Lex Talionis: Revisiting Daube's Classic

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Abstract: (1) The great merit, in my view, of Daube's analysis of talion (Chapter III of *Studies in Biblical Law*), in which he seeks to show the importance of the idea of compensation within the very institution of retaliation, resides in his combination of legal and narrative material; (2) his attention to the linguistics of the formula, (3) including the interpretation of *nefesh tahat nefesh* as having at one stage connoted the provision of a *live* substitute; (4) his account of its place within the developing literary structures found in the legal provisions; (5) and his insight into the underlying theological beliefs regarding the spilling of blood. (6) However, in several respects he did not go far enough. The idea of substitution is applied in the miscarriage laws themselves, with a parallel far more direct from the ancient Near East than Daube recognised; (7) there is not just one talionic formula, but rather two: the *ka'asher* formula has its own separate history, which can be traced in the narratives as well as the laws perhaps even more richly than the *tahat* formula; (8) and the processes of priestly systematisation — both literary (through the elaborate chiasmus in *Lev.* 24) and substantive — went one step further than the incorporation (in *Lev.* 24) of wrongs of different kinds (to humans, to animals) under one heading or rubric: they extended to the movement from wrongs to rights.

(9) More broadly, though Daube was both sensitive to, and critical of, the kind of historical jurisprudence derived from 19th-century models (and here represented by Jolowicz) — and indeed in his theory of increasing systematisation gave expression to views which are more compatible with what I would regard as a superior 20th-century model of legal advance (based upon theories of cognitive development) — he could not quite resist even speculative reconstruction of "stages" of individual legal institutions and rules (10) nor indeed, at this stage, a degree of rabbinic apologetics (11). Moreover, for all his sensitivity to language, and his awareness of the sociological differences between rules relating to self-help and those providing for forms of institutional settlement, he appears still wedded to the notion that what we find even in the *Mishpatim* is statutory language. (12) He fails to apply here his notion of the "self-understood" (cf. Bernstein's "restricted code") in legal language. Had he done so, he might have taken a more sympathetic view of the Josephan interpretation (followed by several modern scholars) of the *tahat* formula, as presupposing the possibility of voluntary composition.

In my contribution to David Daube's 80th birthday volume,[1] I offered some remarks on the famous talmudic story of the oven of Okhnai (BM 59b[2]). On this occasion, it may be apt to invoke the talmudic postscript to that story, according to which Elijah reports God's reaction to the rejection of supernatural intervention in the halakhic process: "What did the Holy One, Blessed be He, do in that hour — He laughed [with joy] ... saying, 'My sons have defeated Me, 'My sons have defeated Me.'" That, *mutatis mutandis*, would certainly have been David's reaction to the prospect of rational contradiction on the part of his pupils.

1. The great merit of Daube's analysis of talion in Chapter III of *Studies in Biblical Law*, 1947 (to

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1 "Law, Language and Narrative: David Daube on Some Divine Speech-Acts", in *Essays in Law and Religion. The Berkeley and Oxford Symposia in Honour of David Daube*, ed. C.M. Carmichael (Berkeley: University of California at Berkeley, 1993), 51-66, at 51-53.

2 See also Jackson, "The Concept of Religious Law in Judaism", *Aufstieg und Niedergang der römischen Welt* (Berlin: W. de Gruyter, l979), Bd. II.19.1, 33-52, at 46ff.

which page references below refer) resides in his combination of legal and narrative material, in order to demonstrate a sophisticated thesis regarding the relationship between the *language* of the formula and the *ideas* which underlie it: viz. that "the formula of retaliation prescribes literal retribution for homicide and depriving a person of his eye, tooth or the like. On the other hand ... [with a qualification in relation to Deuteronomy[3]] the formula of retaliation is worded as if retaliation were compensation" (114).

2. In so arguing, he pays particular attention to the usage of *tahat* (meaning: "in the place of"[4]) in the formula (103-105), noting that the author of *Exodus* 21:23 must have been thinking chiefly of compensation, in using the verb *venatatah,* "thou shalt give",[5] to introduce the formula (104).[6] He analyses also the recurrent usage in the *Mishpatim* (though not in the pericope which includes the talionic formula) of the verb *shillem* (133ff.), as referring to restitution in kind, arguing convincingly (in my view) that the one apparent exception, the clause *kesef yashiv liv'alav* in *Exodus* 21:34, is an interpolation (139f.).

