Stuttgart et al.: Kohlhammer, 1984; L. Mildenberg, "Yehud-Münzen," in: *Palästina in vorhellenistischer Zeit*. Handbuch der Archäologie Vorderasien II/1H, ed. H. Weippert, Munich: C.H. Beck, 1988; U. Hübner, "Münze," NBL 5, Zurich: Benziger, 1995, 850–53, and especially idem, "The development of monetary systems in Palestine during the Achaemenid and Hellenistic Eras" in this volume.

[55] Beth-Shean, Megiddo, Ein-Gedi (Weippert, "Geld," 89).

[56] *ksp*, see Mayer, "*ksp*"; J. W. Betlyon, "Coinage," AncBD 1, New York: Doubleday, 1992, 1076; Ezr. 2:69 and Neh. 7:70–71 mention *darkmomim*, i.e. Drachmai.

[57] W. Schwabacher, "Geldumlauf und Münzprägung in Syrien im 6. und 5. Jahrhundert," *Opuscula Archaeologica* 6 (1950), 139–49.

Zech. 11:13, a late third-century BCE text, points to the existence of an official melting down of coins in the Jerusalem temple,[58] a process which only makes sense if the material that was melted down retained its value. Similarly, Herodotus reports on the tribute received by Darius I from the 20 satrapies (*Hist*. III 96): "This tribute the king stores up in his treasure house in the following manner: He melts it down and pours it into jars of earthenware, and when he has filled the jars he takes off the earthenware jar from the metal; and *when he wants money he cuts off so much as he needs on each occasion*." This process of "cutting off money" shows that Darius I himself relied on hacked silver as opposed to coined "money."

Moreover, the appearance of coined money under the rule of Darius I seems to be an innovation that was foremost due to *political* rather than to *economic* circumstances.[59] Already Herodotus notes: "Darius wished to perpetuate his memory by something no other king had previously done." The coining of money seems not only to have been a revolutionary act in the economic realm; it also serves as a political demonstration of the power and sovereignty of the Persian king. It is, therefore, not altogether surprising that the first coining of *high* values in Judah – as late as the Jewish War (66–70 CE) (shekels and half-shekels) – served the same purpose: it demonstrated the power of the Jewish revolutionaries. The coins of that time show inscriptions like "Jerusalem the holy one," "Shekel of Israel," "Liberty of Zion," "For the liberation of Zion."[60]

Therefore, one should keep in mind that *coined* "money," even in Persian times, was not yet an indispensable economic instrument. Coins from the Persian period in ancient Judah are almost exclusively of local origin – coined by the local governor – and represent only small values. Hardly any Persian imperial coin or coins from Egypt, Cyprus, or Asia Minor (only a few from Greece) have been found in Judah.[61]

[58] O. Eissfeldt, "Eine Einschmelzstelle am Tempel zu Jerusalem" (1937/1939), in *Kleine Schriften II*, ed. idem, Tübingen: Mohr Siebeck, 1963, 107–9.

[59] L. Mildenberg, "Über das Münzwesen im Reich der Achämeniden," in *Vestigia Leonis: Studien zur antiken Numismatik Israels, Palästinas und der östlichen Mittelmeerwelt*. NTOA 36, ed. U. Hübner and E. A. Knauf (Fribourg: Universitätsverlag and Göttingen: Vandenhoeck & Ruprecht, 1998), 3–29; P. Briant, *From Cyrus to Alexander: A History of the Persian Empire*, trans. by P. T. Daniels (Winona Lake: Eisenbrauns, 2002), 409.

[60] Betlyon, "Coinage." [61] Rappaport, "Numismatics," 29.