JOURNAL OF JEWISH STUDIES

Vol. XXV No. 1 SPECIAL ISSUE February 1974

Studies in Jewish Legal History in Honour of David Daube

Edited by Bernard S. Jackson

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JOURNAL OF JEWISH STUDIES
67 Great Russell Street, London WC1B 3BT

*Conventions of Knowledge in Talmudic Law**

by Joseph Agassi

WHAT brings me today to Talmudic Law is a topic from the contemporary methodology of the social sciences, and its historical roots. About ten years ago I wrote a sketchy critical survey of contemporary methodology of the social sciences from a Popperian point of view.[1] Popper himself did not like the paper, so perhaps the epithet is misleading. I do not insist on it. I showed that, strange as it may sound, though most of us defend the reformist or gradualist view of society and of its institutions, as manifested in parliamentary democracy, there is a poverty of fundamental literature, methodological and epistemological, in this field. There is almost no gradualist theory of society and there is almost no gradualist theory of knowledge or gradualist epistemology. The poverty is largely due to the fact that philosophically most writers believe in naturalism—both in respect to society and in respect to science—or in shamefaced conventionalism, again, both in social philosophy and in the philosophy of science. This dichotomy was enhanced partly on the authority of Plato, who contrasted nature and convention the way Parmenides had contrasted the way of truth and the way of error. Partly it was due to the fact that reformist influences often came from unacknowledged sources, namely legal ones—the Roman and the Talmudic traditions. Ever since Malinowski discovered that people are unreliable sources of information concerning their own cultures, much less their histories, a new kind of literature in cultural history has developed, concerning underground or hidden influences. I find it fascinating, for instance, to read about the underground mystic movement in the history of science, including influences of German idealism. Here I wish to draw attention to the underground movement of Jewish reformist philosophy. Both sources are, of course, objectionable, at least *prima facie*, in their very parochialism. Otherwise they need not be hidden. Yet objectionable as they are, we have to admit their positive contributions if and as we find them.

There is a literature on the interaction between the Talmudic or Halachic literature and the literature of the Greek and Roman Law—including the contributions of Lieberman and of David Daube concerning the Greek

* A paper read at the Oriental Institute, University of Oxford, February 1969, under the chairmanship of Prof. Daube.

[1] "Methodological Individualism", *British Journal of Sociology* 11 (1960), pp. 244–70, reprinted in John O'Neill, ed., *Modes of Individualism and Collectivism*, Heinemann, London, 1973.

origin of the rules of interpretation, or *Middoth*, of the text of the law. Mostly, I think, the literature is diffusionist, to use an anthropological term again: we can expect neighbours to influence each others' institutions and customs, and so some Greek customs influence Greek legal practices which then influence Jewish or Roman legal practices. And *vice versa*.

My own interest is not merely in customs, but also in the philosophies which underlie them. And I wish to report to you that though there is no secret about the influence of social and political philosophy and of epistemology or philosophy of science on legal philosophy, and so on the practices of the Law, the road in the other direction has scarely been studied. Though legislators are so often lawyers, what they bring to society at large from their legal practice is obscured—often by their own legal philosophy which comes from general social philosophy. My own hypothesis in this direction is this. *Current parliamentary legal reforms are rooted in various traditional philosophies, one of which is the one manifest in current legal systems, but is only implicit there. The practices of reforms of various institutions through minute deliberation and through juridical precedent instantiate legal reformism. The western legal reformist system is originally Athenian but also, in part, and in a more tempered way and a more successful one—Talmudic:* from the Great Knesseth or Great Synagogue which was *an élitist legislature with two parties*—first the Sadducees and Pharisees, and then of the Pharisees Hillel and Shammai.[2] As to underlying philosophy, *contrary to Hillel's own intentions, the declared philosophy of the Talmudic tradition was not the true one of a reformist legislature, but an ideology of a conservative traditionalist authoritarian system which no one quite believed in—this leading to much of the confusion which persisted until recently*. The philosophy underlying western legal reforms, and western legislation, is largely naturalistic, yet in a similar manner there is *a declared and an undeclared philosophy*. All this, I feel, is well worthy of exploration, and is capable of throwing much light on the development of the system of legislation under false philosophies.

I

When we approach contemporary social and legal philosophy we immediately encounter Plato. To quote Huntington Cairn's well-known *Legal Philosophy From Plato to Hegel* of 1949, "most juristic disputes of the present day have been under continuous analysis in philosophic thought since their crystallization by the ancient Greeks . . .", mainly in the works of Plato. Plato starts with the dichotomy of all law into nature and convention,

[2] For the Great Knesseth as a link between scribes and pharisees see, e.g. H. Loewe, *Judaism and Christianity* (1937), p. 8, and other works by Loewe.

and then opts for nature. This is a close-parallel with Parmenides's epistemology (which he largely accepts), which contrasts the way of truth, leading to the real nature of things, with the way of error which is mere opinion, and which varies from culture to culture. As Protagoras says, the fire burns the same everywhere but *nomos* varies from place to place. I shall try to show that the parallel between social methodology and epistemology runs fairly close, up till the very present.

The naturalistic school views the laws of society as the laws of nature, and and thus as the true laws. All deviation from these are obviously falsehoods and lies. The true laws of nature, further, are claimed by some to be the laws of individual psychology and by others the laws of society as a whole, or as an organism. Thus, naturalism is divided into psychologism and organicism. In sharp opposition to naturalism is conventionalism, the philosophy of all society as mere convention, as fiction, merely accepted *as if* true. Perhaps I should not say sharp, as organicism, which is naturalist, may be conventionalist, e.g. with Hegel. What is rare, however, is the reformist or gradualist school, which views *all society as convention, but* which considers *some conventions better than others*. For example, parliamentary democracies.