3. One of the most original aspects of Daube's account is his understanding that *nefesh tahat nefesh* may have referred in some sources to substitution of a *live* person, rather than the taking of a life:

> We know of ancient Oriental laws according to which all that a man who had killed another man had to do was to supply the latter's family with one or more persons (citing "the first few paragraphs of the Hittite Code"). Under this system, in the case of homicide, one life was simply replaced by another. If there was a similar stage in Hebrew law, and if the clause 'life in the place of life' came into existence in that era, the wording would be easily intelligible (116).

In support of this, he argues from two narratives in Kings. The first is the parable of the guardsman, used to reproach Ahab for not carrying out his obligation to execute the defeated Ben-Hadad (*1 Kgs* 20:39-43). A disguised prophet pretends to be a soldier who has been commanded to guard a prisoner, in the following terms: "Guard this man! If he is missing it

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3 Daube (129f.) considers the possibility that the *tahat* formula here indicates atonement ("life to atone for life"), and suggests that this may be appropriate in the context of the offence of someone who has attempted to get someone else condemned by false evidence, but failed to do so, so that there is no actual loss on the part of the "victim" for which there can be direct compensation. Cf. S.M. Paul, *Studies in the Book of the Covenant in the Light of Cuneiform and Biblical Law* (Leiden: E.J. Brill, 1970), 74 n.5, observing that the Deuteronomic rule "adds an entirely new dimension to the Law of talion. Talion is prescribed here for attempted or contemplated (but not real!) injury." By contrast, A. Prévost, 'A Propos du Talion', in *Mélanges dédiés à la mémoire de Jacques Teneur* (Lille: Université du droit et de la santé, 1977), II.619-629, at 627, and J.M. Sprinkle, "The Interpretation of Exodus 21:22-25 (*Lex Talionis*) and Abortion", *Westminster Theological Journal* 55 (1993), 233-253, at 240, argue that the Deuteronomic version replaces *tahat* with a *bet pretii* — a view which is closer to Daube's own conception of the idea underlying the *tahat* formula.

4 Cf., though to different effect (that the formula should not be taken literally), P. Doron, "A New Look at an Old Lex", *Journal of the Ancient Near Eastern Society of Columbia University* 1/2 (1969), 21-27, at 23f.; Prévost, *supra* n.3, at 627; Sprinkle, *supra* n.3, at 240.

5 Daube sees the use here of the second person as seeking to exclude an original vicarious punishment (105f.), and suggests that the present text may be an interpolation amending an earlier text which provided for it. However, he leaves open the possibility that the second person address was chosen even by the original author in order to emphasise opposition to practises which we come across in other Oriental codes "and which surely prevailed also among those for whom he wrote". I have always been hesitant to accept the view that a number of biblical sources, including this (and *Exod.* 21:31), are to be understood as allusive rejections of an ancient Near Eastern practice of vicarious punishment. However, Westbrook's observations in this session ("Extracting Law from Biblical Narratives") on Reuben's (rejected) offer to Jacob of the lives of his own two sons if Reuben does not bring Benjamin back safely (*Gen.* 42:37) may be relevant here.

6 Cf. Doron, *supra* n.4, at 23f.; Prévost, *supra* n.3, at 627; L. Schwienhorst-Schönberger, *Das Bundesbuch (Ex 20,22-23,33). Studien zu seiner Entstehung und Theologie* (Berlin: de Gruyter, 1990), 101. J. Weingreen, "The Concepts of Retaliation and Compensation in Biblical Law", *Proceedings of the Royal Irish Academy* 76/C/1 (1976), 1-11, at 7, notes that this is the basis also of the rabbinic argument in *Sanh.* 87b.

will be your life for his life (*vehayta nafshekha tahat nafsho*) or you must weigh out silver." The prisoner, however, escapes. Ahab pronounces judgment against the soldier: "So shall your judgment be; you yourself have decided it." The prophet thereupon reveals himself, and turns the judgment, using precisely the same words, against Ahab: *vehayta nefshekha tahat nafsho*. In the second narrative (*2 Kgs* 10:24), Jehu, having enticed the Baal worshippers into the temple of Baal, tells the guards whom he places outside: "The man who allows any of those whom I give into your hands to escape shall forfeit his life (*nafsho tahat nafsho*)." Daube argues that the *tahat* formula is employed here

> ... in a sense rather, though not quite, like the one just suggested; that is to say, where it refers to a real substitution of one man for another. Both times we are told about a guard who has to answer with his head for a prisoner doomed to death; if the prisoner escapes, the guard's soul is to be in the place of the prisoner's.

