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"Elements in the Development of the Concept of False Witness from the Code of Hammurabi through the Babylonian and(Jerusalem) Palestinian Talmuds."

Allen H. Podet

Thesis submitted in partial fulfillment of requirements for the Degree of Master of Arts in Hebrew Letters and Ordination.

Hebrew Union College - Jewish Institute of Religion

June, 1962 Referee: Professor Alexander Guttmann.

A B S T R A C T

(from the GENERAL INTRODUCTION, q.v.)

The thesis consists of nine major sections, which attempt to present a developmental view of the legal concept of false witness.

I. The broad legal setting of false witness as a concept is laid down and structurally analyzed; some principles that everge are applied to instances of Jewish law.

II. The earliest prebiblical references to the laws of false witness are considered and compared with one another and with the Decalogical statement, the IX Commandment.

III. The developing legal structure is traced through a Biblical appearance, which is subjected to close textual analysis.

IV. Subsequent development in the Tannaitic period is demonstrated in a discussion of selected passages from the Mishna; here we find the first clear signs of the tension between Originality and Continuity as principles of halakhic development.

V. In the Amoraic period we find a complication of these principles and see a key to a pattern of solution.

VI. A brilliant Amoraic case definition of false witness, by which is maintained the safety of the society and which nonetheless introduces an unprecedented humanity towards the criminal is seen here.

VII. Unsolved problems are noted and general conclusions are marshalled.

VIII. Appendices deal more fully with two specific problems.

IX. Four critical bibliographies relate this work to other works in this and in tangential areas.

כבד אלהים הסתר דבר
וכבד מלכים חקר דבר
משלי כה:ב

P R E F A C E

This study grows out of a deep concern for and involvement with Rabbinics which was fed and fanned at the Hebrew Union College-Jewish Institute of Religion. I desire to express my gratitude for the careful guidance of Professor Alexander Guttman, rendered to me in the preparation of this work. Again and again, his well-developed suggestions and lucid conceptualizations were freely given and ultimately became integral parts of the study.

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A special word of thanks is reserved for my typist, Sonya Roos, who has spent herself unreservedly and in two languages, to see this thing properly through. With good coffee and good sense, she has made my life much easier.

Not a line of this would ever have been possible without the day by day indoctrination which I received long ago at the hands of my father, Cantor Irving M. Podet ז"ל. He was a man of great knowledge and wisdom, who passed his positive view of life and religion on to both his sons, and created thereby an imperishable monument to all that he held dear, and to all that he was and remains. To his memory this work is dedicated.

Cincinnati
21 March 1962

A. H. P.

C O N T E N T S

A GENERAL INTRODUCTION

I. The Legal Setting - Basic Terms and Ideas

Law is an expression, in the most concrete terms, of the ways in which a people lives. Legal process is the most concrete expression of a people's legal structure. In a system based upon evidence by witness, the false witness is attacking the very foundations of civil life, and, in most cases, of religious life as well. The seemingly minor crime of false witness, therefore, is in fact among the most far-reaching of crimes, because it undermines the premise of the entire legal system, namely, the trust of the state in its citizens and of the citizens in each other. Without that trust, there is no possibility of a society as we know the term.

For this reason, subtle as it may be, false witness is recognized by every society which has endured as a crime of the greatest significance, and is dealt with accordingly.

In Jewish law, needless to say, this principle is carried through. The influence of this principle, of this conceptualization, upon Jewish jurisprudence seen as an organic entity is thorough and unavoidable.

II. The Prebiblical Instances of the Laws of False Witness

Even before the earliest strata of Jewish law, the problem of false witness was faced in some of the oldest

codes known to man - for how long could so basic a threat go unseen? - and the way in which early codes respond to the false witness is indeed a telling index to the societies that produced them.

The Decalogue is no exception. This basic code of laws too recognizes false witness as among its most fundamental concerns. However, the decalogue itself does not stand alone (regardless of whether it was meant to or not); it interacts with the legal framework into which it is set, of which it is a part. This gives rise to certain problems.

The Decalogue.

The Decalogical reference to false witness, like a true symbol, is something of substance which points beyond itself. The IX Commandment is rarely dealt with directly in Jewish jurisprudence, but rather it is considered a summary statement which points to a section of Deuteronomy 19, where the business of false witness is taken up in detail. Since the decalogical statement gives an abstract formulation, whereas the Deuteronomy 19 statement deals with a specific case, the latter takes precedence. Any discussion of the IX Commandment, therefore, must be in terms of the Deuteronomic passage.

III. The Biblical Basis of False Witness

An analysis of this passage will demonstrate that the

understanding of the passage in the Bible involves numerous other concepts, among which is the talio. We shall see just what sort of case was envisioned in the Biblical presentation, and what details were important; how many witnesses made a case, and what was the legal position of the witness-accuser. We shall see the primitive, pre-biblical law and continue throughout the period of the Biblical legislation.

IV. Some Tannaitic Considerations on the Issue of Deuteronomy 19:15-21

In the Tannaitic period, examples are found of a tension or conflict between the principles of Continuity and Originality. In a mishnaic analysis, the conflict makes itself felt, especially in regard to certain threads of thought which have attached to false witness since its earliest appearances, e.g., talio and the (restriction of the)death penalty.

V. Some Amoraic Considerations on תורה: An Elucidation of Deuteronomy 19:19

The Amoraic period, which followed the Tannaitic period, was one of tremendous intellectual dynamism, of thought at its very keenest coping with every problem of concrete life. This period, represented here in its treatment of instances of false witness, brought to bear in the Talmud

the full power of a sophisticated approach to traditions. All of the details which never occured in a primitive code like that of Hammurabi are carried out here to their resolutions, and a new and humane conception of punishment is harmonized with the essential need to defend the state against the basic threat which false witness remains.

VI. An Analysis of an Amoraic Case Definition of זוממין

As part of this effort at harmonization of humaneness with defense of the very roots of civilized life, the Amoraim, in a passage which we shall consider, evolve a brilliant case definition of false witness, by which they maintain the safety of the society and yet introduce an unprecedented humanity towards the criminal on a practical level.

VII. A General Conclusion

There remain unresolved problems in false witness, problems beyond our present scope, which are briefly dealt with and outlined for possible future work. Among these problems are difficulties with secondary interpretations of the evidence which we shall so far have considered.

VIII. Two important problems, that of the "number of witnesses" and that of indictment procedure, are allocated

special treatment in appendices.

IX. Critical Bibliographies

Critical bibliographies are an important part of our work, in that they permit us to indicate the place of some of the available literature as it touches on our problems.

- Part 1 -

THE LEGAL SETTING * BASIC TERMS AND IDEAS

I. Structural Aspects of Law

Law is the systematization of relations between men.[1] A law may exist without enforcement,[2] and, indeed, a law may exist without classical formulation;[3] to say that something is a law[4] is not to say that it is either enforced or explicitly formulated,[5] or violated, or that it would necessarily be recognized publicly[6] were it to be violated.

When we say that we are dealing with a law, however, we have said that we are dealing with something that presumes a system[7] behind it, in terms of which[8] it has meaning. Therefore we say, Law is the systematization of relations between men.[9]

When two persons in a relation do not agree in their perception of that relation,[10] controversy arises, which, unresolved, may express itself in procedure.

Procedure is that structural machinery of recourse within law which expresses itself in recognizable patterns, rules, regulations, and forms, set in motion by a wronged person,[11] by which the society[12] attempts to guarantee to its constituents their rights[13] or deal with wrongs which they commit.[14] Where the wronged person or plaintiff is an individual,[15] the representative of the system is impartial and an arbitrator.[16] This we class as civil law.[17] Where the wronged person is the State, then the state is both

prosecutor and judge,[18] and we are dealing with what is called Criminal law.[19]

The function of the interpreter, whether it be civil law or criminal law, is to reassert the principle of a right presumed to exist before the occurrence of the wrong.