There are various reasons for the extreme unpopularity of this gradualist philosophy, going back to Plato and his predecessors. Perhaps the most important one is that gradualism, as a social philosophy, also as an epistemology, is fundamentally sceptical. And scepticism, since the days of Plato, was viewed as irresponsible and not serious, as more than somewhat cynical. Pyrrhonism was, still is, considered by most of those who encounter it, as a sophism rather than as a serious philosophy. The popular view is that if truth is not within reach it has to be ignored. This view is called positivism in some contexts. Positivism is shared, then, both by the conventionalist who says that there is no truth, the relativist, the cynic, etc., and by the naturalist who thinks that truth is, or soon can be, ascertained and implemented. Naturalists believe that truth is within reach, thereby condemning conventionalism, and conventionalists concede that acting as if we have the truth is a lie if the truth can at all be ascertained. Between the two the view is lost that convention is false, yet *there are degrees of falsehood*, and we may try to minimize the degree of falsehood of our conventions. All scepticism was identified as conventionalism or even worse forms of cynicism.

Positivism, in the sense of the word as used here, is a very popular perennial philosophy, particularly a very popular philosophy of science. In our own century conventionalism was advocated by such important philosophers of science as Poincaré, Duhem, and Eddington, and naturalism by Wittgenstein, the Vienna Circle, and P. W. Bridgman. The reformist school of the philosophy of science stems, I believe, from Faraday through Einstein, and other thinkers. I have met it in the form of the teachings of Sir Karl Popper.

The reformist social philosophy which views social institutions as conventions akin to scientific theories has also been developed by him—though merely as an afterthought. But of course, it is an increasingly popular contemporary view. For example, I understand that in legal philosophy Professor H. L. A. Hart of Oxford is a gradualist—though in anthologies on legal philosophy he is presented as yet another conventionalist.

All this sounds too incredible to take seriously even for a moment. We all know that we all try to improve both our knowledge and our social institutions and habits and customs and laws—yet the dichotomy between nature and convention, I allege, allows for no improvement, and is very popular nonetheless. This is impossible.

Indeed, I have not made myself clear. No one ever denied that there may be improvement, that we observe improvements all around us all the time. What I am suggesting is that the dichotomy between nature and convention excludes not any improvement, but any improvement which is achieved by the transition from one convention to another convention—both false, or both as if true, yet the latter being less remote from the truth than the former.

Perhaps I shall be allowed, here, to quote an authoritative, and even somewhat more extreme, statement. It is to be found in the 1968 *International Encyclopedia of the Social Sciences*, at the end of the article on Legislation (ix. 231), by Professor Benjamin Akzin of Jerusalem.

> And yet, for all their weaknesses, natural law concepts . . . exercise a permanent influence on positive law in general and on legislation in particular. Enacted rules of law are quite often a reflection of those natural law concepts which prevail at the time. . . . This applies to partial changes in positive law . . . But it applies no less to . . . wholesale changes . . . i.e. to *revolutions*.

There are various reasons for such a strange perversity, or perpetuation of a fiction. There is, first, the question of authority. As a few writers, including Hart, have noted, the simplest claim for authority is the divine ordinance, later translated as the law of Nature. The claim for divine ordinance is not Talmudic or Jewish in particular; thus, we find Hesiod saying, "Zeus himself ordained law for mankind." The Roman law, though, was an exception here; its authority was not claimed to be divine, only moral.

Another, fairly allied reason for the perpetration of the naturalistic error is the lack of readiness to change one's views in public. As Sir Frederick Pollock says in his essay on 'The History of the Law of Nature':[3]

> Ancient Roman lawyers were no more willing than modern English ones

[3] *Essays*, p. 35, quoted by H. F. Jolowicz, *Lectures on Jurisprudence* (1963), p. 43.

> to admit frankly that they were innovating on grounds of convenience. The Greek doctrine of the Law of Nature furnished exactly the ideal foundation which was wanted, and the classical jurists . . . proceeded . . . for the purpose of legal science

to make surreptitious changes. Of course there is a psychological reluctance to admit error not peculiar to lawyers, but there is also the lawyer's reluctance to allow himself to say what may undermine his authority. Notice that while denying that reform is naturalist Sir Frederick alleges, as a matter of course, that reform is made "on grounds of convenience"; this in conformity with Plato's dichotomy.

It is hard to see how the law's authority could be upheld by a pretence so thin as to be open to Akzin's very sharp and obvious criticism. The answer, at least one offered by Roscoe Pound, is that legal philosophy had an impossible task, which was simultaneously executed in various ways:

> Attempts to unify or to reconcile stability and change, to make the legal order appear something fixed and settled and beyond question, while at the same time allowing adaptation to the pressure of infinite and variable human desires, have proceeded along three main lines—authority, philosophy, and history. The Greek and Roman world relied upon authority and later upon philosophy.[4]

The modern world has relied successively on all three.

I shall not discuss Pound's classification. Let me mention now, however, that second to no philosophy except naturalism, is conventionalism, the philosophy which sees the law as a system in principle arbitrary yet in fact self sustaining, and resting on existing agreement noted in tradition and history. As I have said, ever since Plato launched an attack against conventionalism as cynical, this remained the main objection to it. I think the objection holds, that willy nilly conventionalists turn out to be cynical. For example, I do not think that when Alf Ross compares[5] the law of a given state, say Illinois, with that of a given game, such as chess, he means to say the law is as arbitrary and unrational as chess. Yet he says so all the same. He says chess is not based on *a priori* reasons but is found as it is, and so is the law. This is obviously false, and Ross qualifies it, but to no avail. He speaks of "the spiritual life of the judge" (p. 141), but, as he says, "there is no Archimedean point for the verification, no part of the law which is verified before any part", and hence "the test of the validity is that of the system in its entirety". There is no room here for added factors such as "the spiritual life of the judge".

[4] ROSOCE POUND, *Interpretations of Legal History* (1923 and 1946), first chapter, on Authority.