The difference, for Daube, between this and the Hittite laws resides not so much in whether the substitute is given over for destruction or for service as whether it is the offender who is given over (personal liability), or a member of his family (vicarious liability — though Daube may well have taken this to exemplify his notion of "ruler punishment": ch.IV). In fact, the parallel in the Ahab narrative may be even closer to that in the Hittite Laws: according to the parable told by the prophet (as against its application to Ahab's own situation) the prisoner was *not* necessarily "doomed to death" (116): he may well have been intended as a captive, so that the negligent guard was liable not to death but rather to taking his place as a (live) substitute, a prisoner/slave.

4. Daube's analysis is remarkable also for its account of the place of the formula within the developing literary structures found in the legal provisions. He accepts that *nefesh tahat nefesh* "may at some date have stood alone" (115), and favours the view that it is an interpolation in the Exodus passage (106);[7] he also suggests that *Exod*. 21:25, which specifies three types of injury, may be later than the list of parts of the body in v.24, at least as parts of the formula (112).[8] His account of *Leviticus* 24 is notable for his attention to its literary structure (esp. at 112-115), which uses the formula also in respect of compensation for the killing of an animal, and the implications of this literary structure for the ideas underlying the formula.

5. Daube's linguistic sensitivity led him also to support his general thesis regarding the role played by the idea of compensation in the talionic provisions with an insight into the underlying theological beliefs regarding the spilling of blood: "the idea that if you deprive in man of a certain power or faculty, this power or faculty becomes yours" (121). Taking support

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7 Until recently, there was a broad consensus that the formula did not originate there; cf. Schwienhorst-Schönberger, *supra* n.6, at 81-83; Sprinkle, *supra* n.3, at 234f.; J.W. Welch, 'Chiasmus in Biblical Law', in *The Boston Conference Volume*, ed. B.S. Jackson (Atlanta: Scholars Press, 1990), 5-22 (*Jewish Law Association Studies,* IV), at 14. E. Otto now sees the talionic formula in vv.24-25 as an integral part of *Exod.* 21:18-32 ("Town and Rural Countryside in Ancient Israelite Law: Reception and Redaction in Cuneiform and Israelite Law", *JSOT* 57 (1993), 3-22, at 15), on the grounds of "the quotation of 21.24 in 21.26-27": "Aspects of Legal Reforms and Reformulations in Ancient Cuneiform and Israelite Law", in *Theory and Method in Biblical and Cuneiform Law*, ed. B.M. Levinson (Sheffield: Sheffield Academic Press, 1994), 160-196, at 183. C. Houtman, *Das Bundesbuch. Ein Kommentar* (Leiden: E.J. Brill, 1997), 167, while agreeing that the formula is traditional and stereotypical (impliedly, circulating independently in oral form), holds that, so far as the written text was concerned, it belongs with the law of miscarriage from at least the time when the latter was first written down.

8 They are not, however, represented in the priestly account, on which Daube comments (at 113): "Evidently, the author of the formula of retaliation in xxiv.20 has replaced the two clauses preserved in Exodus and Deuteronomy, 'hand for hand, foot for foot', by the one, 'breach (*scil*. of hand or foot) for breach (of hand or foot)'. He has replaced them, that is, by a priestly term, and, furthermore, he has given this priestly term the place of honour in his formula ... The formula in Leviticus is concerned solely with the causing of a deformity in the priestly sense. But it is interested neither in smaller, curable wrongs nor in the question precisely how the deformity has been caused, by a blow or by fire or in any other way."

from Balaam's prophecy (*Numbers* 23:24) that Israel "shall not lie down until he eat of the prey, and drink the blood of the slain", he comments: "The murderer gets hold of the murdered man's strength. But by taking vengeance and killing the murderer, the victim's family in turn seizes the strength of the offender. Where this belief prevails, retaliation does imply compensation" (123). This is reflected in expressions like *darash damim* and *go'el hadam*. The very formula of retaliation reflects the same idea: "the killing of the murderer is a getting back of what has been lost" (*ibid.*). Indeed, he seeks to apply this notion also to non-fatal injuries, speculating that "in some remote age" there may have been a belief that one might gain man's strength by cutting off his hands (126).

