

working draft

Miscarriage and Talion in Exodus 21:22-27

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Scholarship generally sees the miscarriage, talion, and slave-injury laws (Exod 21:22-27) in the Covenant Code as the result of complex redactional development (for the full text, see below).¹ The original law may have consisted of a version of v. 22, without the inconsistency between two men knocking the woman but only one paying the penalty and perhaps without the phrase about paying *בְּקִלְיָם*, whatever that means. This original law may have read: "When men struggle and they knock a pregnant woman and her foetus² comes out, but there is no *וְיָסָף* they shall be fined as the husband of the woman exacts from them." If a version of the second miscarriage law in v. 23 was also original, its protasis read "If there is *וְיָסָף*," as the present biblical text. Yet its apodosis may have been different from the present "you shall pay life for life." The second person verb here "you shall pay" is irregular in the context of casuistic style. Hence the apodosis to this second law may have originally read "*he* shall give life for life." In any case, the delineation of other talion penalties in vv. 24-25 "an eye for eye, tooth for tooth, arm for arm, leg for leg, burn for burn, injury for injury, wound for wound" is almost universally viewed as secondary to the miscarriage law. The style of these verses deviates from casuistic law, and they include injuries that go beyond the context of injury to a pregnant woman or her child. In addition, some argue that these two verses did not arise on the same level. Verse 25 about a burn, injury and wound--injuries to an unspecified part of the body--may be secondary to the eye, tooth, arm, and leg of v. 24. Finally, the laws that follow in vv. 26-27 and that speak of injuries to a slave's eye or tooth correlate with the talion laws about an eye and tooth in v. 24. Therefore these latter verses can only have been added at the same time as or later than the talion list of v. 24. In sum, there appear to be two, three, four, or even more strata in these laws.

The evidence adduced and the logic employed for a redactional argument along these lines, even though the details are debatable, are compelling. I would agree to a version of this reconstruction if it were not for a complicating piece of evidence. As I have spelled out so far in a few articles on the subject,³ the whole of the Covenant Code, both its casuistic and apodictic laws, appears to be based on the Laws of Hammurabi as a

source and a model. The use of the Laws of Hammurabi most likely occurred in the Neo-Assyrian period, between 740-630 BCE and prior to the composition of the basic laws of Deuteronomy that use the Covenant Code as a source. The evidence for the conclusion about dependence on the Laws of Hammurabi includes not only the topical correlation between the various casuistic laws of the collections and the fact that almost every casuistic law in the Covenant Code has a correlate in the Laws of Hammurabi. It also includes the fact that the Covenant Code reflects the order of the laws the latter half of Hammurabi's text, starting with the debt-servant law of LH 117 (=21:2, 7). Moreover, in its apodictic laws, the Covenant Code reflects the thematic pattern of the exhortatory block of the epilogue (col. 47:59-49:17). The Covenant Code also shares the A-B-A genre distribution of Hammurabi's composition, though the Covenant Code's outer sections consist of apodictic law instead of royal praise. Therefore, from beginning to end, and from detailed level to broad structure, the Covenant Code correlates with the Laws of Hammurabi. This cannot be explained by coincidence or oral tradition. When Hammurabi's text seen as a source for the Covenant Code, the redactional complexities of many of the laws, including the miscarriage, talion, and slave injury laws, find a different solution. They are the result, not of successive growth and development, but of a unitary creative revision and recombination of different laws from Hammurabi's text. The Covenant Code has done to the Laws of Hammurabi what Deuteronomy did to the Covenant Code or what the Holiness Legislation did to both the Covenant Code and Deuteronomy.⁴ It has taken a prestigious legal document and transformed it to create something entirely new.

We do not have time to review the detail of the Covenant Code's contextual and structural correlations with the Laws of Hammurabi. We can note, however, that the core assault laws in the Covenant Code and the Laws of Hammurabi share a common structure and content. LH 206-208, which appear just before the miscarriage laws of LH 209-214, form a series about the injury of a free person, homicide of a free person, and homicide of a commoner. The Covenant Code's injury laws in 21:18-21, as well as its homicide law in 21:12-14, are based on these.

Exod 21:18-21	LH 206-208
¹⁸ When men fight and one strikes his fellow with a stone or with a fist, and he (the latter) does not die but takes to his bed— ¹⁹ if he gets up and walks about outside on his staff, the striker is absolved, but he must recompense him for his period of inactivity and provide for his cure.	²⁰⁶ If an <i>awilum</i> strikes another <i>awilum</i> in a fight and injures him, that <i>awilum</i> shall swear (saying), "I did not strike him with intent," and he shall pay the physician.
¹² He who strikes a man so that he dies shall be put to death, ¹³ and he who did not plan it, but God directed (him) to his hand, I will appoint a place for you to which he may flee. ¹⁴ If a person plots against his fellow to kill him by deceit, you shall take him from my altar to be put to death	²⁰⁷ If he dies from his being struck, he shall also swear (as in previous paragraph). If (the victim) is an <i>awilum</i> , he shall weigh out one-half mina (= thirty shekels) of silver.
²⁰ If a man strikes his male slave or female slave with a rod and he (or she) dies under his hand (i.e., immediately), he is to be avenged. ²¹ But if he lingers for a day or two, he shall not be avenged, since he is his (the master's) property.	²⁰⁸ If (the victim who dies when struck) is a common person, he (the assailing <i>awilum</i>) shall weight out one-third mina (= twenty shekels) of silver.