II. Jewish Law

In view of the arbitrary nature of the classification of laws,[20] it is senseless to carry the categorical analysis of Jewish law beyond the gross divisions which we have utilized.[21]

A. The Courts

From the Biblical precept of Deuteronomy,[22]

ושפחת בחגך אתה ובנך ובתך ועבדך ואמתך והלוי והגר והיתום והאלמנה אשר בשעריך.

we find the specific information that criminal courts were established in all cities of more than 230 inhabitants.[23] The term Sanhedrin in the sense of "deliberative assembly," "court," was applied to three primary and numberless subordinate groups:[24]

(a) Courts of three judges for civil matters;[25]

(b) Courts of twenty-three for capital matters;[26]

(c) A legislature in Jerusalem of 71 members, with a fixed political organization.[27] The legislative and political functions which attach to the term "sanhedrin" may refer to different councils.[28][29][30]

B. The Juridical Process of Criminal Indictment

The machinery of criminal indictment[31] in Jewish law is set in motion by action of the primary witnesses, which is at the same time testimony and accusation. The witnesses, to have grounds for indictment , must establish[32] the following:

(1) They had seen the crime;[33]

(2) They had warned the criminal;[34] this warning must be immediately prior to commission of the crime;[35] exceptions are for the cases of

(a) False Witnesses;

(b) Contributory inciters to idolatry; and

(c) Thieves who steal at night.[36]

C. Procedure[37]

As regards criminal cases, Talmudic Law recognizes only eyewitness evidence, rejecting oaths, declarations, documents, or עד מפי עד evidence. The basic procedure is as follows:

(1) Preliminary questions are asked in order to establish the character of the witnesses (these questions may be found in Sanhedrin 27);

(2) The witnesses are admonished with a formula calculated to inspire dread in false witnesses, but so expressed as to present a deterrent to legitimate witnesses, so that they do not with-

hold evidence. This formula is found in its entirety in the Mishna on Babylonian Talmud Tractate Sanhedrin folio 37a:

שמא תאמרו מאומד ומשמועה עד מפי עד ומפי אדם נאמן שמא אי אתם יודעין שסופנו לבדוק אתכם בדרישה ובחקירה הוו יודעין שלא כדיני ממונות דיני נפשות דיני ממונות אדם נותן ממון ומחכפרלו דיני נפשות דמו ורם זרעותיו תלויין בו עד סוף העולם שכן מצינו בקין שהרג את אחיו שנאמר (פסד) דמי אחיך צועקים אינו אומר דם אחיך אלא דמי אחיך דמו ודם זרעותיו ד"א דמי אחיך שהיה דמו מושלך על העצים ועל האבנים לפיכך נברא אדם יחידי ללמדך שכל המאבד נפש אחת מישראל מעלה עליו הכתוב כאילו איבד עולם מלא וכל המקיים נפש אחת מישראל מעלה עליו הכתוב כאילו קיים עולם מלא ומפני שלום הכריות שלא יאמר אדם לחבירו אבא גדול מאביד ושלא יהו העדוקים אומרים הרבה רשויות נשמים ולהגיד גדולתו של הקדוש ברוך הוא שאדם טובע במה מטבעות בחותם אחד כולן דומין זה לזה ומלך מלכי המלכים הקב"ה טבע כל אדם בחותמו של אדם הראשון ואין אחד מהן דומה לחבירו לפיכך כל אחד ואחד חייב לומר בשבילי נברא העולם ושמא תאמרו (לז ע"כ) מה לנו ולצרה הזאת והלא כבר נאמר והוא עד או ראה או ידע אם לא יגיד וגומר ושמא תאמרו מה לנו לחוב בדמו של זה והלא כבר נאמר באבוד רשעים רנה.

"Possibly you intend to base your testimony on either surmise or on testimony which you have heard from another party or from an otherwise reliable person (this may be a <u>terminus technicus</u> for an eyewitness); possibly you are unaware that we will ultimately investigate you through the

procedures of חקרה and דרשה. You must know, then, that criminal (literally, "capital") cases are not like civil (literally "monetary") cases. In civil cases a man may make monetary restitution and thereby atone for the trespass which he has committed. As regards criminal cases, however, both the blood of the victim himself and the blood of the offspring who will now never be born to that victim weigh upon the murderer, to the end of all time. Precisely for this reason is it stated in the case of Cain, the voice of the (literally:) bloods (employing the plural form דמי- instead of the singular construct (דמ-) of your brother Abel are crying to me: that is to say, both his own blood and the blood of his seed. Therefore was Adam created alone in the world, so as to teach you that anyone who destroys one life in this world is to be considered as if he had destroyed an entire world, and anyone who saves one life in this world is to be considered as if he had saved an entire world. You may see that all inhabitants of the world have been created in the form of אדם, the first man, yet the faces of each of them are dissimilar one from another; for this reason each and every one of them may hold

that for his sake was the world created. Now, lest you become frightened and seek to escape the position in which you are, it has already been written in Scripture that, One who is a witness, or beholds, or knows, and does not say so, must bear his guilt. Furthermore, lest you become afraid of bearing the bloodguilt of the person a against whom you testify, it has already been said in Scripture (Proverbs 11:10) "At the destruction of the wicked, there is joy."

This formula varies slightly in the Jerusalem Talmud. Cf. also in this regard Maimonides Hilkoth Sanhedrin 12,3.

(3) At this point, the witnesses make their depositions.

(4) These statements are investigated by meticulous questioning intended to determine the precise extent of the actual knowledge of the witness and to reveal surmise and conjecture as well as premeditated falsehood.

(i) חקירות, and

(ii) דרישות consist of principal questions on the person of the murderer and the exact important circumstances of the case. Included are two groups of seven formal and fixed questions on the time and place of the event. The

formula is given in several forms, representing several traditions, in the Mishna.

(iii) בדיקות concern themselves with particular and less central circumstances of the situation.

In the cases of (i) and (ii) there must be complete agreement in the testimony of the two witnesses; in the case of (iii), it is enough if there is no direct contradiction. That is to say, ignorance will invalidate the testimony in the חקירות and דרישות, but it would require not only ignorance but contradiction to invalidate testimony on grounds arising from the בדיקות.

In all of the above, the witness is not presented with statements to which he may assent, but is asked to produce positive evidence. The exhortation in Aboth, הזהרו בדבריכם, let the questioners be cautious in just how they express their questions, lest they may give evidence to the witnesses, refers to the process of separating the witnesses and taking their stories one by one so as to avoid one receiving a clue either from the other or from the questioner. The intent of the Aboth passage is the censure what we call leading the witness, and should be considered in conjunction with a contemporaneous passage,

Aboth I 9, הוה מרבה לחקור את העדים. In regard to contradiction of witnesses, Cf. Maimonides Hilkoth Eduth I 4, II 6; Mishna Sanhedrin 40a.

(5) Further testimony is then solicited from the public at large; every effort is made to solicit witnesses for acquittal or witnesses favorable to the defendant;

(6) Judgment is passed. If judgment is unanimous for conviction, a mistrial is declared. If judgment for death, then the defendant is permitter up to three opportunities to introduce new evidence without support, and unlimited opportunities to do so supported by counterwitnesses. If the accusing witnesses are met by counterwitnesses during this period, they may become liable to the death penalty (qvi.).

(7) Judgment is executed, under the direction of the court, at the hands of the witnesses, in the presence of a quorum publicum, according to the particular fate appropriate to the crime. Hebrew law recognizes four capital penalties, viz:

(a) Stoning, in which for example the convict is precipitated from a given height and a heavy stone placed upon his body;

(b) Burning, in which for example the convict was forced by strangulation--one witness at

each end of a soft strong cloth--to open his mouth, whereon lead was poured down the throat;

(c) Strangulation, in which for example the process begun in (b) was carried to its conclusion, and

(d) Decapitation, executed in the customary manner; once more, by the witnesses.

We may ask at this point, what would be the outcome, were the witnesses discovered to have been false after the execution? It is a question to which having laid the groundwork, we shall return.

- Part II -

SOME PRE-BIBLICAL INSTANCES OF THE LAWS OF FALSE WITNESS

I. The Decalogue and other Codices

When we speak of a decalogue, we refer to a codex of ten statements, or laws, or principles, which are in some sense associated with one another and which form together a coherent and inclusive legal unit.

There are at least five discrete decalogues discussed in connection with the Hebrew Bible:[128]

A. The Sinai Decalogue:

(1) Exodus 20: 1-17;

(2) Deuteronomy 5:6-18;

(3) Hosea 6:5; 8:12;

B. The Book of the Covenant, Exodus 20:23--23:19;

C. The Yahwistic Decalogue, Exodus 34:10--27;

D. The Shechem Decalogue, Deuteronomy 27:15--26;

E. The Law of Holiness, Leviticus 17--26.

II. Some Pre-Biblical Instances of The Laws of False Witness

A. Hammurabi and Prior Codes

The prebiblical history of the IX Commandment, that is to say, of the injunction against false witness, is usually discussed in terms of the Code of Hammurabi, one of the most ancient legal documents extant.[121] In this document[130] we find two specific references to false witness,[131] both of which provide the death penalty for

false testimony in both capital and non-capital cases.[132] Reference is made also to a case involving a principle of talio.

It is interesting that the Hammurabi Code touches the H Decalogue only a three points,

(1) in regard to false witness,

(2) in regard to theft, and

(3) in regard to covetousness.

In view of the basic nature of these offenses, it is not clear whether what may after all be accidental coincidence of language is enough to assure the Hammurabi Code as important a role as it is often assigned in the history of the H Decalogue.

