

Legal Attitudes Towards the Fetus

Sometimes a biblical passage can give more specific guidance on contemporary ethical issues. This has been the case with one of the laws dealing with the punishment of those who cause injuries to others (Exodus 21:22-25). This passage is one of the more controversial ones on the question of the biblical position on abortion. Even among ancient Jewish scholars there were different schools of thought on how the passage should be interpreted. The Palestinian Jewish opinion is preserved in the Mishnah, Talmud and writings of Josephus, and is similar to that used in most modern translations. According to this view, the passage states that if two men are fighting and an accidental blow to a pregnant woman results in a miscarriage, and the woman is not injured, the man who struck her is to be fined. If she is injured, the man is to be punished according to the *lex talionis*, which ensures that the punishment fits the severity of the injury (see below). In ancient times, this led to the Jewish view that the fetus did not have the legal status of a person.¹ The other major school of Jewish thought on this passage is preserved in the Septuagint translation where the Hebrew word for injury, *ason*, is translated as "formed." Thus, the passage would be rendered:

If two men fight and strike a pregnant woman, and her unformed embryo departs, he shall be fined; according as the woman's husband lays upon (him) he shall give according to that which is thought fit. But if it be formed, he shall give a life for a life.²

Thus, a distinction is introduced between an unformed and a fully formed fetus, leading to a more severe punishment for the death of a "formed" fetus than the Palestinian interpretation called for. This translation is thought to have been influenced heavily by two issues which were being debated in Alexandria at the time when this translation was made. The first was the Aristotelian distinction between the formed and unformed fetus, and the second was the debate between the Platonic view of life starting at conception and the Stoic view of life starting at birth.³ The Septuagint translation was followed by the Latin Vulgate, and has thus been very influential, and is still seen by some to give the preferable rendering of this passage.⁴

In spite of the different interpretations of this passage, all Jewish writers consistently expressed their abhorrence of abortions done for any reason other than to save the life of the mother. Meredith Kline has stated that "the most significant thing about abortion legislation in

¹ M. J. Gorman, *Abortion and the Early Church* (Downers Grove: InterVarsity, 1982), 41.

² Stanley Isser, "Two Traditions: The Law of Exodus 21:22-23 Revisited," *Catholic Biblical Quarterly* 52 (January 1990): 30-1.

³ Gorman, 35.

⁴ Stanley Isser, "Two Traditions: The Law of Exodus 21:22-23 Revisited," *Catholic Biblical Quarterly* 52 (January 1990): 44-5.

the Biblical law is that there is none. It was so unthinkable that an Israelite woman should desire an abortion that there was no need to mention this offense in the criminal code."⁵

The ancient debate over whether or not the fetus should be given full personhood status was unrelated to the abortion, but was undertaken for legal and ritualistic purposes.⁶ Determining whether a miscarriage represented the legal birth of a child or not would have had a bearing on inheritance laws and also on the length of the uncleanness period which the mother would have to undergo (whether the same as that after childbirth or after menstruation). Also, the scholars were interested in whether or not it was ethical to do an abortion to save the life of the mother, and in determining appropriate penalties in cases of accidental abortion. Other deeply held views such as the duty to procreate, respect for the sanctity of life, and abhorrence of unnecessary bloodshed combined to give the Jews a reputation among ancient pagan and Roman writers of being completely opposed to abortion (and infanticide).⁷

Whichever way ancient Jewish scholars interpreted this passage, they did not see any support in it for a liberal attitude towards abortion. Yet this is precisely how some modern interpreters use this passage. It is claimed that this passage assigns the fetus a lower status than that of living human beings. In combination with the Old Testament's silence on abortion, this is taken as support for liberalized abortion rights.⁸ A thorough investigation of this passage is needed to see if this interpretation is warranted. The impact of this verse can be seen in how the biblical ethicist Norman Geisler changed his opinion on abortion from one where he viewed it as acceptable for a number of social and medical reasons⁹ to one where he sees it as only acceptable to save the mother's life.¹⁰ The only difference between his justifications for his earlier view and his more recent one is that his interpretation of this passage has changed to the one being proposed here.

The first part of this passage which needs to be studied is the phrase translated by "miscarriage" in most modern versions. The Hebrew phrase is composed of *yasa*, a commonly used verb which means to go out or come out,¹¹ and the plural noun *yeled*, which means children.¹² The term *yasa* refers to the ordinary birth of children coming forth metaphorically from the loins of their father (e.g. Genesis 15:4; 46:26; Isaiah 39:7) or literally from the womb of their mother (Genesis 25:25-26; 38:27-30; Job 1:21; 3:11; Ecclesiastes 5:15; Jeremiah 1:5;

⁵ Meredith Kline, "Lex talionis and the human fetus," *Journal of the Evangelical Theological Society* 20 (1977): 193.