The Covenant Code has moved the middle law on homicide (LH 207), which deals specifically with inadvertent homicide, to the head of its assault laws in 21:12-14. This is a reasonable and logical reordering of the text. The outer laws of the series, LH 206 and 208, remained as the basis for the contiguous laws of 21:18-19 and 20-21, respectively. The laws on injury to a person in LH 206 and 21:18-19 display their relationship in contextualizing the injury in a fight, describing the injury as arising from striking, and requiring payment for recovery. The Covenant Code has more creatively transformed the laws on killing one of a lower class. LH 208 treats a commoner whereas 21:20-21 treat a slave. The Covenant Code has chosen to deal with a slave since it may have accorded better with Israelite/Judean social reality and also because laws in the immediate vicinity of LH 206-208 do in fact have social gradations that include slaves (LH 196-201, 202-205, 209-214, 215-217, 218-220, 221-223). The Covenant Code has also been innovative in its slave-homicide law by including features of the debt-servant legislation of LH 116. I will cite and discuss this text in another context, below.⁵

The parallel blocks of laws on injury-homicide in both collections (LH 206, 208 // 21:18-19, 20-21) are followed directly by the miscarriage laws: LH 209-214 and 21:22-23.⁶ A primary difference is that while Hammurabi's legislation treats cases with socially graded victims—free woman, commoner, slave—the Covenant Code treats only one case

involving a woman, implicitly free.⁷ Hence 21:22-23 correlates specifically with LH 209-210.⁸

Exodus 21:22-25	LH 209-210
<p>²²When men struggle and they knock a pregnant woman and her foetus comes out, but there is no calamity/accidental death (אסון), he shall be fined as the husband of the woman exacts from him, and he shall pay (ונתן) <i>bip̄l̄l̄im</i> (בפללים).</p> <p>²³If there is calamity/accidental death (אסון), you shall pay (ונתתה) life for life, ²⁴eye for eye, tooth for tooth, arm for arm, leg for leg, ²⁵burn for burn, injury for injury, wound for wound.</p>	<p>²⁰⁹If an <i>awilum</i> strikes an <i>awilum</i> -woman (literally: daughter of an <i>awilum</i>) and he causes her to miscarry her fetus, he shall weight out ten shekels of silver for her fetus.</p> <p>²¹⁰If that woman dies, they shall kill his daughter.</p>

Hammurabi's laws deal with two cases: the first where a child is born dead but the mother is unhurt and the second where the mother also dies. It is reasonable to view the biblical laws as reflecting the same cases.⁹ But there are two problems that complicate this: the obscure term אָסוֹן in vv. 22-23 and the anomalous second person verb form "you shall give" וְנָתַתָּה in v. 23. Westbrook ties the two problems together and argues that אָסוֹן means "a case of a perpetrator unknown." The phrase "and there is no אָסוֹן" in v. 22 is therefore conceptually a double negative: "it is not a case in which the perpetrator is unknown," i.e., the perpetrator is known. Therefore the assailant pays the fine of v. 22b. The second law of v. 23 describes a case where the perpetrator is not known or determinable. In this case the community—i.e., the "you" of "you shall give" in v. 23—provides the remedy.¹⁰

This interpretation of אָסוֹן seems a stretch, and the verb "you shall give" does not demand this interpretation, as we will see later on. Rather, the source evidence indicates that אָסוֹן refers to the death of the woman. This understanding is consistent with the other attestation of the term in which it refers to the misfortune that might befall Benjamin, Joseph's brother, should he travel to Egypt (Gen 42:4, 38; 44:29).¹¹ The meaning of אָסוֹן must accordingly be more specifically "calamitous death" or perhaps even "accidental death."¹² Thus v. 23, which says that "there is אָסוֹן," means that the mother has suffered such a death.¹³ This makes sense in the context, which presents the event as inadvertent (see below).

Perhaps the most striking difference between the Covenant Code's law and its source is the change of the penalty in the case that the woman dies. In LH 210, if the woman--described as "daughter of a man" (*marāt awīlim*)--dies, the daughter of the assailant is to be put to death. The Covenant Code has the requirement "you shall give life for life" (v. 23) followed by the talion list. The Covenant Code has replaced the penalty of Hammurabi's law.

One of the reasons for this is that the Covenant Code does not countenance vicarious punishment. This is clear from the goring ox laws. The Covenant Code replicates the basic outline of Hammurabi's ox laws: they both begin with a case of *ad hoc* goring (LH 250 // 21:28), followed by a case where the owner of the animal has been warned but does not control it (LH 251 // v. 29), followed by a case of goring a slave (LH 252 // v. 32):

Ex 21:28-32	LH 250-252
<p>²⁸If an ox gores a man or woman and he dies, the ox shall be stoned, its flesh shall not be eaten, and the owner of the ox is not liable.</p> <p>²⁹If an ox is a habitual gorer, from previous experience, and its owner has been warned, but he did not restrain it, and it kills a man or woman,</p> <p>the ox shall be stoned and its owner shall be put to death.</p> <p>³⁰If ransom is laid upon him, he shall pay the redemption price for his life, according to whatever is laid upon him.</p> <p>³¹Or (if) it gores a son or daughter, it shall be done for him according to this law.</p> <p>³²If the ox gores a male slave or a female slave, he shall pay thirty shekels of silver to his (the slave's) master and the ox shall be stoned.</p>	<p>²⁵⁰If an ox gores a man while passing through the street and kills (him), that case has no claim.</p> <p>²⁵¹If a man's ox is a habitual gorer, and his district has informed him that it is a habitual gorer, but he did not file its horns and did not control his ox, and that ox gores a man of the <i>awīlum</i>-class/son of a man (<i>mār awīlim</i>) and kills (him),</p> <p>he shall pay one-half mina (= thirty) shekels of silver.</p> <p>²⁵²If it is the slave of an <i>awīlum</i> he shall pay one-third mina (= twenty) shekels of silver.</p>

The Covenant Code inserts a law about a child being a victim in the case where an owner has been warned about his animal (v. 31). This is not a later addition but part of the Covenant Code's "interpretation" of the Laws of Hammurabi. The victim in the correlative Akkadian law is described as a "son of a man" (*mār awīlim*). Modern scholarship, e.g., Westbrook versus Yaron, disputes whether this should be taken literally

or mean "a member of the *awīlum* class."¹⁴ Apparently this dispute existed in antiquity. The Covenant Code rendered this law following both interpretations, with v. 29 according to the meaning "member of the *awīlum*-class," hence an adult, and v. 31 according to the literal meaning, referring to a child. The Covenant Code's inclusion of a child-victim law in the context of the ox laws may have also been prompted by the law about a shoddy house that falls and that kills an owner's child in LH 230. According to this law, the contractor's son is to be put to death. This law is not far from Hammurabi's goring ox law and may have influenced the Covenant Code's negligence law in 21:33-34.¹⁵

The Covenant Code appears to reject vicarious punishment in another case. As noted above, the slave-homicide laws of 21:20-21 are built partly on the laws about killing one of a lower class in LH 208 and partly on the law about killing a debt-servant in LH 116. LH 116 requires vicarious punishment (the layout of texts here shows the relationship of vv. 20-21 to both LH 115 and 116):

