MOSES'S RESTATEMENT OF TORTS: MODERN PRINCIPLES OF JUSTICE AND EFFICIENCY IN THE *MISHPATIM*

Louis W. Hensler III*

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*. Professor of Law, Regent University School of Law; J.D. 1988, University of Chicago Law School; B.A. 1985, Bob Jones University. I wish to acknowledge William Magee's valuable reference assistance. Scott Pryor, Craig Stern, and Eric Enlow provided very helpful comments on an early draft. I also acknowledge the help of Donald Soles, who directed my attention to the work of the theonomists on this subject.

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INTRODUCTION

In 1979, the American Bar Association ("ABA") created the Special Committee on the Tort Liability System and charged it to "present a 'review of the . . . system.'"[1] Five years later, after a thorough review,[2] the Committee's report started by indicating "the depth of the roots of tort law in the Judeo-Christian tradition."[3] The report stated: "So far as we know, there is no word in the Bible for 'torts.' Yet the 'norms' which the Creator told Moses to set before the Israelites, in the chapter of *Exodus* following the Ten Commandments, are filled with what we think of as 'tort' rules."[4] The seminal biblical passage to which the Committee thus alluded in its report is the subject of this article.

*A. Bible>Old Testament>Pentateuch>*Exodus*>Covenant Code>*Mishpatim*>Biblical Tort Law*

A relatively tiny slice of the Bible is committed to what we today would call tort law. All of the tort law to be found in the Bible appears in the Old Testament, particularly the first five books of the Old Testament, which are collectively called the Torah or Pentateuch.[5] More particularly, most biblical

1. SPECIAL COMMITTEE ON THE TORT LIABILITY SYSTEM, TOWARDS A JURISPRUDENCE OF INJURY: THE CONTINUING CREATION OF A SYSTEM OF SUBSTANTIVE JUSTICE IN AMERICAN TORT LAW, Committee Preface (1984).

2. *See id.* at i (explaining that the ABA "has provided the resources to walk through and around" the entire field of tort law).

3. *Id.* at 1-1.

4. *Id.* (footnote omitted); *see also* Douglas H. Cook, *Negligence or Strict Liability? A Study in Biblical Tort Law*, 13 WHITTIER L. REV. 1, 1–2 (1992); Nelson P. Miller, *An Ancient Law of Care*, 26 WHITTIER L. REV. 3, 29 (2004).

5. "Torah" frequently is used by Jewish scholars, and "Pentateuch" frequently is used by Christians. David B. Kopel, *The Torah and Self-Defense*, 109 PA. ST. L. REV. 17, 17 (2004). While both terms refer to the first five books of the Bible, the terms "Torah" and "Pentateuch" are not perfectly synonymous. The word "Pentateuch" comes from the Greek, "penta" (five) and "teuchos" (book). Irene Merker Rosenberg & Yale L. Rosenberg, *In the Beginning: The Talmudic Rule Against Self-Incrimination*, 63 N.Y.U. L. REV. 955, 986 (1988). The meaning of the term "Torah," which comes from Hebrew, can be a little broader than "Pentateuch"—Torah can refer to both the Pentateuch and the Talmud (the rabbinic elaboration of the Pentateuch). David Kader, *Torts and Torah*, 4 J.L. & RELIGION 161, 163

tort law resides in the second book of the Pentateuch, the book of *Exodus*.[6] And most of the tort law in the Bible resides in a small part of *Exodus* called the "Book of the Covenant,"[7] which includes "the only significant concentration of tort rules in the Bible."[8] In the *Exodus* narrative, Moses received the law from God and "recorded everything that God said in a document known . . . as the Book of the Covenant."[9] The term "Book of the Covenant" comes from *Exodus* 24:7: "Then he [Moses] took the book of the covenant and read it in the hearing of the people; and they said, 'All that the LORD has spoken we will do, and we will be obedient!'"[10] This Book of the Covenant (roughly *Exodus* chapters 21–23) can be divided into the "*debarim* (words)," which "dealt with matters of a cultic and moral nature," and the "*mishpatim* (ordinances)," which "had the casuistic form of case law, and regulated the secular affairs of an economic and social order."[11] Casuistic law "is the type of legal formulation with a protasis describing the case under consideration and differentiating it from similar cases, and an apodosis prescribing the legal consequences. Remedial casuistic law stipulates a remedy (compensation or punishment) for violation of primary rights."[12] The

(1986). These first five books of the Bible also frequently have been called "the Law of Moses" due to the long Jewish and Christian traditions holding Moses to be the primary author of those books. Dillard S. Gardner, *The Almost-Forgotten Law Book*, 27 NOTRE DAME LAW. 43, 48 (1952). Traditional Jews and Christians alike have regarded "the Bible as of divine origin and as having been received by Moses about the year 1350 B.C." Saul Levmore, *Rethinking Comparative Law: Variety and Uniformity in Ancient and Modern Tort Law*, 61 TUL. L. REV. 235, 266 n.87 (1986). "Secular scholars regard the Old Testament as consisting of a number of distinct strands composed by different authors at different times. For these scholars the rules set out in Exodus . . . date between 1200-400 B.C." *Id.* The precise authorship and timing of Exodus are not a focus of this article.

6. Cook, *supra* note 4, at 5.

7. NEW BIBLE COMMENTARY 109 (G.J. Wenham, J.A. Motyer, D.A. Carson & R.T. France eds., 21st Century ed. 1994); *accord* JOE M. SPRINKLE, 'THE BOOK OF THE COVENANT': A LITERARY APPROACH 27 (1994); Cook, *supra* note 4, at 5.

8. Cook, *supra* note 4, at 5.

9. NEW BIBLE COMMENTARY, *supra* note 7, at 109.

10. *Exodus* 24:7 (New American Standard). References to *Exodus* in this article will be to the English Bible, which numbers references differently from the Hebrew Bible. The English Bible references, particularly in chapter 22, are one verse higher than the Hebrew Bible references. Based on the terminology in *Exodus* 24:7, "[b]iblical scholars have generally used the term 'book of the covenant' or sometimes 'covenant code' to designate Exod. 20.22–23.33." SPRINKLE, *supra* note 7, at 27; *see also* Reuven Yaron, *The Goring Ox in Near Eastern Laws*, *in* JEWISH LAW IN ANCIENT AND MODERN ISRAEL 50, 51 (1971) (using "Book of the Covenant"); J.J. Finkelstein, *The Ox that Gored*, 71 AM. PHIL. SOC'Y 5, 16–17 (1981) (using "Covenant Code"). But use of the phrase "Covenant Code" instead of the biblical phrase "Book of the Covenant" is now "falling into disuse since a law code is a systematic statement of law, but the so-called 'codes' in the Bible are neither individually nor as a whole comprehensive enough to justify this designation." SPRINKLE, *supra* note 7, at 27.

11. BREVARD S. CHILDS, THE BOOK OF EXODUS: A CRITICAL, THEOLOGICAL COMMENTARY 452 (Peter Ackroyd et al. eds., 1974).

12. DALE PATRICK, OLD TESTAMENT LAW 75 (1985).

casuistic law in the *mishpatim* includes, among other things,[13] tort provisions.[14] This article will focus on this part of the *mishpatim* addressing what we would today call civil torts.

Within the entire Bible, only this relatively brief passage within the *mishpatim* significantly "enters into cases of liability, damages, and ownership disputes,"[15] and yet rabbinic tradition has developed these tiny kernels of biblical tort law into a full-blown tort system.[16] This article will not be concerned primarily with that vast body of Jewish tort law that has been developed from the *mishpatim*. Rather, this article will focus on the seminal texts themselves, considering only a few, primarily the earliest, Jewish commentaries on those texts.

B. Why Study the Mishpatim*?*

Why study these kernels of biblical tort law? One reason is that the Anglo-American common law of tort developed in a Christian context.[17] The

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13. While most biblical tort law is found within the *mishpatim*, the *mishpatim* contains more than tort law. *See* Finkelstein, *supra* note 10, at 25–26 (discussing, in addition to the tort law in the *mishpatim*, some criminal law contained in the *mishpatim*). Other themes of the *mishpatim* include slavery (21:2–11), capital crimes (21:12–17), bailment or loan (22:6–14), and seduction (22:15–16). *Id.*

14. *See* PATRICK, *supra* note 12, at 65 (noting that the tort law in the *mishpatim* takes the form of casuistic law).

15. *Id.* at 256.

16. "Jewish law is composed of several layers of literature." Yehoshua Liebermann, *Economic Efficiency and Making of the Law: The Case of Transaction Costs in Jewish Law*, 15 J. LEGAL STUD. 387, 389 (1986) [hereinafter Liebermann, *Economic Efficiency*]. Jewish tort law begins with four categories of tort derived from four Torah texts, all found in the Book of the Covenant. Kader, *supra* note 5, at 164–65. Layered on top of these seminal texts from the Torah is the Talmud, "the body of Jewish law and lore, as they developed and became fixed in the post-biblical period, during the first centuries of the Christian era." Yaron, *supra* note 10, at 51; *see also* Levmore, *supra* note 5, at 266 n.88 ("Talmudic law was as an oral tradition but was eventually codified in A.D. 500."). The Talmud consists of two parts. The oldest part, the Mishnah, which is a digest of the oral teachings of the *Tannaim*, was completed about 200 C.E. Kader, *supra* note 5, at 163; *see also* David Daube, *Civil Law of the Mishnah: The Arrangement of the Three Gates*, 18 TUL. L. REV. 351, 352 (1944) [hereinafter Daube, *The Three Gates*] (explaining the origins of the Three Gates); *accord* Yaron, *supra* note 10, at 51. The second part comes from "[t]he post Mishnahic teachers or interpreters, the *Amoraim*, in both Palestine and Babylonia, [who] generated numerous debates, discussions, interpretations that became collected and edited in approximately 400 C.E. in Palestine and 500 C.E. in Babylonia." Kader, *supra* note 5, at 163; *accord* Daube, *The Three Gates*, *supra*, at 351–52. This newer part of the Talmud is called the Germara. Steven F. Friedell, *Some Observations on the Talmudic Law of Torts*, 15 RUTGERS L. REV. 897, 897 (1984); *accord* Kader, *supra* note 5, at 163. The development of Jewish tort law did not end in the fifth century. "[A] great number of Jewish law scholars have written comprehensive and authoritative volumes of commentaries and responsa from the sixth century up to contemporary time. Some writers integrated the massive literature into formal codes. The most distinct codes are those written by Maimonides . . . and R. Joseph Karo." Liebermann, *Economic Efficiency*, *supra*, at 389 (footnote omitted).

17. *See* P.J. VERDAM, MOSAIC LAW IN PRACTICE AND STUDY THROUGHOUT THE AGES 15–16 (1959) (asserting that Christianity began to influence private law once its moral and spiritual guidance had

people developing the law accepted the Bible in general—and thus the *mishpatim* in particular—as divinely inspired and authoritative.[18] While the dominantly Christian culture under which Anglo-American tort law developed did not necessarily see all of the Mosaic law, especially the ceremonial law, as binding, Christians did not generally reject the parts of the Old Testament "law regulating . . . restitution in the case of damage to property,"[19] such as the *mishpatim*.

To the contrary, the Book of the Covenant was revered by significant lawmakers from as far back as the ninth century, perhaps most notably by Alfred the Great, who at least twice proclaimed the Mosaic law to be of Divine origin.[20] In a reverential show of respect for the Book of the Covenant, "[t]he Laws of Alfred the Great (*ca.* 900 A.D.) were prefaced by a translation" of a long passage from *Exodus* including the *mishpatim*.[21] While Alfred did not make the Book of the Covenant a formal part of his law code, his choice to attach it as a preface to his law code is nevertheless significant, as Liebermann eloquently describes:

> Mosaic law, two thousand years after it had been written down, and nearly a thousand years after it had lost its political force, met with an admiring translator among the Teutons of Britain. He was not an anonymous monk, scholarly, and amusing his leisure with a private tract, but the King of the West Saxons, the most famous lawgiver of whom Britain can boast before the Norman Conquest. . . .
>
> . . . .
>
> The two different parts played by Alfred in his internal policy by which he has come down to posterity, as an educator and as a lawgiver, are for once combined in the introduction which about 890 he prefixed to his own code of laws . . . .[22]

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established a foothold in the Roman mind); *see also* JONATHAN BURNSIDE, GOD, JUSTICE, AND SOCIETY: ASPECTS OF LAW AND LEGALITY IN THE BIBLE, at xxv–xxvi (2011) (footnote omitted) (quoting Lord Denning for the proposition that "the common law of England has been moulded for centuries by judges who have been brought up in the Christian faith"); Bird v. Holbrook (1828) 130 Eng. Rep. 911, 916 (Eng.) ("[T]here is no act which Christianity forbids, that the law will not reach: if it were otherwise, Christianity would not be, as it has always been held to be, part of the law of England.").

18. *See, e.g.*, F. Liebermann, *King Alfred and Mosaic Law*, 6 JEWISH HIST. SOC'Y OF ENG. 21, 31 (1912) [hereinafter Liebermann, *King Alfred and Mosaic Law*] (recounting King Alfred's great respect for the Mosaic Law).

19. Daube, *The Three Gates*, *supra* note 16, at 359.

20. Liebermann, *King Alfred and Mosaic Law*, *supra* note 18, at 31.

21. Finkelstein, *supra* note 10, at 75.

22. Liebermann, *King Alfred and Mosaic Law*, *supra* note 18, at 21.

Alfred was not the first legal authority to use the Mosaic law, but his use may have been the most extensive:

> Mosaic law . . . had already been quoted by many Teutonic legal writers, not only in the canons of the Church, but also in secular laws and jurisprudence. Here, however, it is not merely a few single lines, but more than two long chapters, in their continuous sequence, which were embodied into a royal code, and put, not in a casual, indifferent place, but at the very beginning of the whole.[23]

While it is difficult at best, and perhaps impossible, to draw direct lines of correspondence between the *mishpatim* and Anglo-American tort rules, it would be surprising if the influence of the *mishpatim* ended with Alfred the Great. While Anglo-American tort law was developing, the Bible was a ready source of authority for the learned on all topics: "The most learned, the profoundest thinkers, had recourse to the Bible on almost all questions, especially on public law and principles of justice."[24] Biblical passages "lay in the minds of" not only theologians but also "many others too, including many devout layfolk—as they handled the . . . disputes of medieval Europe."[25] Jurists of the early common law were intimately familiar with the Bible and would have taken these passages from the *mishpatim* as legally authoritative.[26] Thus, "to study biblical law is to explore materials that have been of profound significance in giving shape and color, not only to English law and legal history, but also to Western civilization as a whole."[27]

C. The Nature of the Mishpatim

Before embarking on a systematic analysis of the tort law of the *mishpatim*, it is important to get a sense of the nature of the text. The writer is not setting out a legal code[28]—this brief passage is inadequate as a

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23. *Id.* at 23.

24. George Horowitz, *The Privilege Against Self-Incrimination—How Did It Originate?*, 31 TEMP. L.Q. 121, 137 (1958).

25. CHRISTOPHER N.L. BROOKE, THE MEDIEVAL IDEA OF MARRIAGE 51 (1993).

26. *See, e.g.*, Calvin's Case (1608) 77 Eng. Rep. 377, 392 (Eng.) (arguing that natural law is supreme law, no less a figure than Lord Coke called Moses "the first reporter or writer of law in the world").

27. BURNSIDE, *supra* note 17, at xxvi (footnote omitted).

28. For purposes of this study, the precise authorship and dating of the *mishpatim* is irrelevant. Authorship was traditionally assigned to Moses at a very early date, but the important point for present purposes is that the text has been in essentially its present form throughout all relevant time periods. *See* Daube, *The Three Gates*, *supra* note 16, at 351 (explaining that Jewish Law, in the form of the Mishnah, is better preserved than any other law from the period). When this article refers to the "writer" or "author"

comprehensive code of tort law.[29] Rather, the purpose of the selected paradigms included in the *mishpatim* "was to provide a basis for teaching the nature of divine justice. By studying specific cases . . . in concrete situations, the reader of the Pentateuch could learn the basic principles undergirding the covenant relationship."[30] The author of the *mishpatim* is both establishing casuistic paradigms to guide the resolution of legal disputes and making moral and ethical points relating to such disputes.[31] Thus, it is possible—and probably intended by the author—to discern general principles from the paradigms outlined in the *mishpatim*.[32]

This idea that the paradigms of the *mishpatim* can be mined for generally applicable principles is at least somewhat controversial. For example, Bernard Jackson has stressed "the dangers to be encountered by those who seek" underlying principles in Biblical law:

> The search for such principles involves substantially the scholar's own legal, theological, or other preconceptions. In most cases it takes the form of generalisation from a small number of concretely expressed laws and/or narratives. It is assumed that these sources reflect the alleged principles which are implicit. All the scholar has to do is make them explicit. Sadly, the matter is not as simple. Different scholars may select for emphasis different aspects of the text, and hence construct different principles. Different views may be taken not only of the essential element deserving generalisation, but of the level of generality or abstraction at which the principle is to be pitched.[33]

But I tend to agree with Sprinkle that Jackson's critique assumes a mechanical approach to the paradigms of the *mishpatim* that are inappropriate to the text: "Jackson misreads it all as 'law' in the modern, narrow sense of that term. It is more fruitfully read as morality."[34]

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of the *mishpatim*, the reference is to the final redactor, whomever that may have been and precisely whenever the text took its final form.

29. *See* SPRINKLE, *supra* note 7, at 27 (reasoning that the "codes" in the Bible are not complete enough to be considered legal codes in the modern sense).

30. JOHN H. SAILHAMER, THE PENTATEUCH AS NARRATIVE: A BIBLICAL-THEOLOGICAL COMMENTARY 290 (1992).

31. *See* SPRINKLE, *supra* note 7, at 99 ("Although the material in Exod. 21.18-27 relates to legal matters, the author is using law as a vehicle for expressing morality . . . . [T]hese regulations serve as illustrations of certain principles . . . .").

32. *Id.* at 121.

33. BERNARD S. JACKSON, *Reflections on Biblical Criminal Law, in* ESSAYS IN JEWISH AND COMPARATIVE LEGAL HISTORY 25, 31 (1975) [hereinafter JACKSON, *Reflections*].