The Code of Hammurabi is not the first code of its kind extant,[133] but it is the first one of consequence with which we must deal in relation to talio and false witness.[134]

B. Character of the Hammurabi Code

The Code of Hammurabi is a tight structure of 282 sections of policy in Babylonian common law, sandwiched between a poetic prologue and epilogue, which establishes the relation of the Code and of Hammurabi to Marduk, God of Babylon. The code envisions a fixed, divine order in which the citizen participates. A crime against the state is a crime against the deity.

Justice is absolute and severe. The iron rock of the talio is the cornerstone of this code. In the words of the eminent Jewish scholar, Cyrus Gordon, of Brandeis University, "All notions of Christian charity" have no place here; we are dealing with that severe justice which, to Gordon seems to be characteristic of the "Old Testament".[135]

C. Talio

The very first law of the Code deals with the accusation of murder brought by one person against another. If the charge cannot be proven by the witness-accuser, then the latter shall be put to death. The considerations of intention so important to Talmudic law, the ultimate guilt of the accused, sincerity of the accuser, etc., are not in evidence. It is possible that in the administration of the code, they were taken into account, but this is not demonstrable from our evidence. By the third law, it is established on principle that talio is to be the standard response to capital accusations, and in the fourth, talio has been extended to grain or many cases involving bribed witnesses.

Talio however is not always the ultimate in severity. The code exceeds the demands of talio often, as in the case of theft from God (Temple) or Palace, the

penalty is death (section 6). Again, it makes a great deal of difference against whom the offense was committed. Equal justice under law applied - then at least - to equals before the law. Thus, if a seignoir destroy the eye of his equal (196), he is liable to talio; if only of a freeman (198), he pays a mana of silver; if of a slave (199), he pays half the slave's price. Similarly, if a seignoir strike his equal (206), he vows a disclaimer and pays the physician; or (203) he pays one mana of silver. But if a man strike his superior (202), he is whipped in public; and if the attacker be a slave (205), he is mutilated into the bargain.

In spite of the fact that these distinctions are so clear in certain areas of the law, they are not dominant in the laws of false witness (including sections 9 through 11), except in the economic sense: these distinctions of rank - seignior, freeman, bondman, slave - must have betokened some economic stratification, and penalties vary with the status, economic as well as the social, of one apprehended in a criminal act. If a seignior steal from God or Palace (8), he repays 30-fold; if from a freeman, 10-fold; and if he cannot repay, he is put to death.

D. Summary

We may see clearly the use of talio in the

Hammurabi Code. However, this usage is limited by the ranks and statuses of criminal and victim. In questions of false witness, the all-important question of intention was never raised, nor was the question of competence or circumstance. In certain areas, the Code was consciously and specifically rejected by Biblical law.[136a] That the talio is employed for false witness in Hammurabi is clear, but it is not at all indisputable that the Biblical laws related to false witness are a derivation from, a reaction to, or a rejection of the Hammurabi Code. Nor can we say with certainty that they are at all related to the Hammurabi laws other than by the normal coincidence of similar situations which arise in societies of a certain structure.

- Part III -

THE BIBLICAL BASIS OF FALSE WITNESS

I. Text

The primary Biblical basis of false witness, complete with the stipulation of talio as a legal consequence, is to be found in Deuteronomy 19:16-21:

כי-יקום עד-חמס באיש לענות בו סרה: ועמדו שני-האנשים אשר-
להם הריב לפני יהוה לפני הכהנים והשפטים אשר יהיו בימים
ההם: ודרשו השפטים היטב והנה עד-שקר העד שקר ענה באחיו:
ועשיתם לו כאשר זמם לעשות לאחיו ובערת הרע מקרבך: והנשארים
ישמעו ויראו ולא-יספו לעשות עוד כדבר הרע הזה בקרבך: ולא
תחוס עינך נפש בנפש עין בעין שן בשן יד ביד רגל ברגל:

> "The evidence of one witness is not acceptable, both as regards cases of transgression and cases of sin which may be committed. Only by the testimony of two witnesses or three may an accusation be substantiated. If a witness of violence shall give evidence against a man to the effect that he has committed a crime, then the two litigants shall come before the Lord, i.e., before the priests and the judges who will be in authority at that time. If, when the judges have investigated assiduously, it is found that the witness is a false witness, who has falsified evidence so as to incriminate the other person, then they shall do to him as he had intended to have done to the accused, with the result that in this manner the evil will be put away from the community, because those who remain will be warned by this occurrence so that they do not repeat this act of evil among you. And let there be no pity in meeting out justice: life for life, eye for eye, tooth for tooth, hand for hand, foot for foot." 39

II. Analysis

An intensive textual analysis of this passage would be of service to us in furthering our understanding of its significance in the Biblical idiom and in its context.

A. Verse 15: לא-יקום

The לא form has been demonstrated[40] to be a permanent prohibitive, in contrast to the temporary prohibitive אל the reversal of the letters. The immediate examples which spring to mind from Hebrew usage are, for אל, Genesis 15:1: אל תירא, "do not fear" -- not "never fear", but simply an injunction not to fear in the present circumstances. Again, the sense of "do not" for אל as opposed to the imperative sense of "never..." for לא is communicated in Genesis again,[41] אל-תשלח " do not put your hand forth", where there is no possibility of the negative having the attribute or force of permanency. There is another example, however, which would tend to indicate that both this distinction, and that favored by the Brown, Driver, and Briggs Hebrew and English Lexicon of the Old Testament (Oxford, 1957 printing), namely, the analogy of אל with Greek mē, to express a subjective deprecation or wish as opposed to לא with Greek ou, to express objective denial of a fact.[42] This troublesome example is Psalm 121, which says of the deity in verse

3b, אל--ינום שמרך, and in verse 4a-alpha and b-alpha, הנה לא-ינום...שומר יש׳. It would seem clear that here the words are interchangeable, but formally this is not to be expected. It is characteristic of Hebrew parallelism that the parallels are never in poetic material exact equivalents. Rather is some motion, some progress always evident from strophe to strophe. In this case, it seems highly tenable that the possible translation should be, "your Guard does not sleep, ... indeed, He never sleeps, the Guard of Israel."

The other adverb of negation, לא-, is beautifully illustrated with the jussive in the Israel story: לא יעקב יאמר עוד..., "Your name shall nevermore be called Jacob,..." Again with the imperfect in the Deuteronomic Decalogue, ולא-תענה ברעך עד שוא, "And never shall you testify falsely against your fellow."[45]

B. A Formal Note?

לא-יקום, then, may be said to be using לא- in a formally well established manner. The verb יקום, to which the לא is bound by a מקף, is a normal derivation from the root קום, to arise, to stand up, to take a place (מקום). In its primary meaning of "to arise", there are eight meanings the word is held to communicate, eight situations to which it may apply in the sense of "arise", of which this usage seems to be the

sixth, the use of "arise" to mean arising as a preliminary to formal speech.

In Judges 20:8, we read ויקם כל-העם כאיש אחד לאמר

לא נלך איש לאהלו ולא נסור איש לביתו.

"And the whole nation arose as one man to say, "We will not return to our tents or go back to our places." The intention here is the use of arising, probably in a physical sense, to indicate the formality and importance of the declaration.

Again, we note the structure in the book of Job,[52]

ותקמטני לעד היה ויקם בי כחשי בפני יענה.

"...my leanness rises to testify against me."[53] So we have here our first clear example of the form in a case which includes the use of the dative beth personae, and the intention is to denounce or speak against someone. We may contrast with this the use in the same book[54] of the same verbal structure in a different formal setting:

(אני ידעתי גאלי חי) ואחרון על-עפר יקום.

"...and at the last He will vindicate[55] those who are dust (dead?)."[56]

So that it is necessary again to differentiate between the structure קום על--and the structure קום ב; the Deuteronomic passages with which we are concerned --19:15 and 16-- both employ the...ב form. We may

suggest then, on an analogy with similar uses which we will not consider in Psalm 27:12 and Psalm 35:11, that the form we have before us, with the dative beth personae subsequent, is characteristic of certain cases where the intention is to establish not necessarily testimony, but rather accusation.

C. Verse 15: לא ידים עד אהר

We are, in fact dealing with a rather late text,[57] and it does not surprise us therefore that the witness structure has become quite elaborated. From a pristine significance of repetition,[58] the עוד complex comes to refer to the giving of solemn accusation, testimony. As the term עד "witness," "accuser," "testifier,"[59] it occurs 69 times in Holy Writ.

Characteristically, this term, which is found in J,[60] E,[61] P,[62] D,[63] and R,[64] may refer to evidence, as in Exodus 22:12 where it refers to a carcass, or in Genesis 31:48, where it marks a heap of stones. This second intension (also Genesis 31:52) is a reminder, resultant to an act or condition. Job's state of health has been called an accusation against him also.[65]

However, it is in Numbers 5:13 that we find a clear use of this term with the consequent beth:

ושכב איש אתה שכבת-זרע ונעלם מעיני אישה ונסתרה והיא נטמאה ועד אין בה והוא לא נתפשה.

