

After the Revelation at Har Sinai, HaShem teaches Moshe many civil laws on the mountain.

וְאִם-אֶסֶן יְהִיָּה וְנִתְּתָה גֹּפֶת גֹּפֶת תַּחַת גֹּפֶת:

“And if there will be harm, then the harmer shall give a life to substitute a life.” (Shemos 21:23).

This passuk follows the previous passuk that tells us: “If two men struggle with each other and one strikes a pregnant woman which induces labor and there is parturition, but no harm occurs, the man who is responsible shall then pay a fine toward the husband, as per a court ruling.” (Ibid 21:22).

When reading these two pessukim together we decipher a few questions. First, why did the passuk talk about two men fighting and then incidentally one hitting a pregnant woman? Second, the passuk does not say the man who struck the woman, but the one responsible (Unosh, yay-onosh); who is that? Third, importantly, who do these pessukim refer to as “אֶסֶן” “the harmed;” is it the mother or the baby, or perhaps the husband? Furthermore, in our passuk we ask, what does giving a life in place of a life mean? Is it killing the responsible party or some other civil penalty?

In Gemara Yerushalmi Sandhedrin 9:4, *Chizkiah learns out the rule that if a person threw a rock at one person, but killed another and damaged someone else’s jar, then the person is guilty on both accounts.*

Gemara Baba Kama 84a says, *Abaya learns from Chizkiah that we cannot take a life literally or an eye literally (based on Shemos 21:23-24). It may come that a weak person will die when taking his eye. Therefore, it must be civil damages.*

Gemara Chagigah 11a likewise says, *Rabbi Yehuda HaNasi says that it is not a literal life for a life, but it is civil damages, the value of the life.*

If it is civil damages, then whose life do we evaluate to set the monetary amount; is it the killed or the killer? Our passuk says ‘life instead of life.’ If we do not literally kill the killer does the killer have to pay the value of his own life or life of the victim?

Other Gemaras like Baba Kama 84a (other opinion), Kesubas 30a and 33b, and Makkos seem to say that it means literally a life is exacted for taking a life.

Gemara Kesubas 33a says, *Rabbi Elazar learns that our passuk is talking about when the two men fighting sought to kill each other. They killed another instead.* This is brought down in Gemara Sandhedrin 79a as well. Their conduct was reckless, more severe than negligence.

Rashi learns that *the ‘harmed’ in our passuk is the pregnant woman. The reason for the dispute in the Gemara about civil or capital penalty is because our passuk uses the word נפש ‘soul’ instead of literally ‘life.’*

Rabbeinu Bachaya also learns that the mother is who is harmed.

Ibin Ezra and Malbim say, *and also bring down a summary of the dispute of the Gemaras, reiterating the proofs to both sides: Capital penalty because of their intent to kill each other, and civil penalty because it says here “life for a life” instead of “surely put to death” (mos yumos).*

Rashbam and Bechor Shor learn that *the liable party is put to death and pays no civil penalty.*

Daas Zekeinim learns, *if an unexpected complication resulted, such as the premature stillborn death of the fetus. If we had not had this verse, we might have thought that no death penalty would apply seeing that what he had intended to do had not been carried out. The Torah therefore repeats this expression “a life for a life,” to remind us that regardless of who had been killed by him, he deserves death for having intended to kill a human being, something he had intended to do, and something which carries the death penalty.*

Ohr Chaim points out the passuk says, ונתתה, *and you shall give. You can only give money, not one’s own life. That is taken. Thus, ‘life for a life’ is tort damages.*

Rabbeinu Bachaya takes a kabbalistic approach. *Based on Rabbi Shimon bar Yochai: The words ‘when men struggle’ refer to a struggle between the angels Michael and Samael (the angel of death). The words “and strike a pregnant woman” refer to the spiritual concept of the Jewish people becoming a victim. The words “and the child exits the body” refer to the Jewish people going into exile. The words “he will most certainly be punished,” refer to Samael in accordance with “the Lord of Bnei Yisroel (the husband) will impose upon him.” Thus, HaShem will punish Samael, בפלילים, in criminal proceedings.*

The elegiac interpretation aside, our passuk is conveying important rules in civil and quasi-criminal law. Our passuk is actually stand-alone. The previous passuk is a precursor to it but the lessons in our passuk are self-sustaining. The previous passuk—men fighting and hitting a pregnant woman—come to teach four things. One – a negligent person, and certainly one who is acting reckless and with wonton disregard for others’ safety, does not choose his plaintiff. This means, the men did not intend to harm a pregnant woman. They did not intend to harm a third

party. However, the liable party here not only harmed a woman, but a pregnant woman. Not only that, it was one with a baby that was due to come out. He may not have struck her severely, yet she and her fetus are the one he possibly harmed. If they struck a strong man, no harm would be done. However, he struck a pregnant woman. She is his plaintiff, will bring him to court—or her husband will bring him to court—for damages and possible criminal penalties.