6. However, in several respects he did not go far enough. One relates to the very idea of providing a live substitute. Daube's account of the role of substitution in the law of homicide overlooks two aspects of the evidence: the parallel between the Bible and the ancient Near East is both closer and more distant. It is closer in that we have a text from the Middle Assyrian Laws which provides for such live substitution in the very case of causing a miscarriage. According to the Middle Assyrian Laws (Driver's translation):

> [If a man] has struck a married [woman] and caused her to lose [the fruit of her womb, the wife of the man] who [caused] the (other) married woman [to lose] the fruit of [her womb] shall be treated as [he has] treated her; [for the fruit of] her womb he pays (on the principle of) a life (for a life).[9]

The final clause reads in the Akkadian: *kimu sha libisha napshate umalla;* Roth now renders it "he shall make full payment of a life for her fetus". Daube was aware of this text (168f.), but took account of it only in relation to the vicarious punishment laid down in relation to the injury to the mother. However, the text provides this separate remedy — live substitution, as I have argued[10] — whether the mother dies or is injured; it is not merely a paraphrase or reiteration of the sanction in relation to the mother. On the other hand, Daube's account of the role of substitution in the law of homicide is more distant in that the evidence does not suggest that substitution of live persons was ever the regular remedy for murder, either in any of the ancient Near Eastern societies or in that of the Bible. The Hittite provisions where we find such substitution are all cases of killing either in a quarrel (which, in my view, was not regarded as premeditated homicide in the Bible) or by accident. Contrary to the view of Daube, I am inclined to regard the miscarriage in Exodus as non-intentionally caused, in which case substitution of persons rather than "life for life" (in the conventional sense) is more understandable.

7. This may be a point of detail, on which there remains scope for disagreement. However, there are other, more fundamental aspects of his analysis where Daube provided directions which might be pursued more systematically. The comparison of formulae in the laws and the narratives leads to the conclusion that there is not just one talionic formula, but rather two.[11] The *ka'asher* formula has its own separate history, which can be traced in the narratives as well as the laws perhaps even more richly than the *tahat* formula. Just as the *tahat* formula occurs independently in the narratives in Kings, being quoted in *oratio directa*, so too does the *ka'asher* formula. It is found in the story of the captured Canaanite king, "Adoni-Bezek", who is made to exclaim: "Seventy kings with their thumbs and their great toes cut off used to pick up scraps under my table; as I have done, so God has requited me" (*Judges* 1:6-7). The language

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9 Translation of G.R. Driver and J.C. Miles, *The Assyrian Laws* (Oxford: Clarendon Press, 1935), 419.

10 *Essays in Jewish and Comparative Legal History* (Leiden: E. J Brill, 1975), 96-98. Support for this view has come, *inter alia*, from S. Isser, "Two Traditions: The Law of Exodus 21:22-23 Revisited", *CBQ* 52 (1990), 30-45, at 44, citing also the use of *nefesh* in *Lev.* 27; and Prévost, *supra* n.3, at 626, who went so far as to suggest that the Hebrew of *Exod.* 21:23, starting with the verb *venatata,* is a "quasi-literal transposition" of the Akkadian of MAL A50. *Aliter* Schwienhorst-Schönberger, *supra* n.6, at 101.

11 *Studies in the Semiotics of Biblical Law* (Sheffield: Sheffield Academic Press, 2000), ch.10.

attributed to the king (*ka'asher asiti, ken shilem*[12] *li elohim*) is comparable to the form found in both *Deut*. 19:19 (*va'asitem lo ka'asher zamam la'asot le'ahiv*) and *Lev*. 24:19 (*ka'asher asah, ken ye'aseh lo*). The *ka'asher* formula is prominent also in the story of Samson, where the Philistines claim that they want to take Samson prisoner and "to do to him as he did to us" (*Judg*. 15:10: *la'asot lo ka'asher asah lanu*), to which Samson retorts: "as they have done to me so I did to them", *ka'asher asu li, ken asiti lahem* (*Judg*. 15:11). Proverbs, too, provides evidence of the use of the *ka'asher* formula (usually in two clauses using *asah l'*, often linked by *ken*) in oral interaction, here accompanied by criticism: "Do not say, I will do to him as he has done to me (*ka'asher asah li ken a'aseh lo*); I will pay the man back for what he has done" (*Prov*. 24:29). The structural similarities between these formulations are such that we can hardly doubt that they are all reflections of an alternative oral formula for retaliation, distinct from the *tahat* formula. I have recently argued that the following distinction may be discerned between the usages of the two formulae: the *ka'asher* formula implies (only) *qualitatively* equivalent retribution, but without any concern for *quantitative* equivalence.[13] This latter element, however, is added in the *tahat* formula: [only one] eye for an eye, etc.