"...and there is no one to testify against her,..."

D. Verse 15 a-alpha, continued: באיש

The temptation to read איש here as "man" is great, but misleading. Indeed, our last quotation is a case in which a witness is called, if not found, against a woman. Just as a רֵעַ may be a friend, a cohort, a fellow, etc., depending on the context in which the term is used, similarly here, an איש is to be understood as a person, a fellow, and the question of gender is not legitimate. In fact, it is used in 1 Kings 7:30 for inanimate objects:

וארבעה אופני נחשת למכונה האחת וסרני נחשת וארבעה פעמתיו
כתפת להם מתחת לכיר הכתפות יצקור מעבר איש ליות.

And in a distributive sense in Genesis 9:5 et passim:

ואך את-דמכם לנפשתיכם אדרש מיד כל-חיה אדרשנו ומיד האדם
מיד איש אחיו אדרש את-נפש האדם.

We have many cases where it is used in such a manner as to include women, one of which is Job 42:11

ויבאו אליו כל-אחיו וכל-אחיתיו וכל-ידעיו לפנים ויאכלו
עמו לחם בביתו וינדו לו וינחמו אתו על כל-הרעה אשר-הביא
יהוה עליו ויתנו-לו איש קשיטה אחת ואיש נזם זהב אחד.

E. Is איש an Ethnic Term?

The question has, however, been raised as to whether the term איש is to be understood as a reference to a peer, a fellow in the ethnos, or whether it means a fellowman, any human being, be he Jew or non-Jew. The larger issue of which this is a part is the

66

67

issue of universalism in opposition to particularism. Often value judgments are applied to these terms, positive for the former and negative for the latter. Then examples such as our passage -- or better examples -- may be adduced and explained in terms of Jewish thought, often with a deprecatory overtone.[68]

It seems to me to be clear, that

(1) the universe of discourse is precisely what is being dealt with here and in all similar cases;

(2) the justification of attaching value judgments to the universalism - particularism continuum is somewhat questionable as a matter of procedure; and

(3) if such values be applied, it is by no means certain that universalism should be identified as the more positive value.

(1) No system can reasonably be expected to express its ideas or intentions in a language other than that of its daily commerce. Had the term איש actually in this context read איש עברי without a contrast to a person not in this class, one would normally assume oneself to be dealing with the universe of discourse. In precisely the same manner, the protections of the American Constitu-

tion were not written in such a manner as to be denied to American Citizens of Chinese descent, although those who wrote that document could not have meant by "man" or equivalently "citizen" any mental picture which included such citizens. We may therefore say, insofar as it has meaning to formulate the problem in these terms, that the use of אדם here seems to be used with reference to the universe of discourse in its totality.

(2) Some approaches to Biblical scholarship seem to consider the question of the extent of the universalism of each Prophet or Writing in turn as a problem of paramount importance. Is it not possible that this question has been overstressed? Isn't it conceivable that the question of universalism, so important to us, was not really a major concern of this period at all, and that the question itself represents an imposition of our emphasis upon a structure which had its own internal emphases? It seems to me that the question of the extent of universalism is a borderline issue between Biblical scholarship and polemic apologetic material. It is a fascinating topic, but one whose relevance has not always been made clear from a detached, scholarly point of view.

(3) Universalism, as a term, has so liberal and visionary a ring about it that it would seem almost unpatriotic to comment upon its possible negative aspects. Yet this term, attached as it is to warm emotive reactions, has a technical meaning, refers to a conceptualization which is liable to analysis and criticism in a purely investigative vein. It seems to me that universalism has not always been seen in this light.

69 70

Universalism is the extension of concern from one's own group to the larger group, ultimately to the totality of the largest society with which one has contact.

This policy implies a sense of mission. The Roman Catholic Church presently embraces universalism, and the Roman Catholic Church is currently led to the notion of mission. It is evident to me, if I am a universalist, that if I possess the Truth, I must disseminate it to the universe of persons, I must make it operative at the broadest possible level. Yet, if this be so, then a mad dictator may be a universalist. He possesses the Truth, and he is going to bring it to the world --whether the world wants it or no. In fact, he is willing to expend his own energy and that of his people to bring this Truth, to exercise this

Mission, to embrace all peoples in his universe.[71]

On the contrary, were he to hold that although he possessed the Truth, he was interested only in his particular group and had no intention of bringing it to the world, he would have been a narrow particularist. He would be concerned only with his narrow geopolitical confines. He would manifest no sense of mission. Universalism, when it puts on the face, as it sometimes does, of having the Truth and making it universally known, has wraught untold havoc on this globe. So if the arbiter be the calm scholar in search of truth as he sees it, then universalism in all its various forms may not always be an unqualified desideratum. This by way of comment on איש.

F. Verse 15 a-alpha continued: לכל עון

כל, like the quadrilateral כיל,[72] is a word with many significances, the proper one in any case being a function of the context.[73] Derived ultimately from the root כלל,[74] which denotes the idea of completeness or perfection, the word is held in its nominal from כל, once כול,[75] to mean "the whole", or "all", or "any".[76] The construct state, indicated here by the מקף in לכל-עון, would indicate that the word is to be understood as "all-or (i.e., any of) that class of non-legal acts

classed as "iniquities".[77]

(1) The varieties of sin.

There is an approach which identifies the overtones of חטא with the sense of "Missing" and those of עון with "erring". It is not easy to differentiate, in any case, what is the position of חטאת in this structure, a word which no one denies traces its origin to that of חטא.

(2) A geometry of sin.

It is my own opinion that the three terms, עון, חטא, and חטאת,[78] are used here to describe a universe of discourse which encompasses more than simply these three points, in precisely the same way as three geometric points determine or define a plane, which extends beyond those points.

If this is the case, then it becomes important to see in what ways the three terms agree, rather than in what way they differ. But in fact they are so close in meaning that we shall be inevitably plunged into that aspect of them, whether we will or no.

S.R.Drive in his Introduction to the Literature of the Old Testament,[79] maintains the position we have given above, viz., that עון, the term with which we are dealing, is derived from עוה, "to

err", "to err from the way".[80] This might indicate that we are dealing with a positive error, as opposed to a mere falling short. And in fact, the crime of Cain in Genesis 4:13 (J) is described as an עון. This, also, is the term employed in the D Decalog (Deuteronomy 5:9) in connection with inherited iniquity. Here, however, no specific crime is mentioned, unless we read the line as a continuation of the previous thought, viz., the prohibition of worshipping other gods.

Interesting confirmation of this seems to be present in the condemnation of Eli and his house (1 Samuel 2:22--3:14). Here again, עון refers to ritual evils, evils which we would connect with cultic purity.[81] Can we, however, overlook the interesting condemnation in Leviticus 26, 14-46? Here (a) ritual trespasses are linked several times with the term חטאת. At the same time, (b) in the last P verse[82] עון is defined as follows:

> והארץ תעזב מהם ותרץ את-שבתתיה בהשמה מהם והם ירצו את-עונם יען וביען במשפטי מאסו ואת-חקתי געלה נפשם.[83]

It seems reasonable from a comparison of these occurences of the term עון that it was at the least used in several different senses, and that it was at least an occasional parallel to חטאת,

as above and in I Samuel 20:1;

ויברח דוד מנוית ברמה ויבא ויאמר לפני יהונתן מה
עשיתי מהעוני ומה-חטאתי לפני אביך כי מבקש את-נפשי.

it was understood in parallel function also to
פשע in Job 14:17.

שמעו שמוע מלתי ואחותי באזניכם.

and apparently in Isaiah 50:1 and 53:5 as well[84]

כה אמר יהוה אי זה ספר כריתות אמכם אשר שלחתיה או מי
מנושי אשר-מכרתי אתכם לו הן בעונתיכם נמכרתם ובפשעיכם
שלחה אמכם.

והוא מחלל מפשעינו מדכא מעונותינו מוסר שלומנו עליו
ובחברתו נרפא-לנו.

A more interesting elucidation of this term in view of what is to come in our Deuteronomy passage is the parallel with חמס in Ezekiel 9:9

ויאמר אלי עון בית-ישראל ויהודה גדול במאד מאד ותמלא
הארץ דמים והעיר מלאה מסה כי אמרו עזב יהוה את-הארץ
ואין יהוה ראה.

Again, it is worthy of note that in a P document source, we find in Joshua 22:17

המעט_לנו את_עון פעור אשר לא-הטהרנו ממנו עד היום
הזה ויהי הנגף בעדת יהוה.