Exod 21:20-21	LH 115-116
<p>²⁰When a man strikes his male slave or his female slave with a rod and he dies under his hand, he shall suffer vengeance.</p> <p>²¹But if he (the slave) endures for a day or two, he will not suffer vengeance, because he is his silver.</p>	<p>¹¹⁵If a man is owed grain or silver by another man and he (the creditor) takes the from the debtor the one to serve as a debt servant into debt servitude, and then the debt servant dies (naturally) in the house of creditor, that case has no claim.</p> <p>¹¹⁶If the debt servant dies from beating or from mistreatment in the house of his/her creditor, the owner of the debt servant (= the debtor) shall bring proof against his merchant. If (the debt servant was) the man's son, they shall kill his son. If (the one in bondage was) the man's slave, he shall weigh out one-third mina (= twenty shekels) of silver. He shall forfeit as much as he gave as a loan.</p>

It has been argued that the Covenant Code's verb "to suffer vengeance," which employs the root נָקַם , refers to vicarious punishment.¹⁶ This is not entirely clear. One might expect the Covenant Code to be more forthright on the issue if this is its intent. In any case, the Covenant Code precludes this interpretation because it does not describe the victim as a child. The vague verb נָקַם may have been chosen, not because it allows for vicarious punishment, but because of the complexity of the Covenant Code's having blended chattel- and debt-slave laws. It may refer to different forms of vengeance

appropriate to the specific status of the slave. Alternatively, or even concomitantly, the verb may refer to the ideal of capital punishment but allow compensation, similar to the options in the goring ox laws (vv. 29-30).

To replace the unacceptable rule of vicarious punishment in the miscarriage law of LH 210, the Covenant Code pulled in the talion laws from LH 196-201, which it had hitherto ignored in its sequential use of Hammurabi's laws to this point. The Covenant Code did not need to go far to access the talion laws; they appear just a few paragraphs before the core laws on injury, homicide, and miscarriage in LH 206-214 that CC used for 21:12-14, 18-23:

Exodus 22:23b-25	LH 196-201
^{23b} ...you shall give life for life, ²⁴ eye for eye, tooth for tooth, arm for arm, leg for leg, ²⁵ burn for burn, injury for injury, wound for wound.	¹⁹⁶ If an <i>awilum</i> blinds the eye of a member of the <i>awilum</i> -class, they shall blind his eye. ¹⁹⁷ If he breaks the bone of an <i>awilum</i> , they shall break his bone ¹⁹⁸ If he blind the eye of a commoner or breaks the bone of a commoner, he shall weigh out one mina (sixty shekels) of silver. ¹⁹⁹ If he blinds the eye of an <i>awilum</i> 's slave or breaks the bone of an <i>awilum</i> 's slave, he shall weigh out half of his value. ²⁰⁰ If an <i>awilum</i> knocks out the tooth of an <i>awilum</i> of the same rank, they shall knock out his tooth. ²⁰¹ If he knocks out the tooth of a commoner, he shall weigh out one third mina (twenty shekels) of silver.

All of the talion dyads in v. 24 have correspondences in the Laws of Hammurabi. An "eye" is found in LH 196, 198, 199; a "tooth" is found in LH 200-201; an "arm" and "leg" include fractures, which are mentioned in LH 197, 198, 199. The other dyads in the Covenant Code's law derive from other laws. The equation "life for life" in v. 23b is an analogical expansion of the cases in LH 196-201 and probably echoes the capital verdict in the miscarriage law in LH 210.¹⁷ The Covenant Code has reformulated this requirement to fit its talion wording. The "burn," "injury," and "wound" in v. 25 may derive from Hammurabi's injury laws.¹⁸ LH 206, which, as we have seen, guided the formulation of vv. 18-19, talks about the striker inflicting a *simmum* "wound" on his opponent.¹⁹ The terms תַּצַּע "injury" and הַבִּינָה "wound" in v. 25 are apt renderings of *simmum*. The term בָּנָה "burn" can be viewed as a logical extension of injury phenomenology.²⁰

The Covenant Code made two other significant changes to its sources in connection with the incorporation of the talion summary. First it converted the modality of the assault in miscarriage from intentional to inadvertent assault. That the assault in Hammurabi's law is intentional is indicated by the law's not referring to inadvertence, in contrast to the assault laws that precede in LH 206-208, where inadvertence is clear. It is also visible in the severe requirement of vicarious punishment for killing the pregnant woman. The Covenant Code, differently, portrays the context as two men fighting. This motif was introduced from the context of injury in v. 18 and its source in LH 206.²¹ This datum in the miscarriage law portrays the men as only happening to knock the woman, an unintended consequence.²²

The change of the modality of intention is tied to the other change that the Covenant Code made to its source. While the talion laws of the Hammurabi's text prescribe, perhaps rhetorically, that corporal retaliation is to be exacted for corporal injury (specifically in the cases of free persons), the Covenant Code prescribes only payment. The verb that governs the Covenant Code's talion list is "you shall give" וְנָתַתָּה in v. 23b. In other passages in the Covenant Code the verb נָתַן means "to pay":²³ one who incapacitates another "gives (i.e., pays) for his period of inactivity" (v. 19); in the first miscarriage law, the assailant "gives (i.e., pays)" the amount exacted by the husband (v. 22); and the owner of an ox that fatally gores "gives (i.e., pays) a ransom for his life according to what is exacted from him" (v. 30) or, for a slave, "gives (i.e., pays) thirty shekels of silver" (v. 32). This usage of נָתַן parallels the use of Akkadian *nadānum* "to give" which means "to pay" in various laws.²⁴ "Giving life for life" in the Covenant Code, therefore, means paying the equivalent of the life lost; "giving an eye for an eye" and so on down the talion inventory means paying the equivalent for the loss of body part or the injury.²⁵

This leads to the solution for the perplexing deviation in the verb's number, second person "you shall give/pay."²⁶ The Covenant Code used the replacement of the apodosis of LH 210 as an opportunity to write a *general law* that applied not only to miscarriage, but to all cases of homicide and injury.²⁷ The "you" is a rhetorical device that broadens the law's application.²⁸ The Covenant Code also signals the wider application of the law by the enlarged the context of injury beyond the scope of what is

expected in a case of aggravated miscarriage. Indeed, the talion list, if it applies only to miscarriage, is overkill. But as a general law its elaborateness makes perfect sense. The apodosis in vv. 23b-25 in fact almost acts like an independent apodictic law, close to the style of the Covenant Code's initial and final apodictic laws, which, according to source analysis, must be seen as part of the basic composition of the Covenant Code.