34. SPRINKLE, *supra* note 7, at 122 (footnote omitted).

D. Method for Studying the Mishpatim

This study will proceed in the following way. First, the study will focus on 19 verses of the *mishpatim*, *Exodus* 21:18–22:6. The selection of these 19 verses follows the example of my colleague, Doug Cook, who narrowed the "substance of biblical tort law" to these same 19 verses within the Book of the Covenant.[35] These 19 verses include all of the key texts from which the elaborate system of Jewish tort law has been developed.[36] This study divides these 19 verses into 19 paradigms by culling out a new paradigm each time a new protasis appears in the text.[37] This study will look in turn at each of these 19 specific paradigms, focusing on the casuistic nature of the *mishpatim* by setting out the protasis and apodosis for each paradigm and then attempting to discern the animating principles illustrated in each. Once the 19 paradigms have been analyzed in this way, the article will conclude briefly.

I. ANALYSIS OF THE *MISHPATIM*

The first organizational principle apparent within the tort law of the *mishpatim* is the distinction between personal injury and property damage: "The laws set out in *Exodus* 21:12–21:32 relate to acts adversely affecting persons, while those found in *Exodus* 21:33–22:15 concern injuries or damages to property."[38]

A. Personal Injury in the Mishpatim *(*Exodus *21:18–32)*

1. Human v. Human Personal Injury (*Exodus* 21:18–27)

According to Joe M. Sprinkle, "Exod. 21.12-27 can be isolated as a distinct unit in that all of these regulations deal with offenses of humans

35. Cook, *supra* note 4, at 5. A few other tort provisions are scattered in other parts of the Pentateuch, but this study will focus on these 19 verses, the only concentrated passage of tort law provisions in the Bible.

36. *See supra* note 16 (summarizing the structure and history of Jewish tort law).

37. It would be possible to divide the text slightly differently depending on what is seen as a new protasis. But I think any good faith dispute of the division employed here would be *de minimus*.

38. Richard H. Hiers, *Ancient Laws, Yet Strangely Modern: Biblical Contract and Tort Jurisprudence*, 88 U. DET. MERCY L. REV. 473, 481 (2011); *see also* Levmore, *supra* note 5, at 267 (distinguishing the sections of *Exodus* that deal with personal injury and property damage).

against other humans."[39] Focusing only on the tort law provisions, *Exodus* 21:18–27 "consists of four . . . offenses involving battery or mayhem."[40]

Paradigm #1: Battery (21:18–19)

Protasis: "When men quarrel and one strikes the other with stone or fist, and he does not die but has to take to his bed—if he then gets up and walks outdoors upon his staff . . . ."[41]

Apodosis: "[T]he assailant shall go unpunished, except that he must pay for his idleness and his cure."[42]

Principle: An actor who intentionally strikes another directly or indirectly should pay for lost time and recovery expenses of the other.[43]

Even though verse 18 speaks only of "men," Rabbi Ishmael (with some dissenting opinion) generalized the principle to all humans:

> "And if men quarrel": This tells me only of men. Whence do I derive (the same for) women? R. Yishmael says: Since all of the injuries in the Torah are unqualified (as to women) and Scripture specified one as pertaining to women as well as to men (viz. Exodus 21:29), so, I specify all injuries in the Torah as applying to women as well as to men.[44]

Moreover, the word here translated "men" (*ish*), while masculine, is a rather generic collective noun and could be translated "mankind."[45] Hence, the principle here applies to all actors, not only to male actors.

This injury takes place in the midst of a heated quarrel.[46] The Hebrew verb ריב (*rib*) usually refers to verbal argument, and most scholars have concluded that the quarrel is included in the protasis of this paradigm to

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39. SPRINKLE, *supra* note 7, at 73.

40. *Id.*

41. *Exodus* 21:18–19 (Jewish Publ'n Soc'y trans.), https://www.sefaria.org/Exodus.21?lang=bi&aliyot=0. Here, and in all subsequent statements of protasis and apodosis, I will be using the Jewish Publication Society translation of *Exodus*.

42. *Id.*

43. Of course, the principle inferred from each paradigm could be articulated at nearly infinite levels of generality.

44. MEKHILTA D'RABBI YISHMAEL 21:18 (Shraga Silverstein trans., n.d.) (c. 135 C.E.) [hereinafter MEKHILTA D'RABBI YISHMAEL] (emphasis omitted), https://www.sefaria.org/Mekhilta_d'Rabbi_Yishmael?lang=bi&p2=Mekhilta_d%27Rabbi_Yishmael.22.1.1&lang2=en. The earliest Rabbinic commentators whose work is extant today are the authors of the *Mekilta* from the school of Rabbi Ishmael.

45. *See, e.g.*, *Exodus* 21:18–19 (New International Version) (translating the word as "people").

46. SHALOM M. PAUL, STUDIES IN THE BOOK OF THE COVENANT IN THE LIGHT OF CUNEIFORM AND BIBLICAL LAW 67 (1970).

distinguish this paradigm from other cases that involve premeditation.[47] This interpretation is based on the idea that this is not a case of an attacker lying in wait, rather, the injury is the result of an escalating verbal confrontation.[48] But perhaps the context of the verbal quarrel also, or even primarily, is included as part of this example to establish a dividing line between mutual verbal aggression and unilateral physical attack. This interpretation is supported by the fact that it is the collective noun אֲנוֹשׁ (men) who strive together but the individual אִישׁ (man) who strikes the victim.[49] The men are quarreling together, but only one escalates to physical violence. No liability is suggested for any combatant in the "quarrel" until one escalates to physical violence.[50] Voluntarily engaging in a verbal quarrel is not tantamount to consenting to a physical attack.[51] Tort liability kicks in only when the interaction turns from mutual verbal aggression to unilateral physical aggression.[52]

Scholars have inferred various meanings from the phrase "with stone or fist."[53] The *Mekilta*, the earliest extant rabbinic commentary, treats the words "stone" and "fist" as a compound: "'And if with a hand-stone (i.e., a stone the size of a full hand) (whereby he can die he strike him'). He is not liable until he strikes him with something that has the potential to kill and in a locus which is critical to life."[54] But this interpretation gives no significance to the conjunction "or."[55] The rule applies to cases where the attacker uses a stone *or* fist, not a stone the size of a fist.

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47. *See* BERNARD S. JACKSON, WISDOM-LAWS: A STUDY OF THE MISHPATIM OF EXODUS 21:1–22:16, at 172 (2006) [hereinafter JACKSON, WISDOM-LAWS] (explaining that *Exodus* 21:18–19 deals with assault that occurs during a quarrel, in which injury is intentional but not premeditated); *see also* ROBERT M. FRAKES, COMPILING THE *COLLATIO LEGUM MOSAICARUM ET ROMANARUM* IN LATE ANTIQUITY 251 (2011) (explaining that the crime of killing as the result of a verbal argument that escalated into a quarrel is accidental homicide, not premeditated murder).

48. *See* JACKSON, WISDOM-LAWS, *supra* note 47, at 271–72 (pointing out the lack of premeditation in a verbal argument).

49. *Exodus* 21:18–19 (Jewish Publ'n Soc'y trans.).

50. *Id.* (making both the quarrel and the violence essential elements of the protasis).

51. *Cf.* RESTATEMENT (SECOND) OF TORTS § 892A (AM. LAW INST. 1965) (providing that a person's consent is not effective unless they consent to the specific conduct directed toward them).

52. Aristotle's concept of corrective justice in the tort context is his idea of the "involuntary transaction[]." 19 ARISTOTLE, THE NICOMACHEAN ETHICS bk. V, ch. iv, at 279 (H. Rackham trans., Harvard University Press rev. ed. 1982) (c. 384 B.C.E.). That is, a tort victim is one who is subjected to an "involuntary transaction[]" in which they give something up and receive nothing in return. *Id.* For Aristotle, to achieve justice for a tort is to, essentially, complete the transaction so that the person who has lost is restored to their previous position. *Id.*

53. *Exodus* 21:18–19 (Jewish Publ'n Soc'y trans.).

54. MEKHILTA D'RABBI YISHMAEL, *supra* note 44, 21:18.

55. *Cf. Montclair v. Ramsdell*, 107 U.S. 147, 152 (1882) (reciting the established principle that "[i]t is the duty of the court to give effect, if possible, to every clause and word of a statute.").

Most scholars treat the significance of "stone or fist" as evidence of the fact that the striking was intentional.[56] Sprinkle takes this position: "The significance of 'stone' or 'fist' is that use of either of these as a weapon proves that the blow was intentionally delivered."[57] Sprinkle supports his argument with historical context: "In many cultures the clenched fist is a symbol of violence and hostile intent; in contrast, a slap with an open hand . . . would represent insult rather than intent of physical injury."[58] Patrick agrees but ties the significance of "stone or fist" into the context of the sudden quarrel: "Presumably the mention of 'stone or . . . fist' means to exclude a case in which a lethal weapon (sword, etc.) was used. If someone picks up a stone in a fight, it is a matter of momentary passion, not a premeditated attack to kill or injure."[59] A different interpretation is taken by Stuart, who sees "stone or fist" as indicating that the stated rule applies both where the attacker is armed and unarmed: **"**whether by hitting or kicking ('fist' is the paradigm word for fighting without using anything as a weapon) or by something used as a weapon ('stone' is the paradigm word for any object used to inflict injury)."[60] This explanation seems to fit the context well. Perhaps the point is that the striker is liable whether the blow is struck directly, with a fist, or at a distance, with a stone.[61]

Scholars disagree over the significance of the phrase "and he does not die."[62] All agree that there is no punishment for the attacker beyond compensation for non-fatal bodily injury.[63] As Sprinkle put it, "if the injured man recovers from the blow so as to walk about on a staff, the offender is 'culpable' only for his time laid up and his medical expenses."[64] Similarly, Frakes reads this protasis to mean that there is no death penalty absent premeditation: "The implication seems to be that if the victim does not rise out of bed, but instead dies, the perpetrator might be guilty of accidental homicide, but not premediated murder."[65] Patrick agrees: "[W]here there is

56. *See infra* text accompanying notes 57–61.

57. *Id.*

58. *Id.* at 90.

59. PATRICK, *supra* note 12, at 75 (omission in original).

60. DOUGLAS K. STUART, THE NEW AMERICAN COMMENTARY: EXODUS 489–90 (E. Ray Clendenen ed., 2006).

61. *Cf.* RESTATEMENT (SECOND) OF TORTS § 13 (AM. LAW INST. 1965) (stating that an actor is subject to liability for intentional battery whether contact results directly or indirectly).

62. *See infra* text accompanying notes 63–69.

63. *See infra* text accompanying notes 64–69.

64. SPRINKLE, *supra* note 7, at 90 (footnote omitted).

65. FRAKES, *supra* note 47, at 251. Note, however, that the role of premeditation in biblical homicide is controverted. *See generally* Craig A. Stern, *Torah and Murder: The Cities of Refuge and Anglo-American Law*, 35 VAL. U. L. Rev. 461, 466–76 (2001) (arguing both sides of the debate over the Bible's treatment of intentional homicide).

no evidence of premeditation and the result is injury, the case is given a civil remedy—compensation for loss of income during convalescence."[66] Paul also concludes that "talionic punishment applies only to injuries resulting from an originally premeditated intentional assault."[67] The *Mekilta* likewise interprets the clause "the assailant shall go unpunished" as referring to absolving the attacker of the talionic death penalty.[68] In summary, the protasis of this case is the sudden escalation of a verbal argument into intentional direct or indirect harmful, but non-fatal, contact with the victim's body.[69]

The attacker is expressly responsible for lost earnings (*sheveth*) and medical expenses (*ripui*), and the *Mekilta* adds payment "for (injury to his limbs [nezek])."[70] This inclusion of payment for permanent impairment of the body may be fairly inferred from the phrase "his cure,"[71] or, as the King James translates it, "cause him to be thoroughly healed."[72] If complete healing is not possible, payment in lieu of healing makes sense. Stuart's interpretation similarly suggests a recovery for "pain and suffering" only when complete healing is not possible: "the injured party could not claim[,] . . . as modern Western laws often allow, special multiple 'damages' for 'pain and suffering' as long as he eventually recovers enough to be ambulatory ('walks around outside with his staff') and then finally fully well, without permanent injury ('completely healed')."[73] The *Mekilta* is careful to note that lost earnings are given only for as long as it takes for the victim to heal: "I might think, forever (i.e., for life-long disability.) It is, therefore,

66. PATRICK, *supra* note 12, at 75.

67. PAUL, *supra* note 46, at 67–68; *See* Morris J. Fish, *An Eye for an Eye: Proportionality as a Moral Principle of Punishment*, 28 OXFORD J. LEGAL STUD. 57, 58–59 (2008) (defining "talionic punishment" as punishment that restores a level of equilibrium or proportionality by mirroring the harm itself, e.g., "an eye for an eye").

68. *Exodus* 21:18–19 (Jewish Publ'n Soc'y trans.). *See* MEKHILTA D'RABBI YISHMAEL, *supra* note 44, 21:19 ("'[T]hen the striker shall be absolved': from the death penalty.").

69. At least one scholar interprets this passage as implying the death penalty when the victim dies: "However, there is an implied, unstated second condition which (if expressed) would state: 'If he is *not* able to rise, but dies in bed . . . ' The implication, in that case, is that the offender *would be* 'culpable' of the capital offense . . . . For the case as stated, the wounded man cannot demand the life of the offender on the grounds that 'he tried to kill me', but may only demand compensation for the damages actually caused." SPRINKLE, *supra* note 7, at 90–91 (first omission in original). But the passage does not address the scenario in which the victim dies, and it does not seem safe to adopt this inference contrary to the weight of scholarship.

70. MEKHILTA D'RABBI YISHMAEL, *supra* note 44, 21:19.

71. *Exodus* 21:19 (Jewish Publ'n Soc'y trans.).

72. *Exodus* 21:19 (King James).

73. STUART, *supra* note 60, at 490.

written 'and heal shall he heal' (i.e., he pays) sheveth only for so long as it takes for the wound to heal."[74]

While many scholars see this paradigm as applying to a verbal quarrel that erupts into a physical altercation, some thoughtful commentators seem to see the paradigm as portraying an instance of voluntary mutual combat: "By forcing the physical victor to pay for both the medical costs and the alternative costs (forfeited productivity on the part of the loser), biblical law helps to reduce conflict. The physical victor becomes an economic loser."[75] Thus, North would interpret this paradigm as applying the majority rule in American tort law that one cannot effectively consent to illegal conduct.[76] North makes the instrumental argument that the biblical rule makes good policy sense since it will discourage voluntary brawling by making the winner of the brawl liable for any resulting harm.[77] The *Restatement of Torts* rejects this argument:

> To the argument that to allow consent to bar recovery in tort will encourage defendants to engage in criminal conduct because they know that no tort liability will result, the reply is that the contrary rule would equally encourage plaintiffs to engage in or permit the conduct because they know that if harm results to them they can recover for it.[78]

But it would seem that most who agree to engage in mutual combat probably expect to prevail in the fight, which would suggest that North has the better of the policy arguments.

Finally, Sprinkle makes the general case—applicable to most, if not all, of these *mishpatim* paradigms—that the principle illustrated here, "that if a man injures someone, he should pay for the financial damages he has caused[,]"[79] could be voluntarily executed by the parties involved: "courts . . . would come into play only if the offender tries to evade his moral obligation."[80] Sprinkle's point is supported by the fact that this paradigm is

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74. MEKHILTA D'RABBI YISHMAEL, *supra* note 44, 21:19.

75. GARY NORTH, TOOLS OF DOMINION: THE CASE LAWS OF EXODUS 340 (1990); *see also* 3 JOHN CALVIN, COMMENTARIES ON THE LAST FOUR BOOKS OF MOSES, ARRANGED IN THE FORM OF A HARMONY 40 (Charles William Bingham trans., Edinburgh, Calvinist Translation Soc'y 1854) ("[B]oth were to be alike punished for the violence unjustly inflicted.").

76. *See* NORTH, *supra* note 75, at 340–41 (suggesting that the more seriously injured combatant could not have effectively consented to the harm because he is entitled to compensation).

77. *See id.* at 340 (explaining that whoever wins the physical altercation loses economically, thus deterring all from engaging in violent physical conduct).

78. RESTATEMENT (SECOND) OF TORTS § 892C, cmt. b (AM. LAW INST. 1979).

79. SPRINKLE, *supra* note 7, at 103.

80. *Id.*

included in the casuistic form of the *mishpatim* rather than the apodictic form used in other parts of the Book of the Covenant.[81] The author could have written "do not harm your fellow by striking him," but he did not.[82] Of course, courts will require one who batters another to compensate for the injury after the fact.[83] Torts generally are of this character.[84] There is no injunction here to avoid the injury before the fact,[85] only an after-the-fact requirement to make it good.[86] That is one reason that tort damages are measured by the harm done, not by the egregiousness of defendant's conduct—they are the price of creating the risk of harm, not a sanction for engaging in risky conduct.[87] In other words, perhaps the fact that the author of the *mishpatim* chose the casuistic style rather than the apodictic style for these tort provisions suggests that the victim's entitlement is to be enforced through a *liability rule* rather than a *property rule*.[88] As a practical matter, the liability rule allows a party to infringe an entitlement as long as he is willing to pay an objectively determined value for it.[89] Perhaps the breach of duty comes, not when the man strikes the victim, but rather when the striker fails to remedy the resulting harm. Perhaps the principle here is "repair the injury

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81. *See* James G. Williams, *Concerning One of the Apodictic Formulas*, 14 VETUS TESTAMENTUM 484, 484 (1964) (distinguishing between apodictic and casuistic parts of the Book of the Covenant: apodictic is in the form of a stipulation or command, whereas casuistic is in the form of a conditional statement).

82. *Exodus* 21:18–19 (Jewish Publ'n Soc'y trans.).

83. *See* RESTATEMENT (SECOND) OF TORTS § 901 (AM. LAW INST. 1979) (providing that one purpose of damages is to compensate the tort victim).

84. *See* MEREDITH J. DUNCAN ET AL., TORTS: A CONTEMPORARY APPROACH 1 (3d ed. 2018) ("Tort law provides a legal cause of action for recovery of wrongs committed against individuals resulting in injury to their person or property.").

85. This does not mean that other provisions of the Torah do not command that Israelites avoid injuring their neighbors, merely that the provisions of the *mishpatim* focusing on tort principles do not. *See, e.g.*, *Exodus* 20:13 (King James) ("Thou shalt not kill.").

86. *See* Louis W. Hensler III, *Torts as Fouls: What Sports Taught Me About Corrective Justice, Strict Liability, and Civil Recourse in Tort Law*, 42 SW. L. REV. 291, 328 & n.224 (2013) [hereinafter Hensler, *Torts as Fouls*] (using the example of defamation to explain that tort law does not deal in prior restraint where the would-be defendant's interests (e.g., freedom of speech) are implicated—compensation after harm, rather than prevention of harm, best protects both the plaintiff's and the defendant's interests).