(3) <u>Can we say that iniquity is distinguishable from sin?</u>

To the present time, we have seen certain us-

ages of the word עון , customarily translated "iniquity," and חטא , which we may include in the class of things called "sin." We will also want to deal with חֲטָאָה , which is found in such J E texts as[85] נצר חסד לאלפים נשא עון ופשע וחטאה

ונקה לא ינקה פקד עון אבות על-בנים ועל-בני בנים

על-שלשים ועל-רבעים

Further, this is distinguishable from חַטָּאָה ,[86] which we may find in this J E text:[87]

וישב משה אל-יהוה ויאמר אנא חטא העם הזה חטאה

גדלה ויעשו להם אלהי זהב.

We may say that the distinction here is a Masoretic one, but this solves nothing. Were then the Masoretes trying to distinguish two forms, two separable derivations? What information did they have, on what tradition were they acting, that they discriminated?

Or shall we say that something for which we see no clear and immediate reason, must be a mistake or a chance pointing? Shall we say that scholars who totalled the number of letters in the several fractions of Holy Writ were so careless in their pointing of that text? The critical Ginsburg Hebrew Bible[88] does not even mention any variations in accentuation or pointing of these

words in the various editions.[89] That there must have been some distinction to R^{E}, we cannot dispute,[90] but what such distinctionmmight have been, we cannot say.

חטאת, however, is a major concept. It may be a sin against man, as in Numbers 12:11 (J) or Numbers 5:6 (P); it may be a sin against God, as in Leviticus 4:14 (P); it is involved, at least, as almost a personality in the story of Cain (Genesis 4:7), where in one J passage, חטאת in verse 7 gives rise to עון in verse 13:

הלוא אם-תיטיב שאת ואם לא תיטיב לפתח חטאת רבץ ואליך תשוקתו ואתה תמשל-בו. ויאמר קין אל-הבל אחיו ויהי ב-היותם בשדה ויקם קין אל-הבל אחיו ויהרגהו. ויאמר יהוה אל-קין אי הבל אחיך ויאמר לא ידעתי השמר אחי אנכי. ויאמר מה עשית קול דמי אחיך צעקים אלי מן-האדמה. ועתה ארור אתה מן-האדמה אשר פצתה את-פיה לקחת את- דמי אחיך מידך כי תעבד את-האדמה לא-תסף תת-כחה לך נע ונד תהיה בארץ. ויאמר קין אל-יהוה גדול עוני מנשוא.

And again, in Psalm 32,

הטאתי אודיעך ועוני לא-כסיתי אמרתי אודה עלי פשעי ליהוה ואתה נשאת עון חטאתי סלה.

Is this a technical usage, or is it merely the use of two terms, as we have seen before, to indicate a broad area?

And if, as seems to be the case, the terms are in some cases interchangeable, what is the character of the region which they indicate?

(4) A summary on sin?

We have examined a number of occurences of the terms for varieties of iniquity, trespass, and sin, and we have established that, if there is a common and clear distinction between the significances of the terms, it is not available to us in this setting with any clarity. It is not reasonable on the basis of the evidence to distinguish cultic sins from civil transgressions in this passage. The witness denouncing is doing the denouncing, we may now say, with reference to any part of a broad area of sins and transgressions.

G. Verse 15b על-פי שני עדים או על-פי שלשה-עדים יקים דבר

על-פי is a common structure for either of two ideas:

(1) upon the basis of, according to the mouth or measure of;

(2) orally.

The first of these then breaks down further into two subclasses:

(a) according to the command of; and

(b) according to the evidence or sentence of .

The second idea, that על-פי means "orally", is an intentional inreading of the Rabbinic mind into על-פי הדברים האלא , performed in connection with the justification of the Oral Doctrine. It derives its reading from the absolute intent, which would be expressed by [92], and at a later time. It is clear here that here a particular use of על connected with a particular use of פי forming an idiom of fairly common occurence. על here is defined as "on the ground or basis of", as in Genesis 24:9, or Deuteronomy 9:18. "Hence, the basis being conceived as regulative, על comes to denote the norm or standard (Cf. Germ. 'auf die Art'; W. Wright, Arabic Grammar, volume 2, section 59 part i): the transition may be seen in a passage like Exodus 24:8, the covenant which Y. made with you on the basis of (על), or in agreement with, all these words (cf. על-פי 34:27)".[93]

Therefore, the evidence of Deuteronomy 17:6,

על-פי שנים עדים או שלשה עדים יומת חמת לא יומת על-פי עד אחד.

joined to the further examples in (a) 19:15 and (b) 21:5

(a) לא-יקום עד אחד באיש לכל-עון ולכל-חטאת בכל-חטא אשר יחטא על-פי שני עדים או על-פי שלשה-עדים יקום דבר.

(b) ונגשו הכהנים בני לוי כי בם בחר יהוה אלהיך לשרתו ולברך בשם יהוה ועל-פיהם יהיה כל-ריב

establish conclusively that the significance which is to be understood here is that which we have designated 1 b, "according to the evidence or sentence of."

H. Verse 15b-beta: יקום דבר

We are of course familiar with the term דבר, and the four branches into which its meanings fall:[94]

(1) Depart, perish, retreat;[95]

(2) Suceed, follow temporally, physically, socially; rearmost part;[96]

(3) Lead, guide;[97]

(4) Consider, appraise, look to the issue of an affair; speak, plan.

We are presented with certain instances of the use of דבר, such as Exodus 18:16[98]

כי-יהיה להם דבר בא אלי ושפטתי בין איש ובין רעהו והודעתי
את-חקי האלהים ואת-תורתיו.

which seem to refer to judicial proceedings. One who "has a case," participates in judicial preceedings, is a בעל דברים in Exodus 24:14.[99] So that the requisite two or three witnesses are requisite for instituting judicial proceedings.[100]

I. Verse 16a: כי יקום עד חמס באיש

(1) The significance of כי.

New material here which might be open to examina-

tion is a consideration of the precise significance of כי[101] here and a consideration of the technical meaning of עד-חמס.

has been defined with the meanings of:

(a) If (the conditional), as Deuteronomy 6:25, Numbers 5:20;[102]

(b) When, as in Leviticus 25:20, or Exodus 21:2

(c) That, as in the divine appraisal in Genesis 1:10, an accusative;

(d) Ja,[103] an intensive particle, as in Numbers 23:23;

(e) For, for in that case, as in Exodus 9:15;

(f) Because, since, as in Genesis 3:14, a consequent;

(g) But, as in Isaiah 8:23 (more accurately doch); and other cases which are open to conflicting opinions.

Some see many more significances to the particle, as impossible of definition as the Yiddish נו. In our case, either (a) or (b) can be applied. The subsequent context will be seen to favor (b).

(2) What is the עד חמס?

On the basis of the verb חמס, to wrong, to treat violently,[104] one comes to כלי חמס in the poem which includes Genesis 49:5 as "instruments of

violence," and from this to Exodus 23:1,

לא תשא שמע שוא אל-תשת ידך עם-רשע להיות עד חמס.

which is a J E text that uses the word in the sense of an עד whose actions tend to produce violence, or better, wrong.

Psalm 27,[105] removed as it is from this context, sheds light on the term:

אל-תתנני בנפש צרי כי קמו-בי עדי-שקר ויפח חמס.

"...false witnesses who utter such things as are wrong (or alt.: conducive to violence."

It is in this light that our understanding of the term is to be established, as referring to a man who wrongly accuses (ענה) a man (using the beth) of crime or wrong, סרה. This last is a technical term which occurs ten times in the Hebrew Bible, usually (from סור, turn aside, apostatize) in reference to apostasy,[106] but here more likely in general referent to any form of defection, comparable to its use in Isaiah 59:13, in parallel to שקר:

פשע וכחש ביהוה ונסוג מאחר אלהינו דבר-עשק וסרה הרו והגו מלב דברי-שקר.

J. Verse 17a-alpha: ועמדו שני-האנשים אשר-להם הרים

Again we see the use of the idea of arising, suggestive of the forms of the root קום above. A matter-at-law is to be "raised". The accuser, the litigants

here, are to "stand" or "arise". Some have compared the scene to that of a duel, with the litigation being fought out by men who rise to challenge, and rise to meet challenges.[107] At any rate, the idea of arising has lent a variety of what are by now no doubt technical terms to the judicial procedure. Here the term ריב is to be understood in its primary significance of contention, quarrel, case at law, as in Deuteronomy 21:5.

K. Verse 17a: לפני די

(1) לפני, to the face of (plural construct), is so common a structure in the sense of "before" that it requires only three notes:

(a) The singular, פנה, does not seem to occur in the Hebrew Bible in the sense of face. It is derived from the root פנה whose significance is to "turn" or "turn and look";

(b) The corresponding term לפני used not only in connection with God but generally in the Targum to this passage et passim is קדם, before, in front of; if this were only so to eliminate a possible anthropomorphic reference to the "face of God", it would be, we suspect, both

(i) characteristic of the Targum and

(ii) found only in reference to God.