One of the striking differences between the homicide laws in 21:12-14 and LH 207 (see the texts above) is that the Covenant Code does not require indemnification for inadvertent homicide. Hammurabi's legislation, however, requires this: "If (the victim) is an *awīlum*, he shall weigh out one-half mina (= thirty shekels) of silver." The Covenant Code has not overlooked this requirement. It reserved presenting it until its comprehensive talion law. In a case of inadvertent homicide, according to the general talion rule, one must "pay life for life" (v. 23b). The rest of the Covenant Code's talion list prescribes indemnity for inadvertent injuries, in whatever context. This payment exceeds the requirement of Hammurabi's basic injury law in LH 206. This law does not require indemnification but only payment to the physician. Notably, the Covenant Code's injury law based on LH 206 makes a change that is in harmony with the requirement of payment for inadvertent injuries in the talion law. Verse 19 says that one not only pays for medical costs, but also for the victim's time out of work, his *שָׁבֵתוֹ* ("period of inactivity"; v. 19). In other words, the injury law of vv. 18-19 and the talion law of vv. 23b-25 both require *disability payments* for injury. The reason why the Covenant Code uses different language to describe these payments is due to the difference between the nature of the injuries (perhaps temporary versus permanent) and dependence on different parts of LH.

The Covenant Code continued its use of Hammurabi's talion laws in its slave injury laws in 21:26-27:²⁹

Exodus 21:26-27	LH 196-201
<p>²⁶If a man strikes the eye of his male slave or the eye of his female slave and destroys it, he shall send him away free for his eye.</p> <p>²⁷And if he knocks out the tooth of his male slave or the tooth of his female slave, he shall send him away free for his tooth.</p>	<p>¹⁹⁶If an <i>awilum</i> blinds the eye of a member of the <i>awilum</i> class, they shall blind his eye.</p> <p>¹⁹⁷If he breaks the bone of an <i>awilum</i> they shall break his bone</p> <p>¹⁹⁸If he blind the eye of a commoner or breaks the bone of a commoner, he shall weigh out one mina (sixty shekels) of silver.</p> <p>¹⁹⁹If he blinds the eye of an <i>awilum</i>'s slave or breaks the bone of an <i>awilum</i>'s slave, he shall weigh out half of his value.</p> <p>²⁰⁰If an <i>awilum</i> knocks out the tooth of an <i>awilu</i> of the same rank, they shall knock out his tooth.</p> <p>²⁰¹If he knocks out the tooth of a commoner, he shall weigh out one third mina (twenty shekels) of silver.</p>

Because this is a new topic, the Covenant Code wrote fully formed casuistic laws and did not summarize these in list form. It further did not follow the Hammurabi's legislaition in prescribing payments for permanent injuries to slaves. Rather, they are to be released. This is partly due to the change in the assailant from an external party to the owner himself. It would make no sense for the owner to pay a fine to himself. The change in penalty, as well as the change in who the assailant is, further comes from a larger systematic modification. The Covenant Code's slaves in this law include debt-slaves as well as chattel-slaves, just as we saw in the case of vv. 20-21. The requirement of release it taken over from the debt-release law of 21:2-11, which is based on LH 117.

To conclude, the various pieces of evidence for redactional development within the miscarriage and slave-injury laws dissolve when the Covenant Code's literary source is recognized and considered. In fact, the inconsistencies used to establish the redactional development of the pericope become evidence of the use of the Laws of Hammurabi as a source. The textual bumps and tensions arise from the combination of laws and motifs from different parts of Hammurabi's text to create the Covenant Code's new legislation. The two basic cases in the Covenant Code's miscarriage law, loss of the child versus the loss of the mother too (vv. 22 and 23), are original in view of their source. The inconsistency in v. 22, where two men fight but only one is punished, is due to introducing fighting from the context from v. 18 and its source, LH 206, into the context of aggravated miscarriage in LH 209. The inconsistency is an artifact of the imperfect

blending of sources.³⁰ The miscarriage law also originally incorporated the talion law as a replacement for the unacceptable penalty of vicarious punishment in LH 210. The Covenant Code took this as an opportunity to write a general rule that complemented its other homicide and injury in earlier verses. Hence, the exceptional second person verb form in v. 23. The whole of the talion list can be judged original: the eye, tooth, arm and leg of v. 24 are found exactly or conceptually in Hammurabi's talion law, and the injuries of v. 25 are entailed by the term *simnum* of LH 206.³¹ The slave-injury laws of vv. 26-27 are original, being based on Hammurabi's talion laws. Their penalties, different from those in Hammurabi's laws, are due to including debt-slaves in their context.³²

This analysis of the origin of the Covenant Code's law has importance for the study of the history of biblical, Israelite, and Near Eastern law. It indicates that there is no prehistory to this law other than what we find in the Laws of Hammurabi. Israel/Judah might have practiced a law like this, but the Covenant Code is not evidence of this.³³ Features that do not derive from the Laws of Hammurabi may derive from the Covenant Code's own native background. I am thinking here about the conflation of debt- and chattel-slaves or the enigmatic phrase "he must pay *בְּכֶלֶלִים*." But we must imagine that the Covenant Code has transformed elements from its own environment as much as it transformed elements found in the Laws of Hammurabi. This means that one cannot use the Covenant Code's legislation in reconstructing the history of actual Israelite/Judean law. Nor can one use this particular legislation to reconstruct a history of talion in the ancient Near East.³⁴ The Covenant Code is an academic-literary reflex of the Laws of Hammurabi, and does not constitute evidence for any evolutionary scheme. While, no doubt, throughout the ancient Near East there was a propensity for measure for measure punishment, which is expressed in other places in the Hebrew Bible,³⁵ the specific pedigree of the Covenant Code's laws is a matter of literary-historical analysis.