[5] *The Nature of Law*, Readings in Legal Philosophy, M. P. Golding, N.Y. (1966), p. 135.

Ross is attacking the law of nature as aprioristic and denies the existence of a principle, *a priori* or not, on which the authority of the law is based. But nevertheless he wishes to defend the system as a whole. Of course, this may cause the petrification of the system—especially if we really do verify it as a whole, and thus the whole of it and thus each and every part of it! Then we have no need for any reform, small or big, nor for "the spiritual life of the judge"!

II

What turns out, it seems, is that somehow the various attempts to execute the task—of establishing a solid yet flexible system—though each a failure, together give us something: a life of the attempt to defend the system of laws; the legal system becomes a way of life.

To quote a minor but representative instance, let me refer to Robert N. Wilkin's *The Spirit of the Legal Profession*, Yale University, 1938, page 3:

> The law is the gift of Rome to the World. . . . Prior to the time of the Roman Republic there were laws, but no such concepts as the law. . . . There were the Code of Hammurabi, . . . the Torah . . . such laws were usually shrouded in mystery and religious superstition. They were for the most part arbitrary and inflexible, like the proverbial laws of the Medes and Persians . . . when the Romans were called upon to administer the laws of different countries they began to study the principles that were common to all.

I do not know how old is the claim of Wilkin that Roman Law is the result of the expansion peculiar to Rome. I have found this in historical sketch by Boaz Cohen:[6]

> Muehlenbruch, in a note to his edition of *Antiquitates Romanae of Heineccius*, 1841, p. 402 (quoted by R. Dareste, in the *Journal des Savants*, 1884, p. 378, note 3) expressed the idea that the appearance of new juridicial notions among the Romans is to be explained as the reaction to Jewish or Oriental Law. . . .

But Wilkin says something rather deeper: he says the Romans looked for the *common denominator of all laws* they met, which is, or claimed to be, the law of nature! Now Wilkin does not claim that attempts to base Roman Law on Natural Laws are successful. He himself knows the difficulty with Ius Gentium and its various readings and misreadings, including the reading

[6] BOAZ COHEN, *Jewish and Roman Law* (1966), pp. 13–14, note.

of it as the natural law. What he means is that the very effort to rationalize the law, not the success of this act, gave the law respectability and universality.

Let me add at once that at the same time, if not somewhat earlier, Jewish law too became respected beyond its natural domain. It is not that I wish to claim priority for Jewish law here rather than for Roman law, but that my source so indicates. In his *Life Of Moses* (II, 17–24), Philo Judaeus says, I suppose in allusion to Herodotus (III, 38), that everyone likes his laws best and despises all alien laws—with the exception, he adds, of Jewish Law, which the Gentiles cared enough about to have it translated in full and carefully, and particularly the law of the Sabbath, etc. The same is expressed, or perhaps echoed, in Josephus's *Contra Apionem*. Of course, when Wilkin compares the Torah with the code of Hammurabi and contrasts both with Roman Law, he may be referring to the pre-Pharisaic Hebrew Law. But then he should have mentioned also the ancient Roman Twelve Tables which were indeed repeatedly compared with the other two codes, Hammurabi's and the pre-Pharisaic Hebrew. Late Roman Law compares with late Hebrew Law: as is well known, the Talmud explicitly presents one code of law, the Noachide, as that common to all men. The Talmud, much more than the Roman law, fits the—incidentally, Platonic—contrast between mere codes and legal systems encompassing what we would call today ways of life. In this respect, at least, though both Roman Law and Jewish Law are more than mere codes, originally Roman Law, but not the Torah, distinguished ritual and social law (*fas* and *ius*).[7] But let us ignore the characteristic bias in favour of the Roman Law and against Jewish Law manifest in Wilkin and others. The reason I have quoted him is that despite all inaccuracy he has a significant idea to express. It is the same idea as the one repeated, for example, by Jolowicz:[8]

> Some Stoics wrote books on practical casuistry, in which they discussed what was man's duty, and these books did to some extent help to bring more advanced views of morality into Roman Law.

Yet this is too sketchy; it does not offer a view of the Law as progressively improving, in morality or as a way of life.

To end this part of my discourse let me say that even Talmudic scholars, who as a matter of course usually take the Talmud to present a way of life rather than a codex, until this century have all obscured this very fact by centring on the codex which the Talmudic Law contains— the Halachah in the strict sense—and by stressing the Halachic ruling that one cannot throw doubt on a Halachic ruling of the Talmud from the non-Halachic, folkloric, so-called Haggadic, part of it. This ruling—one does not question the

[7] See BOAZ COHEN, *op. cit.*, p. 29.
[8] H. F. Jolowicz, *Lectures on Jurisprudence* (1963), pp. 40–1.

Halachah on the basis of Aggadah—strictly was never accepted, since no ruling is: remember the flexibility within stability. It is even impossible to abide by this ruling strictly for want of a clean-cut delineation between the Halachic and the Aggadic parts of the Talmud, particularly where fancy commentaries on old texts, the Midrash or the Midrashic part, are concerned. Moreover, when there is no known or stressed conflict between the Halachah and the Aggadah, the codex and the folklore, surely ruling on the basis of the Aggadah was not forbidden. And so when questioning a Halachah on the basis of an Aggadah we may only be questioning a faulty reading of it.[9]

It is many years since I abandoned my Talmudic studies and when I did so I had the impression that the unhistoricity and parochialism of the Talmud, the casuistic hairsplitting and codification, were indeed as worthless and stuffy as the spokesmen of the Enlightenment in the Jewish street had declared them to be. However much I altered my attitude in considering the Talmud in its historical context, however interesting I found it from the literary and anthropological viewpoint and from the viewpoint of mediaeval philosophy—Jewish or not—it had not occurred to me until recently to alter my view of the Talmud on one point. I persistently viewed it as dead, or perhaps as living only within a petrified milieu.