But the fact is that קדם is the standard or

normal translation of לפנים. It also occurs in the Biblical usages of Aramaic, as in Daniel 2:9;

(c) A few specimen occurences of the Hebrew לפני will serve to conclude this case: Genesis 18:22, עמד לפני אברהם, or 47:2 ויצגם לפני פרעה do not permit of alternate translations, as does not Amos 1:1 לפני-הרעש.

(2) יי - The Tetragrammaton.

The Tetragrammaton, we shall read as יי, because

(a) we have no idea what the authentic pronounciation of it was, nor have we the means of discovering it;

(b) we wish no part in perpetuating pronunciations or readings which we know to be incorrect, such as Jehovah; and

(c) in the absence of any ancient reading but the traditional קרי, we see no real choice but to accept that one with the above understandings and reservations, and avoid, at least, giving needless invitation to religious sensitivities.

The tetragrammaton occurs some 6,823 times in Holy Writ, in J, E, D, P, and H, both with and without אלהים. In this case, although its meaning

is clear, its precise function is open to question. Rashi[109] holds that the litigants shall appear "as if" before God himself; the term is an indication of seriousness and importance. Before reaching a conclusion, we will proceed to the next phrase.

L. Verse 17b-alpha: לפני הכהנים והשפטים

From the original meaning of "seer", in the course of the formal organization of the cultic system, the term כהן came to mean a "servant" or "ministrant" of the Deity. The term is applied to priests of other cults. For example, Potiphar was a כהן אן in Genesis 41:45 (E), and Dagon had his כהנים in 1 Samuel 5:5. In any case, the כהנים were in a sense mediaries of God, and we may suggest that it is possible that the intent here is that the case be brought before God, i.e., before his representatives of mediaries. The distinction of כהנים from שפטים would seem at first glance to indicate - by force of the waw consecutive - that although the כהנים had a role to play in juridical matters, they were not the actual judges. But vide infra.

M. Verse 18: ודרשו השפטים היטב

And as we suspected, here we find that it is not the כהנים who are involved with the עדים, but the

שפטים. It is they who practice the actual investigations. דרש we take to mean seek, search, here specifically to inquire or investigate well.

N. Verse 18b-alpha: והנה עד-שקר העד

(1) Like הן, הנה, which bears the accusative suffix, is understood universally as a demonstrative particle: "note!" "See!" "Literally,"lo!" Often used where English would use the word, "here!"

(2) שקר connotes from its earliest occurences deception. So also the Aramaic שקר. When used with the dative beth, as here and in 2 Samuel 18:13:

או-עשיתי בנפשו שקר וכל-דבר לא-יכחד מן+המלך ואתה תתיצב מנגד.

it means "to defraud, to wrong, to practice evil against." Again, in Leviticus 19:11 it is so used in parallel to כחש:

לא תגנבו ולא-תכחשו ולא-תשקרו איש בעמיתו.

(3) The use of ענה to mean testify, usually against someone when the dative beth is employed, is also common. In Genesis 30:33 it is positive, that is, testimony for someone; this is the only case of this kind. Examples of negative testimony are Numbers 35:30 (P), 1 Samuel 12:3, et passim.

O. Verse 18b-alpha continued: והנה עד-שקר העד

(1) Is the Masoretic accentuation correct?

Oscar Baehr in Das Gesetz Ueber Falsche Zeugen nach Bibel und Talmud (Itzkowski, Berlin, 1882) brings up the suggestion that it is not.

Instead of reading the b part of the verse so:

(a) והנה עד-שקר העד: שקר ענה באחין

(b) והנה עד-שקר: העד שקר ענה באחין

(c) והנה עד-שקר,העיד שקר, ענה באחין

Leaving aside, for the moment, the Rabbinic question of why the word עד appears twice,[111] we find that the word העד is a nominal, a substantive form, "the witness". It is striking, then, that there seems to be a unanimity among translators in reading it as a hiphil form from עוד, say, some reading of העיד which has somehow lost the י.

(2) So the Septuagint holds,[112] with (c) above, "and behold, a false witness has testified falsehood; he has arisen (ענה, anteste) against his brother." Similarly the Vulgate reads without the "he has arisen" (i.e., ignoring the word ענה completely). The Syrian reads, ונהגון אן סהדותא דגלתא בעא הוא דנסהד על אחוהי

and the Targ. Sam. reads, והא סעד שקר אסיד שקר לבס באחין.

(3) It seems, however, that the same error is not made by Nahmanides, who in the Rabbinic Bible

reads with the Masoretic (a) reading. This reading appears to be the simplest one, and, following the זקף קטן on the word הער(which appears in that form and place in all the versions documented by Ginsberg, Op. Cit.), we will read, "...and it is seen that the witness is a false witness; calumny has he testified against his fellow!"[113]

P. Verse 19a: ועשיתם לו כאשר זמם לעשות לאחיו

The object of the command is not the judges per se, but the people as a whole to whom the entire passage is addressed. Also the term לאחיו has been dealt with in connection with איש, supra.

זמם, also is itself a relatively uncomplicated term, but because it becomes the central technical term in the complex of understandings based on this verse, it is an important one.

The verb-form זמם occurs in Aramaic with the meaning which it seemingly has here, to devise, to plan, to purpose, to plot, to consider in a negative sense. Only once in the Hebrew Bible does it occur with a positive overtone:[114]

בן שבתי זממתי בימים האלה להיטיב את-ירושלם ואת-בית יהודה אל-תיראו.

In all other cases - and the verb occurs 26 times in the Hebrew Bible - it means to plot evil. Genesis 11:6

is a parallel to our passage:

ויאמר יהוה הן עם אחד ושפה אחת לכלם וזה החלם לעשות
ועתה לא-יבצר מהם כל אשר יזמו לעשות.

"..all that they have plotted to do, intended to do, planned to do." With reference to the builders of the tower of Babel, there is no question that these plans were for evil. The subsequent action of God bears this out. Surely J^{R} already followed a long pattern of connotations when he elected to use this term. Further, the nominal form זמה, plan evil, wicked device, is established lexicographically by such instances as Psalm 26:10, where it is parallel to שחד; Again, in Hosea 6:9, עשה זמה is employed where murder is the context. We seem to be dealing with evil intention on the most serious level. In Leviticus 18:17[115] the term is used with incest as the referrent. Again, in Leviticus 19:29,[116] another H text, it is licentiousness which is subsumed under this title. In Job 31:11[117] it is adultery; in Jeremiah 13:27 it is idolatry itself, metaphorically expressed in an example of harlotry:

נאפיך ומצהלותיך זמת זנותך על-גבעות בשדה ראיתי
שקוציך אוי לך ירושלם לא תטהרי אחרי מתי עד.

The related noun מזמה, purpose, device, occurs in Proverbs 12:2 to mean "a man of evil practices", as opposed to טוב:[118]

Q. Verse 19b: ובערת הרע מקרבך

The root בער, to burn, earlier perhaps to seek out, retains the meaning in all its forms of "to consume, burn out, burn (transitive and intransitive)". Often used with the word אש, fire, and the dative beth,[119] it is here used metaphorically in what amounts to a standard Deuteronomic clause. For we find the same formula that we have here, uva-arta hara miqirbekha (miy israel),[120] in six places. It is possible that we have here a root רעם which is associated in a broad manner with transgression at its most serious level, to which is applied a term בער used in connection with the vilest transgressions, usually of a nature that we would analytically call "religious". There is, as we made clear above, no reason to suppose that the original writers made a corresponding distinction. The term רע itself gives us no clue. It is used indiscriminately with

(1) ethical badness in Deuteronomy 28:20 et passim (in the stock phrase רע מעלליכם);

(2) bad quality, as in Genesis 41:19;

(3) wilfulness, as in 1 Samuel 17:28;

(4) sadness, as in Nehemiah 2:2;

(5) disease, as in Deuteronomy 28:35;

(6) adversity, as in Genesis 44:34 (J), et al.

It is a generalized term for any evil act.

The use of קרב to denote the "midst of the people", the community, is perfectly well established. We need only supply a few examples from many: Deuteronomy 37:17 Deuteronomy 17:20 et seq., Genesis 24:3, Exodus 31:14.[121]

R. Verse 20: והנשארים ישמעו ויראו ולא יוספו לעשות עוד כדבר הרע הזאת בקרבך.

Who is referred to here by the title הנשארים? One suspects that it is the totality of the camp, the whole of the community which is direct or indirect witness to what is obviously intended to be a public ceremony. Then too, we are dealing with a small community, and it is reasonable to expect that most of its members will in fact be well informed, if not in fact spectators, of this event: the public trial of a false accuser. In any case, even if they are not present at the condemnation and the talio which is so closely connected with the crime of false witness,[122] then וישמעו, they shall hear of it.