8. Moreover, the processes of priestly systematisation to which Daube drew attention (110-112) went further than the incorporation (in *Lev.* 24) of wrongs of different kinds (to humans, to animals) under one heading or rubric. It is not only a matter of using the formula *nefesh tahat nefesh* (in different senses) in respect of both: the *tahat* formula is "enveloped", at the very centre of a larger chiasmus[14] (of which Daube seems not to have been aware), by the repeated *ka'asher* formula. This structure in itself suggests that the (qualitative) *ka'asher* principle is to be qualified by the (quantitative) *tahat* formula.[15] The larger chiasmus, in my view,[16] presents a literary reworking of themes from the Covenant Code in the form of an oracle presented in the narrative context of a quarrel (*Lev*. 24:10, *vayintsu*, cf. *Exod*. 21:22).[17] The processes of priestly systematisation. moreover, went a significant step further, in the use made of the *ka'asher* formula: the notion of justified equivalence was extended from wrongs to rights.[18] *Numbers* 15:14-16 is concerned with the rights of the *ger* in relation to the temple cult:

> **14** And if a stranger sojourns with you, or whoever is among you in your generations, and will offer an offering made by fire, of a sweet savor to the Lord; as you do, so he shall do (*ka'asher*

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12 The use of the verb here appears to have been overlooked by Daube, even though it provides further support for his general thesis.

13 *Studies, supra* n.11, at 271-80. It is this opposition between the qualitative and the quantitative which makes the boast of Lamech — "I have slain a man for [merely] wounding me, a young man for [merely] striking me. If Cain is avenged sevenfold, truly Lamech seventy-sevenfold", *Gen.* 4:23 — so outrageous: he sees in purely quantitative terms what is in fact a qualitative difference — between non-fatal and fatal injuries. A similar issue may underlie the narrative of Moses' killing of the Egyptian taskmaster in *Exod.* 2:11-15. See further B.S. Jackson, "Law, Wisdom and Narrative", in *Narrativity in Biblical and Related Texts/La Narrativité dans la Bible et les textes apparantés,* ed. G.W. Brooke and J.-D. Kaestli (Louvain: Peeters, 2000), 31-51 (Bibliotheca Ephemeridum Theologicarum Lovaniensium, 149), at 45-47, where I suggest that it may well have been the qualitative connotations of the use of the *ka'asher* formula (without quantitative restriction) in narratives such as that of Samson which *Prov*. 24:29 is seeking to target.

14 Cf. Welch, *supra* n.7, at 7-9 (citing Thomas Boys, 1825, as having first identified the major part of this structure).

15 The distinction is applied, seemingly, to institutional remedies by H.F. Jolowicz, "The Assessment of Penalties in Primitive Law", in *Cambridge Legal Essays* (Cambridge: Cambridge University Press, 1926), 114f., criticised by Daube at 130: "Recently Professor Jolowicz, in an article already mentioned, has declared that 'ancient systems deal with tort and the damages for it not so much quantitatively as qualitatively. The penalty is made to fit, not the amount of damage inflicted by the tort, but the nature of the tort itself'."

16 *Studies, supra* n.11, at 291-93.

17 Nor, we may note, is this the earliest manifestation of chiasmus in expressions of the talionic principle. God's proclamation of protection to Noah and his descendants also exhibits this form: *shofekh dam ha'adam, ba'adam damo yishafekh* (*Gen.* 9:6), as Welch, *supra* n.7, at 7, has pointed out.

18 Similarly, in relation to the "one law" concept, used in *Lev.* 24 in respect of the penal liability of the *ger* for blasphemy. See also Jackson, *supra* n.11, at 285f., on the use of the "one law" concept in *B.K.* 84a.