87. *See* RESTATEMENT (SECOND) OF TORTS § 901 cmt. a (AM. LAW INST. 1963) ("[T]he law of torts attempts primarily to put an injured person in a position as nearly as possible equivalent to his position prior to the tort.").

88. *See* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral,* 85 HARV. L. REV 1089, 1092 (1972) (explaining that under the property rule "someone who wishes to remove the entitlement from its holder must buy it from him in a voluntary transaction[,]" while under the liability rule, someone who destroys another's entitlement must pay the value the original holder would have demanded).

89. *Id.* at 1092–93.

you cause to another." Within this vision, the injury is the wrong, and the breach of duty is the failure to repair the wrong.[90]

Paradigm #2: Immediately Fatal Battery of Slave (21:20)

Protasis: "When a man strikes his slave, male or female, with a rod, and he dies there and then . . . ."[91]

Apodosis: "[H]e must be avenged."[92]

Principle: The slave's human dignity demands that his murderer be punished.

This paradigm is like the immediately preceding one in that it involves a human striking another human,[93] but the context and the severity of the injury are different. Here, we do not have the escalation of a quarrel between social equals, but the excessive discipline of a slave.[94] Moreover, the attack here is fatal, whereas in the immediately preceding case it was not.[95]

The text specifies that the master has beaten the slave to death "with a rod."[96] The author of the *Mekilta* infers from the phrase "with a rod" that the rule applies only if the master strikes the slave with an instrument likely to produce death.[97] So if a master strikes his slave with a rod and the slave dies immediately, the slave must be "avenged."[98] The principle established here is the essential human dignity of the slave:

> The slave, too, is a human being, he, too, was created in the Divine image, and whoever assails the sanctity of his life shall be answerable for it and be put to death. This is an important innovation introduced by the Torah: the law that declares (*v*[*erse*].

90. *See* Hensler, *Torts as Fouls, supra* note 86, at 328–29 (asserting that the breach of duty that tort law seeks to remedy is the failure to repair harm, not the choice to engage in conduct that will result in injury).

91. *Exodus* 21:20 (Jewish Publ'n Soc'y trans.).

92. *Id.*

93. *See supra* notes 41–43 (introducing Paradigm #1).

94. *See* SPRINKLE, *supra* note 7, at 91 (discussing a case between a master and a bondsman or bondswoman).

95. Technically, this paradigm probably does not address a tort issue. The principle here addressed is that a master who kills his slave is subject to punishment. Contemporary American lawyers would characterize this as a criminal law rather than a civil issue, a distinction not made in the *mishpatim*. *See* Cook, *supra* note 4, at 13 n.74 ("[C]hapters 21 and 22 of *Exodus* do not make a clear, overt distinction between criminal penalties and civil sanctions."). However, in the interests of context and completeness, this paradigm will be addressed briefly.

96. *Exodus* 21:20 (Jewish Publ'n Soc'y trans.).

97. MEKHILTA D'RABBI YISHMAEL, *supra* note 44, 21:20.

98. *Exodus* 21:20 (Jewish Publ'n Soc'y trans.).

> 12): 'Whoever strikes a man so that he dies shall be put to death', applies even to one who beats his slave.[99]

While the apodosis here provides simply "he must be avenged," the author of the *Mekilta* inferred that the punishment was death.[100] Childs rejects this interpretation and infers that those who interpret the applicable punishment as death are merely exhibiting "good intentions toward the Bible" by unduly exalting the biblical position of the slave.[101] Interestingly, Joseph Smith, the founding prophet of the Church of Jesus Christ of Latter Day Saints who claimed direct inspiration from God to edit the King James Bible, changed the language of this paradigm by substituting the words "surely be put to death" in place of the words "be surely punished,"[102] thus agreeing with the authors of the *Mekilta*.[103] Be that as it may, this paradigm establishes that the master is not free to beat his slave to death with impunity.

The concept that the rules applied to a slave are different from those applied to a battery between freepersons seems harsh to twenty-first century western sensibilities.[104] And there may be good reason to criticize this rule if it were held up as an ideal, but while these paradigms of the *mishpatim* do establish moral principles (here, the moral principle that the slave is worthy of basic human dignity, if not equality of treatment), these paradigms are not merely moral ideals. They are also practical rules to govern real people within a historical context.[105] St. Thomas Aquinas similarly counseled against requiring the impossible through human law: "laws imposed on men should also be in keeping with their condition, for, as Isidore says . . . law should be possible both according to nature, and according to the customs of the

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99. U. CASSUTO, A COMMENTARY ON THE BOOK OF EXODUS 273 (Israel Abrahams trans., 1967); *accord* CALVIN, *supra* note 75, at 40 ("Although in civil matters there was a wide distinction between slaves and free-men . . . that God may shew [sic] how dear and precious men's lives are to Him, He has no respect to persons with regard to murder; but avenges the death of a slave and a free-man in the same way, if he should die immediately of his wound.").

100. MEKHILTA D'RABBI YISHMAEL, *supra* note 44, 21:20.

101. CHILDS, *supra* note 11, at 471.

102. *See Joseph Smith Translation (JST)*, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, https://www.lds.org/scriptures/gs/joseph-smith-translation-jst (last visited Dec. 8, 2019) (noting Joseph Smith's claimed inspiration). *Compare Exodus* 21:20 (JST) ("[H]e shall surely be put to death."), *with Exodus* 21:20 (King James) ("[H]e shall be surely punished."). Thus, Joseph Smith attempted to clarify that the punishment specified for the fatal beating of a slave was death, the same punishment prescribed for the intentional killing of any human. *See Exodus* 21:12 (JST) ("He that smiteth a man, so that he die, shall be surely put to death.").

103. MEKHILTA D'RABBI YISHMAEL, *supra* note 44, 21:20 (reasoning that, given the text, the only appropriate punishment is death).

104. *See* CHILDS, *supra* note 11, at 471 ("The discrepancy of judgment between the case of a free citizen and of a slave is striking.").

105. *See infra* text accompanying notes 107–12 (demonstrating that the Mosaic laws were progressive but practical, not idealistic).

country."[106] The attitude that idealism within the Mosaic law is tempered by the demands of historical reality should be familiar to Christians from the teachings of Jesus on divorce.[107] Jesus answered his inquisitors on the subject by teaching a very high view of marriage and a correspondingly dim view of divorce.[108] Immediately recognizing that the Mosaic law permitted divorce, Jesus's challengers asked him, "Why then did Moses command to GIVE HER A CERTIFICATE AND DIVORCE HER?"[109] Jesus responded, "Because of your hardness of heart, Moses permitted you to divorce your wives; but from the beginning it has not been this way."[110] Thus, Jesus recognized that while Mosaic law may have been fundamentally moral and a moral advance in its time, it was also written to govern imperfect people with hard hearts, not to establish some unattainable moral ideal.[111] Nevertheless, for the time, this rule was exceptionally favorable to the slave:

> This law is without precedent in all other ancient Near Eastern collections, where the case of a slave being killed by his master is never mentioned. The biblical law introduces a new evaluation of the intrinsic worth of a slave, i.e., he is considered a human being in his own right. There is a concern here for the interest and protection of the slave as a person; hence, he is not treated merely as chattel of value solely to his master.[112]

Paradigm #3: Slave's Delayed Death After Master's Beating (21:21)

Protasis: "But if he survives a day or two . . . ."[113]

Apodosis: "[H]e is not to be avenged, since he is the other's property."[114]

Principle: A master may be privileged to inflict a harmful contact.

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106. 3 THOMAS AQUINAS, SUMMA THEOLOGICA, pt. I-II, q. 96, art. 2, at 66 (Fathers of the English Dominican Province trans., Benziger Bros. 1915) (1485) [hereinafter AQUINAS, SUMMA THEOLOGICA] (emphasis omitted) (citation omitted).

107. *See Matthew* 19:6–8 (New American Standard) (relating Jesus's teachings on divorce).

108. *See id.* 19:6 ("Consequently they are no more two, but one flesh. What therefore God has joined together, let no man separate.").

109. *Id.* 19:7.

110. *Id.* 19:8 (citation omitted).

111. *Id.*

112. PAUL, *supra* note 46, at 69; *see also* CHRISTOPHER J.H. WRIGHT, GOD'S PEOPLE IN GOD'S LAND: FAMILY, LAND, AND PROPERTY IN THE OLD TESTAMENT 241 (1990) (noting that the Mosaic law governing a master's treatment of his slaves was unique among contemporaneous laws because it made such treatment a matter of public concern).

113. *Exodus* 21:21 (Jewish Publ'n Soc'y trans.).

114. *Id.*

Again, this paradigm probably addresses a criminal law, not a tort issue.[115] The only distinctions between this and the immediately preceding paradigm are that here the beaten slave does not die right away, and, therefore, the slave is not avenged and the master is not punished (beyond the loss of the slave).[116] These differences can be explained only by the existence of a privilege on the part of the master to use reasonable corporal discipline on the slave: "[U]nlike the case of social equals who have no general right to strike one another, the master does have the right to strike his bondsman, but only to make him work."[117]

If the slave did not die immediately, it could be inferred that the beating was not excessive: "[I]t could be assumed that an Israelite would not intentionally deprive himself of his own property. So if the slave died several days after a beating, homicidal guilt could be discounted: the man's loss of property was sufficient punishment."[118] The author of the *Mekilta* limited this privilege of corporal discipline to the owner of the slave: "Scripture hereby apprises us that . . . a distinction is made (in the application of the aforementioned provision) between himself and another, (the provision applying only if he killed them, but not if another killed them.)"[119] Thus, there was no general privilege to beat slaves, only a privilege by the master to use corporal discipline on his own slaves.

Once again, Joseph Smith softened this seemingly harsh paradigm. First, Smith supplemented the existing protasis with the words "and recover."[120] Thus, under Smith's version of the rule, the master avoided punishment only if the slave recovered. Second, Smith replaced the entire apodosis with "he shall not be put to death, for he is his servant."[121] This second change softened the biblical apodosis of this paradigm in two ways. First, the master whose

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115. *See supra* note 95 (explaining that the matter of a master fatally battering his slave is not strictly a tort issue).

116. *Compare Exodus* 21:21 (Jewish Publ'n Soc'y trans.) (providing that the law need not avenge the life of a slave who dies days after his master strikes him), *with id.* 21:20 (demanding vengeance against the master who strikes a slave and kills him immediately).

117. SPRINKLE, *supra* note 7, at 91; 2 C.F. KEIL & F. DELITZSCH, BIBLICAL COMMENTARY ON THE OLD TESTAMENT 134 (James Martin trans., 1878) (citation omitted) ("The master had always the right to punish or 'chasten' [the slave] with a stick; this right was involved in the paternal authority of the master . . . .").

118. WRIGHT, *supra* note 112, at 241; *see also* KEIL & DELITZSCH, *supra* note 117, at 134 ("By the continuance of [the slave's] life, if only for a day or two, it would become perfectly evident that the master did not wish to kill his servant; and if nevertheless [the slave] died after this, the loss of the slave was punishment enough for the master.").

119. MEKHILTA D'RABBI YISHMAEL, *supra* note 44, 21:21.

120. *Exodus* 21:21 (JST).

121. *Compare id.* ("[H]e shall not be put to death, for he is his servant."), *with Exodus* 21:21 (King James) ("[H]e shall not be punished: for he is his money."). These changes to *Exodus* 21:20–21 are the only changes Smith was inspired to make within the 19 verses studied in this article.

slave died a day or two after a beating avoided the death penalty, but did not necessarily avoid some other form of punishment.[122] Second, the language comparing the slave to the master's "money" (the King James terminology for the slave) was eliminated.[123]

A comparable privilege to use corporal discipline exists under the *Restatement of Torts*: "[a] parent is privileged to apply such reasonable force . . . upon his child as he reasonably believes to be necessary for its proper control, training, or education."[124] Much as the biblical rule relied on the financial incentive of the master to guard against excessive punishment of the slave, the *Restatement* relies on the natural affection of the parent for the child to guard against excessive punishment of the child by the parent: "The parent may be assumed to have the welfare of the child primarily at heart . . . ."[125] Until the 20th century, the parental privilege was essentially absolute: "cases carried this to the length of saying that the parent is not liable for any force . . . so long as he acts in good faith for the welfare of the child."[126]

Paradigm #4: Transferred Intent (21:22)

Protasis: "When men fight, and one of them pushes a pregnant woman and a miscarriage results, but no other damage ensues . . . ."[127]

Apodosis: "[T]he one responsible shall be fined according as the woman's husband may exact from him, the payment to be based on reckoning."[128]

Principle: If an act is done with the intention of affecting a third person, but causes a harmful bodily contact to another, the actor is liable to the other.

Here again, as in verse 18, the author of the *mishpatim* posits "men" (collective plural) or "humankind" in conflict, but this time the original conflict is not a mere quarrel, as in verse 18, but rather a full-blown brawl.[129] Thus, it appears that the brawling men intend to harm each other, this being

122. *See, e.g.*, *Exodus* 21:26–27 (Jewish Publ'n Soc'y trans.) (requiring a master to free a slave whom he has permanently impaired).

123. *Exodus* 21:21 (King James).

124. RESTATEMENT (SECOND) OF TORTS § 147(1) (AM. LAW. INST. 1965).

125. *Id.* § 147 cmt. d; *see also* Louis W. Hensler III, *The Legal Significance of the Natural Affection of Charlie Gard's Parents*, 17 CONN. PUB. INT. L.J. 58, 65–68 (2017) ("[T]he parent acting in good faith is to be controlled only by natural affection.").

126. RESTATEMENT (SECOND) OF TORTS § 147 cmt. d (AM. LAW INST. 1965).

127. *Exodus* 21:22 (Jewish Publ'n Soc'y trans.).

128. *Id.*

129. *See supra* text accompanying notes 41–45 (discussing *Exodus* 21:18 and its reference to "men" as a proxy for humankind).

no mere verbal quarrel, but do not necessarily intend to harm the woman or her unborn child: "There is an unusual change in person and number within the passage. Men (3rd person masc. pl.) brawl. Men (3rd person masc. pl.) run into the pregnant woman. But only one man (3rd person masc. sing.) pays her husband . . . ."[130] Sprinkle infers from the plurals that the injury to the pregnant woman is accidental—the men "are fighting each other, not the woman, and are out of control."[131] Patrick agrees: "The protasis, 'When men strive together and hurt a woman with child, so that . . .' suggests that the blow to the woman need not be intended."[132] Thus, most commentators have read this injury to be accidental in the sense that the brawling men did not intend to injure the actual victim.[133] The lack of intent to harm the victim distinguishes this paradigm from the intentional battery paradigm in verse 18.[134]

Thus, this paradigm establishes the principle that one whose dangerous conduct injures a victim is liable to the victim without regard to whether the actor intended to harm that precise victim. Shalom Paul sees this paradigm, involving brawlers who do intend serious harm to one another, as falling somewhere between accidental homicide (this being no pure accident) and the law of bodily assaults (there being no specific intent to injure the precise victim here), justifying the imposition of the harsh talionic penalty by the more serious intent of the brawlers, who intend serious harm to one another:

> In the section above, v[erses] 18-19, a monetary rather than a talionic punishment was prescribed for bodily injuries incurred as a result of an unpremeditated assault climaxing a verbal dispute—an act which in and of itself is not unlawful. Here, however, the guilty parties were engaged from the outset in a fight, i.e., an unlawful act with intent to inflict injury. Since there was an original intent to cause harm, this case differs from both the law of accidental homicide (v[erse] 12) and the law of bodily assaults (v[erses] 18-19) . . . .[135]

130. SPRINKLE, *supra* note 7, at 92.

131. *Id.* at 93.

132. PATRICK, *supra* note 12, at 76.

133. *See* CHILDS, *supra* note 11, at 471 (observing that commentators usually assume that an injury to a pregnant woman under these circumstances is accidental); *accord* BURNSIDE, *supra* note 17, at 278 (citation omitted) ("The assault upon the pregnant woman does not seem to be deliberate.").

134. *See supra* notes 57–59 (explaining that most scholars interpret *Exodus* 21:18 as dealing with the circumstances of an intentional assault).

135. PAUL, *supra* note 46, at 74 (footnotes omitted).

Paul's interpretation follows that of the author of the *Mekilta*, who saw this case as designed to demonstrate that there is responsibility for one who intends to injure another but ends up injuring a third party:

> What is the intent of this section? From "And if a man be bent against his neighbor to kill him," we hear only that one who intends to smite his foe and does so is to be put to death; but we do not hear the same for one who intends to smite his foe and smites his friend. It is, therefore, written (to this effect) "And if men fight . . . and if there be death (in his friend) then you shall give a life for a life."[136]

Under this interpretation, this paradigm is similar to the contemporary tort doctrine of transferred intent under the *Restatement of Torts* whereby the intent to invade the protected interest of one victim transfers to provide the intent necessary to make out a cause of action in tort against a different, unintended victim.[137] Here, the brawlers intend to cause harmful bodily contact with each other. If their brawling injures someone else, such as a pregnant woman, then they are liable just as though they had intended to injure the pregnant woman.[138]

According to the apodosis, "[t]he violent person who has imposed on the woman and the child the risk of injury or death must compensate the family."[139] It may be that both brawlers are jointly responsible: "The switch to singular, 'he pays', reflects an indefinite use of the singular. That is, 'someone' pays."[140] The precise amount of the payment is not specified: "[The law] leaves it to the woman's husband to suggest a penalty and to the judges (NIV 'court') to impose one."[141] Paul suggests that liability is calculated based on the stage of development of the miscarried embryo:

> [A] . . . study of the root *pll* has shown that the basic meaning of this stem is "to estimate, assess, calculate," and it has been

136. MEKHILTA D'RABBI YISHMAEL, *supra* note 44, 21:22 (citation omitted) (omission in original).

137. *See* LOUIS W. HENSLER III, TORTS: CASES, MATERIALS, QUESTIONS, AND COMMENTS FROM A JUDEO-CHRISTIAN PERSPECTIVE 23–24 (2015) [hereinafter HENSLER, TORTS] (explaining the principle of transferred intent in tort law); *see also* RESTATEMENT (SECOND) OF TORTS § 16 (AM. LAW INST. 1965) ("If an act is done with the intention of affecting a third person . . . but causes a harmful bodily contact to another, the actor is liable to such other as fully as though he intended so to affect him.").

138. *See* PAUL, *supra* note 46, at 72 (footnote omitted) ("Should the pregnant woman die, the law of talion, 'a life for a life,' is put into effect.").