The b part of the verse is indeed puzzling. Are we meant to assume that we are faced with a camp most of whose members are actively committing the crime of false witness? And if not, what does it mean to say that those who remain, presumably the camp, will no longer continue to do this evil thing? One possible answer is to reread the word נשארים so as to give it

the specific referent of those practitioners who have not yet been found out. This is a highly specialized, and, at first glance, highly unusual reading for a word which gives no indication of being a special term, but it seems to me that the reading is not too far fetched, and it permits the text to make perfect sense as it stands.

The closing of the verse is the standard formula which we have analyzed above.

S. Verse 21: The Talio

It is impossible to deal with this statement without turning the attention to the classical formulation of the talio, that sharp-chiselled cornerstone of all law through our own day:[123]

וכי-ינצו אנשים ונגפו אשה הרה ויצאו ילדיה ולא יהיה אסון
ענוש יענש כאשר ישית עליו בעל האשה ונתן בפללים. ואם-אסון
יהיה ונתתה נפש תחת נפש. עין תחת עין שן תחת שן יד תחת יד
רגל תחת רגל. כויה תחת כויה פצע תחת פצע הבורה תחת
חבורה.

"If some men are fighting with one another, and in the process they hurt a pregnant woman,[124] so that her children are miscarried but there is no further damage, then they shall be inescapably fined according to the limits set by the woman's husband, and they shall pay against that fine according to the decision of the Arbitrators. But if there is further damage, then you shall give an

eye in place of an eye, a tooth in place of a tooth,[125] a hand in place of a hand, a foot in place of a foot; a burn in place of a burn, a wound in place of a wound, a bruise in place of a bruise."

Now, if we return to our verse, we find, after the caution that "your eye (the seat, or one of the seats, of pity and forgiveness) take no pity (or compassion; the whole is a standard idiom, as in Deuteronomy 7:16, 13:9, 19:13, et passim.)"[126] upon the culpable one, that the text does not read as in Exodus עין תחת עין etc.[127] but rather עין בעין.

(1) It is not known (cf. Baba Kama 84a) whether talio was ever literally applied. We have no evidence of it, and we do know of the possibility that it was a mere threat. Although the Exodus talio seems to be case law, certainly the Levitical one is open to interpretation.

(2) It is not at all clear how the employment of the beth will, from a formal point of view, change the interpretation of the talio if at all.

- Part IV -

SOME TANNAITIC CONSIDERATIONS ON THE ISSUE OF DEUTERONOMY 19:15-21

I. Orientation

If it is possible to trace the development and expansion of this passage in the Mishna, then it would seem that we will add to our understanding of the meaning which it assumed in the historical development of Jewish Jurisprudence. For the Mishna, compiled by Judah the Prince around the year 200 of the Civil Era, reflects strata of law which must have been in existence, in practice in fact, long before that time.[137]

A. Continuity

Between the close of the Biblical Canon,[138] then, and the inception of what was later[139] to be compiled as the Mishna, there is no real break. The process of Jewish jurisprudence, like the process of Jewish life, went on, and the close of the Canon was simply another milestone, achieved and left behind in the march onwards.

Jewish jurisprudence, however, tended to meet new times not by accretion so much as by internal development.[140] That is today, the Rabbinic method sought to find in the existing body of legislation some peg on which to hang contemporary legislation, some Biblical or other textual ground upon which to erect the structure of necessary new laws (dealt with by Guttmann, Michael, אסמכתא, Breslau, 1934). Often in Talmudic arguments,[141] the question is asked מנא הימא קאמר, upon what does the Tanna base his argument? And the answer

is often .. תנא אקרא קאי, דכתיב,[142] the Tanna bases his argument upon a Biblical text, as it is written,...

B. Originality

Often in the Mishna, what seems to be original legislation is found.[143] Sometimes it appears that Biblical texts are being utilized for a more nearly systematic exposition of their implications, as in Berakoth 1:3. In any case the Biblical text is brought in, incidentally or essentially.

It is these considerations which make possible the tracing of our passages through their Mishnaic appearances, so as to better our understanding of them in this significant literature.

II. Textual Citations in the Mishna analyzed

The third division of the Mishna, Nashim,[144] deals with those aspects of daily life in which women are involved. It is subdivided into seven tractates, of which the fifth, Sotah,[145] deals with suspicion of adultery. Chapter six of this tractate deals with the accusation of adultery, and of its four mishnayoth, we are concerned with the third.

A. Adultery

(1) The case is this:

(a) A man warned his wife (not to speak with or consort with someone);

(b) This (a) was witnessed;

(c) She nonetheless went aside (committed adultery) in secret;

(d) This (c) was witnessed;

(e) She then enters into a state of being defiled;

(f) This (e) is testified to by witness.

(2) Bearing upon the facts of the case, we introduce the following sources:

(1) Numbers 5:18 establishes the test of the bitter waters to exonerate a suspected adulteress;

(2) Numbers 5:13, in discussing this case, refers to the situation "If there is no witness against her;"

(3) Deuteronomy 19:15, our test, speaks definitely of the need for two witnesses to establish a case.

(3) Analysis:

Now the question is raised, if we grant that two witnesses (3) are required to establish (c), which, if established by (d) would make her prohibited until she cleared herself by (1); then how many witnesses shall we demand in (f) in order to establish (e), which if established will make her permanently prohibited? Analysis of (2)

would seem to call for a minimum of one witness in (f), but if this is so, then we may infer that only one would be required for (d). Since (2) is less definite than (3), however, we are forced to require two witnesses (3) for (f) as well as for (d).

This example of a hermeneutic inferential argument demonstrates the position of authority which may be attached to a definitive Biblical text, such as ours. It is at the same time clear that the argument could have been reversed from the point at which it was seen that two verses were in possible conflict. It is precisely the possibility of free interpretation which makes necessary the investigation of just how our verses were understood in the Rabbinic material, and here we see that the definitive law is legislated in accordance with our D passage.

(4) Further citations.

Our D passage occurs three times more in the Mishna,[146] in the fourth division, Neziqin, which deals with torts, civil and criminal offenses. It is subdivided into ten tractates, of which the fifth, Makkoth,[147] deals with (1) false witness; (2) cities of refuge for accidental homicides (cf. Introduction); and (3) the infliction of corporal punishment. Chapter one of this tractate deals

with false witness, and it consists of ten mishnayoth.[148]

B. When talio cannot be applied.

(1) The sources:

(1) The punishment for false witness is talio (Deuteronomy 19:19: ועשיתם לו כאשר זמם לעשות לאחיו וביערת הרע מקרבך.

(2) One who is of impaired priestly stock is ineligible to serve as a priest (Kiddushin 4:1 ff.)

(3) Deuteronomy 25:7-9 prescribes חליצה, drawing off of the shoe, as the ceremony of quittal for the obligation of levirate marriage; cf. Yebamoth 12:1 ff. Issue of the woman cannot serve as priests.

(4) Gemara Makkoth 2b holds that Deuteronomy 25:1 ff. applies specifically to false witnesses.

(5) Kethubha 4:7-12 and 5:1 establish that the wife's jointure must be paid her in event of the groom's death or divorce, except under conditions which constitute claim to have it legally set aside.

(2) The case:

a. How is false witness to be dealt with, in cases where (1) cannot apply?

(i) If testimony was falsely brought against a priest that his mother performed חליצה (3) and therefore he is subject to (2), these witnesses cannot be dealt with according to (1), even if they are priests themselves. Instead, according to (4), they receive the 40 stripes.

(ii) If false witnesses accuse a man of a crime (of unintentional homicide, which involves not a penalty but the escape from the blood avenger) of exile, the witnesses may not be sent to exile (1), but, in accordance with (4), they suffer the 40 stripes.

(iii) In cases where false witnesses accuse a man of divorcing his wife (5) without paying her the jointure (כתובה), since they may not have damaged the man (he may yet divorce her, or die, and she would receive her כתובה by forcing him to pay what he might have paid anyway, the question becomes one of time element: he might have paid her the כתובה, but he was not ready to pay it then. Again, possibly he would outlive her, in which case he would not pay it at all. What would be the worth of her כתובה considering

this element of chance? This is the amount that the witnesses are fined.[150]

(iv) If false witnesses testify that A owes B the sum of 1,000 Zuz (any given sum of money) payable within 30 days, whereas the truth is that it is payable within ten years, the court estimates the value of having the usufruct of 1,000 Zuz for the balance of time (here, ten years less 30 days); this is the amount of the fine.[151]

b. Which takes precedence, (a) our D passage, the penalty for violation of which is precise talio, or (b) the statement of false witness in the broader terms in the Yithro Decalogue (Exodus 20:16), the penalty for violation of which involves scourging?[152] What is the name of the case of false witness?