Two - the responsible party is not necessarily the one who struck her. When summing up the guilt, the passuk says ‘he who is liable’ not *he that struck her*. A starts a fight with B and B then falls into the pregnant woman. Beis Din can find A liable even though B actually struck her. Beis Din can also assign liability to both depending on the testimony and circumstances.

Three - when Beis Din imposes the civil penalty and/or fine, it is based on the contemporary standards. The passuk does not give a set amount. It is for Beis Din to decide. Beis Din will assess the fine based on the factors and the norms of that time period.

Four – a husband may bring a case on behalf of his unborn son, his minor child, and his wife and he may get damages for infliction of emotional distress. The passuk tells that the fine gets assessed on behalf of the husband. This does not mean that the mother and child died. The passuk says no harm was done. It means in Torah law, the father / husband has an interest in the well-being of his wife and his unborn and born children. While the passuk indicates no harm was done, there is still a fine assessed for emotional distress that was caused.

Now we get to our passuk. The case of the harm done is to the child or fetus. If death came to the wife, we already have that passuk. “One who strikes a man so that he dies shall surely be put to death.” (Shemos 21:12). In our case they were acting with wonton disregard, basically with intention. This passuk is also not premeditated, as premeditated murder is dealt with in a later passuk. “But, if a man plots deliberately against his friend to slay him with cunning, then from before My altar you shall take him to die.” (Ibid 21:14). If we say our situation was unintentional, there already is a passuk for that. “But, one who did not stalk his prey, but the Lord put the victim into his hand, I will make a place for you to which he shall flee.” (Ibid 21:13). So, accidental death goes to exile in the city of Leviim. It is also not talking about if the baby was born premature and needed doctors and medical care. A previous passuk already told us that. If he will quarrel and strike another and the victim will need medical care, “he shall give payment for his idleness, and he shall provide for his cure.” (Ibid 21:19). Thus, the

Torah already covered intentional, reckless, and unintentional death. It also dealt with bodily harm.

Our passuk then comes to teach something new. The damage done here was done through negligence. The men did not intend to kill each other; it was a quarrel. *If harm was done, i.e. the fetus is forced into premature parturition then the person shall give soul in place of soul.* The Torah is telling us that abortion is unlawful. The Torah cares about a fetus in utero. It does not indicate what stage of development the fetus is in. Harm to the fetus must be dealt with, and the value is life for life. It is not a mere fine. This is a wergild.

By saying “he shall give soul for soul” the Torah is telling us that he must pay the value of one soul for another. A liable party cannot give his own life. It can only be taken from him. He can, however, pay money for its value. Additionally, the guilty party can argue that a fetus is not worth anything. Surely, a fetus in the early stages of pregnancy has little to no value. There is no proof that the fetus will be viable. Even one where labor was induced early but at full term, there is no proof that the newborn will survive thirty days. The Torah teaches how to assess the damages. Not a life for a life, but a *soul for a soul*.

The passuk does not say *if he caused death*. Instead, it says “if harm is caused.” Harm is to the parents because the fetus is not necessarily a life yet. It is, however, a soul no matter its stage in development. The harmer’s soul is equal to the ejected infant’s soul. The liable party must pay a wergild. If the harm was intentional then the criminal law stated earlier would apply.

Our passuk read by itself is telling us: when a person causes harm to another, he pays exactly what he caused. Taken with the next passuk the Torah is teaching that damages are exact. Pay wergild for a soul taken, “an eye for an eye, a tooth for a tooth, a hand for a hand, a foot for a foot, a burn for a burn, a wound for a wound, a bruise for a bruise.” (Ibid 21:24-25). Certainly, Beis Din will not be able to match a bruise for a bruise. The passuk goes from most severe, *soul for a soul*, to least severe, *bruise for a bruise*. The value is not based on the victim. It is based on what an eye is worth to someone, the general public. Damages are set monetarily for the damages caused. It is beyond this piece to go through each and discuss why each one is necessary to mention in the passuk.

Our passuk says, *when harm is done, damages are assessed in proportion to the harm done*. Even a fetus has a soul and has value per the Torah.