⁶ Gorman, 33-45.

⁷ Bruce K. Waltke, "Old Testament Texts Bearing on the Problem of the Control of Human Reproduction," in *Birth Control and the Christian*, eds. Walter O. Spitzer and Carlyle L. Saylor (Wheaton, Ill.: Tyndale, 1969), 10.

⁸ Norman Geisler, *Ethics: Alternatives and Issues* (Grand Rapids: Zondervan, 1971), 218-23.

⁹ Norman Geisler, *Ethics: Alternatives and Issues* (Grand Rapids: Zondervan, 1971), 218-23.

¹⁰ Norman Geisler, *Christian Ethics: Options and Issues* (Grand Rapids: Baker, 1989), 145-52.

¹¹ Brown, *Lexicon*, 422-5. R. Laird Harris, ed., *Theological Wordbook of the Old Testament* (Chicago: Moody Press, 1980), 1:393-4.

¹² *Ibid.*, 409. Harris, 1:378-80.

20:18).¹³ Only in Numbers 12:12 does it describe a stillbirth, and there the subject is not *yeled*, but *mwt*, something dead.¹⁴ The only place where *yeled* refers to a fetus, as opposed to a born child, is in Exodus 21:22 if this phrase is translated as a miscarriage.¹⁵ The most usual rendering of this phrase would be to translate it as "her children came out" or "were born." Something is being read into the text to suggest that the children were born dead, that is, that this was a miscarriage.¹⁶

The Old Testament uses two other words to describe miscarriages. One, *nepel*, is used three times (Job 3:16; Ecclesiastes 6:3; Psalm 58:8) and has as its root in a word which means to fail.¹⁷ The other, *shakal*, is used twenty-five times and means to be bereaved, to make childless, or to miscarry (e.g. Genesis 27:45; 31:38; 43:14; Exodus 23:26).¹⁸ Use of this word in the next chapter of Exodus shows that Moses knew this word, and suggests that he was trying to communicate something other than a miscarriage in our passage. If the injury had been described by *mwt*, the verse could more likely have been interpreted as referring to a miscarriage when seen in light of the same word selection in Numbers 12:12. However, this is rendered impossible by the use of the word *ason* in our passage. It seems clear that this passage should not be interpreted as referring to a miscarriage, but to a premature birth.

A second controversial issue in this passage is to whom the injury in verses 22 and 23 refers. The Hebrew term *ason* is seldom used and describes an unforeseen disaster in the only other passages where it is used (Genesis 42:2, 38; 44:29).¹⁹ Jackson points out that this term is distinctive in how it emphasizes the effect of the injury on a person other than the victim.²⁰ When concern is with the injured party the more common term *mwt* is used, as in Exodus 21:12, 18, 20, 28, 35, and 22:1. The Palestinian texts of Exodus related *ason* to the woman whereas the Septuagint reading related it to the fetus. Thus, many English translations add a word such as "other" or "further" before "harm" to distinguish between harm to the fetus and harm to the mother. For example the New American Standard Bible has:

And if men struggle with each other and strike a woman with child so that she has a miscarriage, but there is no further injury, he shall surely be fined. . . . But if there is any further injury, then you shall appoint as a penalty life for life...

This gives the impression that, in the first case, the only harm is the death of the fetus, and this is to result in a fine. However, in the second case the fetus dies, but there is further harm

¹³ Jack W. Cottrell, "Abortion and the Mosaic Law," *Christianity Today* 17 (March 1973): 8.

¹⁴ John Ellington, "Miscarriage or Premature Birth?" *The Bible Translator* 37 (July 1986): 334-7.

¹⁵ Harris, 1:380.

¹⁶ The plural is used to cover any possible number of children in the woman's womb. See U. Cassuto, *A Commentary on the Book of Exodus*, trans. Israel Abrahams (repr., Jerusalem: Magnes Press, 1983), 272-8.

¹⁷ Brown, *Lexicon*, 658. Harris, 2:586-7.

¹⁸ *Ibid.*, 1013. Harris, 2:923.

¹⁹ Stanley Isser, "Two Traditions: The Law of Exodus 21:22-23 Revisited," *Catholic Biblical Quarterly* 52 (January 1990): 41.