139. NORTH, *supra* note 75, at 381.

140. SPRINKLE, *supra* note 7, at 93 (footnote omitted).

141. STUART, *supra* note 60, at 492.

> suggested that the Heb[rew] . . . be translated, "the payment to be based on reckoning," with the "reckoning" possibly being based on the estimated age of the embryo.[142]

But Sprinkle agrees with Stuart that "[a]lthough the stage of development is a factor to be considered, the exact price is not legislated, being a matter of tort between the husband and the offending party."[143]

Paradigm #5: Lex Talionis and Corrective Justice (21:23–25)

Protasis: "But if other damage ensues . . . ."[144]

Apodosis: "[T]he penalty shall be life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burn for burn, wound for wound, bruise for bruise."[145]

Principle: Liability is to be measured by the injury.

The only distinction between the protasis in this paradigm and that of the immediately preceding paradigm is the indication here that "other damage ensues."[146] The apodosis here also includes the rule of talion ("life for life, eye for eye, tooth for tooth") where the immediately preceding apodosis did not.[147] Thus, the new rule is talionic responsibility where "other damage ensues."[148]

The phrase "other damage ensues" is ambiguous. Cassuto interprets "damage" to refer to the death of the woman or her child.[149] Some early Christian commentators, such as Origen, interpreted this paradigm to apply only to the death of the "fully formed" infant: "But if an infant already formed issue forth when a woman with child has been stricken by quarreling men, we easily understand that a life is given for a life, that is, that what has

142. PAUL, *supra* note 46, at 71–72 (footnotes omitted).

143. SPRINKLE, *supra* note 7, at 94. This interpretation suggests that this is an essentially private law matter and that the actor's breach of civil duty comes at the point that he fails to make good the damage that his act caused. *See supra* note 90 (asserting that the breach of duty that tort law seeks to remedy is the failure to repair harm).

144. *Exodus* 21:23 (Jewish Publ'n Soc'y trans.).

145. *Id.* 21:23–25.

146. *Compare id.* (contemplating a brawl in which "other damage ensues"), *with id.* 21:22 (addressing the brawl in which "no other damage ensues").

147. *See id.* 21:22 (providing that the one who caused the harm shall pay compensation).

148. *Id.* 21:23.

149. *See* CASSUTO, *supra* note 99, at 275 (commenting that the King James Bible's translation to "mischief" implies the woman or baby dies); *accord* CALVIN, *supra* note 75, at 42 (emphasis in original) ("I am led to conclude, without hesitation, that the words, 'if death should follow,' must be applied to the *fœtus* as well as to the mother.").

been committed should be punished by death."[150] Likewise, Theodoret of Cyrus opined that if the infant had developed "human features," then life had been communicated to the infant, and its death warranted talionic responsibility:

> It is the general opinion that life is communicated to the fetus when its body is fully formed in the womb . . . . So, in the case of a pregnant woman who suffers miscarriage in the course of a fight, the lawgiver ordains that if the infant comes out with human features—that is, fully formed—the case is to be considered murder . . . . But if it comes out before it is fully formed, the case is not to be considered murder, since the miscarriage occurred before the animation of the child. Nonetheless, the party responsible is to make recompense.[151]

While some respectable modern scholarly opinions see the word "damage" as referring to injury either to the mother or to the unborn child,[152] most later scholars interpret "damage" to refer to some additional injury (even death) of the woman above and beyond any injury to the unborn child.[153] The only thing that is clear about the protasis here is that this paradigm applies to an injury that goes beyond an early miscarriage.[154]

The primary substantive provision in this paradigm comes in the apodosis in the statement of *lex talionis*. Most scholars do not take overly literally the talionic responsibility introduced here, at least outside the case of intentional homicide:

> The *lex talionis* . . . assumes a system of ransom in which monetary composition can serve to substitute for the literal talion . . . . Literal application of the *lex talionis* is inconsistent with Exod. 21.18-19 where a deliberate injury does not result in a punishment of injuring the offender to the exact same degree he injured the man he struck—which, by the way would be absurdly impractical—but instead the offender pays money. The verb . . .

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150. ORIGEN: HOMILIES ON GENESIS AND EXODUS 301 (Ronald E. Heine trans., 1982) (c. 220 C.E.).

151. 1 THEODORET OF CYRUS, THE QUESTIONS ON THE OCTATEUCH: ON GENESIS AND EXODUS 301 (Robert C. Hill trans., 2007) (c. 452 C.E.).

152. *See, e.g.*, KEIL & DELITZSCH, *supra* note 117, at 135 ("[E]ven if no injury had been done to the woman and the fruit of her womb, such a blow might have endangered life.").

153. *See, e.g.*, PAUL, *supra* note 46, at 72 (footnotes omitted) ("Should the pregnant woman die, the law of talion, 'a life for a life,' is put into effect.").

154. *See Exodus* 21:22–25 (Jewish Publ'n Soc'y trans.) (addressing simple miscarriage in verse 22 and going further in verses 23–25).

> used in 'you will pay out' (v[erse] 23) is used of monetary payments in the immediate context (v[erses] 19b, 22b, 30, 32) . . . .[155]

Biblical scholars have focused "on the meaning of the word 'for' in such phrases as 'eye for eye, tooth for tooth' (Exodus 21:24)."[156] The Hebrew word *tachat* "frequently refers to one thing's taking the place of another and . . . to one thing's being given in the place of another by way of compensation."[157] This is the word used in the very next paradigm, in which a slave whose master destroys his eye or tooth is permitted to "go free on account of (*tachat*) his eye" or tooth.[158] The same word (*tachat*) "is used in the expression 'ox *for* ox' (21.36) in the sense of giving the value of an ox for the ox killed, whether that be by substituting a live animal or its monetary equivalent."[159] Thus, the language of *lex talionis* easily encompasses a monetary or other payment of sufficient size to compensate for the loss of a life, the loss of a tooth, or some other injury.[160]

The immediate context also supports a non-literal meaning of the talionic remedy. The immediate context here is the case of an accidental miscarriage resulting from a brawl.[161] Several of the injuries enumerated in the formulaic list of injuries to be remedied by talion, particularly "burn for burn," seem highly unlikely in his context.[162] In fact, while all "three references in the Torah to talio" are substantially similar, in each case, the "list of injuries" does not "quite seem to fit" the immediate context.[163] "The overall impression is of an ancient maxim, applied wherever 'measure for measure' is to be the standard of justice . . . ."[164] Thus, the emphasis in this apodosis is on the equality of the remedy, not on the literal imposition of a physical penalty.

The non-literal application of the *lex talionis* is implied also by the use of the second-person pronoun:

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155. SPRINKLE, *supra* note 7, at 94; *accord* Levmore, *supra* note 5, at 267 (footnote omitted) ("Talionic rules are set out, although here it is even clearer that apart from homicide the law describes a system of monetary compensation, rather than strictly in-kind retribution.").

156. BURNSIDE, *supra* note 17, at 276.

157. DAVID DAUBE, *Lex Talionis*, *in* STUDIES IN BIBLICAL LAW 102, 103–04 (KTAV Publishing House, Inc. 1969) (1947) (endnote omitted).

158. BURNSIDE, *supra* note 17, at 276 (citation omitted).

159. SPRINKLE, *supra* note 7, at 94; *accord* BURNSIDE, *supra* note 17, at 277.

160. Burnside helpfully uses the term "positive talion" for compensation, in contrast to "negative talion" for mere punishment or vengeance. BURNSIDE, *supra* note 17, at 277.

161. *Exodus* 21:22–25 (Jewish Publ'n Soc'y trans.).

162. *See* RAYMOND WESTBROOK & BRUCE WELLS, EVERYDAY LAW IN BIBLICAL ISRAEL 79 (2009) (questioning whether the Torah's talionic prescriptions were meant in the literal sense).

163. *Id.*

164. *Id.* at 79–80.

> The "you" (sing.) who pays according to this principle is Israel represented by an individual. . . . This passage may be paraphrased: "This is what you, O Israel(ite), should do in so far as you find yourself to be . . . in similar circumstances, you should pay in accord with the principle life for life . . . ."[165]

Thus, the biblical rule is that one who injures another is responsible to restore to that other, as nearly as possible, what the victim lost. The categories of damages in the Talmudic discussions of torts are "primarily derived from the *lex talionis* language of *Exodus* 21:18-25. These categories include *shevet*, loss of earnings; *ripui*, healing (medical costs); *boshet*, humiliation; *tza'ar*, pain and suffering; *nezek*, damage or loss as to property."[166] This biblical rule of talion is consistent with contemporary tort damages under the *Restatement of Torts*, which "attempts primarily to put an injured person in a position as nearly as possible equivalent to his position prior to the tort."[167]

This focus of both the *Restatement of Torts* and the *mishpatim* on the loss of the victim is consistent with the private law concept of *corrective* or *commutative justice*.[168] St. Thomas Aquinas cites at least one provision of the *mishpatim* as being consonant with justice, particularly corrective justice.[169] As in Aquinas's day, contemporary conceptions of corrective or commutative justice can be traced to Aristotle,[170] particularly, Aristotle's *Nicomachean Ethics*.[171] As in the *mishpatim*, Aristotle focuses the corrective justice inquiry on the injury of the victim.[172] Aristotle's vision of corrective

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165. SPRINKLE, *supra* note 7, at 95.

166. Kader, *supra* note 5, at 166.

167. RESTATEMENT (SECOND) OF TORTS § 901 cmt. a (AM. LAW INST. 1979).

168. *See* Anton-Hermann Chroust & David L. Osborn, *Aristotle's Conception of Justice*, 17 NOTRE DAME LAW. 129, 140–42 (1942) (explaining that the essence of Aristotle's notion of corrective justice is restoring balance between the criminal and the victim).

169. THOMAS AQUINAS, SUMMA THEOLOGICA, pt. II-II, q. 61, art. 4, *reprinted in* FROM IRENAEUS TO GROTIUS: A SOURCEBOOK IN CHRISTIAN POLITICAL THOUGHT 100–1625, at 355, 357–58 (Oliver O'Donovan & Joan Lockwood O'Donovan eds., Thomas Gilby trans., 1999) [hereinafter FROM IRENAEUS TO GROTIUS].

170. *See* Richard A. Posner, *The Concept of Corrective Justice in Recent Theories of Tort Law*, 10 J. LEGAL STUD. 187, 188 (1981) (recognizing Aristotle's influence on modern legal scholars); *accord* Ernest J. Weinrib, *Correlativity, Personality, and the Emerging Consensus on Corrective Justice*, 2 THEORETICAL INQUIRIES L. 107, 108 (2001).

171. *See* ARISTOTLE, *supra* note 52, at 275 (speaking of "Justice in Rectification" where the judicial system seeks to "equalize" or correct an injustice by penalizing the offender).

172. Though translations vary widely, Aristotle's focus on the victim's injury is clear. *See, e.g.*, *id.* ("[T]he law looks only at the nature of the damage, treating the parties as equal, and merely asking whether one has done and the other suffered injustice, whether one inflicted and the other has sustained damage."); ARISTOTLE, THE NICOMACHEAN ETHICS bk. V, ch. iv, at 126 (R.W. Browne trans., London, Henry G. Bohn 1850) (c. 384 B.C.E.) ("[T]he law looks to the difference of the hurt alone, and treats the persons, if one commits and the other suffers injury, as equal, and also if one has done and the other suffered hurt."); ARISTOTLE, THE NICOMACHEAN ETHICS bk. V, ch. iv, at 149–50 (Robert Williams trans.,

justice has to do with restoring equality after imposed injuries: "[T]he just . . . consists in having an equal amount before and after the transaction."[173] As Aquinas put it, justice "implies a certain balance of equality."[174]

Aristotle's corrective justice, unlike distributive justice, ignores the relative virtue of the parties and merely replaces an injury from the party who received the injury back onto the party who inflicted it.[175] The act of one through an exercise of the will injuring another is the "injustice" that is to be rectified.[176] In other words, the injustice (done by one and suffered by another) that corrective justice rectifies is (from the point of view of the actor) the voluntary (not necessarily intentional) and (from the point of view of the one acted upon) involuntary infliction of damage or injury by one upon another. If the injury is done by one to another, then corrective justice requires rectification.[177] Corrective justice steps in to restore the parties to their pre-injury state when one imposes an injury on another.[178] Aquinas likewise saw justice as a relational concept: "[W]ith justice, . . . that which is correct is constituted by a relation to another, for a work of ours is said to be just when it meets another on the level, as with the payment of a fair wage for a service rendered."[179]

St. Thomas Aquinas's *Commentary on Aristotle's Nicomachean Ethics* is instructive here:

> [Aristotle] says that if one of two contestants receives a wound and the other inflicts it, or even if one commits murder and the other is murdered, this . . . brings about inequality because the assailant and the murderer have more of what is esteemed good, inasmuch as they have done their own will and so seem as it were to have gained. But the man who is wounded or murdered has more of evil insofar as he is deprived against his will of well-being or life, and so he seems as it were to have suffered loss. The judge tries to

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London, Longmans, Green, & Co. 1869) (c. 384 B.C.E.) ("If A. has committed and B. has suffered a wrong, or if A. has injured and B. has been injured, the law only looks to the actual nett [sic] result of the injury, and draws no distinction between the parties.").

173. Posner, *supra* note 170, at 189 (omission in original) (footnote omitted).

174. FROM IRENAEUS TO GROTIUS, *supra* note 169, at 355.

175. *See* Posner, *supra* note 170, at 189–91 ("If, for example, the thief was a gentleman and the injured party a beggar—a member of an inferior class in the State—this difference of rank is nothing to the law . . . .").

176. ARISTOTLE, *supra* note 52, at 275.

177. Kathryn R. Heidt, *Corrective Justice From Aristotle to Second Order Liability: Who Should Pay When the Culpable Cannot?*, 47 WASH. & LEE L. REV. 347, 354 (1990) (discussing the basic condition for applying Aristotle's corrective justice—that one person has been injured and another has done the injuring).

178. *Id.* at 350.

179. FROM IRENAEUS TO GROTIUS, *supra* note 169, at 355.

> equalize this by subtracting from the gain and allotting compensation for the loss, inasmuch as he takes away something from the assailant and the murderer contrary to their will and bestows it to the gain or honor of the person wounded or murdered.[180]

Aquinas elsewhere explained similarly that "the nature of commutative justice demands that equivalent recompense be made, namely that the reaction as repayment matches the action."[181] Thus, the need for rectification through corrective justice is triggered any time that (and only when) an actor's exercise of will imposes an injury or loss on another.[182] The rule of *lex talionis*, whereby one who injures another is required to make recompense commensurate with the "damage" caused, establishes corrective justice as at least one goal of the tort law of the *mishpatim*.[183]

Paradigm #6: Permanent Impairment of Slave (21:26–27)

Protasis: "When a man strikes the eye of his slave, male or female, and destroys it . . . . If he knocks out the tooth of his slave, male or female . . . ."[184]

Apodosis: "[H]e shall let him go free on account of his eye . . . . [H]e shall let him go free on account of his tooth."[185]

Principle: The slave's human dignity entitles him to compensation for permanent personal injury.

The *mishpatim* here returns to the subject of the slave.[186] The interjection of paradigms involving brawling men and the pregnant woman between two paradigms relating to slaves raises the question why the two cases involving slavery are separated this way.[187] Many contemporary "source-oriented scholars" take the position that the case of the brawling men and the pregnant

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180. THOMAS AQUINAS, COMMENTARY ON ARISTOTLE'S NICOMACHEAN ETHICS 302 (C.I. Litzinger trans., Dumb Ox Books 1993).

181. FROM IRENAEUS TO GROTIUS, *supra* note 169, at 356–58 (specifying that commutative justice requires individuals to pay what they owe whether another's loss is the result of a voluntary or involuntary transaction).

182. *Id.* at 358.

183. *See supra* notes 155–67 and accompanying text (exploring how scholars have interpreted the rule of *lex talionis* in the *mishpatim*).

184. *Exodus* 21:26–27 (Jewish Publ'n Soc'y trans.).

185. *Id.*

186. *See supra* notes 91–126 and accompanying text (discussing *Exodus* 21:20–21).

187. *See* SPRINKLE, *supra* note 7, at 96–97 (puzzling over the significance of the order of cases in this part of the *mishpatim*).

woman "is an example of interpolation or else represents some other scribal misadventure."[188] However, Sprinkle sees "a more integral connection between" the case of the pregnant woman and this second case involving the slave.[189] The law of *lex talionis*, under which the brawler pays "the exact monetary equivalent" for the harm caused, here "form[s] a contrast with" the case of the permanently impaired slave:[190]

> [The case of the slave,] by using similar language but drawing a quite different conclusion indicates that this principle does not apply in the case of a beating of a bondsman in which the beating is intentional (this is his master's right if for the purpose of making him work), but the maiming was (in all likelihood) unintentional. In this case, and unlike the 'talionic formula', the penalty does not vary according to the degree of injury, but maiming of any sort, as great as the loss of an eye, as little as the loss of a tooth, results in the bondsman's freedom and the loss of the master's investment, that is, the master loses the time owed by the bondsman in lieu of the bondsman's unpaid debt.[191]

One likely effect of the rule is to deter abuse of slaves: "Obviously the law is seeking to prevent any kind of mistreatment toward slaves by lumping all injuries together without distinction."[192] Thus, the Torah again shows an unusual solicitude for the slave.[193]

One mystery of this passage is why the author chose "eye" and "tooth" as examples.[194] The principle illustrated by the selection of these two examples does not suggest that the remedy is limited only to the more severe injuries—loss of an eye is a very serious injury, but loss of a tooth is relatively minor. The author of the *Mekilta* concluded that the unifying principle is the permanence of the injury:

> I might think (that he goes free) even if he knocked out a milk tooth, (which grows back); it is, therefore, written "eye." Just as an eye does not grow back, so the tooth (in question must be one

188. *Id.* at 96 (citation omitted).

189. *Id.*

190. *Id.* at 97.

191. *Id.*

192. CHILDS, *supra* note 11, at 473.

193. *See* PAUL, *supra* note 46, at 78 ("[I]n an unparalleled example of concern for the interest of a slave, the law here provides for his release if the master should destroy his eye or knock out his tooth."); *see also supra* note 112 and accompanying text (discussing the Torah's progressive approach of prescribing the death penalty for masters who killed their slaves).

194. *Exodus* 21:26–27 (Jewish Publ'n Soc'y trans.).