My studies in social philosophy did not take me where I had to question this until recently. The literature on legal philosophy which one encounters either as a social philosopher or as a historian of anthropology, is but a variant on old fashioned social philosophy. Whether Platonic naturalism, Burkian organicism, Hegelian organicism plus conventionalism, modern conventionalism—these are theories of the foundation of the authority of the Law, and as such no different from the theories of the foundations of society in general, with which one can be familiar without any study of the more specifically legal literature. Also the social theories which centre round authority are the same as the theory of foundation of knowledge. I found recently, however, passages eulogizing the Roman Law just on the grounds of its ambiguity and muddling through, such as studies on the development of the various readings of the *ius gentium* and its identification with natural law, and I felt a strange feeling of meeting an old acquaintance. Come to think of it, there is no philosophical foundation to the widespread practice of muddling through. Except for a stray remark on muddling through (such as in Shaw's preface to his *Devil's Disciple*) there is almost no mention of it.

I must mention, before leaving this part, a recent work by David Daube, on *Collaboration with Tyranny in Rabbinic Law*, 1965. Whereas the ruling, the law of the land is the law, of Mar Samuel, is used by many authors to ignore questions of conflict between Rabbinic Law and the Law of the land,

[9] See BOAZ COHEN, *Jewish and Roman Law* (1966), vol. I, p. xv, and works by Hershberg and Murmelstein and by Lieberman, referred to there.

Daube takes the most serious conflict, namely, when tyranny requires of a community to cooperate in matters of treason and such. Daube also notes that this point reflects questions of interaction between Jewish and Roman Law: Judah bar Ilai, Daube notes, who allowed some cooperation, was a Romanophile, and he was sharply opposed by Simon bar Johai, the only Jew who has something like a Saint's-day in the Jewish calendar (mid-way between Easter and Whitsuntide), and who was a rebel hunted by the Roman authorities for many years. It is hard to say, comments Daube, who of the two was nobler.

Daube shows that, though Aggadic, the discussion about cooperation with the rulers has legislative implications. On the major issues Daube does not present a solution to the tragic problem he poses, and he generally refrains from expressing opinions. Yet on one minor and only related issue, Daube expresses a legislative opinion—if possible—overruling a mediaeval authority; or, alternatively, imposing as a stipulation on the mediaeval ruling the most narrow interpretation possible.

In the style of the Jewish scholar, though very much modernized, Daube drops his point and ends his book by telling a story with a happy ending and with a learned footnote to it. What happens to his ruling? and why? He does not offer any authority, he does not himself hold semikhah and so his ruling may be utterly ignored by the tradition and thus forgotten. Whether it will be, I do not know. If it is accepted it will surely have the authority of convention, history, and even scholarship. But this will only be so *post hoc*—after it has been accepted. Its acceptance will have to stand on its own feet—moral and rational; not, as Pollock would say, for reasons of convenience and expediency.

To return to my first point. There are many ways to reconcile given legal and social reforms with the rather naive dichotomy between nature and convention. My question, however, is rather different; not, how, once reformism was born, it was accommodated; and how once a specific reform was born, it was accommodated; rather, how was it born? How was it absorbed? This is much more intriguing. Of course, it is quite possible that reformism was not invented but evolved, that reforms were regularly made as after-thought. I personally doubt this. *Prima facie*, I find it hardly credible that such a complex entity as a social philosophy manifest in legal and political reforms and such complex acts as reforms, should just evolve quietly, unobtrusively, and in defiance of all learned traditions.

III

I must now develop some ideas concerning the philosophy of science in some more detail, in the hope of being able to force the issue a bit and make

it seem less abstract and more real. The obvious case in point would be conventions of knowledge, on which I have published a few notes—namely court and inquest procedures and their like, concerning testimonies, patents, and similar knowledge-claims, and concerning inference from a known fact to an unknown fact via alleged Laws of Nature. For here, obviously, the idea that the law is natural has a bearing on the law's rulings about nature. On the one hand the idea that the law is mere convention, then becomes the idea that truth is relative; it also becomes hard to digest—at least for a man falsely condemned in due-process. On the other hand, the idea that the law is natural excludes all error and is equally hard to digest, indeed contrary to the laws of appeal and the customs of test-case and so forth. Here the Platonic dichotomy becomes a terrible dilemma.

We must not push this point of mine too far. Take an example or two from Jewish Law. Sir Thomas Browne, in his *Pseudodoxa Epidemica*, expresses puzzlement at the suggestion—which he found in Ebenezer—that a woman may conceive to a man yet without sexual intercourse, while taking a bath. It looks as if Browne has found an erroneous claim here about nature. Evidently, however, the source of the story is a Talmudic debate of a merely heuristic interest, on the topic, she who got pregnant in her bath. The Talmudic question was, why did the bride of the grand priest have to be a virgin? Was it in order to secure succession by a genuine descendant? If so, the grand priest is not permitted to marry a pregnant virgin; otherwise he is. The case, then, is much akin to a counter example in logic, to a *Gedanken experiment*; it is not a claim about nature. (Ebenezer misapplied it for a humanitarian purpose.) Similarly there is the Talmudic ruling that sexual intercourse with a female under three years of age does not deprive her of her status of a virgin, but over that age it does. The biology of the matter is rather irrelevant here—because Jewish Law acknowledges the legal status of a virgin even to women who by sheer accident are no longer virgins just as it denies that status to any widow, even in the face of attested biological fact. The question is, however, can we pile convention on convention in each case in which the law seems to conflict with facts of nature? *How far can convention depart from nature?* How flexible do we want our system to be on this issue? Can the legal system be entirely a make-believe world?

To answer this is much harder than it seems. Most people will consider my examples as exceptional and most knowledge-claims made in court matters of a straight-forward nature, susceptible to scientific decision without much ado. That is to say, when it comes to knowledge-claims most people are naturalists. In any case, they are positivists. And hence there seems to be little trouble here, and the question, when and how does the law clash with science seems to be easily answerable. It is not.