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ENDNOTES
(in draft form)

¹ For example, Otto sees vv. 18-19 and 22 (without וְנָתַן בְּפִלְלִים) as original to the larger section of assault laws. The phrase וְנָתַן בְּפִלְלִים was then added to v. 22 along with v. 23. Eventually vv. 24-25 and the slave laws of vv. 20-21 and 26-27 were added. In the present passage the talion law is the center of the structure (*Wandel*, 28-29, 30-31, 62; *Körperverletzungen*, 134-135, 168; "Town," 19; "Aspects," 183, 185). Schwienhorst-Schönberger, *Bundesbuch*, 52-58, 62, 75-76, 78-81, 116-117, 119, 234, says that vv. 18-19, 22a α b α is the basic text. A redactor added vv. 20-21, 22a β β , 23-24, 26-27. He sees the second person verb in v. 23 as secondary. Rothenbusch, *Rechtssammlung*, 285, 296, 300, sees 21:18-19 and 22-23* as an original unit to which 21:23b-25 was added. This was then expanded by the slave laws of vv. 20-21 and 26-27. Jackson, *Wisdom-Laws*, 172-254 (esp. 177, 188, 207, 211, 233-239), gives a complex analysis. In brief he says that the earlier sections of this part of CC consisted of vv. 18-19 (with the payment clause of v. 19 originally at the end of v. 18) and the slave laws of vv. 20-21, 26-27. The miscarriage law in vv. 22-23 (referring to premature birth and then the death of the baby) may have grown up under the influence of Deuteronomic law, to which v. 24 was then attached. Verses 22-24 were then inserted as a unit before vv. 26-27. Verse 25 was eventually added, reflecting the priestly concern with bodily blemishes (e.g., Lev 22). וְנָתַן בְּפִלְלִים in v. 22 and כִּי כִפְפוּ הוּא in v. 21 (the latter reflecting slave concerns in Lev 25) are later insertions. Osumi, "Brandmal," 26-29; *Kompositionsgeschichte*, 116-117, 153-154, says vv. 24-27 are an addition but as such they are a unity. They were inserted along with 21:2-11, coming from the hand that wrote the second person singular stratum of the apodictic laws. Kugelmass, "Lex Talionis," 138-170, says vv. 23-25 are a priestly addition extending the theological perspective of Lev 24:19-20: "by adding one bodily part after another [in Exod 21:24] and arranging them in the same style as life for life (נַפֶּשׁ תַּחַת נַפֶּשׁ), the priestly author of the passage is able to instill a greater degree of intensity to the notion that attacking one's fellow-man with such violence as to leave him permanently injured, is considered to be a capital offense against the property of God, for which the only penalty is capital punishment" (p. 170). Crüsemann, "Auge um Auge," says vv. 22-23 are original, but v. 24 is an expansion. Carmichael, "The Biblical Laws of Talion," 27-28, says vv. 23b-25 are a Deuteronomic formulation, hence later in the context. Liedke, *Gestalt*, 101, notes the very *ad hoc* formulation of the talion list, which points to its secondary character. Alt, "Zur Talionsformel," argued that the deviant form of the talion law over against casuistic and apodictic forms and the second person verb derive from a cultic Sitz im Leben, on the basis of a comparison with a Punic-Latin text. For summaries of different views, see Jackson, *Wisdom-Laws*, 185-186; Otto, *Körperverletzungen*, 134-137; "Talion," 101-107; Crüsemann, *Torah*, 149; idem, "Auge," 413-15; Osumi, *Kompositionsgeschichte*, 113, 119ff, 152ff.; Phillips, *Essays*, 66; Jüngling, "Auge für Auge," 16-17, 19, 31, 35; Kugelmass, *Lex Talionis*, 138-170. For theories about a two- or three-phase development of the components of the talion laws in 23b, 24, and 25, see Schwienhorst-Schönberger, *Bundesbuch*, 80-82; see also 61. See also Rofé's view, n. 6, below.

² A terminological problem is the meaning of וְיָצְאוּ יְלָדֶיהָ, literally "her children come out," in v. 22. Some argue that the original text was a singular, like the Samaritan וַיֵּצֵא וְלֶדָה "her child comes out" and that the sequence of letters was wrongly divided yielding a plural verb, which in turn led to a "correction" in the writing of the noun. So Rothenbusch, *Rechtssammlung*, 286-287, n. 268 end; Jepsen, *Untersuchungen*, 35 n. 2. Others take the MT as the original reading but say that it allows for a case of multiple pregnancy or perhaps refers to the woman's losing her ability to bear children. Crüsemann, *Torah*, 160, says it means more than one child was born. This is the view of Schenker, "Drei Mosaiksteinchen," 374-378; *Kult und Recht*, 97-101. For him v. 22 deals with an internal injury (to the woman) and vv. 23-25 deal with external physical irremediable injuries. Talion (which he understands to be literally performed according to vv. 23b-25) is not possible in the first case. For a critique see Houtman, *Exodus*, 3:170. For discussion of views, see Jackson, *Wisdom-Laws*, 215-261 n. 22. Schwienhorst-Schönberger, *Bundesbuch*, 96-98 (see also 82-83), makes the appealing argument that the plural is a way of referring to the foetus. Because it is not wholly formed the text used a unique idiom, much like the specialized Sumerian and Akkadian terms nig₂.ša₃.ga.na and ša libbīša, literally "that which is inside her," which is used for the embryo in the Akkadian laws. See Rothenbusch, *Rechtssammlung*, 302 on the Mesopotamian terminology.

³ See Wright, "Laws of Hammurabi as a Source for the Covenant Collection"; idem, "Compositional Logic"; idem, "Fallacies of Chiasmus." See Wells' response, "The Covenant Code," and

my response, "The Laws of Hammurabi and the Covenant Code." This last article contains the most up-to-date charting of the general evidence for dependence.

⁴ For Deuteronomy's "hermeneutical innovations" with regard to CC, see Levinson, *Deuteronomy*. For the Holiness Legislation, see Stackert, *Rewriting*.

⁵ Schwienhorst-Schönberger, *Bundesbuch*, 62-63, uses LH as part of the reason for removing vv. 20-21 since, as he reads it, miscarriage (LH 209-210 = vv. 22-23) directly follows assault (LH 206-208 = vv. 18-19). He does not realize that vv. 20-21 actually correspond with LH 208.

⁶ Therefore Rofé's view, "Family and Sex," 134-135, that "this law [21:22-25] constitutes an alien element in its present context . . . where it stands between two similarly-formulated injunctions concerning the beating of slaves (21:20-21; 21:26-27)" cannot be sustained. He believes that vv. 22-25 are secondary.