> which) does not grow back. This tells me only of tooth and eye. Whence do I derive (the same for) all of the other organs? It is derived inductively (binyan av) from the two, viz.: Tooth is not like eye, and eye is not like tooth. What is common to them is that they (i.e., their maimings) are permanent maimings of external organ prominences which do not grow back, (the maiming of which) causes the servant to go free, so (the maimings of) all such organ prominences which do not grow back cause him to go free.[195]

Keil and Delitzsch refine this interpretation: "Eye and tooth are individual examples selected to denote all the members, from the most important and indispensable down to the very least."[196] There is no similar counterpart in contemporary tort law, and perhaps this provision and the earlier specification concerning killing a slave are included to signal the essential humanity of the slave at a historical time in which human slavery was generally accepted.[197]

2. Animal Property v. Human Personal Injury (*Exodus* 21:28–32)

The topic of an owner's liability for the harm his animal causes to humans "is the natural follow-up to death and injury due to human assault, though it moves even further from criminal law."[198] Considered in context, *Exodus* 21:28–32 is part of a broader unit:

> [This] unit . . . can be generalized as offenses of one person's property (ox) against a person and one person's property (pit or ox) against another person's property. They follow a group of regulations dealing with offenses of humans against other humans (21.12-27), and precede a group of regulations whose emphasis is offenses of people against other people's property (21.37–22.16). All this represents logical progression in 21.12–22.16: from offenses of humans against humans, to offenses of property against humans, to offenses of property against property, to offenses of humans against property.[199]

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195. MEKHILTA D'RABBI YISHMAEL, *supra* note 44, 21:27.

196. KEIL & DELITZSCH, *supra* note 117, at 135 (citation omitted).

197. *See* PAUL, *supra* note 46, at 69 (finding, in the *mishpatim*'s rules governing the master-slave relationship, concern for the slave, not only as a piece of property, but as a human being).

198. PATRICK, *supra* note 12, at 77.

199. SPRINKLE, *supra* note 7, at 105 (citation omitted).

The first four paradigms in this unit each relate to a goring ox and are "structured according to the declining social status of the victim:" free adult, free child, slave, and ox.[200]

Paradigm #7: Ox Gores Free Adult (21:28)

Protasis: "When an ox gores a man or a woman to death . . . ."[201]

Apodosis: "[T]he ox shall be stoned and its flesh shall not be eaten, but the owner of the ox is not to be punished."[202]

Principle: Liability is limited to harm proximately caused, but the sanctity of human life is again affirmed.

The passage here (and in the next paradigm as well) speaks specifically of an ox, but there is no reason to think that the principles here should be limited to oxen.[203] North would extend the principles announced in these twin paradigms quite broadly to:

> [O]wners of notorious beasts or notorious machinery — capital that is known to be risky to innocent bystanders. Automobiles, trucks, certain kinds of occupations, nuclear power plants, coal mines, and similar examples of dangerous tools are covered by this general principle of personal liability.[204]

It is significant to the principle of this particular paradigm that the ox is goring, something that oxen do not typically do, at least not to humans:

> People who own animals are responsible for their behavior, except when that behavior could not have been predicted or reasonably expected in advance. In v[erse] 28 the paradigm used to illustrate the legal principles intended to apply in such cases is that of a bull who killed someone, which was not what bulls usually or normally did.[205]

200. BURNSIDE, *supra* note 17, at 21.

201. *Exodus* 21:28 (Jewish Publ'n Soc'y trans.).

202. *Id.*

203. *See* AUGUSTINE, QUESTIONS ON THE HEPTATEUCH, bk. II (c. 420 C.E.), *reprinted in* 1 WRITINGS ON THE OLD TESTAMENT 87, 131 (Joseph T. Lienhard trans., 2016) ("[W]hat is said of the bull is to be understood as the part for the whole—whichever beasts subject to human use are dangerous to human beings.").

204. NORTH, *supra* note 75, at 483.

205. STUART, *supra* note 60, at 496.

Likewise, Baron Blackburn famously wrote in the case of *Fletcher v. Rylands*:

> The law . . . seems to be perfectly settled from early times; the owner must keep them in at his peril, or he will be answerable for the natural consequences of their escape; that is with regard to tame beasts, for the grass they eat and trample upon, though not for any injury to the person of others, for our ancestors have settled that it is not the general nature of horses to kick, or bulls to gore; but if the owner knows that the beast has a vicious propensity to attack man, he will be answerable for that too.[206]

Maimonides also distinguished between *tam* (unexpected damage caused by the animal, for which the owner is only partially liable) and *mu'ad* (expected damage caused by an animal, for which the owner is fully liable).[207] *Shen* (grazing) and *regel* (damage by treading) both are normal for the ox and are considered *mu'ad*.[208] "The fact that *shen* and *regel* torts result from an animal's normal activities distinguishes them from *keren* — the abnormal, unexpected act of an animal, such as goring, biting, or kicking."[209] Jackson sees the distinction between *tam* and *mu'ad* as "purely descriptive," not prescriptive.[210] In other words, the distinction has to do only with probability, not with whether the animal is in any way violating "natural law."[211]

The issue here is one of causation, particularly *proximate cause* or *scope of liability*, to use the terminology employed in the *Third Restatement of Torts*, which limits the liability of an actor "to those harms that result from the risks that made the actor's conduct tortious."[212] The foreseeable risk of the ox is *shen* and *regel*, and later paradigms within the *mishpatim* extend liability to the owner of a trespassing ox that destroys crops by trampling on or grazing in those crops.[213] But the owner of an ox would not be liable if the

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206. Fletcher v. Rylands (1866) L.R. 1 Ex. 265, 280 (Eng.).

207. Bernard S. Jackson, *Maimonides' Definitions of* Tam *and* Mu'ad, 1 JEWISH L. ANN. 168, 168–69 (1978) [hereinafter Jackson, *Maimonides' Definitions*].

208. *See* INST. FOR RESEARCH IN JEWISH LAW, HEBREW UNIV. OF JERUSALEM, THE PRINCIPLES OF JEWISH LAW 324 (Menachem Elon ed., 1975) (describing the types of animal behavior that qualify as *mu'ad*).

209. *Id.*

210. Jackson, *Maimonides' Definitions*, *supra* note 207, at 176.

211. *Id.* at 174, 176.

212. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYS. & EMOT. HARM § 29 (AM. LAW INST. 2010).

213. *See Exodus* 22:4 (Jewish Publ'n Soc'y trans.). Under the *Restatement of Torts*, strict liability for trespassing livestock is limited to the sorts of harm to be expected from such trespass, so if the property

ox were suddenly stricken dead and fell on a victim standing nearby.[214] Neither would the owner be liable if a sudden whirlwind lifted the ox onto a victim.[215] Similarly, the ox owner is not responsible for the unexpected *keren* of the goring ox.[216] Such unforeseeable injury is an act of God, like a lightning strike.[217] The victim's odds of being killed probably were not appreciably increased by the owner's possession of an ox—to use Judge Guido Calabresi's terminology, there is at best a very tenuous "causal link" between ox ownership and human death.[218] A little imagination might suggest that it is at least theoretically equally possible that the ownership of the ox could lead to a position of increasing victim's safety. This paradigm limits liability to those cases of "causal link" in which defendant's conduct appreciably increases the risk of the injury that results.[219]

While the ox owner is free of responsibility to the victim of the goring, the ox nevertheless is stoned to death.[220] It is tempting to see this as a public safety regulation, but the paradigm provides for the execution of the ox by ritual stoning and a taboo on eating the flesh, which does not fit the "safety regulation" explanation.[221] As Van Selms explained: "The meaning can not be explained in a utilitarian way; it is not with the intention to prevent reiteration of fatal incidents that the ox is stoned. In that case the ox could have been slaughtered in the usual way and its meat eaten."[222]

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owner trips over the trespassing livestock, that would not be a case of strict liability. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYS. & EMOT. HARM § 21, cmt. g (AM. LAW INST. 2010).

214. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYS. & EMOT. HARM § 34 (AM. LAW. INST. 2010) (limiting liability to that attributed to the actor's breach of duty).

215. *Id.*

216. *Id.*

217. *Id.*

218. *See* Guido Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 U. CHI. L. REV. 69, 71 (1975) ("There is a causal link between an act or activity and an injury when we conclude on the basis of the available evidence that the recurrence of that act or activity will increase the chances that the injury will also occur.").

219. *Id.*; *see* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYS. & EMOT. HARM § 34 (AM. LAW. INST. 2010) (providing that when the defendant's actions do not contribute to the factual cause of the injury, the defendant is not liable).

220. *Exodus* 21:28 (Jewish Publ'n Soc'y trans.).

221. *See* PATRICK, *supra* note 12, at 77–78 (reasoning that the ritualistic killing of the ox—and the taboo attached to the consumption of its meat—indicate that the killing was not justified on "purely rational grounds").

222. A. Van Selms, *The Goring Ox in Babylonian and Biblical Law*, 18 ARCHIV ORIENTÁLNÍ 321, 328 (1950); *accord* SPRINKLE, *supra* note 7, at 123 (reasoning that, if the lawgivers merely wanted to remove the threat of a dangerous animal, they would not need to mandate a specific method for killing the ox).

Rather, "[t]he stoning of the ox and its taboo status are related . . . to the religious presupposition of bloodguilt"[223] established earlier in the Pentateuch.[224] The ox in the paradigm was guilty on two counts. First, it had shed human blood.[225] Second, it had violated the divinely ordained hierarchy that placed humans at the pinnacle of creation.[226] Both at the completion of creation,[227] and upon humankind's emergence from the ark into a freshly cleansed earth following the Noahic flood,[228] God had pronounced humans to have the first place on the earth. God told Noah that to enforce humanity's place at the pinnacle of creation, God would place the "fear" and "terror" of humans "on every beast of the earth."[229] God also at that time gave humans permission to eat animals.[230] But God specifically prohibited the consumption of blood.[231] In fact, God provided that there would be an accounting for blood: "And surely I will require your lifeblood; from every beast I will require it. And from *every* man, from every man's brother I will require the life of man. Whoever sheds man's blood, [b]y man his blood shall be shed, [f]or in the image of God He made man."[232] This divinely prescribed accounting for blood explains the stoning and taboo on the goring ox.[233] Finkelstein made the point rather dramatically:

> The ox is to be executed, not because it had committed a crime, but rather because the very act of killing a human being—voluntarily or involuntarily—had rendered it an object of public

223. PAUL, *supra* note 46, at 79 (footnotes omitted); *see also* CASSUTO, *supra* note 99, at 279 (justifying the stoning of the ox and the taboo against eating its flesh with reference to *Genesis* 9:5–6 which places the guilt for spilling blood on the ox, rather than on the ox's owner).

224. *Genesis* 9:5–6 (King James).

225. *Exodus* 21:28 (Jewish Publ'n Soc'y trans.).

226. *See* Finkelstein, *supra* note 10, at 28 ("[B]y killing a human being . . . [the ox] has objectively committed a *de facto* insurrection against the hierarchic order established by Creation . . . . It has acted against man, its superior in the hierarchy of Creation . . . ."); PATRICK, *supra* note 12, at 78 ("[T]he ox has violated the hierarchy of being which places humans over animals . . . ."); SPRINKLE, *supra* note 7, at 125 ("The ox that gores a man to death disrupts the divinely sanctioned hierarchy in which man in the image of God was to rule over the beasts . . . .").

227. *Genesis* 1:28 (New American Standard) (relating God's message to humans at their creation that they should rule over all other living things).

228. *Id.* 9:2 (relating God's message to Noah and his family that all living things would fear humans and belong to humans).

229. *Id.*; *accord* NORTH, *supra* note 75, at 462.

230. *Genesis* 9:3 (New American Standard).

231. *Id.* 9:4.

232. *Id.* 9:5–6.

233. *See* PAUL, *supra* note 46, at 79 (comparing the *mishpatim*'s apodosis to that of a similar provision in Hammurabi's Code which does not require the death of the ox and concluding that the two sources of law prescribe different results because ancient Jewish law, unlike Babylonian law, incorporated the divine concept of bloodguilt).

> horror. This horror is engendered by the implications of such a killing: the animal was seen as living rebuttal of the divinely ordained hierarchy of creation; by an action that itself could not be judged on a moral standard the ox turned into an instrument that undermined the moral foundations of the universe.[234]

In summary, this paradigm limits the liability of the livestock owner for unforeseeable injury caused by the livestock and simultaneously reinforces the sanctity of human life.[235]

Paradigm #8: *Mu'ad* Gores Free Adult (21:29–30)

Protasis: "If, however, that ox has been in the habit of goring, and its owner, though warned, has failed to guard it, and it kills a man or a woman . . . ."[236]

Apodosis: "[T]he ox shall be stoned and its owner, too, shall be put to death. If ransom is laid upon him, he must pay whatever is laid upon him to redeem his life."[237]

Principle: One who keeps a vicious animal is strictly liable for the injuries it causes.

The term "*mu'ad*," mentioned with regard to expected damage in the discussion of the immediately preceding paradigm, literally means "one that has been testified against."[238] The term apparently comes from the language of this paradigm: "[I]t hath been testified to his owner."[239] Probably some indication of viciousness short of an actual previous goring was sufficient to put the owner on notice.[240]

The owner who now knows of the beast's vicious tendencies has a difficult choice:

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234. Finkelstein, *supra* note 10, at 70.

235. *See* SPRINKLE, *supra* note 7, at 127 ("By prohibiting the eating of the flesh, the regulation serves to express the lawgiver's outrage at a violation of the divine order and to underscore the value that he places on human life.").

236. *Exodus* 21:29–30 (Jewish Publ'n Soc'y trans.).

237. *Id.*

238. Friedell, *supra* note 16, at 908–09.

239. *Exodus* 21:29 (King James).

240. BERNARD S. JACKSON, *The Goring Ox*, *in* ESSAYS IN JEWISH AND COMPARATIVE LEGAL HISTORY, *supra* note 33, at 108, 124 [hereinafter JACKSON, *Goring Ox*] ("[I]t is unlikely that only an ox which had gored a man was contemplated in v[erse] 29. Once the owner was put on notice that his beast was prone to gore man or beast, he was expected to remove the menace.").

> Was the beast to be "kept in"—that is, shut in or tied up? But that would render it useless to its owner for ploughing—its prime *raison d'être*. Was it to be "watched," or "guarded"? But how could that be done effectively by one person on an unpredictable and vicious animal? The law makes no provision for the confusing legal situation that would arise if the owner had taken such precautions, but the ox subsequently wrought its havoc notwithstanding.[241]

The phrase "has failed to guard it" sparked the beginnings of a debate within the early rabbinic tradition between a strict liability rule and a negligence rule relating to the *mu'ad*:

> Rabbi Judah prefers a "subjective" decision, a decision, that is, which has regard to the degree of care or negligence shewn [sic] by the owner of the ox in the individual case before the court. Meir and Eliezer prefer an "objective" decision, postulate "absolute responsibility" in the case of an ox known to be ferocious, would make the owner fully liable irrespective of the particular circumstances and the measures that he may have taken.[242]

Perhaps the earliest extant authority on this debate, the Septuagint, appears to favor the strict liability rule: "[W]hen we consult the Septuagint, we find that the words 'and he does not guard him' are rendered by 'and if he does not do away with it.' Here we have the 'absolute responsibility' of Rabbi Meir and Rabbi Eliezer: there is no guarding but the knife."[243] Also in the strict liability camp are Josephus and the Vulgate: "The Vulgate follows this slightly ambiguous terminology with *nec recluserit eum*. Josephus commences his account with the statement 'An ox that goreth with its horns shall be slaughtered by its owner' . . . . Of course, both the Vulgate and Josephus may well be dependent on the LXX."[244] And at least some modern commentators agree that this paradigm establishes a rule of strict liability for personal injury caused by the *mu'ad*:

> [W]ould the owner be allowed to plead that he had taken reasonable steps to forestall the danger and that the fatal event was the consequence not of his own neglect but rather of circumstances beyond his control, and that he should therefore be absolved of

241. WRIGHT, *supra* note 112, at 161.
242. Daube, *The Three Gates*, *supra* note 16, at 368–69 (footnote omitted).
243. *Id.* at 369.
244. JACKSON, *Goring Ox*, *supra* note 240, at 123.

> liability? I do not wish to commit myself by offering a definite answer, but on the whole it would seem more likely that notions of *Erfolgshaftung*, strict liability for the results, would prevail, and that because of the prior official warning.[245]

A strict liability rule seems most consistent with the text here. The liability of the owner does not turn on the quality of his effort, but rather the result.[246] In other words, the question of the owner's liability does not turn on what he did to keep the vicious ox in, but on whether he in fact kept it in.[247]

Unlike the immediately preceding paradigm, there is no question of causation.[248] The fatal goring here is not like a lightning strike, for this ox has struck before.[249] Until the fatal goring, the power of decision was with the owner of the ox, even if the ox had evidenced vicious tendencies:

> The danger was not yet sufficient to necessitate collective action, nor was there yet any reason to deprive the owner of the flesh and the hide. But if the owner did not act in the interests of the community, he himself became personally liable, and in addition he lost the value of the flesh, which he would have if he slaughtered the beast himself.[250]

If a fatal goring occurred after a warning, then the penalty was twofold: "the ox was to be stoned (as also in the case of unprecedented goring), and the owner was to be executed, unless a ransom is accepted for his life—presumably by the kin of the victim."[251] It is unclear how literally the idea of executing the owner should be taken here. Perhaps the point is merely that

245. Yaron, *supra* note 10, at 57.

246. *See Exodus* 21:29–30 (Jewish Publ'n Soc'y trans.) (establishing liability for the owner if the owner knew the animal was vicious and failed to secure it).

247. Similarly, under the *Restatement of Torts*, liability for injuries caused by animals known to be vicious is strict. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYS. & EMOT. HARM § 23 (AM. LAW INST. 2010) ("An owner or possessor of an animal that the owner or possessor knows or has reason to know has dangerous tendencies abnormal for the animal's category is subject to strict liability for physical harm caused by the animal if the harm ensues from that dangerous tendency.").

248. *See supra* notes 212–19 and accompanying text (discussing the element of causation in *Exodus* 21:28).

249. *See Exodus* 21:29 (Jewish Publ'n Soc'y trans.) (specifying an ox that "has been in the habit of goring").