There is a strange convention in the literature on the philosophy of science

concerning evidence in law-courts which begins, I believe, with Robert Boyle in 1661. It is the following fiction: however doubtful any evidence is from the philosopher's viewpoint, all evidence is obvious from any common-sense viewpoint; moreover this is amply exemplified by any witness on any stand. The appeal to legal procedures in matters of evidence, the appeal to the so-called moral certainty (the expression is Boyle's), is persistent. It has been repeated by Pierre Duhem, as well as by my own teacher Sir Karl Popper. This fiction must be exploded as pointless and confusing.

It is no accident that the fiction starts in the mid-seventeenth century. Not much earlier, testimonies concerning the super-natural were still acceptable in courts, as well as evidence procured under torture. At that time, in enlightened society this was passé. Now what is enlightened society? Clearly, not one which admits super-natural testimonies, nor one which admits its evidence from tortured witnesses (i.e. not England of Boyle and Newton). Ergo, in enlightened society the evidence of a witness is unproblematic.

This is a very strange fact. Barely were the canons of enlightened evidence laid down, and a circularity was established—the canons were the reasons for court-procedures, and court-procedures were the paradigm of the canons. This was the proof that even if philosophically questionable the canons were eminently common sense. On this flimsy ground Pyrrhonism was dismissed as not serious even though Boyle was himself a sceptic. At the same time in which witches were still sentenced to death, court-procedures were deemed common sense. One must thus admit the following historical point about the interaction between the philosophy of enlightened scientific evidence and the philosophy of enlightened legal evidence in the seventeenth century: what was viewed as enlightened common-sense testimony on the strength of legal practices was also declared as legal practice because it was enlightened common-sense testimony. Robert Boyle used his influence to strengthen the case of enlightenment by a sleight of hand.

Since it is still so common sense to view court-procedures as common sense, let me mention one fact which is so problematic. If a witness identifies certain characteristics of a suspect, he may, in some courts, identify these characteristics and let experts compute the likelihood of wrongly pinning these on the suspect; in others this is not permitted and the witness must do so unaided by experts. I still remember that it was a precedent when, in a San Francisco court in the mid-fifties the judge allowed the prosecution to use probabilities in arguing that the persons the witness had seen were, indeed, the accused.

The importance of hard and fast facts for science has been argued from the naturalistic viewpoint of science which considers science as firmly rooted in facts. This viewpoint, inductivism, sees facts as independent of theory in order to avoid the vicious circle of theory and fact depending on each other.

The sophisticated conventionalist viewpoint may deny that bare facts, hard and fast facts, at all exist—since viewing scientific theories as mere conventions exempts us from planting them firmly, in facts or in anything else. This is Duhem's philosophy of science. It entails the harsh conclusion that the same testimony, when couched in one conventional language of science may make us condemn the accused and when couched in another conventional language of science the same testimony may make us acquit him. And we may conjure, with no great difficulty, theoretical systems and build such examples. We may even have historical cases to this effect.

To avoid this terrible corollary, and quite *ad hoc*, Pierre Duhem sharply distinguished between the facts of science, and the facts of common sense. The facts couched in scientific language, he said, are susceptible to change with the change of convention, of scientific theory. The facts of common sense, couched in ordinary language, he said, are as final and unproblematic as any court testimony. This is too incredible. Yet it has not been criticized, though any lawyer can offer criticism of it with not much ingenuity. The fact is that Duhem was so anxious to save ordinary eyewitness testimony that he forgot all about problematic testimony and even all about expert witness testimony, whether problematic or not.

How do we allow an expert witness to testify? How can we have any stability in our courts and in our society if experts can change their views every now and then?

The difficulty was felt by St. Robert Cardinal Bellarmine, when he wanted from Galileo a proof that Copernicanism was no mere fashion, before he could advise the Pope to endorse it as a philosophy. As a calendar computation device he had already accepted it, and the Jesuit astronomers were using it—in Europe and in China.

But how did he know that as a calendar computation device Copernicanism, or any scientific theory for that matter, was acceptable? He did not. He followed precedent. The precedent was set in the second century A.D. by Rabban Gamliel, who followed science in computing the high holidays. He was not willing, however, to make his reform clash with tradition, and so he did see witnesses testifying that they had seen a new moon. Now there was a certain set standard of expertise expected of new moon witnesses, which was, in fact, extremely low. Yet one day the witnesses Rabban Gamliel accepted were not up even to the accepted low standard. He accepted their testimony anyway—knowing from his scientific background that it was true—but Rabbi Joshua, a more traditional fellow, rebelled. Rabban Gamliel ordered him to come to him on a pilgrimage on the day which on his view should have been the Day of Atonement. Much disturbed, Rabbi Joshua obeyed, much to Rabban Gamliel's relief.

The precedent worked, and also many other reforms which followed suit.

There is a long tradition of expert witnesses overruling and endorsing eyewitness testimonies in all sorts of ways—and it usually operates rather well. What is its rationale? There is no literature on this point, in my opinion, except very few recent essays, including one by myself.[10] And for an obvious reason. The philosophy of science is split between nature and convention. The naturalist thinks that technology follows science since science procures the truth. The conventionalist thinks that science does not attain the truth but is geared for technological needs, guided by convenience and expediency. Ergo, when science is applied, e.g. in courts, there is no special difficulty.