> *ta'asu ken ya'aseh*): **15** One ordinance shall be both for you of the congregation, and also for the stranger who sojourns with you, an ordinance forever in your generations; as you are, so shall the stranger be before the Lord: **16** One Torah and one code shall be for you, and for the stranger who sojourns with you.

9. I turn now to more general questions. What does "Lex Talionis" indicate about Daube's scholarly agenda, and how far have matters moved on in the half century since it was written? Daube was both sensitive to, and critical of, the kind of historical jurisprudence derived from 19th-century models. The chapter is framed in large part as a debate over the priority of punishment to compensation in ancient legal thought. The one proponent of this view with whose work Daube explicitly engages is H.F. Jolowicz;[19] it was to Jolowicz, then in London, that Lenel wrote a letter of introduction for Daube, when he advised Daube to leave Germany in 1933, as Alan Rodger has indicated in his obituary. Though it was Buckland, in Cambridge, who became Daube's principal mentor (and to whom *Studies* is dedicated with great respect and affection), I suggest that we take the debate with Jolowicz in this chapter not as a polemic, but rather as an expression of gratitude and respect. For Daube was not prone to debate explicitly and at length with those with whom he disagreed; he preferred to allude to opposing views and concentrate on stating and establishing his own, contrary position. Indeed, if we seek to assess this essay within the history of scholarship, it is against the *wider* background of theories of historical jurisprudence that it is best viewed. As he puts it in introducing the chapter:

> The following remarks are intended to show that the principle of compensation, in Hebrew law, goes back to the earliest period of legal history open to inquiry. It is often pointed out that a good many notions which in modern law are connected only with crime, above all, the notion of punishment, in ancient times played a greater or lesser part in what to-day would be pure civil law transactions ... What does not seem to have been much noticed is the opposite phenomenon, the presence in ancient times of civil law notions in what today would be pure criminal law affairs. (102)

9.1 Daube was well aware of the problematics of the conception of "progress" upon which such theories were based:

> Criminal law, with punishment, appears to us less civilised than civil law, with compensation. Hence we are inclined to think that the former must be older than the latter — a conclusion ultimately rooted in the liberal teaching of an ever-progressing mankind, but highly questionable when we go by the rigorous evidence of the sources. (131)

9.2 His own reaction to this is to stress the cognitive, rather than the substantive features of the progression: a movement from a period of lesser to one of greater differentiation:

> The difference between the primitive stage and the present lies chiefly in this, that the two, criminal law and civil law, were not always so strictly distinguished as they are nowadays. Any given case was considered from both the criminal law standpoint and the civil law standpoint at the same time, or better, from one standpoint that embraced everything ... (103)

The early lack of differentiation, however, is explained in social as well as cognitive terms:

> It seems that primitive thought comes nearer than modern thought to conceiving of the order under which a community lives as a compact whole. The various aspects of the system are closely interconnected, the several principles governing actions or events are not scientifically worked out, delimited and shut up each in a watertight compartment by itself. As a result it often happens that where we, coming from the modern world, at first sight notice only one idea, it is in reality a number of ideas that are effective, only that one of them overshadows the

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19 See n.15, *supra.*

rest. (145f)

9.3 His theory of the increasing stress on systematisation found in the priestly sources also gave expression to views which are more compatible with what I would regard as a superior 20th-century model of legal development, one based upon theories of cognitive development.[20] Again, he recognises the cognitive equivalences between retaliation and restitution, when he writes:

> ... retaliation, roughly, does restore the original proportion of power between the two persons or families concerned. The difference between it and restitution proper is that it restores the original relation in a negative way, by depriving the wrongdoer of the same thing of which he has deprived the person wronged; while restitution is positive and gives back to the person wronged that which the wrongdoer has appropriated. (128)

9.4 However, the logic of this equivalence is so appealing to Daube that he is tempted to the opposite extreme: instead of a developmental pattern, he claims a universal:

> Punishment constitutes compensation in both directions: the criminal, by suffering punishment, is making restitution to the offended party, and again, in suffering punishments, receives his due. The two notions are so frequent, they appear in sources so different in all other respects, they underlie terms so ancient ... and, it may be added, they are of so universal a nature, occurring in the ancient and modern literatures of all nations, that we must assume their existence right from the beginnings of any social life. (146)

9.5 Elsewhere, however, Daube does lapse into (what he himself labels as) speculative reconstruction of "stages" of individual legal institutions and rules. He suggests, for example, a three stage development of homicide (118): originally, "a homicide had only to furnish one or more persons to the family of his victim"; next, "a homicide had himself to enter his victim's family"; finally, "a homicide was claimed by the victim's family with a view, not to receiving him as a substitute for the victim, but to putting him to death for his deed."