⁷ For Otto this is a decisive sign that the biblical miscarriage law (originally just 21:22 in his view; see n. 1) cannot be based on cuneiform tradition. He says "Exod. 21:22-23 also knows of no distinction between laws concerning the free woman and those concerning the slave, although this distinction is one of the main characteristics of the cuneiform laws. . . . there is no reason why such a distinction should be suppressed by the redactor of the collection of injury-laws in Exod. 21.18-32" ("Town," 16; cf. *Körperverletzungen*, 125-126). The LH-source thesis behind the present study explains this gap in CC. CC selectively uses LH and does not seek to replicate every legal detail of LH. Furthermore, as we will see below, the apodosis-penalty of LH 210 has been replaced in CC by the talion law (from LH 196-201). This necessarily interrupts the continuation of the miscarriage laws. After the talion law, CC does in fact move on to slaves, but in the context of talion (vv. 26-27, based on LH 198, 199, 201). CC did not include a slave woman in the miscarriage laws perhaps because replacing the apodosis of LH 210 with the talion laws from LH 196-201 distracted its attention from continuing its laws with LH 211-214. See below.

⁸ Those who recognize the similarity of the texts include Cazelles, *Études*, 152; Chirichigno, *Debt-Slavery*, 193; Paul, *Studies*, 70-73; Jackson, *Wisdom-Laws*, 209 n. 1.

⁹ Other Near Eastern miscarriage laws support this understanding of the basic laws of CC. These, like LH 209-214, speak of the death of the child and then the mother. See LLI d-e; MAL A 21, 50-53. SLEx 1-2 deal with different degrees of contact, which relate to intention. For comparison, see Rothenbusch, *Rechtssammlung*, 303-307; Otto, *Körperverletzungen*, 25-117; "Town," 7-14.

¹⁰ Westbrook "Talion"; *Studies*, 69-70, 80. Berlin, "Meaning of pll," basically accepts Westbrook's interpretation, which influences her interpretation of מִלֵּצְדָּה. For a critique of Westbrook, see Schwienhorst-Schönberger, *Bundesbuch*, 107-109 (but note the nuance of 126); Rothenbusch, *Rechtssammlung*, 292-293, 294; Jackson, *Wisdom-Laws*, 214, 224-225, 228-229.

¹¹ Jacob's description of what happened to Joseph—being torn by a beast—is the sort of incident included under this term (44:28). The term also appears in Sirach 31:22; 38:18; 41:9. The term in these instances can be rendered "catastrophic death."

¹² Houtman, *Exodus*, 3:168 ("fatal accident"); Otto, *Körperverletzungen*, 119 ("Todesfolge"); Osumi, "Brandmal," 15; Osumi, *Kompositionsgeschichte*, 113-114 (death of the mother). Rothenbusch, *Rechtssammlung*, 295 (cf. 286-295) says that חַסָּד either refers to just the death of the woman (in which case the core of the original miscarriage law would be vv. 22-23a whose final apodosis was later replaced with the talion formula in v. 23b) or more broadly to a serious injury up to and including death ("eine schwere Verletzung bis hin zum Tod"; in this case the whole of v. 23 is secondary and part of the talion law addition, based on the assumption that an original law, following Near Eastern parallels, would have described only the death of the woman, not her injury).

¹³ A problem for this interpretation of חַסָּד is the list of injuries in vv. 24-25. These seem to broaden the meaning of the term to a range of bodily suffering that includes all of the injuries in that list. Because of the context of vv. 24-25, a number broaden the meaning of חַסָּד to mean serious injury. Schwienhorst-Schönberger, *Bundesbuch*, 89-93, 117-119, says it is a broad type of calamity (Unglück) that can include death but is not limited to this. Rothenbusch, *Rechtssammlung*, 222, translates "schwerer Schaden" (and see the options he gives in the previous note). Sprinkle, *Book*, 92-93, argues that the word is cognate with Akkadian *asûm* and has a medical meaning of "injury requiring attention of a physician, serious injury." The problem in the specific versus general meaning of the term is solved when the talion law in vv. 23b-25 is viewed as a general law which does double duty: it provides an apodosis to v. 23a but also stands as a rather independent general law. See below.

¹⁴ See Wright, "The Laws of Hammurabi and the Covenant Code," 230-231, n. 42.

¹⁵ See Wright, "Compositional Logic."

points to a lack of intent if it means "unexpected/unfortunate death" (see above); so Otto, *Körperverletzungen*, 124; Houtman, *Exodus*, 3:168.

²³ Schwienhorst-Schönberger, *Bundesbuch*, 75, 101 also makes this argument about the verb (cf. Sprinkle, *Book*, 94). He further notes the use of the verb שלם in 21:36 and 37, which clearly refers to payment (this verb is used with the תהה replacement formula found in the talion laws). The reason why the talion law does not use the verb שלם is because, in the ox law, it refers to replacing the lost animal with another animal, whereas נתן means to pay the equivalent. Rothenbusch, *Rechtssammlung*, 284, believes that the talion laws would have been carried out by the payment of material compensation. He finds little evidence that talion was routinely performed (cf. pp. 278-284, 291, 300). Several take the talion law to require literal capital or bodily punishment. Crüsemann, "Auge," 413-15, 419 (cf. Osumi, "Brandmal," 3-4 and Crüsemann, *Torah*, 148-149) argues that CC's law corrects the earlier practice of paying a fixed sum for injuries and has a social-justice function of protecting the poor from demand of payment and guards against the rich getting off with a payment that is easy to pay. Osumi, "Brandmal," 6, says that as written the formula intends literal talion but could have been actualized by payment. Brin, "Development," 60 and n. 2, says that the plain meaning of giving a life for life can only mean the death penalty, and hence the law in 21:23b contradicts 21:13 which says that there is no death penalty for inadvertent homicide. Loewenstamm, "Exodus XXI 22-25," argues that because v. 23 does not prescribe the payment of the fine for killing the child according to v. 22, "life for life" must mean the death penalty. This may be true unless "life for life" can include payment for the child as well as the mother. He also claims that the shift from third to second person indicates a grave penalty, capital punishment. This second person form can be explained differently (see below).