It is a fact that Pierre Duhem speaks of scientific systems in the same way that Alf Ross speaks of legal systems: they are verified as wholes and modified in small parts. Now both clash with a very simple problem: a system is verified as a whole or its part is modified in particular instance, out of pragmatic considerations. But how do we decide which pragmatic consideration to apply? The pragmatic considerations derived from any system will always justify that system. This is the marvellous point which was made logically by Sir Francis Bacon, the lawyer who, Dr. William Harvey used to say, talks philosophy like a Lord Chancellor. And the same marvellous point was made factually by the great Oxford anthropologist E. E. Evans-Pritchard in his *Magic and Witchcraft among the Azande* of 1937. For the system as a whole to be meaningfully verified and meaningfully in need of modification, we need a theory of validation outside the system. How do we go about it? How, in fact, did Rabban Gamliel effect the reform?

The answer to the detailed question about Rabban Gamliel may be found implicit in E. Wiesenberg's "Elements of a Lunar Theory in the Mishnah, Rosh Hashonah, 2: 6, and the Talmudic Complements Thereto".[11] In his conclusion Wiesenberg supports Maimonides's view: the investigators checked evidence of witnesses by astronomical calculations. If so, clearly the point Rabban Gamliel had was that the new theory was better and dispensed of witnesses altogether (not of all data, but of enough data not to be in need of witnesses every month). Here we see that the more important reform was made prior to Gamliel's time, that he too was following a precedent. I do not know whose. We can also see, I think, how *reformist epistemology and reformist jurisprudence go hand-in-hand.* In both cases there is *no authority, but reasonable risk.*

Perhaps I should say a generality on science in Talmudic law. There is no study of this issue that I know of. The story of Rabban Gamliel is open to different interpretation. Though I have followed the traditional one of Tosafot YomTov, I cannot say that it is clear enough. There is enough anti-science in the Talmud, but at crucial points scientific authority is

[10] "Can Religion Go Beyond Reason?" *Zygon* 4 (1969), pp. 128–68.
[11] *Hebrew Union College Annual* 33 (1962), pp. 153–96.

admitted, however grudgingly. Thus, in *Hullin* 63a there is an acknowledgment that a zoology master has a higher authority than a Talmudic one in deciding the identity of birds listed in the Old Testament as kosher or as not kosher. The expression, pejorative, I am sure, 'hunting master' is silently contrasted with 'wisdom master' (for the zoologist and Talmudist, respectively). Similarly in the following story. Rabbi Johanan had a disagreement with Resh Lakish on a point of law about the ritual purification of knives, and Resh Lakish reduced it to a point of fact and claimed authority over Rabbi Johanan as one who had lived by his sword. Rabbi Johanan gave in, but also cursed Resh Lakish, who consequently died, much to Rabbi Johanan's grief. These indications, I feel, are very strong: the Talmud was reluctantly realistic about matters of fact.

IV

There is little study of the Talmud from a secular viewpoint which is not in the hostile vein of Spinoza and other naturalists, or in the apologetic vein of Mendelssohn and others who felt attached to the Talmud. And, one must agree, there are too many sidelines which cloud the main issue. I do not hope to clear them all, but merely to sketch an idea which you may find worthless and knock down at once, or perhaps deserving of some further elaboration before it be superseded. Let me first, then, clear a few points.

Much has been said about the question of the Talmud's authoritarianism. Some saw in the thirteen rules of hermeneutics, the *Middoth* of Rabbi Ishmael, evidence that the Talmud had a logic of its own. This is rather silly, not only since, as Daube has shown, it is derivative, but also since arguments from analogy—and analogy was verbal and often far fetched—were not permitted except on one's master's authority, though arguments *a fortiori* were permissible to invent. Hence, no peculiar logic, and a professional authoritarianism. Some tried to explain this authoritarianism rationally, notably Moses Mendelssohn. I need not go into these. Others, like Julius Guttmann, the leading historian of Jewish philosophy in our century, stress that the variety of religious and legal and scientific beliefs of the Talmud is ample evidence against the view of the Talmud as authoritarian. In the same vein the great Harvard historian, Harry A. Wolfson, has declared in his *Philo* that there is no essential difference between the methods of the Talmud and of science: both are hypothetico-deductive, he says, though one argues from the biblical text and one from facts of nature.

There are reasons going in both directions. Profession of authoritarianism was quite common in antiquity, yet often meant little. Hesiod said, "Zeus himself ordained law for mankind" and the Talmud says, "The law was

given to Moses in Sinai". How seriously all this was taken is still unclear, just as we do not quite know why exactly Socrates' last words were a request for a pagan sacrifice. Yet we do know that in the Greek world the open rejection of religious authoritarianism led to utterly new views on the law, including cynicism and the collapse of the social and legal system—whereas in the Hellenistic world there was a semblance of authoritarianism and a convention of not destroying the foundations of the system and of even defending them *ad hoc* when need be. The conventionalist view of science which, indeed, is hypothetico-deductivist, does permit the *ad hoc* defence of the fundamental axioms of the scientific system, but it also does allow the slow alteration of these axioms to avoid too many *ad hoc* corrections. Assuming this philosophy to be true, we have to admit that there is some truth in Harry Wolfson's view, with two exceptions. First, in science we frankly alter even fundamentals; not so in Talmudic disquisitions. Secondly, the choice of fundamental text, namely the Bible, is somewhat too *ad hoc* for any scientific taste. But perhaps one may view the text, like arguments from analogy, rather a matter of traditional continuity, rather a flexible matter, and so make the Talmudic disquisition more akin to science à la conventionalism—except that this was held as a secret, if it was held at all, amongst the Talmudic scholars. It may be hard to envisage a secret shared by a whole tradition, but sociological conventionalism, which is somewhat cynical, is never as confessedly cynical as Thrasymachus is in Plato's *Republic*; its cynicism is more hypocritical; and whatever we think of the New Testament, we must admit that Jesus did call the early Talmudists hypocrites, and systematically and rather forcefully.