250. JACKSON, *Goring Ox*, *supra* note 240, at 124.

251. WRIGHT, *supra* note 112, at 162.

the owner's life is figuratively forfeit. A death penalty would not fit here.[252] There is no death penalty in the *mishpatim* for accidental homicide:

> The "ransom" . . . of v[erse] 30 is not a fine for negligence, but rather a substitution of a monetary payment for the "life" of the negligent owner by which he placates or mollifies the victim's family, thereby settling the grievance between the family and the offending party. On the principle of "life for life" (cf. 21.23) the negligent owner, having allowed his ox to take a human life, had in principle forfeited his own life. Yet because it was not a matter of intentional homicide in which ransom was forbidden (Num. 35.31), he could, with the agreement of the victim's family, be saved from execution by a monetary payment. The amount of payment is left open, possibly due to the lawgiver's reluctance to place a monetary value on human life, for the only thing really commensurate with the life of a victim would be another human life.[253]

This is not a case of vicarious liability of the ox owner for the misdeed of the ox. If that were the case, the owner would have been responsible as well in the immediately preceding paradigm involving the ox not known to be dangerous.[254] Rather than vicarious liability, this is liability for the owner's own choice to keep the animal known to be vicious.[255] The significance of the owner's knowledge of the beast's unusual vicious tendency is to give the owner the choice whether to keep the vicious beast and to make the owner responsible for the consequences of that choice:

> This case law applies to an owner who chose to keep possession of the beast. Thus, he simultaneously chose to bear the additional risks associated with the behavior of that particular beast. The owner also chose not to take the time and trouble necessary to restrain the beast. This is his lawful decision. No one is sent by the civil government to inspect the quality of the fence or the strength of the rope around its neck. But its owner is prohibited by biblical

252. *See* SPRINKLE, *supra* note 7, at 117–18 (suggesting that it is more likely that the owner of the murderous ox would owe the victim's family a ransom than that he would be executed).

253. *Id.* at 117–18 (footnotes omitted).

254. *See* RESTATEMENT (SECOND) OF TORTS § 877 (AM. LAW INST. 1965) (distilling the doctrine of vicarious liability and providing that a person is liable for the harmful acts of those whom he or she controls, or has a duty to control, if due care would have prevented the harm).

255. *See* JACKSON, *Goring Ox*, *supra* note 240, at 127 ("He is punished not for the act of his ox (vicarious liability) but for his own failure to kill [the ox].").

> law from passing on these now-known risks of ownership to innocent third parties.[256]

Thus, this paradigm does not regulate what the owner may do with his vicious ox. Rather, the paradigm makes the owner responsible for the consequences of his choice regarding the dangerous ox.

Paradigm #9: Ox Gores Minor (21:31)

Protasis: "So, too, if it gores a minor, male or female . . . ."[257]
Apodosis: "[The owner] shall be dealt with according to the same rule."[258]
Principle: Children possess human dignity.

This paradigm shows that "[t]he biblical laws concerning the goring ox apply equally as well in a case where a son or a daughter of a freeman is gored to death."[259] The principle here is that children have human dignity.

Paradigm #10: Ox Gores Slave (21:32)

Protasis: "But if the ox gores a slave, male or female . . . ."[260]
Apodosis: "[H]e shall pay thirty shekels of silver to the master, and the ox shall be stoned."[261]
Principle: The slave is superior to the ox.

In the case of the slave gored by an ox, instead of the *lex talionis* responsibility, the owner of the ox pays the price of the slave.[262] Consistent with the other provisions relating to slaves, this paradigm affirms that the slave possesses human dignity,[263] while still treating the slave in a diminished way: "The ambiguous status of the slave is here characterized by both the acceptance of the composition on behalf of his death and the stoning of the ox. The latter is another reflex of the religious principle embodied in Gen.

256. NORTH, *supra* note 75, at 500.
257. *Exodus* 21:31 (Jewish Publ'n Soc'y trans.).
258. *Id.* (alteration in original).
259. PAUL, *supra* note 46, at 83; *accord* MEKHILTA D'RABBI YISHMAEL, *supra* note 44, 21:31.
260. *Exodus* 21:32 (Jewish Publ'n Soc'y trans.).
261. *Id.*
262. *Id.*
263. *See* CASSUTO, *supra* note 99, at 280 ("[B]ecause the slaves, too, were created in the Divine image.").

9:5, for the slave is still considered a human being."[264] So the slave is affirmed as human, and yet the owner of the ox that kills a slave is not subject to full *lex talionis* responsibility.[265] Perhaps the difference is attributable to the fact that the slave does not own his own human capital, and 30 shekels of silver is sufficient to compensate the master of the slave for the loss of the slave.[266] Again, perhaps this provision is a less than ideal rule designed to move in a positive direction within the limits of its historical context.[267]

B. Property Damage in the Mishpatim *(*Exodus *21:33–22:6)*

1. Property v. Property (*Exodus* 21:33–36)

Paradigm #11: The Open Pit (21:33–34)

Protasis: "When a man opens a pit, or digs a pit and does not cover it, and an ox or an ass falls into it . . . ."[268]

Apodosis: "[T]he one responsible for the pit must make restitution; he shall pay the price to the owner, but shall keep the dead animal."[269]

Principle: Strict liability extends to one who creates non-invasive risk.

Here, "the lawgiver temporarily leaves the realm of goring oxen and goes to that of pits."[270] The author of the *Mekilta* wondered why this provision was necessary at all, liability for damage caused by property (the ox) already having been established.[271] Why does that case not cover this one?[272] The *Mekilta*'s answer was that the pit is distinguishable from the ox in that the ox is mobile while the pit is not.[273] Therefore, a separate rule is

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264. PAUL, *supra* note 46, at 83 (footnote omitted); *see also* SPRINKLE, *supra* note 7, at 125 (reasoning that an ox that kills a human, whether slave or free, must be stoned because the ox has transgressed the divine order which places humans above beasts).

265. *Exodus* 21:32 (Jewish Publ'n Soc'y trans.) (setting the compensation for the tort in monetary terms).

266. NORTH, *supra* note 75, at 480–81 (reasoning that 30 shekels could be more than enough to compensate the master if the slave's term of servitude was near complete and explaining that, in that case, the price could go toward freeing the slave's family members).

267. *See supra* text accompanying notes 105–12 (demonstrating that the Mosaic laws were progressive but practical, not idealistic).

268. *Exodus* 21:33–34 (Jewish Publ'n Soc'y trans.).

269. *Id.*

270. SPRINKLE, *supra* note 7, at 111.

271. *See* MEKHILTA D'RABBI YISHMAEL, *supra* note 44, 21:33 ("Since the ox is his possession and the pit is his possession, then if you have learned that he is liable for his ox, should he not be liable for his pit?").

272. *Id.*

273. *Id.*

necessary even though both are cases of legal liability.[274] The authors of the Mishnah likewise distinguished harm caused by the pit from the other primary causes of injury in that the danger of the pit is passive, whereas the other risks actively "go forth and do injury."[275] Unlike beasts and fire, to be discussed in succeeding paradigms, the pit has no potential for physical invasion.[276] Nevertheless, the one who opens the pit is legally responsible for the risk created.[277]

Much of the historical discussion over the meaning of this paradigm focuses on precisely who is the responsible party, but the protasis establishes who is legally responsible—one who "opens" or "digs" a pit.[278] This is the *ba'al*, or controller of the pit.[279] Therefore, liability extends to the one who digs a pit in the first place and to the one who opens a pit already dug.[280] Both involve the creation of a dangerous risk if the pit is not later covered.[281]

Some have been tempted to see this paradigm as a case of premises liability, holding the owner of the pit legally responsible for dangerous artificial conditions within the owner's property.[282] This temptation flows from the fact that some "translations render the phrase *ba'al habor* as 'the owner of the pit' . . . ."[283] But this translation probably is not the best. When and where this paradigm was written:

> [T]he notion of ownership of a waterhole would often have been illusory . . . . [I]n the desert, waterholes would be dug by nomads,

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274. *See id.* (demonstrating that liability for pits is complicated by varying levels of liability for harm that results from one digging a pit, covering a pit, or uncovering a pit).

275. THE MISHNAH 332 (Herbert Danby trans., Oxford University Press 1933) (c. 200 C.E.).

276. For a rather aggressive reliance on the significance of physical invasion to tort liability, see Richard A. Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*, 8 J. LEGAL STUD. 49 (1979).

277. The distinction covered here between trespassory invasions, such as fire and cattle, and more indirect risks, such as that posed by the pit, is reminiscent of the common law distinction between the writ of trespass for "direct" harms and the writ of trespass on the case, for indirect harms. *See* HENSLER, TORTS, *supra* note 137, at 167 (explaining that trespass on the case was not governed by strict liability, rather the plaintiff had to show that the defendant's conduct was blameworthy).

278. *Exodus* 21:33–34 (Jewish Publ'n Soc'y trans.).

279. *See* JACKSON, WISDOM-LAWS, *supra* note 47, at 315 (interpreting the Hebrew "*ba'al*" as meaning "control" over the pit).

280. *See* MEKHILTA D'RABBI YISHMAEL, *supra* note 44, 21:33 (finding that the common ground between "opening" a pit and "digging" a pit is that the actor is responsible for the consequences of failing to guard the pit).

281. *See* JACKSON, WISDOM-LAWS, *supra* note 47, at 319 (reasoning that the question of who left the pit open provided a workable test for liability).

282. *See id.* at 315 (acknowledging the temptation to view the pit as a case of strict liability for the owner and adding that this temptation is whetted by the verse's position after the case of the goring ox).

283. *Id.* at 314.

> whose control over them would cease when they left the neighbourhood . . . . The proprietary relationship expressed by *ba'al* can here be little more than "control".[284]

Accordingly, the JPS translation set out here better renders the phrase *ba'al habor* as "the one responsible for the pit."[285]

This passage was early on interpreted "to include liability for (even) a non-paid watchman (who fails to cover it)."[286] Thus, liability extends not to the "owner" of the pit, but rather to the one who created the risk by digging or opening without covering.[287] In this way, this paradigm departs from tort responsibility under the *Restatement*, which extends a duty to owners of property for risky conditions created on their property by others.[288]

This rule of liability for one who creates a risk is consistent with duty analysis under the *Restatement of Torts*.[289] Under the *Restatement*, "[a]n actor ordinarily has a duty . . . when the actor's conduct creates a risk of physical harm."[290] The other side of this duty coin is provided in section 37 of the *Third Restatement of Torts*.[291] There, the background rule is that "[a]n actor whose conduct has not created a risk of physical or emotional harm to another has no duty of care to the other."[292] So, under both the *mishpatim* and the *Restatement of Torts*, creating a risk of harm, such as digging or opening a pit, creates a duty on the creator of the risk.

A second point of discussion concerning this paradigm relates to precisely what duty on the part of the risk-creator the paradigm contemplates.[293] Shalom Paul focuses the liability principle on the "culpable negligence" of the one who does not cover the pit.[294] Levmore agrees: "Verses 33 and 34 do not suggest a strict liability rule for all pit diggers, because it is quite clear that if the digger covered the pit and then, say, a storm

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284. *Id.* at 315.

285. *Exodus* 21:34 (Jewish Publ'n Soc'y trans.).

286. MEKHILTA D'RABBI YISHMAEL, *supra* note 44, 21:33.

287. *Id.*

288. RESTATEMENT OF THE LAW (THIRD) OF TORTS: LIABILITY FOR PHYS. & EMOT. HARM § 51 (AM. LAW INST. 2012) ("[A] land possessor owes a duty . . . to entrants on the land with regard to . . . artificial conditions on the land that pose risks to entrants on the land.").

289. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYS. & EMOT. HARM § 7 (AM. LAW INST., 2010).

290. *Id.*

291. *Id.* § 37.

292. *Id.*

293. *See infra* text accompanying notes 294–300.

294. PAUL, *supra* note 46, at 84.

or passer-by uncovered it, the digger would not be liable."[295] But this probably reads a modern tort conception back onto the text:

> His formulation imputes to the law the abstract and sophisticated concept of "culpable negligence"—which simply is not in it. The law in fact imposes (what we might call) strict liability on the owner of an uncovered pit for the death of an ox or ass that falls into it. The owner of the pit may not have been in the least culpable in not covering the pit. He may have done his very best to guide the animal away. Nevertheless, according to the terms of the provision, he is liable.[296]

The first indication of what became the popular idea that liability in the *mishpatim* was fault-based is absent from the earliest sources such as Philo and Josephus and started to appear later, with the "early rabbinic sources."[297] Originally, in contrast with contemporary American tort law, liability under the *mishpatim* likely was intended to be strict.[298]

The opener of the pit must make good any harm foreseeably caused by the pit. "Ox" and "ass" are exemplary, not exhaustive.[299] Liability would extend to cases of injury or death to any livestock falling into the risky open pit.[300]

Paradigm #12: Ox v. Ox (21:35)

Protasis: "When a man's ox injures his neighbor's ox and it dies . . . ."[301]

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295. Levmore, *supra* note 5, at 268 (footnote omitted). Weingreen agrees with Levmore: "This is a straightforward example of responsibility for the loss . . . through negligence in not keeping the mouth of the pit covered." J. Weingreen, *Concepts in Ancient Biblical Civil and Criminal Law*, 24 IRISH JURIST 113, 133 (1989).

296. JACKSON, *Reflections*, *supra* note 33, at 32; *accord* Cook, *supra* note 4, at 9 ("[T]here are circumstances under which one might leave a pit uncovered yet not fail to act as a reasonable person, thereby triggering no liability for negligence.").

297. JACKSON, WISDOM-LAWS, *supra* note 47, at 318.

298. *Compare, e.g.*, *id.* at 319 (categorizing the example of the uncovered pit as one of strict liability), *with* RESTATEMENT OF THE LAW (THIRD) OF TORTS: LIABILITY FOR PHYS. & EMOT. HARM § 51 (AM. LAW INST. 2012) (providing that the property owner owes a duty of reasonable care to those who enter the owner's property).

299. *See* SPRINKLE, *supra* note 7, at 121 ("[T]he expression 'ox or donkey' is a merismus for domestic animals of whatever sort.").

300. *See* KEIL & DELITZSCH, *supra* note 117, at 136 (noting that the lawgiver intended "ox" and "ass" as examples and chose these examples because they were of greatest importance to the Israelites).

301. *Exodus* 21:35 (Jewish Publ'n Soc'y trans.).

Apodosis: "[T]hey shall sell the live ox and divide its price; they shall also divide the dead animal."[302]

Principle: When two are harmed in a mutually involuntary interaction, they must share the loss.

Here, two oxen have interacted in an unusual way, and at least one ends up dead.[303] The apodosis provides that the owners of the oxen split the loss.[304] Commentators agree that the purpose of the rule illustrated by this paradigm is to share a loss resulting from an interaction in which it is impossible to prove which party caused the loss: "In the kind of case envisioned here, there was no easy way to tell which animal was really at fault and not enough evidence to make either owner obligated to compensate the other . . . ."[305] This rule appears to anticipate the insight of Professor R. H. Coase that all conflicts are reciprocal, in other words, that there is no principled distinction between action and inaction.[306] When two ordinary oxen interact and one ends up dead, there is no principle upon which to say that the living ox imposed the loss, or, more importantly, that the owner of the living ox should be responsible for the entire loss. Therefore, injuries between ordinary oxen are treated as "fortuitous."[307] "The aim of the rule . . . in Exodus [21:35] . . . is to achieve an equitable distribution of loss when the circumstances of the case suggest that there was no clear justification for shifting the burden of the loss from one party to the other."[308] But this paradigm must be understood in conjunction with the immediately succeeding paradigm involving a *mu'ad*.

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302. *Id.*

303. *Id.*

304. *Id.*

305. STUART, *supra* note 60, at 498; *see also* Van Selms, *supra* note 222, at 327 ("In the case of one ox goring the other, . . . it might prove difficult to indicate the culprit; by ordering the equal division of the price of both animals the rights of the respective owners were restored in the best way.") David Daube, *Direct and Indirect Causation in Biblical Law*, 11 VETUS TESTAMENTUM 246, 259 (1961) [hereinafter Daube, *Direct and Indirect Causation*] (praising the idea of sharing the loss as an ingenious way to handle the problem of determining which one of the oxen was the aggressor).

306. *See* Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 2 (1960) (providing examples of reciprocal conflicts).

307. Friedell, *supra* note 16, at 912.

308. Finkelstein, *supra* note 10, at 36; *see* Friedell, *supra* note 16, at 913 ("[H]alf damages are imposed as a means of sharing a loss among two equally responsible and equally innocent parties."); *see also* JACKSON, *Goring Ox*, *supra* note 240, at 132 (footnote omitted) ("It is widely held that its object was to divide the loss equally between two equally blameless owners.").

Paradigm #13: *Mu'ad* v. Ox (21:36)

Protasis: "If, however, it is known that the ox was in the habit of goring, and its owner has failed to guard it . . . ."[309]

Apodosis: "[H]e must restore ox for ox, but shall keep the dead animal."[310]

Principle: The property owner whose property poses a risk to the property of another is responsible for any loss resulting from that risk.

Here we have the return of the *mu'ad*:

> In contrast with the case posed in verse 35, the second example adds the circumstance that the ox that had gored the other ox to death had already had a reputation for such a tendency, that this was known to its owner, and that the latter had failed to take adequate precautions.[311]

No longer is this a mere mutual accident or a reciprocal conflict.[312] Rather, the known propensity of one ox to gore transforms this into a case where one property owner is imposing a non-reciprocal risk on another.[313]

As with the case of the open pit, this paradigm includes language ("its owner has failed to guard it") that some have interpreted to imply a fault-based form of responsibility: "Where the owner knows his ox to be dangerous, and equally in the case of the pit, there is in addition to the ownership a blameworthy omission making him responsible for what happens: 'and he cover it not' in the case of the pit, 'and he guard him not' in that of the ox."[314] This "has failed to guard it" language also appeared earlier with reference to the *mu'ad* in verse 29.[315] As discussed there, the best interpretation is that the owner of the ox known to be dangerous is responsible for expectable harm the ox does without regard to the care exercised by the owner to guard the ox.[316] The question is not whether the

309. *Exodus* 21:36 (Jewish Publ'n Soc'y trans.).

310. *Id.*

311. Finkelstein, *supra* note 10, at 35; *see also* JACKSON, *Goring Ox*, *supra* note 240, at 147 ("It is the distinction between oxen of different dispositions which . . . is the new element in v[erse] 36."); *see supra* notes 238–40 and accompanying text (discussing *mu'ad* in the context of *Exodus* 21:29–30).

312. *See* Finkelstein, *supra* note 10, at 35 (reasoning that when an ox has a reputation as a dangerous animal, the owner of the ox imposes a non-reciprocal risk on others).

313. *Id.*

314. Daube, *Direct and Indirect Causation, supra* note 305, at 259 (footnotes omitted).

315. *Exodus* 21:29 (Jewish Publ'n Soc'y trans.); *see also supra* notes 238–40 (discussing the *mu'ad* in the context of *Exodus* 21:29–30).