²⁰ B. S. Jackson, "The Problem of Exodus XXI 22-5 (*Ius Talionis*)," *Vetus Testamentum* 23 (1973): 273-304.

which is to result in application of the *lex talionis*. By implication, this second harm is of a more serious nature than the death of the fetus, and must refer to some injury to, or even death of, the pregnant woman. Therefore, the life of the fetus is seen to be of lesser value than the health of the woman. Thus, biblical justification is claimed for liberalized abortion laws.

However, this interpretation is heavily dependent on the term miscarriage being the proper translation of the Hebrew phrase, and on the inclusion of three words in the English text which are not in the Hebrew. The former has been dealt with above, and the latter can be dealt with by giving a more literal translation of the passage, leaving out the extra English words:

And if men struggle with each other and strike a woman with child so that her children come out, but there is no injury, he shall surely be fined. . . . But if there is injury, then you shall appoint as a penalty life for life...

This changes the interpretation completely. There is now no reason to see this as a passage contrasting two situations involving miscarriages. Instead, it contrasts a situation where a blow causes a child to be born prematurely, but with no injuries to anyone, to a situation where the premature birth is accompanied by some injury.

It is now clear why the term *ason* was used and not the more common word for death, *mwt*. What is of concern here is not specifically the death of the fetus, but an unforeseen harm to the fetus, which has a profound impact on another party, namely the parents, and particularly the father. Presumably, if the pregnant woman dies, the other cases given in Exodus 21 can be used to determine the appropriate punishment. In the first case, the man is to be fined, presumably because of the danger to which mother and child were exposed, and the distress caused to the parents.²¹ This fine is to be assessed by the husband, with input from the judges to evaluate its appropriateness. In the second case, punishment for the injury is to be determined by the *lex talionis*.

The *lex talionis* formula has generally been taken to express the principle that an offense should receive a just punishment, neither more nor less, and was not to be taken literally.²² It was used when a variety of possible injuries were to be accounted for by the law, as is certainly the case here. It allowed for use of the ransom procedure in applicable cases. Thus, the one sentenced to death could have ransomed his or her life if the assault was shown to have been accidental, which was not possible in premeditated murder (Exodus 21:30; Numbers 35:31). Jackson notes that this interpretation would mean that *ason* would describe relatively minor injuries, which he finds unacceptable.²³ Therefore, he suggests that verses 24-25 are an interpolation, and that the original punishment dealt only with death of the fetus, which was to be punished by a substitutionary death of the culprit's fetus. This would coincide with a similar law

²¹ Cottrell, 8.

²² Meredith G. Kline, "Lex Talionis and the Human Fetus," *Journal of the Evangelical Theological Society* 20 (1977): 197.

²³ Jackson, 274.

found in the Middle Assyrian Laws. However, substitutionary punishment was strictly forbidden in the Pentateuch (Deuteronomy 24:16). Also, it is problematic to explain an unclear passage by eliminating a portion of it, and then interpreting what remains. This is particularly questionable when a law from another ancient culture is used as the main support for this interpretation. These other codes differed in many ways from the biblical code, and should be compared cautiously.

Instead, it makes more sense to see the author calling into place a formula which was used to determine suitable punishments when a range of injuries were possible to the fetus and mother. Since *ason* brings out the impact of the injury on the parents, this is going to be very profound, regardless of what physical injury may also result. In calling for a life to be paid for by a life, even if it could be ransomed, this passage gives "perhaps the most decisive positive evidence in Scripture that the fetus is to be regarded as a living person."²⁴ However, one problem remains. Why would accidental injury or death in this case call for the full force of the *lex talionis* when normally these are treated with much more leniency (Exodus 21:13, 28)? The obvious conclusion is that the life within the womb of a woman is so precious that greater caution than would be customary is called for when around pregnant women. This may sound like a particularly severe judgment, and may have been why Jewish scholars came to interpret it in the more lenient way given at the beginning of this section.²⁵ Regardless of the uncertainty, this reveals the extremely high value placed by God on the life of the unborn, and his abhorrence of anything interfering with the unborn coming to birth.

While this passage cannot be seen as the final word on abortion, even for Christians, it certainly cannot be taken to justify abortion in any way. Even though it has been translated for many centuries in a way which suggests that there is a difference in value between a fetus and a born person, "the weight of scholarly opinion . . . is outweighed by the text itself."²⁶

²⁴ Jackson, 291-304.

²⁵ Kline, 193.

²⁶ Jackson, 301.