And so let us explore the view that the exercise of dialectics had led to the collapse of classical Greece—as Richard Crossman and Sir Karl Popper declare—and that later antiquity resolved to confine the limits of dialectics by convention, or hypocritically if you wish.[12] Assuming this, we may see both the Talmudic practice and Roman jurisprudence as an important stage in the development of the Hellenistic world, indeed as the concealed development of the modified conventionalism which I advocate, of the view which breaks away from the dichotomy between Nature and Convention by postulating Nature as the regulative idea and the multitude of Conventions as improvements towards this regulative idea. I do not mean to say that we know what is the regulative idea—or the final truth—nor that gradualism forbids large alterations. Rather, that *we move from bigger error to lesser error*. Since my thesis is that this modified conventionalism, this gradualism, was a concealed thesis—or perhaps lost in a complex way of life—what evidence is there to support my conjecture, and, in particular, is there a link

[12] "No society and no harmony without doublethink", says E. Gellner, *Inquiry* 4 (1961), p. 209.

between the Talmud and Roman Law? I cannot possibly discuss this fully, but I wish to mention a few details.

First a methodological point. It is all too easy to quote from the Talmud evidence going this way and that way, more liberal, rational, Hellenistic passages, and more tribal, apocalyptic, idiosyncratic passages. *The only kind of evidence which seems to be acceptable is one which strikes us in its cleverness, in its originality, and especially in its awareness of the problems at hand. In particular, I shall not endorse evidence as valid merely because it appeals to my views or because it helps me commend or condemn the Talmud.* What is most easy to argue is that the Talmud as a whole, is, or is not, Hellenistic—whatever Hellenism means and whatever the Talmud as a whole is. We know that Rabban Gamliel established Hellenic studies in Jerusalem, and so we know that at least at the time of the Talmud, if not earlier, Hellenistic problematics were not inaccessible to the Talmudists. And we have evidence of suppression: when cynicism was declared illegal the rule read, he who lays his wife under the fig tree gets flogged. This is doubletalk. The question is, could the Talmudic practices throw some light on such problematics, especially of the social, legal, and religious philosophy, as were met following the collapse of the Greek world and of Alexander's empire, and the rise of the Roman Empire? The legends about the friendship between Rabbi Judah the Prince, the compiler of the Mishnah, and Antoninus, may indicate familiarity. The stories about the Wise Men of Athens may indicate suspicion. The question is, what, if anything could Judaism offer the world by way of social and legal philosophy?

Part of the answer, at least, I find in Julius Guttmann's history of Jewish philosophy, where he speaks of the enormous Talmudic hostility to religious scepticism coupled with enormous religious and philosophical flexibility: the finality of the text coupled with (or tempered by) the great freedom to reinterpret it. This, says Guttmann, this freedom and bondage of Talmudic Judaism, became the hallmark of Jewish and Christian and Moslem mediaeval philosophy. But this is still far from my thesis about modified conventionalism.

What is most impressive about the Talmud surely is its obsessive thoroughness and systematic character. It is not for thee, says one of the earliest texts in the Talmud, to finish the labour. This, of course, has a variety of historical roots going back to the days of Ezra and the early scribes who, as spiritual leaders replaced the priests in all but names (being called scribes and rabbis, writers and masters, rather than priests or officiates) who read bits and pieces—small fractions—of the Torah on the market day. Yet the flourish of minute legal studies is a development of the later period, particularly after the destruction of the Temple and the collapse of Judean society. The story of the foundation of the Yavneh school after the destruction of the Temple

is clear: the Talmudists took upon themselves to save the integrity of Judaism by legal disquisitions.

There is much in the Talmud to convey the sense that law and order are the marks of civilization, that outside the law is the law of the jungle, the law of might is right. Indeed, the Talmud declares even what is simply outside the law's jurisdiction is most common everyday matters to be a domain where might is right.

V

This, I feel, is the place to notice the celebrated fact that in the whole of the Talmud there is one and only one legal reform expressly contrary to the law, to wit Hillel's Prosbol, his abolition of the Law that the Jubilee year cancels all debt. We may imagine what a scandal this stirred and what effort Hillel made in compromising on this point. We have a later instance of a similar nature, namely the repudiation of the law of usury. I say it is similar, since it was performed as an act of circumvention rather than abolition of the law, and since the need for precedent was not satisfied—not due to lack of ingenuity, of course, but as an act of defiance. Jacob Katz discusses in his *Tradition and Crisis* the scandal that this defiance created. Judaism did allow—nay, encourage—defiance, but within the ways of life; once the way of life itself was threatened, it was put above candid and sincere defiance. This did not close issues, and the defiant could go indefinitely—but he had to curb his expression of defiance or be anathematized.

There is much in the Talmud to show that every legal question may be investigated to such a length as to make judgment on it so problematic as to require authority or convention to determine the issue. The investigation may be hermeneutic or logical, but the ruling to which it gives birth follows some guideline that is sometimes indicated but seldom stated. For example, there was the tendency to oppose capital punishment, culminating with its total abolition. (A few scholars suggest that in the Middle Ages Jewish courts did exercise their right to execute criminals, but this is a different matter.) First, circumstantial evidence became increasingly unsatisfactory. Then, since capital punishment can only follow premeditated crime, premeditation had to be proven by explicit dialogue between witnesses and defiant criminal prior to crime. Finally, the courts were instructed to make tests too stringent ever to be practicable. For example, capital punishment for murder must rest on proof of the good health of the victim immediately preceding the crime. This requires a *post mortem*. But even a *post mortem* is not at all conclusive: quite possibly there was fatal damage to the victim just where the killer's sword happened to pierce!

There are limits to such scepticism of laws whose effectiveness has to be protected. These limits are prescribed by other, barely articulated guidelines. For example, inconsistency between witnesses on any matter, however irrelevant, leads to acquittal in matters of capital punishment. Yet, seemingly as an afterthought, come different suggestions. The inconsistency may be irrelevant or easily explicable as a reasonable error, in which case it does not count. The example is a discrepancy in the day of the Lunar month early in the month, at the period before the calendar was standardized. As Maimonides hints, we have stringent rules for capital punishment (thereby abolishing it de facto) and more lax ones for incarceration.