For those who say that CC's talion law should be understood literally, the wording of 1 Kings 20:39, which opposes a "life for life" penalty over against monetary payment is decisive evidence: "your life will be for his life, or you shall weigh out a talent of silver" (וְהָיָה נַפְשְׁךָ נֶפֶשׁ תַּחַת נַפְשׁוֹ אוֹ כֶּבֶד-בָּכֶר תִּשְׁקוּל). But one should observe that this passage does not use the verb נתן. The verb is missing also in 2 Kings 10:24, also brought as evidence for the literal interpretation of CC's law

(הָאִישׁ אֲשֶׁר-יִמָּלֵט מִיַּד הָאֲנָשִׁים אֲשֶׁר אֲנִי מֵבִיא עֲלֵיכֶם נֶפֶשׁ תַּחַת נַפְשׁוֹ) "the person that escapes from the people that I am putting into your power, his life will be for his life"). The wording "you shall give life for life" in CC is actually an awkward way of describing a punishment for a perpetrator; if taken literally nothing indicates that he should give his *own* life (cf. Isa 43:3-4). Jackson, *Wisdom-Laws*, 193, 198-199, 232 says that passages such as 1 Kings 20:39 point to literal talion, but says (p. 233) it is ultimately not decisive, and concludes (pp. 211, 233-234) that the original miscarriage law "life for life" referred to giving a person as a substitute. Otto has a mixed view (*Körperverletzungen*, 122-123, 135, 137; cf. "Town," 16): "life for life" in v. 23b refers to capital punishment, even for inadvertent homicide, whereas the list in vv. 24-25, which is an addition, refers to equivalent payments. Houtman, "Eine schwangere Frau," 389, 392 uniquely suggests that "life for life" in v. 23b means that the household of the person who caused the death is to suffer similarly, i.e., his wife, as vicarious punishment. This is unlikely given the lack of intention in the death or injury. On talion laws generally, see Barmash, *Homicide*, 153-177.

²⁴ See LH 101, 106-107, 112-113, 120-121, 124, 126, 138-140, 217, 221-225, 228, 234, 238, 239, 242/243, 247, 248, 251-252 [// Exod 21:29, 32], 258-261, 264, 267, 271, 273-274, 276-278. Schwienhorst-Schönberger, *Bundesbuch*, 102 compares broader Akkadian idiom of X *kīma* X + *nadānum* which agrees with the Hebrew idiom.

²⁵ Deut 19:21 apparently and Lev 24:17-22 clearly take the talion laws literally (though Lev 24:18, 21 use the נָפֶשׁ תַּחַת נַפְשׁוֹ formula of animals to mean replacement of the animal). They depend upon CC for their formulation.

²⁶ Crüsemann, "Auge," 414, says the abrupt use of a second person verb is original to the context and its purpose is to emphasize the strict rule that the person be put to death (though he believes that the rest of the talion rule in vv. 24-25 is secondary; see Loewenstamm's view in n. 22, above).

²⁷ Those who see vv. 23b-25 as a general law include: Rothenbusch, *Rechtssammlung*, 278, 285, 293-294, 296, 300, 405 (he also sees 21:37-22:3 and 22:8 as general rules [p. 397], and notes distinctiveness of these rules against the cuneiform material); Otto, *Rechtsgeschichte*, 179 (vv. 23b-25 have a formulation that is developed beyond what one finds in Old Babylonian law); Barmash, *Homicide*, 158-159; Childs, *Exodus*, 471-472 (he says that all of vv. 23-25 is a general law and that v. 23a does not deal with miscarriage but is associated with v. 22 by the catchword אסון). Sprinkle, "Interpretation," 239, 251;

Book, 95, sees the second person in 22:23 as a "personalization," i.e., Israel addressed through the individual. Osumi, "Brandmal," 14-15 says that the second person has the function of recalling the capital punishment principle in v. 12.

²⁸ Morrow, "Generic Discrepancy," follows Westbrook ("Lex Talionis," 66) in seeing the second person verb as referring "to the community as a whole or its representatives," but connects it form-critically to a stratum of non-royal prescriptive formulation. Gilmer, *If You Form*, [page#], explains the second person from the influence of wisdom tradition, where the laws were spoken to those responsible for the juridical process. Schwienhorst-Schönberger, *Bundesbuch*, 122-127, sees the second person here and in vv. 13-14 address to the authorities active in judicial administration; it is also part of the style of this (secondary) layer of CC (cf. p. 311).

²⁹ Rothenbusch, *Rechtssammlung*, 317, notes the similarities of the laws and says: "Neben den auffälligen inhaltlichen Parallelen machen die skizzierten komplexen Übereinstimmungen von Ex 21,18-27 und KH § 196-214 einen überlieferungsgeschichtlichen Zusammenhang beider Traditionen m.E. jedenfalls in hohem Maß wahrscheinlich. Das wird sich im folgenden, insbesondere an Ex 21,28-32, weiter bestätigen." Rothenbusch (pp. 302, 312, 316, 317) also notes that only LH and HittL have both laws on blinding/knocking out a tooth and miscarriage in relatively close association. Several scholars note that of talion is unique to LH in cuneiform collections (Rothenbusch, *Rechtssammlung*, 278; Chirichigno, *Debt-Slavery*, 194). Chirichigno says that the similarities between CC and LH in regard to talion "suggests an oral diction of great antiquity, probably an Amorite legal tradition from which both Hammurabi and the Israelite legal compilers drew. Therefore, it is very unlikely that two unique regulations would occur in two different legal collections, both of which exhibit similar topical organization, without there being a common legal source or tradition behind these regulation. Nevertheless, whether the compiler of the Book of the Covenant had access only to an Amorite legal tradition that is evident in LH, or to a copy of LH itself, remains a moot point." Frymer-Kensky, "Tit for Tat," argues for the antiquity of the talion tradition. For objections to Frymer-Kensky, see Jüngling, "Auge für Auge," 2 n. 3. Jüngling, "Auge," 11-14, rejects Finkelstein's notion that talion in CC is an innovation.

³⁰ Rothenbusch, *Rechtssammlung*, 293 says that the fighting may be secondary. If one compresses the chronology of composition, he is right: after conceiving the law in relationship to LH 209-210, CC expanded the context from LH 206 (and v. 18). Loewenstamm, "Exodus XXI 22-25," 357, argues that the inconsistency of number is due to conflating two originally separate laws, one on talion (plural formulation) and one on miscarriage (singular formulation). (For critique of Loewenstamm, see Jackson *Wisdom-Laws*, 211-214.) Jackson's own view (*Wisdom-Laws*, 220-221) is that the verbs were plural in the apodosis meaning that all were responsible for the child's birth or injury, and that a Deuteronomic editor changed it to a singular because of an interest in individual responsibility. Collins, "Notes on the Text," 296-299, 301, emends to [ō]neš ba'āšer yē'ānēš "a fine on-whoever will be punished (the husband of the woman will assign on him)" in order to avoid the inconsistency in verbal number. This is awkward and unlikely.