10. Such theories, however, prompted some inner conflict with the tenets of Daube's religious upbringing. This is most apparent in his treatment of the relationship between the original meaning of the talionic formula and that attributed to it by the Rabbis. He does not wish to adopt the Rabbinic interpretation, that it means no more and no less than "compensation in money" (even though he stresses that, even when taken literally, it incorporated an element of *the idea of* compensation). Yet this is not necessarily incompatible, he argues, with the rabbinic view:

> ... even extreme orthodoxy might concede that the formula of retaliation referred to literal retaliation before it was made part of the Torah. For there is nothing objectionable in the assumption that it may have existed before. Accordingly, even if the interpretation of the law as referring to actual retaliation should be unacceptable for the time after the final, complete revelation of the Torah, my argument may still be upheld for any previous period ... I shall be content, if necessary, to confine my thesis to that period before the final revelation. (109).

If by "the final revelation", Daube is referring to that to Moses, it is difficult to reconcile this passage with his identification of the "second stage" of the history of *nefesh tahat nefesh* with the guardsman stories in Kings. I would suggest that this passage has to be understood more in the context of Daube's personal religious odyssey, rather than as an essential part of the academic claims he makes in this essay.

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[20] See my *Making Sense in Law* (Liverpool: Deborah Charles Publications, 1995), ch.7; *Making Sense in Jurisprudence* (Liverpool: Deborah Charles Publications, 1996), ch.3. In cognitive terms, for example, chiasmus may be regarded as exemplifying Piaget's concept of a "reversible" mental operation: for this concept in the context of the Piagetian theory of cognitive development, see *Making Sense in Law*, 248-50.

11. Moreover, for all his sensitivity to language (including the survival of a technical formula despite a change in meaning: 120), and his awareness of the sociological differences between rules relating to self-help and those providing for forms of institutional settlement,[21] Daube appears still wedded to the notion that what we find even in the *Mishpatim* is statutory language, albeit a language that forms part of the same culture as that reflected in the narratives. Even while detaching the formula from its context in the Exodus passage, in the course of reconstructing its history, he writes that there are "indications that it may at some date have *stood alone*" (115, emphasis supplied). And his assumption is that we should identify the original sense of the formula with its "literal" meaning (albeit glossed with its underlying compensatory ideas). Today, I would suggest, we are more sensitive to both the presence of (non-literal) "oral residue" in early writing. I have suggested that a "narrative" approach to the sense of early Biblical laws (particularly the *Mishpatim*), one in which we ask what are the typical narrative images evoked by the rule, is more appropriate than the search for "literal" meaning, where we ask what is the full range of situations "covered" by its words.[22] In this context, for example, it may well evoke the image of a deliberate assault[23] (by a physically able assailant). There is only one mention in the Hebrew Bible of the actual *practice* of talionic measures for non-fatal assaults (and here the *ka'asher* formula is used): the story of the king Adoni-Bezek. His offence was clearly deliberate.

12. Related to this is our enhanced sensitivity today to what are sometimes called the "pragmatic dimensions" of language: in particular, the effect upon the construction of meaning of what Basil Bernstein called the "restricted code" employed in oral communication (and its residue in early writing) within social groups with shared social knowledge. This restricted code may well extend to the "self-understood"[24] manner of use of the talionic formulae, particularly as applied in the processes of private dispute resolution. If the family of a deceased victim was entitled at one stage to demand blood vengeance, but also to accept *kofer* at the end of the day, the same, *mutatis mutandis,* must have applied to the victim of bodily injury. It is surprising, in my view, that Daube refused to embrace the interpretation of Josephus, *Antiquities* 4.280:

> He that maimeth a man shall undergo the like, being deprived of that limb whereof he deprived the other, unless indeed the maimed man be willing to accept money.