Why two witnesses? Is it that two are more reliable than one? If so, why not three or four? But the law says two or three. Convention stops argument from infinite regress here. The two witnesses should not be brothers. Why? Is it because they are suspect? But then any pair is, whereas the brothers Moses and Aaron are not; but no; the law says no brothers, not even Moses and Aaron. What if two witnesses oppose two witnesses? Stalemate. If two later witnesses testify that former witnesses are conspirators who had been in another place while the crime was allegedly committed, the conspirators are to be punished in proportion to the magnitude of the punishment which the accused would have incurred as a result of their testimony. Why? Why do we trust the latter witnesses rather than the former? The law says so. What if the conspiracy witnesses are called conspirators by other still later witnesses?

The Talmud becomes hopelessly complicated because of its mode of concealed argumentation, because its guidelines are tacit. The claim, the law says so, is neither here nor there, as the law can be bent, and is bent regularly given unmentioned guidelines. Not only is no rationale often given but one rationale is often concealed behind another, smaller one. Why does the Talmud bother to mention overruled opinions of Hillel and Shammai? To tell future generations not to be stubborn anymore that these grand old men. And why are minority views mentioned though overruled? To tell you that until they are declared minorities their rulings are valid. Yet the Talmud every so often rules in favour of minorities against majorities; there is little doubt that the Talmudic labyrinth may all too easily frustrate and exasperate a modern reader. Perhaps this, too, is to a purpose. The multitude of possibilities and precedents and reasons and traditions cannot but enhance criticism and act as some smoke screen to cover the guidelines which are really operative as decision-procedures of sorts. Moreover, the *complexity of the system suggests a deadlock, and a deadlock suggests preference for the status quo—but only up to an unspecified point, which depends on our desire to retain stability and flexibility*. But this is another matter. What I suggest now is that to a large extent the complex legal systems so characteristic of any Western system have

roots that go back to the Talmudic solution of the problem which had led to the collapse of the Greek culture. *Muddling through*, one might say, *is better than collapse*. Society, the Talmudist suggested, was based neither on truth nor on arbitrary convention but on a super-sophisticated system of old rulings and precedents, and on newer ruling and precedents, of interactions between new knowledge and older conventions of knowledge. This philosophy, somehow, never stood side by side with the Greek contrast between Nature and Convention. Judah Halevi compared Greek philosophy to flowers and Jewish philosophy to bread. In my early days, I felt, perhaps that the flowers of the uncompromising search for truth are more important than the bread of compromise between stability and innovation. This, however, is an understandable rebellion, in a period in which we can, indeed, afford both flowers and bread.

Die Blutgerichtsbarkeit in der römischen Provinz Judäa vor dem ersten jüdischen Aufstand

VON ERNST BAMMEL

I

DER gemischten Ordnung, die sich in der frühprinzipalen Zeit für das Reichsgebiet herausbildete, entsprach es, dass in einigen Bereichen des öffentlichen Lebens die Dinge ganz beim Alten blieben, während in anderen ein rascher und durchgreifender Wandlungsprozess einsetzte. Zu den letzteren gehört das Strafrecht. Hatte schon Caesar Neuerungen im Rechtswesen, namentlich im Strafrecht durchgesetzt,[1] so ergaben sich in der Folge Weiterungen, an deren Ende die volle Durchsetzung der Strafgerichtsbarkeit des römischen Hoheitsträgers stand. Theod. Mommsen nahm an, dass die "wesentlichsten Neuerungen" bereits unter Augustus Platz gegriffen hätten. Reichen seine Belege —es sind Angaben über die Christenprozesse— auch nur bis in die Zeit Trajans hinauf, so gibt ihm doch das Urteil, das er von der Entwicklung der Dinge gewonnen hatte, die Grundlage dafür, es als gegeben hinzustellen, dass unter Augustus "die statthalterliche Kriminaljustiz bereits in vollem Umfang gewaltet zu haben scheint".[2] Es war, wie die Formulierung des Satzes zeigt, eine Annahme, die Mommsen mit diesen Worten aussprach. Dies gilt sowohl für die Zeit der Durchsetzung wie für die Norm, unter der der Anspruch stand.

Das Material, das Mommsen vorlegen konnte, ist durch die 1927 veröffentlichten und alsbald einer lebhaften Erörterung unterzogenen Marktinschriften von Kyrene[3] entschieden bereichert worden. Allerdings ist aus den Edikten des Prinzeps zu entnehmen, dass alle Gerichtsbarkeit als vom Träger des Imperiums abhängig angesehen wurde.[4] Indessen ist dieser formale Gesichtspunkt nicht entscheidend, da er mit der Schichtung der

[1] T. MOMMSEN, *Römisches Strafrecht* (1899), S. 129.
[2] a.a.O., S. 238.
[3] Der Text am besten bei STROUX/WENGER, *Die Augustus-Inschrift auf dem Marktplatz von Kyrene* (Abh. d. Bayer. Akad. d. Wiss., Philos.-Philol. u. histor. Kl., 34 (1928), 2 Abh.), S. 8 ff.
[4] Es mag jedoch sein, dass der Eindruck, den die auf Beschwerden zuruckgehenden, also nicht das Rechtssystem gleichmässig behandelnden Edikte vermitteln, zu weit geht. Wenn Stroux betont (S. 96) dass in einem ungeahnten Masse die Gerichtsbarkeit des Statthalters in einer der städtischen Prätur analogen Form normiert worden sei, so ist die Analogie der Verhältnisse zu betonen. Es handelt sich weniger um die Imponierung eines dem stadtrömischen entsprechenden Systems als um die Beschreibung und Verbesserung einer vorhandenen Ordnung im Lichte der stadtrömischen Verhältnisse.