³¹ Hence one cannot accept Jackson's view that in a supposed earlier formulation that lacked vv. 24-25, CC's two laws were concerned only about the status of the child, with v. 22 treating premature birth (but not death of the child), and v. 23 then dealing with miscarriage. See Jackson, "Problem," updated in his *Wisdom-Laws*, 209-239. For a critique of Jackson's original paper, see Loewenstamm, "Exodus XXI 22-25." Schwienhorst-Schönberger, *Bundesbuch*, 94-96 notes that in antiquity an early birth where the baby survived would have to be close to term and therefore doubts that this was punishable. He also notes that Near Eastern laws are generally concerned with the death of the baby (see n. 9, above). The Greek's rendering is somewhat similar to Jackson's in that it understands תִּכּוּן to refer to the child's state of development. In v. 22 "there is no תִּכּוּן" means "if her child (is) amorphous" (τὸ παιδίον ἀσχηματισμένον), whereas in v. 23 "if there is תִּכּוּן," meaning "but if it is completely formed" (ἐὰν δὲ ἔξεικονισμένον ᾦν). That is, v. 23 refers to the still birth of a full-term child; the mother has not died. The Vulgate reflects the meaning as found in LH: "...et abortivum quidem fecerit sed ipsa vixerit... sin autem mors eius fuerit subsecuta" ("and she miscarried but she lived...if however her death followed..."). Targum Onkelos and Pseudo-Jonathan translate the word with "death" (מוֹתָא) and Neofiti translates as "accident" (תִּכּוּן).

³² The only substantial element of 21:22-27 that remains unexplained through LH as a source is the requirement in v. 22 "to pay תִּכּוּן." It is tempting to see this as referring to the stage of pregnancy, a

concern of Hittite Law 17: "If someone makes a free woman miscarry, if it is the tenth month (i.e., full term) he shall give ten shekels of silver. If it is the fifth month, he shall give five shekels of silver..." (Hittite Law 18 prescribes five shekels for full term miscarriage of a slave.) Other interpretations include the following: "By mediation/mediators": Schwienhorst-Schönberger, *Bundesbuch*, 122; Rothenbusch, *Rechtssammlung*, 276-277; Bovati, *Justice*, 175-176; Jackson, *Wisdom-Laws*, 222-223, 396 (he says it refers to formal adjudication [note the mediation of Phineas in Ps 106:30 described by the D verb and, phenomenologically, the mediation of elders in Deut 22:19]); "before witnesses": Otto, *Körpverletzungen*, 119-121; "by assessment/reckoning": Speiser, "The Stem PLL" (critiqued by Jackson, *Wisdom-Laws*, 223-224); Houtman, "Eine schwangere Frau," 387; *Exodus*, 3:163 (note making a reckoning or judgment בלילה in Isa 16:3); "as/being the culpable party": Berlin, "Meaning of pll, 347 (cf. 346; she follows Westbrook's understanding of פלל and interprets the root פלל to mean "be accountable, responsible, liable"); "in exchange for the miscarriages": an emendation to בנפלים (the plural here would correspond with a literal reading of "her children come out" וְיִצְאוּ יְלָדֶיהָ; see the singular noun in Ps 58:9; Job 3:16; Qoh 6:3). See further discussion at Jackson, *Wisdom-Laws*, 222-227; Houtman, *Exodus*, 3:162-163; Liedke, *Gestalt*, 44-45.

³³ For a similar judgment about Deuteronomy's asylum laws, see Stackert, "Cities of Refuge";

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³⁴ A number of scholars have been concerned to chart a history of talion (Diamond, "Eye"; et al.).

³⁵ CC's specific idiom "X תהה X" is not necessarily generated from an Akkadian source (but see the MAL laws cited in n. 17, above). The formula is attested in other parts of the Bible in a distribution that suggests it reflects native idiom prior to the composition of CC, though not in a longer talion list. The phrase "life for life" נָפֶשׁ תַּחַת נָפֶשׁ appears outside the Torah. See Josh 2:14; 1 Kings 20:39, 42; 2 Kings 10:24; Isa 43:3, 4 (cf. Job 16:4). For the relation of 1 Kings 20:39 and 2 Kings 10:24 to Exodus 21:23, see Schwienhorst-Schönberger, *Bundesbuch*, 99-100 and see n. 23, above. The wording of Isa 43:3-4 is close to v. 23b in that it uses the verb נתן "to give," with נָפֶשׁ תַּחַת "in the place of life":

וְנָתַתִּי כְּפָרֶךְ מִצְרַיִם בְּרוֹשׁ וּמִכְּבָא תְּחַתֶּיךָ ... וְאַתָּן אֲדָם תְּחַתֶּיךָ וְלְאַמְרֵים תַּחַת נָפְשֶׁךָ "I give as your ransom Egypt, Ethiopia, and Seba in exchange for you...I give a people in exchange for you and nations in exchange for your life." This is not a context of capital punishment, but ransom. The nations/peoples being given replace Israel as either captives or objects of punishment. The idiom of repaying/returning "evil for good" רָעָה תַּחַת טוֹבָה and comparable formulations, similar to the "X תהה X" formula, also appear broadly. See Gen 44:4; 1 Sam 25:21; 2 Sam 16:12; Jer 18:20; Ps 35:12; 38:21; 109:5; Prov 17:13 (cf. 1 Sam 24:20). All of these cannot be said to derive from the wording or influence of CC. CC has apparently filtered the talion laws of LH 196-201, perhaps with some stimulus of cuneiform laws that connect miscarriage and talion such as MAL A50, 52, through native idiom. Jackson, *Wisdom-Laws*, 189-190, 196, notes that talion plays a role in various texts in the Bible (see examples there; cf. Judg 1:7; 15:10-11; Prov 24:29; see also Westbrook, *Studies*, 45-46; Nel, "Talion Principle"). That ancient Israel had a notion of measure-for-measure punishment or retribution in no way proves, however, that CC's talion law does not depend on LH. It merely points to the confluence of the native-traditional views with a specific foreign literary stimulus. In fact, it may be argued that it is just this specific confluence that led CC to create its general rule of talion.