## BONUS SHTIKEL

There are several laws in this week's portion that give a glimpse of an understanding into the moral code of the Torah.

In the case of a Hebrew slave, "If his master gives him a wife, and she bears him sons or daughters, the woman and her children shall belong to her master, and he shall go out alone." (Shemos 21:4). While this passuk puts the slave in a difficult predicament, the next passuk doubles down. "But if the slave says, *'I love my master, my wife, and my children. I will not go free'* ...and he shall serve his master forever." (Ibid 21:5-6). He remains a slave for the rest of his life. Even after his wife dies and his children are redeemed. He has sold himself into lifelong bondage because of his wife and children.

The key here is "I love my master." If he only loves his wife and his children he does not sell himself as a slave. The master cannot prevent him from living with his wife and children. The free man can work and then redeem them in the future. It is his love for his master that seals his fate. As Moshe explains it, "And it will be, if he says to you, *'I will not leave you,'* because he loves you and your household, for it is good for him with you." (Devarim 15:16). This passuk talks nothing of the slave's family. It is because he loves his master that he remains forever.

If his wife was Hebrew then she and his children will be free after their six years. If his wife is foreign then he can work toward redeeming them, and convert them upon redemption.

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In regards to a thief the passuk says, "If the sun shone upon him, there is bloodguilt to him; he shall surely pay. If he has no money, he shall be sold for his theft." (22:2). At first glance it seems that the homeowner trying to protect himself is liable for killing the thief and if the homeowner cannot pay the wergild then he shall sell himself into slavery. However, looking closer at the previous pessukim help understand this.

"When a man steals an ox or a sheep, and slaughters it or sells it, he shall pay five oxen for the ox, and four sheep for the sheep. If the thief is seized while breaking and entering and he is struck and dies, there is no bloodguilt to him." (Ibid 21:23 – 21:1). This paragraph is teaching about a thief. A thief caught during the act, while breaking and entering, may be attacked and even killed by the homeowner of another that is protecting the property. However, once exposed, then the owner can no longer pursue the matter to harm or kill the thief. It is talking about catching the thief alive because otherwise the thief cannot pay or be sold into slavery.

The thief is caught so he must pay the five times or four times penalty in addition to the value of the stolen animal or object. Or, if the loot is found on his person he pays double. (Ibid 22:3). If the thief cannot pay his fines and penalties Beis Din sells him into six year slavery and the homeowner is paid his damages.

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In regards to pre-marital relationships, the passuk says, “If her father refuses to give her to him in marriage, he shall weigh out money according to the dowry of the virgins.” (Ibid 22:16). Surely, she can refuse to marry him. However, if she wants to marry the man she was with and her father refuses then does the father still has to pay the man the dowry? The previous passuk said, “If a man entices a virgin who is not betrothed to him and lies with her, he shall provide her father with the bride price for her to be his wife.” (Ibid 21:15).

If the couple wants to marry and the father agrees then the man pays the father the bride price. However, if the father does not agree it may seem strange for the father to still have to pay the man the dowry. He enticed his daughter, should he also get compensation? Is this saying the daughter is somehow guiltier than the man and owes him something? He is not losing the daughter, because he should have gone about it the proper way.

Reading the passuk clearly it says, *and the father utterly refuses to give his daughter over to him, he shall weigh out the money according to the dowry payment for virgins*. They both tried to appease the father but he refused to be appeased. The man previously requested the daughter in marriage but the father refused. Ultimately they were intimate. He still can marry her. However, the father does not get the bride price but the father will still give the husband the besula’s dowry. If they do not marry and the daughter marries someone else, because the father refused, then the dowry value to her groom is still the same as if she were a besula.

We compare our pessukim to how Moshe gives a similar Law later. “If a man finds a virgin girl who was not betrothed, and seizes her and lies with her, and they are found. The man who lay with her shall give fifty shekels of silver to the girl's father, (as a penalty), and she shall become his wife, because he violated her. He shall not send her away all the days of his life.” (Devarim 22:28-29). In this case he it is less consensual and more forceful. He “finds” her and “seizes her.” There was no relationship or marriage negotiation beforehand. If she is willing to marry him and her father agrees, then the man pays a fifty shekel of silver penalty on top of the bride price to marry her. He must take care of her—support, clothing, and intimacy. He can

never divorce her. In contrast our passuk in Shemos is more mutually beneficial to the couple and if the father refuses and gives her to another, he must pay the same dowry.

When reading the pessukim carefully we see every detail the Torah puts on justice.