316. *See supra* notes 240–50 (asserting that the *mishpatim* calls for strict liability in such cases).

owner exercised reasonable care to guard the *mu'ad*, but rather whether the owner succeeded in guarding the dangerous ox.[317]

Where, as here, the ox risk is not reciprocal, "[t]he loss . . . is not shared, the guilty owner must fully replace it."[318] Injuring the property of one's neighbor by keeping dangerous property creates an obligation to make good losses caused by that dangerous property: "The victim . . . is to be reimbursed, 'ox for ox.' In other words, he is to be reimbursed like for like, value for value."[319]

2. Human v. Property (*Exodus* 22:1–6)

Paradigm #14: Punitive Damages for Conversion—Livestock Rustling (22:1)

Protasis: "When a man steals an ox or a sheep, and slaughters it or sells it . . . ."[320]

Apodosis: "[H]e shall pay five oxen for the ox, and four sheep for the sheep."[321]

Principle: One who commits irreversible theft must pay punitive damages.

To the 21st century tort lawyer, the text of the *mishpatim* here seems to take a sudden turn into the criminal law field of theft, but[322]:

> [t]he relatedness of this material can be recognized if one realizes that what we call larceny was treated as a civil tort rather than as a crime against the state. Hence, all the cases under consideration would involve a suit with a property owner as plaintiff and a person charged with stealing or damaging property as defendant.[323]

While thus related to the earlier tort provisions, the author of the *mishpatim* signaled that these paradigms relating to theft are also distinct:

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317. *See* JACKSON, WISDOM-LAWS, *supra* note 47, at 271 ("There is . . . a significant textual variant in the LXX, which reads 'and has not destroyed it' rather than 'and has not kept it in'.").

318. Daube, *Direct and Indirect Causation*, *supra* note 305, at 259.

319. NORTH, *supra* note 75, at 501.

320. *Exodus* 21:37 (Jewish Publ'n Soc'y trans.).

321. *Id.*

322. *See Larceny*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("The unlawful taking and carrying away of someone else's tangible personal property with the intent to deprive the possessor of it permanently.").

323. PATRICK, *supra* note 12, at 79.

> Benno Jacob discovers in the text a stylistic device that supports this distinction between damage to persons and goods (torts), on the one hand, and theft as a felony, on the other. All the Biblical torts whether in respect of persons (v[erses] 18, 32) or goods (v[erses] 33–36) are joined by the conjunctive *ve*: *ve-khi* ("*and if*"), whereas the paragraph dealing with cases of theft opens simply with *ki* ("if"), without the conjunctive prefix.[324]

The compensation required for theft goes beyond that provided for accidental harm:

> The thief is treated differently from the one who causes damage. The latter who caused damage through his ox or pit did not intend to deprive his fellow of anything. He is therefore only required to make half or total restitution[.] The thief who deliberately sets out to inflict loss on his fellow deserves . . . [and must provide multiple] restitution.[325]

This requirement of multiple restitution actually was a relaxation of the pending norm in the region, which applied the death penalty to such theft.[326]

A distinctive aspect of this paradigm is that it applies only to the thief who kills or sells the stolen livestock.[327] The killing or selling of the livestock of another forms a contrast with the later paradigm, which involves a mere trespassory possession of the livestock of another, without killing or selling.[328] A similar contrast arose in Anglo-American tort law.[329] The old common law adopted the action of trover "as a remedy against the finder of lost goods who refused to return them to the owner but instead 'converted' them to his own use."[330] The trover action gradually expanded to become "a more or less universal remedy applicable to cases in which the plaintiff had been deprived of his chattel, whether by a wrongful taking, a wrongful detention, some wrongful disposal, or other interference with it."[331] In the 19th century, courts began to divide such torts into two categories, mere

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324. NEHAMA LEIBOWITZ, STUDIES IN SHEMOT 370 n.2 (Aryeh Newman trans., 1976).

325. *Id.* at 362 (endnotes omitted).

326. *See* CASSUTO, *supra* note 99, at 282 ("In accordance with the principle of the sanctity of human life, the Torah had compassion on the thief's life.").

327. *Exodus* 22:1 (Jewish Publ'n Soc'y trans.).

328. *See id.* 22:4 (Jewish Publ'n Soc'y trans.) (providing a lesser punishment for the thief who is caught compared to the man who steals and slaughters an ox or sheep).

329. *See* RESTATEMENT (SECOND) OF TORTS § 222A cmt. c (AM. LAW INST. 1965) (discussing a lesser penalty for trespass to chattels than for conversion).

330. *Id.* § 222A cmt. a.

331. *Id.*

trespass to chattels on the one hand and the more severe case of conversion on the other.[332]

Unlike American tort law—which draws no bright line between the less serious trespass to chattels and the more serious conversion—this paradigm does draw such a bright line by announcing a *per se* rule of multiple recovery for all theft in which the stolen livestock is sold or slaughtered.[333] Selling or slaughtering the stolen livestock is thought to have evidentiary significance: "Daube sees the key in the degree of proof. If the stolen animal were found in someone's possession, he could always claim that he did not steal but that it had wandered astray into his flock or herd, and that he planned to return it to its owner."[334] But that defense is rendered absurd when the stolen livestock has been killed or sold.[335] The adoption of this bright-line distinction for thefts involving sale or slaughter carries with it certain efficiencies of determination:

> [T]he judge is not required to examine all the details of the case; not required to find out what were the "subjective" intentions of the accused. He is given one "objective" criterion to go by. If the animal has been killed or sold, he is to regard the charge as established . . . .[336]

Even though American tort law draws no similar bright line between mere trespass to chattels and the more serious conversion, the case of killing or selling of stolen livestock would be an easy case of the more serious tort of conversion rather than the less serious trespass to chattels under American tort law.[337]

Like American tort law, the rule stated for the sort of conversion described in this paradigm provides enhanced liability over a mere trespass, but unlike American tort law, this paradigm includes an unmistakable

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332. *Id.*; Fouldes v. Willoughby (1841) 151 Eng. Rep. 1153, 1155, 8 M. & W. 540 (Eng.) (distinguishing, for the first time, between trespass to chattels, which is an act interfering with the owner's possession, and conversion, which is an act depriving the owner of dominion over his or her chattel).

333. *Exodus* 21:37 (Jewish Publ'n Soc'y trans.).

334. SPRINKLE, *supra* note 7, at 136 (footnote omitted) (citing DAVID DAUBE, *Codes and Codas*, *in* STUDIES IN BIBLICAL LAW 74, 90 (KTAV Publishing House, Inc. 1969) (1947)).

335. *See* LEIBOWITZ, *supra* note 324, at 363 ("Only when he has actually misappropriated it by positive action can it be finally proved that theft was committed.").

336. David Daube, *Codes and Codas in the Pentateuch*, 53 JURIDICAL REV. 242, 257 (1941).

337. *See* RESTATEMENT (SECOND) OF TORTS § 222A illus. 17 (AM. LAW INST. 1965) ("A intentionally shoots B's horse, as a result of which the horse dies. This is a conversion."); *see also id.* § 226 ("One who intentionally destroys a chattel . . . is subject to liability for conversion . . . .").

automatic punitive element.[338] The American law of conversion can provide for such multiple recovery, but multiple recovery is not automatic, as it is under the *mishpatim*.[339] Like the contemporary tort doctrine permitting punitive damages,[340] the multiple recovery punishment provided in this paradigm apparently is intended to deter the thief.[341] The higher multiples provided in this paradigm may be necessary for full deterrence in the light of the possibility that not all thieves will be caught. "The [multiple] compensation . . . functions as . . . an attempt to render repeated rustling unprofitable (if the rate of apprehension were, say, one in three, it would be unprofitable)."[342] Especially in circumstances such as those outlined in this paradigm—where the primary evidence of the theft has been disposed of—the risk of under-deterrence is significant.[343] Without the multiple recovery, the professional livestock rustler would discount the expected possibility of being required to pay damages by the likelihood that his theft would evade detection.[344] The multiple award helps to force the would-be livestock rustler to consider the full social cost of his contemplated theft.[345]

But why is the multiple remedy for the ox different from the multiple for sheep? The early commentators answered by reference to the relative value of oxen and sheep.[346] Philo cites "a particular honour and precedence [given] to those animals which are the most excellent among all tame flocks and herds."[347] Thus, on the higher multiple applied to oxen, "[Philo] attributes the fivefold restitution for an ox rather than fourfold for a sheep to the fact that,

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338. PAUL, *supra* note 46, at 85; *see also* SPRINKLE, *supra* note 7, at 129 (noting stiffer penalties than those provided for negligence).

339. Under American tort law, multiple recovery would be potentially available in conversion cases under the doctrine of punitive damages. *See* HENSLER, TORTS, *supra* note 137, at 594–95 (explaining that the decision to award punitive damages generally belongs to the jury).

340. *See* Kemezy v. Peters, 79 F.3d 33, 34 (7th Cir. 1996) (asserting that punitive damages bolster the deterrent effect of tort law).

341. "Multiple restitution is meant to deter the rich man who could afford to pay it; a different rule applies to a poor one who, though not required to make full multiple restitution, is nevertheless deterred by the potential loss of his freedom. Yet every thief, rich or poor, must pay for his theft somehow." SPRINKLE, *supra* note 7, at 133 (footnote omitted).

342. PATRICK, *supra* note 12, at 80.

343. *See Kemezy*, 79 F.3d at 35 ("When a tortious act is concealable, a judgment equal to the harm done by the act will underdeter."); *see also* PATRICK, *supra* note 12, at 80 ("The rate (fivefold for cattle, fourfold for sheep) is quite steep, presumably because the animal is unrecoverable and the chances of apprehension and conviction are proportionately lower.").

344. *See supra* note 343 and accompanying text (reasoning that mere compensatory damages are not enough to deter tortious conduct in some situations).

345. *See* SPRINKLE, *supra* note 7, at 133 (explaining how multiple recovery punishment changes the would-be thief's risk-reward calculus).

346. *See infra* text accompanying notes 347–51.

347. PHILO, *The Special Laws, IV*, *in* THE WORKS OF PHILO 616, 617 (C.D. Yonge trans., Hendrickson Publishers, New Updated ed. 1993).

unlike the sheep, an ox was a beast of burden, capable of plowing and threshing, and so was significantly more valuable in the ancient economy."[348] Similarly, Rabbi Meir attributes the higher multiple for oxen to the fact that the ox is a working animal: "Come and see how beloved is work by Him who spoke and brought the world into being. (For) an ox, which he took from its work, he pays five-fold. (For) a lamb which he did not take from its work he pays (only) four-fold."[349] Aquinas attributed the higher penalty to the greater difficulty in guarding certain property:

> [A]s regards theft of other things which can easily be safeguarded from a thief, the thief restored only twice their value. But sheep cannot be easily safeguarded from a thief, because they graze in the fields: wherefore it happened more frequently that sheep were stolen in the fields. Consequently the Law inflicted a heavier penalty, by ordering four sheep to be restored for the theft of one. As to cattle, they were yet more difficult to safeguard, because they are kept in the fields, and do not graze in flocks as sheep do; wherefore a yet more heavy penalty was inflicted in their regard, so that five oxen were to be restored for one ox.[350]

This higher penalty for property that is more difficult to guard fits quite well with the rationale for the multiple penalty rule outlined above, that is, full deterrence of the would-be thief.[351]

Paradigm #15: Self-Defense by Deadly Force (22:2)

Protasis: "If the thief is seized while tunneling, and he is beaten to death . . . ."[352]

Apodosis: "[T]here is no bloodguilt in his case."[353]

Principle: Deadly force is permitted in self-defense.

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348. SPRINKLE, *supra* note 7, at 134–35 (footnote omitted); *see also* CASSUTO, *supra* note 99, at 282 ("[L]ess for a sheep than for an ox, possibly because the rearing of sheep does not require so much, or such prolonged, effort as the rearing of herds.").

349. MEKHILTA D'RABBI YISHMAEL, *supra* note 44, 21:37; *see also* LEIBOWITZ, *supra* note 324, at 367 (reviewing other scholars' explanations for the difference and noting that some attribute the difference to the value of the ox as a beast of burden while others attribute the difference to the greater prevalence of the sheep theft).

350. AQUINAS, SUMMA THEOLOGICA, *supra* note 106, pt. I-II, q. 105, art. 2, at 265.

351. *See supra* notes 338–45 and accompanying text (reasoning that the multiple penalty rule counterbalances—in the would-be thief's calculus—the fact that livestock theft is easily concealed).

352. *Exodus* 22:1 (Jewish Publ'n Soc'y trans.).

353. *Id.*

These rules relating to housebreaking come between two provisions relating to livestock rustling.[354] One possible explanation for this organization centers around the theme of theft: "[T]he lawgiver takes the occasion to rule on a problem that would arise in conjunction with theft. If the owner exercised the right to defend his or her property against an intruder, would the owner be held guilty of murder?"[355] Another possible explanation for this organization is that these paradigms relating to housebreaking, like their bookend paradigms relating to livestock rustling, all exhibit a solicitude for the life of the thief.[356] Thus this may be yet another example of the *mishpatim* taking a relatively high view of human life, even the life of the thief[357]:

> Finkelstein sees [this] as an intentional, parenthetical thought. The lawgiver, although well into the laws on things, . . . is compelled at this point to recapitulate and emphasize the value of the life of the thief: that he is not to be killed except in self-defense. This digression was deliberate . . . .[358]

Philo saw this permissible killing of the thief as a case of deadly force in defense of person, not property.[359] Likewise, the author of the *Mekilta* saw this case as one of "doubt (in the owner's mind) as to whether [the thief] is breaking in to steal or to kill."[360] Modern commentators agree:

> When there is any presumption of danger to the life of the houseowner, he is permitted to protect himself even at the expense of the life of the housebreaker. Thus, if the offense takes place at night, when there is a chance that the housebreaker might have resorted to homicide, and the housebreaker is slain, this is

354. *See id.* 21:37, 22:3 (specifying the penalties for livestock rustling in which the animal is not recovered and livestock rustling in which the animal is recovered, respectively).

355. PATRICK, *supra* note 12, at 80.

356. *See* CASSUTO, *supra* note 99, at 282 ("It also protected the thief found breaking in, and limited this protection only out of its even more justified concern for the life of the owner.").

357. *See* CHILDS, *supra* note 11, at 474 ("The law seeks to guard the lives of both parties involved.").

358. SPRINKLE, *supra* note 7, at 131 (citing Finkelstein, *supra* note 10, at 39).

359. *See* PHILO, *supra* note 347, at 616 (observing that the thief breaks into the house with iron tools and other deadly instruments and reasoning that the owner who kills the thief in the night is preventing murder, not theft).

360. MEKHILTA D'RABBI YISHMAEL, *supra* note 44, 22:1.

> considered a case of self-defense on the part of the owner of the house and falls within the category of justifiable homicide.[361]

This is a rare case in which an Anglo-American common law directly cites the *mishpatim*. Blackstone quoted this biblical paradigm in support of his rule that "[i]f any person . . . attempts to break open a house, *in the night-time* . . . and shall be killed in such attempt, the slayer shall be acquitted and discharged."[362]

Similarly, the *Restatement of Torts* provides a privilege to use force likely to cause death in self-defense by one who "reasonably believes" that another is about to put him "in peril of death or serious bodily harm or ravishment, which can safely be prevented only by the immediate use of such force."[363] The *Restatement*'s general privilege to use deadly force in defense of life applies specifically to one threatened in his or her dwelling.[364] In fact, one of the *Restatement*'s illustrations of this principle is strikingly similar to the paradigm here under consideration:

> A, at night, finds a burglar attempting to break into one of the windows of his dwelling place. A is privileged to prevent B, the burglar, from so doing even by killing or wounding him, since B's entry is not only dangerous to the occupiers of the dwelling place, but is also a felony . . . .[365]

Paradigm #16: Deadly Force in Defense of Property (22:3)

Protasis: "If the sun has risen on him . . . ."[366]

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361. PAUL, *supra* note 46, at 87 (footnote omitted); *see also* CASSUTO, *supra* note 99, at 282 ("[I]t is a rightful presumption that a thief caught breaking into premises is prepared to murder the owner in order to save himself . . . ."); PATRICK, *supra* note 12, at 80 ("As one would expect, an owner is not guilty of murder for killing an intruder after dark, when one cannot recognize the culprit or know whether the intruder has a weapon and one's own safety is in question."); SPRINKLE, *supra* note 7, at 132 ("Whereas in some circumstances, as when a thief is breaking in at night, one might not be held accountable for taking the life of the thief (Exod. 22.1), this is not a matter of punishment but rather of self-defense.").

362. 2 WILLIAM BLACKSTONE, COMMENTARIES *180.

363. RESTATEMENT (SECOND) OF TORTS § 65 (AM. LAW INST. 1965).

364. "The intentional infliction . . . of . . . bodily harm by a means which is intended or likely to cause death or serious bodily harm, for the purpose of preventing or terminating . . . intrusion upon the actor's possession of land or chattels, is privileged if, but only if, the actor reasonably believes that the intruder, unless expelled or excluded, is likely to cause death or serious bodily harm to the actor or to a third person whom the actor is privileged to protect." *Id.* § 79.

365. *Id.* § 79 illus. 3.

366. *Exodus* 22:2 (Jewish Publ'n Soc'y trans.).

Apodosis: "[T]here is bloodguilt in that case.—He must make restitution; if he lacks the means, he shall be sold for his theft."[367]

Principle: One must not use deadly force in defense of property.

If the housebreaker is killed during the daytime, when "the sun be risen upon him," then the killer is guilty of blood—he is a murderer.[368] Thus, while deadly force is excused when used at night when the householder may assume that the housebreaker has come to kill, "the owner of the house may not protect his property at the expense of the life of the housebreaker, who, it is assumed, came only to rob and not to commit homicide; hence, if the housebreaker is slain, the houseowner incurs bloodguilt."[369] The daytime/nighttime distinction may have functioned simply as a presumption that could be rebutted by evidence that there was or was not a reasonable threat to the occupants of the house.[370] Not only is the daytime thief protected against death at the hand of the householder, but the thief is further protected against the then common legal penalty of death for such theft.[371] The *mishpatim* once again emphasizes the value of human life, even the guilty life of a thief.[372] As with the case of the rule permitting deadly force in self-defense, this rule prohibiting the use of deadly force in defense of property is consistent with the *Restatement of Torts*.[373]

Paradigm #17: Trespass to Chattels—Livestock Rustling (22:4)

Protasis: "But if what he stole—whether ox or ass or sheep—is found alive in his possession . . . ."[374]

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367. *Id.*

368. *Exodus* 22:3 (King James); PATRICK, *supra* note 12, at 80.