This provides a middle way between (mandatory[25]) literal retaliation and (mandatory) monetary compensation: literal retaliation subject to the capacity of the victim to accept a financial payment. In *Studies*, Daube does not refer to this at all; in *The New Testament and Rabbinic Judaism,* 256, he comments that it is not referred to in other Jewish sources, and agrees

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21 E.g. "We have also to consider that from very early times delicts were often settled by the parties concerned in a peaceful manner. In those cases, the treaty between the two parties might be rather similar to sale, the wrongdoer 'buying' the thing destroyed or unlawfully taken away by him" (131). At 108, he takes the view that *venatan biflilim* in *Exod.* 21:22 is an interpolation reflecting the growth of institutional regulation. The Bible itself is familiar with the idea that self-help preceded institutional dispute resolution. R. Westbrook, *Studies in Biblical and Cuneiform Law* (Paris: Gabalda, 1988), 45f., describes the stories of Lamech and Samson as "evidence of psychological history".

22 Jackson, *supra* n.11, at 75-82, and in this context 283-286.

23 Cf. Philo, *De Specialibus Legibus* III.195: "If, then, anyone has maliciously injured another in the best and lordliest of senses, sight, and is proved to have struck out his eye, he must in his turn suffer he same ..." (Colson's translation, Loeb edition).

24 Cf. D. Daube, "The Self-Understood in Legal History", *Juridical Review* 85 (1973), 126-34; "The Influence of Interpretation on Writing", *Buffalo Law Review* 20 (1970), 41-59, at 41-48.

25 If, indeed, the formulae are to be so understood. Whether it is mandatory or permissive, I have argued, proceeds from discourse assumptions (themselves part of the "restricted code" of the community) rather than linguistic considerations: Jackson, *supra* n.11, at 286.

neither with the view of the Pharisees nor that of the Sadducees[26] nor with that of any dissentient authority: "Josephus is so much out of touch with the main line, or lines, of Jewish law on this matter that his testimony must be ruled out"; rather, Daube regards Josephus' account as an attempt to align biblical law with the Roman Twelve Tables.[27] However, the very availability of compensation as an alternative to physical retaliation strengthens Daube's interpretation of the latter as having a compensatory function.

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[26] 106f. See further his account of this in "Matthew v.38f.", *JTS* xlv (1944), 177-87, which forms the basis of *The New Testament and Rabbinic Judaism,* 255-59, where he writes (at 255, opposing the view that literal retaliation still formed part of the law in the age of Jesus): "A group of Sadducees, the Boethusaeans, seem to have been in favour of actual retaliation, and their attitude was shared by at least one Talmudic authority, R. Eliezer. It is, however, doubtful whether this doctrine represents a genuine survival of ancient legal ideas; it may well have been a revival due to the Sadducean theory that the Bible ought to be interpreted quite literally and not, as among the Pharisees, in a way that rendered it possible to introduce outside notions." For R. Eliezer, see *B.K.* 84a; for the Boethusians/Sadducees, *Schol. Meg. Ta'anit* 4.

[27] VIII:2, *Si membrum rup(s)it, ni cum eo pacit, talio esto*, reflecting a similarly early stage in Roman institutional history. Even if Josephus was influenced in his formulation by this, he may still be reflecting the original sense of the biblical institution. This interpretation of Josephus has in fact attracted support among scholars (P. Heinisch, *Das Buch Exodus* (Bonn: Hanstein, 1934), 171; U. Cassuto, *A Commentary on the Book of Exodus,* trld. I. Abrahams (Jerusalem: Magnes Press, 1967)*,* 276f.; Jackson, *Essays, supra* n.10, at 85, 86; Sprinkle, *supra* n.3, at 238ff.; *idem*, *The Book of the Covenant - A Literary Approach* (Sheffield: JSOT Press, 1994), 94; Westbrook, *supra* n.21, at 45-47, 71-77, 80), though we need not go as far as the latter (at 71; cf. "The Nature and Origins of the Twelve Tables", *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte (Rom. Abt.)* 105 (1988), 74-121, at 103 on VIII.4) in claiming that the Roman provision actually reflects ancient Near Eastern influence. Houtman, *supra* n.7, at 166, cites *1 Kings* 20:39: that is a case of compounding a (supposed) *capital* liability by payment of money. However, the *capital* liability is expressed in terms of the formula of *Exod.* 21:23: *nafsheha tahat nafsho o kikar kesef tishkol.* Daube chooses to regard the latter phrase as "most probably" an interpolation ((117). *Sed quaere?*