369. PAUL, *supra* note 46, at 87 (footnote omitted); *see also* CASSUTO, *supra* note 99, at 283 ("[I]t can be taken for granted that the proprietor was not in danger and he had no need to kill in order to protect himself . . . .").

370. *See* CASSUTO, *supra* note 99, at 283 ("It is self-understood, that if witnesses were to testify that the killing in the night was not necessary, or was necessary in the day-time, the law would be different; only the Bible presents the case in usual circumstances.").

371. *See id.* (noting the prescribed penalty for theft was a fine and that the thief who could not pay would be sold into servitude).

372. PATRICK, *supra* note 12, at 80 ("Nothing testifies more strongly to the biblical appreciation of the value of the human person over property.").

373. "The intentional infliction . . . of . . . bodily harm by a means which is intended or likely to cause death or serious bodily harm, for the purpose of preventing or terminating . . . intrusion upon the actor's possession of land or chattels, is privileged if, *but only if*, the actor reasonably believes that the intruder . . . is likely to cause death or serious bodily harm to the actor or to a third person whom the actor is privileged to protect." RESTATEMENT (SECOND) OF TORTS § 79 (AM. LAW INST. 1965) (emphasis added).

374. *Exodus* 22:3 (Jewish Publ'n Soc'y trans.).

Apodosis: "[H]e shall pay double."[375]

Principle: Mere trespass to chattels warrants a lesser punitive element than conversion.

Here the text returns to the issue of livestock rustling and provides a background rule of double recovery in the case of mere trespass to chattels (in contrast with the more serious case of conversion of the chattel by sale or slaughter discussed in 22:1).[376] There are a variety of explanations for the lesser penalty where the misappropriated livestock has not yet been disposed of by the thief.[377] Burnside sees the lesser penalty as a rough attempt at accurate compensation: "The lesser penalty may reflect the fact that if you are successful in catching the thief red-handed, then presumably the thief will not have had your animal for very long. If so, the loss to the owner of the use of the animal is not as great . . . ."[378] Aquinas suggested that the lesser penalty may relate to the possibility that the putative livestock rustler did not actually intend to convert the livestock:

> And this I say, unless perchance the animal itself were discovered in the thief's possession: because in that case he had to restore only twice the number, as in the case of other thefts: for there was reason to presume that he intended to restore the animal, since he kept it alive.[379]

Keil and Delitzsch see the distinction between the background rule of double repayment for possession of another's livestock and the four- or fivefold repayment once the livestock has been disposed of as serving the public policy of encouraging restoration through repentance and the return of another's chattel:

> The reason can only have lain in the educational purpose of the law: viz. in the intention to lead the thief to repent of his crime, to acknowledge his guilt, and to restore what he had stolen. Now, as long as he still retained the stolen animal in his own possession, having neither consumed nor parted with it, this was always in his

375. *Id.*

376. *See supra* notes 322–51 and accompanying text (discussing *Exodus* 22:1 and its precepts for conversion).

377. *See infra* text accompanying notes 378–80.

378. BURNSIDE, *supra* note 17, at 303–04.

379. AQUINAS, SUMMA THEOLOGICA, *supra* note 106, pt. I-II, q. 105, art. 2, at 265.

> power; but the possibility was gone as soon as it had either been consumed or sold.[380]

American tort law does not provide such double recovery for a mere trespass to chattels,[381] perhaps because, unlike the *mishpatim*, American law distinguishes between tort and criminal law.[382] Under American law, in addition to any liability to the livestock owner for trespass to chattels, the rustler could also be subject to criminal prosecution for theft.[383] The rule under this paradigm seems to provide the complete civil and criminal incentive in one simple rule.

Paradigm #18: Strict Liability for Trespassing Livestock (22:5)

Protasis: "When a man lets his livestock loose to graze in another's land, and so allows a field or a vineyard to be grazed bare . . . ."[384]

Apodosis: "[H]e must make restitution for the impairment of that field or vineyard."[385]

Principle: The owner of trespassing livestock is strictly liable for expectable harm that they cause.

The subject of the protasis here is the word *ish* (man), not "owner."[386] "The word 'owner' does not occur" in this paradigm.[387] Accordingly, responsibility under this paradigm is not based on ownership of the grazing livestock. To the contrary, Philo gives the generic word "*ish*" or "man" a broad application, applying it to "any shepherd [or] goatherd, or oxherd, or

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380. KEIL & DELITZSCH, *supra* note 117, at 137 (citation omitted); SPRINKLE, *supra* note 7, at 139 ("More promising is the view that sees the twofold penalty if the animal has not been disposed of, rather than a fourfold or fivefold restitution if it has, as the lawgiver's way of encouraging the thief to repent rather than be confirmed in his thievery . . . .").

381. *See* RESTATEMENT (SECOND) OF TORTS § 219 cmt. f (AM. LAW INST. 1965) (providing only for compensatory damages).

382. *Compare id.* § 219 cmt. f (describing the liability for trespass to chattels—also known as theft in the civil system), *and* MODEL PENAL CODE § 223.1 (1962) (providing the punishment for theft in the criminal system), *with Exodus* 22:3 (Jewish Publ'n Soc'y trans.) (punishing theft under one system without distinguishing between civil and criminal systems).

383. *See, e.g.*, 18 U.S.C. § 667 (2012) (providing for criminal prosecution of livestock theft).

384. *Exodus* 22:4 (Jewish Publ'n Soc'y trans.).

385. *Id.*

386. *Id.*

387. Daube, *Direct and Indirect Causation*, *supra* note 305, at 259. As in this paradigm, liability for trespassing livestock under contemporary American tort law extends beyond the owner of the livestock to the "possessor" of the livestock. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYS. & EMOT. HARM § 21 (AM. LAW INST. 2010) ("An owner or possessor of livestock . . . that intrude upon the land of another is subject to strict liability for physical harm caused by the intrusion.").

in short any manager of any kind of cattle."[388] The significance of starting the paradigm with "man" instead of "owner" is that this paradigm addresses a case of liability for one's act, not vicarious liability for damage caused by animate property owned: "These are not cases of a man responsible for an object, or a dangerous object, he owns."[389] Rather, "he is responsible primarily for doing something, for setting the agent to work, rather than because an object belonging to him does something or because he has not prevented a dangerous object belonging to him from doing something."[390]

Having concluded that liability extends to anyone in charge of livestock, the question arises: what sort of conduct by the herder of livestock will support liability? First, it is clear that liability does not depend on the type of harm done. The verb used here, "*ba'ar*," suggests in this context a generic destruction.[391] The word's literal "meaning is . . . 'to burn', but [*ba'ar*] can, more generally, mean 'to devour.'"[392] Since livestock cannot burn crops, the more generic meaning must apply here. Accordingly, "both in ancient and modern times, the predominant view has been that *Exod.* 22:[5] refers to damage by depasturing animals."[393]

What must the keeper of livestock do to be responsible for damage done by the livestock? The protasis here contains two somewhat repetitive clauses.[394] "The text states that the man sent [livestock] out to graze 'a' field . . . but that they ended up grazing another's field . . . ."[395] Patrick provides a persuasive interpretation of this structure: "The . . . protasis has two clauses to cover both intentional and unintentional grazing. In other words, neither intent to graze another's field nor negligence need be proven to merit judgment. The animal owner in all cases must restore to the owner of the crop the loss suffered."[396] The apodosis provides that the one in charge of the livestock "must supply the produce of the equivalent area consumed corresponding to the amount to be expected from the most productive portion of the neighbor's field to make up for the loss of production due to the

388. PHILO, *supra* note 347, at 618.

389. Daube, *Direct and Indirect Causation, supra* note 305, at 259.

390. *Id.* at 259–60.

391. *Exodus* 22:4 (Jewish Publ'n Soc'y trans.).

392. JACKSON, WISDOM-LAWS, *supra* note 47, at 322 (footnote omitted).

393. *Id.*; *see also* E.J. BICKERMAN, STUDIES IN JEWISH AND CHRISTIAN HISTORY 209 (2007) (agreeing that the predominant view—among Jewish jurists—is that the law is concerned with livestock trespassing on cultivated land).

394. *Exodus* 22:4 (Jewish Publ'n Soc'y trans.).

395. SPRINKLE, *supra* note 7, at 141.

396. PATRICK, *supra* note 12, at 81; *see also* Daube, *Direct and Indirect Causation, supra* note 305, at 259 ("[I]t is significnat [sic] that we find the term *shillah*, 'he send in' the cattle, a root very prominent in all kinds of agency (though we are not implying that the 'sending' of the cattle need be more than a 'letting go'—no *dolus* is required) . . . .").

grazing."[397] This simple result of responsibility for harm caused by livestock under one's charge is the same rule applied in America today.[398]

Paradigm #19: Strict Liability for Escaping Fire (22:6)

Protasis: "When a fire is started and spreads to thorns, so that stacked, standing, or growing grain is consumed . . . ."[399]

Apodosis: "[H]e who started the fire must make restitution."[400]

Principle: One who starts a fire is strictly liable for damage caused by the fire.

The protasis involves damage by the outbreak of fire.[401] The apodosis makes the one who "started the fire" liable.[402] This paradigm resembles the famous English case of *Rylands v. Fletcher*.[403] In *Rylands,* defendant had a reservoir built on his property.[404] The reservoir burst, and the water broke out flooding and damaging the plaintiff's property.[405] In *Rylands*, both of the final opinions in the House of Lords alluded to and agreed with the intermediate appellate opinion of Justice Blackburn, which held that the party who brings anything on his property that will cause damage if it escapes is strictly liable for any damage done if it does escape:

> We think that the true rule of law is, that the person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril; and if he does not do so, is *primâ facie* answerable for all the damage which is the natural consequence of its escape . . . . [I]t seems but reasonable and just that the neighbour who has brought something on his own property (which was not naturally there), harmless to others so long as it is confined to his own property, but which he knows will be mischievous if it gets on his neighbour's, should be obliged to make good the damage which ensues if he

397. SPRINKLE, *supra* note 7, at 142 (footnotes omitted).

398. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYS. & EMOT. HARM § 21 (AM. LAW INST. 2010) ("An owner or possessor of livestock or other animals . . . that intrude upon the land of another is subject to strict liability for physical harm caused by the intrusion.").

399. *Exodus* 22:5 (Jewish Publ'n Soc'y trans.).

400. *Id.*

401. *Id.*

402. *Id.*

403. *See* Rylands v. Fletcher (1868) L.R. 3 H.L. 330, 339, [1868] UKHL 1 (Eng.) (holding that any person who "for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril").

404. *Id.* at 330.

405. *Id.* at 332.

> does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued, and it seems but just that he should at his peril keep it there, so that no mischief may accrue, or answer for the natural and anticipated consequence.[406]

Similarly, this paradigm relating to damage by fire establishes "a form of strict liability for the consequences which flow from starting a fire (typically) on one's own land, in the course of burning one's agricultural rubbish."[407] The author of the *Mekilta* sees this paradigm as establishing a general rule of strict liability, not only for cases of damage by fire, but for all damage provisions throughout the entire Torah: "Scripture (thus) comes to equate (for liability) (damaging) perforce with (damaging) wilfully, (damaging) non-intentionally with (damaging) intentionally . . . for all the damaging in the Torah."[408] Cook also sees verse six as "a clear statement of a strict liability rule. The responsibility of the one who started the fire depends not on any showing of negligence or other fault, but rather rests solely upon liability for damage caused."[409] Even Levmore, while not necessarily agreeing that this paradigm establishes a general rule of strict liability, nevertheless concedes that this verse "contains the clearest example of strict liability in ancient laws."[410]

Cook sees this simple rule of "responsibility for damage caused" as the apparent basis of tort liability generally, as illustrated by the paradigms in this passage.[411] Cook associates this biblical rule of strict liability with the causation-based strict liability tort rule famously advocated by legendary American tort professor, Richard Epstein.[412] Epstein's initial approach presumed a background rule of individual liberty,[413] limited by the requirement that the actor must not "'cause harm' to another."[414] Thus, if A's

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406. *Id.* at 339–40 (quoting Justice Blackburn's intermediate appellate opinion).

407. JACKSON, WISDOM-LAWS, *supra* note 47, at 329; *see also* PATRICK, *supra* note 12, at 81 ("The law of burning likewise ignores the question of guilt—a fire tender must make good any loss caused by a fire he or she ignited.").

408. MEKHILTA D'RABBI YISHMAEL, *supra* note 44, 22:5.

409. Cook, *supra* note 4, at 7.

410. Levmore, *supra* note 5, at 269.

411. *See* Cook, *supra* note 4, at 15 (footnote omitted).

412. *See id.* at 15 n.86 (citing Epstein's published work on strict liability); *see* Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973) [hereinafter Epstein, *Theory of Strict Liability*] (examining fairness in common law and the historical conflict between negligence and strict liability).

413. *See* Richard A. Epstein, *Causation and Corrective Justice: A Reply to Two Critics*, 8 J. LEGAL STUD. 477, 479 (1979) [hereinafter Epstein, *Causation and Corrective Justice*] (summarizing the philosophy underlying his work: one has freedom to act, limited only by the proviso that one may not harm another).

414. *Id.*

voluntary act "causes harm" to B, Epstein argued, then this is a *prima facie* basis upon which to hold A legally liable for the harm.[415] "All may act as they please[, b]ut all must make good any harm that they cause."[416]

An important implication of Epstein's strict liability is a non-standard version of corrective justice, something like the version of corrective justice sketched out above.[417] This version of corrective justice is different from the contemporary prevailing view of corrective justice in that Epstein sees justice as requiring an actor to be responsible for the consequences of the actor's voluntary conduct, whereas the standard contemporary version of corrective justice would hold the actor responsible only when the actor's conduct falls below a reasonableness standard.[418] In other words, Epstein's corrective justice would hold actors responsible for what they do, not only for the wrong that they do.[419] Epstein's idea was that, "as between the entirely innocent victim and the 'innocent' party whose [voluntary] act causes an injury, justice demands that the burden of the injury be borne by the party who causes it."[420] "Justice . . . demands that [a] defendant not be allowed to externalize (to borrow a term from Epstein's economic analysis opponents) the costs of his [voluntary] acts . . . ."[421]

Biblical commentators have seen a similar economic explanation for the biblical rule of strict liability for harm caused by fire: "If we are seeking some unarticulated general basis of liability, enterprise liability—one who takes the benefit of an enterprise also assumes its risks—is, in the biblical text, more plausible than negligence, albeit that the typical cases here envisaged may well be accompanied by lack of care."[422] Fire is a useful but risky enterprise. The one who uses fire "cannot legally transfer risks to his neighbor without his neighbor's consent."[423] Epstein's corrective justice version of strict liability assumes that if a party chooses a particular course

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415. Epstein, *Theory of Strict Liability*, *supra* note 412, at 168–69.

416. Hensler, *Torts as Fouls*, *supra* note 86, at 304.

417. *See supra* notes 168–83 and accompanying text (comparing the *mishpatim*'s approach with Aristotle's theory of corrective justice).

418. *Compare* Epstein, *Theory of Strict Liability*, *supra* note 412, at 168–69 (asserting that proof that an individual's voluntary act caused the harm should be sufficient to establish liability for negligence), *with* RESTATEMENT (SECOND) OF TORTS § 283 cmt. c (AM. LAW INST. 1965) (requiring proof that the defendant's departure from the standard of care caused the harm).

419. *See* Hensler, *Torts as Fouls*, *supra* note 86, at 304–05 (recounting Epstein's use of *Vincent v. Lake Erie Transport Co.*, 124 N.W. 221 (Minn. 1910), to illustrate his theory of corrective justice).

420. Hensler, *Torts as Fouls*, *supra* note 86, at 304 (footnote omitted); *see also* Epstein, *Causation and Corrective Justice*, *supra* note 413, at 157–58 (arguing that where both parties have acted reasonably—in either a fiscal or moral sense—liability must fall upon the party whose actions caused the harm).

421. Hensler, *Torts as Fouls*, *supra* note 86, at 305.

422. JACKSON, WISDOM-LAWS, *supra* note 47, at 328 (footnote omitted).

423. NORTH, *supra* note 75, at 551 (emphasis omitted).

of action, that party must believe that he will benefit from that chosen conduct in some way.[424] Similarly here, if a farmer's use of fire causes injury to someone else, then the farmer who garners the benefit from the fire while imposing at least part of the risk on someone else must make good any resulting loss.[425] To permit otherwise would create an "unfair advantage" for the user of fire—"an injustice to be corrected through the tort system."[426]

The defendant's voluntary act "is crucial to Epstein's theory—without it, we cannot be sure that defendant benefits from the injury-producing activity, and without any benefit to the defendant, no imbalance (unfair advantage) is created between this particular defendant and plaintiff."[427] Therefore, liability extends to the one "who started the fire."[428] In essence, this paradigm permits people to use dangerous instrumentalities (like fires, beasts, and pits) to further their goals (in this case, agricultural goals), but the farmer then becomes "an insurer against the risks involved in his normal agricultural activities."[429] Holding the farmer legally responsible for any damage that his use of fire causes forces the farmer to consider the potential for damage to his neighbor when making the choice to use fire, and incentivizes appropriate activity levels and levels of care.[430]

CONCLUSION

This short passage from the *mishpatim* addresses a surprisingly wide variety of tort doctrines, such as the privilege of discipline, transferred intent, proximate cause, premises liability, punitive damages, self-defense, defense of property, trespass to chattels, conversion, trespassing livestock, and abnormally dangerous activities. While some of this passage from the *mishpatim* focuses on non-tort principles, most notably fundamental human dignity, the tort law of the *mishpatim*, at its core, appears to be a corrective-justice-based rule of strict liability for intentional and accidental harm caused by an actor's voluntary conduct.

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424. *See* Epstein, *Theory of Strict Liability*, *supra* note 412, at 158 (drawing on the example of *Vincent*, 124 N.W. 221, in which the defendant decided that it was better to secure the ship to the plaintiff's dock and risk damage to the dock than lose the ship to the storm).

425. *See supra* notes 418, 421 and accompanying text (explaining that Epstein's theory of strict liability does not allow one person to benefit by harming another, no matter how reasonable the actor's conduct may be).

426. Hensler, *Torts as Fouls*, *supra* note 86, at 305.

427. *Id.*

428. *Exodus* 22:5 (Jewish Publ'n Soc'y trans.).

429. JACKSON, WISDOM-LAWS, *supra* note 47, at 330.

430. NORTH, *supra* note 75, at 550.