(i) If false witnesses testify that A owes B a sum (of 200 Zuz) which in fact he does not owe, and, in accordance with (1) they are made to pay the sum to which they are liable under any charge of false witness, then in view of the fact that they have not only (a') violated the injunction against false witness but also (b') entered into

personal legal conflict with the person whom they intended to damage, are they subject to separable charges? That is,

(a') They must pay the sum (here, 200 Zuz); furthermore,

(b') They are subject on grounds of (2) to the 40 stripes.

In this case, there are two possible opinions: either (b') is a separable charge from (a'), bearing a separable punishment, or it is not, in the which case the punishment for (a') supersedes and includes any other legal action arising from this case. The first of these two positions is taken by R. Meir, who thus would administer 80 stripes; the second is taken by the Sages, who would administer 40. The second opinion prevails, the penalty is 40 stripes, and the principle is established.

C. What is the technical qualification of a false witness?[153] When do false witnesses[154] become liable to criminal punishment?[155]

(1) If A and B testify that C murdered D in place X at time Y, then this evidence can be contradicted in either one of two ways:

(a)Further witnesses establish that either C or D or both of them were not in X at time Y; or

(b) Further witnesses establish that A and B were in some place other than X at time Y.

(2) Now the witnesses A and B in (a) are not עדים זוממים, and are not subject to condemnation as false witnesses; theirs may have been an honest error in judgment, and their case is one of invalidated or denied evidence, הכחשה, from the hiphil form הכחיש, to deny, from the root כחש, meaning among other things "to fail". 156

(3) But the witnesses A and B in (b) have fabricated the entire story which they submitted as testimony. They could not possibly have seen that which they claimed to have seen, since they were not in the place at the time. There is no suspicion of error here: we <u>know</u> that this was a case of plotting, premeditation, זדון, the nominal derivative in the hiphil from זדה, from our D passage. Faced with a plot against life, and a legitimate case of false testimony falling within the purview of our D passage, we may reasonably expect an attempt to obtain <u>talio</u>. And, in confimation of this expectation, A and B are put to death upon the testimony of the "further witnesses."

(4) If a third set of witnesses appear to confute the testimony of the "further witnesses", i.e., להזים אותם עדים, to establish that they are זוממים and subject to death penalty just as those whom they established עדים זוממים, then, faced with what may become an unlimited series of pairs[157] of witnesses, we can follow either of three courses:

(a) We may declare a mistrial or a circumstance beyond the power of the court to resolve;

(b) We may execute each pair in turn, as it turns out that they are עדים זוממים.[158]

(c) We could, recognizing in this action a conspiracy to save the first pair, put them alone to death.

In the case before us, alternative (a) would lead to abrogation of the power of the courts; alternative (b) is maintained by the Sages, and ultimately accepted over the dissident voice of alternative (c) which is advocated in the name of Rabbi Judah.

III. עדים זוממים and the death penalty?

In a capital case, we observe the following temporal periodizations:

(a') From the indicatment of the accused until the charge,

which is when the witnesses give their evidence in his presence;

(b') From the charge to the discussion, which is when the youngest judge opens in favor of acquittal;

(c') From the discussion to the vote-taking, which is when the first survey is taken of reasons for aquittal or conviction;

(d') From the vote-taking to the sentencing, which is the act of informing the defendent that he is to die, and how;

(e') From the sentencing to the execution, which is the judicial act of taking the life of the defendent, carried on or incepted by the witnesses at the direction of the court.

A. The Problem

(1) The giving of false witness may be said to begin at (a'); does this mean that the witnesses become liable to the death penalty at (a'), or at some later time, and if at some later time, when?

(2) Once having become liable, do they remain liable, or does their liability cease at some point, and if so, where?

B. An Answer

In answer to (1), עדים זוממים become liable to the

death penalty at the conclusion of (d') according to the Sages (i.e., according to Pharisaic law), and at the conclusion of (e') according to the Sadduces. The Sadducees base their argument on Deuternomy 19:21, נפש בנפש, maintaining that no נפש has been taken prior to the conclusion of (e'). The Sages (Pharisees) counter with an interpretation ostensibly based on Deuteronomy 19:19, כאשר זמם לעשות, as opposed to what does not appear, כאשר עשה. The obvious implications are

(1) that the defendent is still alive, and

(2) that if עשה would refer to the conclusion of (e'), then זמם לעשות must refer to the conclusion of (d'), which is the opening of (e').

How then do the Sages explain the verse upon which the Sadducean case is built? It comes to teach you, they would hold, that the עדים do not become liable as זוממים until the court has handed down the decision of death in (d'), rather than at, say, (a').

C. Another Answer

The Gemara will discuss the problems which arise in connection with question (2), which is to say, after the concusion of (e'), are the עדים זוממים still liable to the death penalty. See in this regard Dr. Solomon Zeitlin's provocative article, "הצדוקים והפרושים", in תורת, Number 3, 1936, שלומון Press, Jerusalem, 1936, p.83 ff.

IV. The Legal Unit

A. The Problem of the Number of Witnesses.

(1) One witness cannot make a case; i.e., he cannot give valid testimony in a capital case. If follows therefore that he cannot threaten to commit judicial murder. From this it follows, in turn, that he cannot be held capitally liable for the crime of false witness;

(2) Two witnesses constitute a legal unit; they can establish a case. It follows, therefore, that they may attempt judicial murder and they may therefore be held as עדים זוממים.

The word "unit" above is important, for if they do not acknowledge knowing each that the act was also witnessed by the other, but give their testimony independently and not as a unit, then they are not a legitimate case of (ii) but only two isolated cases of (i), neither one liable to capital talio.

(3) A unit may be more than two witnesses; e.g., three or a hundred. This has certain violent implications for the whole issue of זוממה:

(a) Since, as we saw in (2), both members of the unit must be convicted of being false witnesses to be culpable, it follows that where

a unit, i.e., a group of persons who bear witness to an observation both made and reported while conscious of being in each others' presence, is to be made liable for capital talio, this can only be done if all members of that unit, be its membership two, three or a hundred, are charged with being עדים זוממים;

(b) All members of a unit so convicted, be its membership two, three or a hundred, are to suffer the death penalty;[159b]

(c) If, in a capital case, where every effort is bent to aid the accused, any one member of the witnessing unit be ineligible to serve as a witness,[160] the whole unit is thus made ineligible, even if the remaining witnesses number more than a quorum of two.[161]

B. An Haggadic Note

It comes to us as no surprize, that we read in an Haggadic note (Makkoth i, 7a, quoted in Jewish Encyclopedia 3:558a) that a court that put one man to death in a seven-year peiod, (or a 70-year period) was considered bloodthirsty. The wonder is that, in view of the Amoraic restrictions to come, anyone at all even met his death at the hands of a Jewish court.

- Part V -

SOME AMORAIC CONSIDERATIONS ON הדמה : AN ELUCIDATION OF DEUTERONOMY 19:19

I. Orientation.

A. Occurence

The text of Deuteronomy 19:19 is referred to 26 times in the Babylonian Talmud;[162] the subject of עדים זוממים is mentioned in ten especially significant places.[163] Comparison of these two listings would indicate that in the four places where they overlap,[164] the subject of the עד זומם is discussed with particular reference to Deuteronomy 19:19.

But the major discussions of עדים זוממים are to be found in Babylonian Tractate Makkoth, folios 1 through 5,[165] and in Baba Qama.

B. Talmudic Setting.

The treatment of false witness has by now developed into a fine legal concept.[166] Unfortunately, for our purpose the character of the Talmud is associative, partly because at certain periods it was perhaps transmitted orally. Thus the subject of עדים זוממים is brought up in various connections, as it becomes associated with one topic and then much later as it becomes the subject of conversation in connection with another. Thus, references to laws of זומם are scattered throughout the Talmud.

Furthermore, the truly monumental mentalities who gave of the finest of their thinking to the Talmudic

discussions have left us a text which, thoroughly incomprehensible without a thorough grounding in concepts of basic law and methodology of logical structures, presents a stimulating challenge in analytic thinking even to those well equipped to handle these disciplines. Again, the Talmudic style is very terse, presupposes complete familiarity with both the historical and contemporary scenes, absolute command of Holy Writ, and extensive contact with a dozen different academic and practical disciplines. Finally, the Talmud employs a host of technical terms, which serve to distinguish fine shades of meaning easily confused even by the scholar. It is little wonder that so few scholars of the period have been able to find their way through this material.

II. The Treatise Makkoth and the Problem

The treatise Makkoth[167] is divided into three chapters. The second deals with accidental homicide; the third deals with corporal punishment. The first deals with עדים זוממים, especially in cases of:

(1) defamation, where they are not subject to talio;[168]

(2) dual liability, as to both pecuniary and corporal punishment;[169]

(3) joint liability, as in cases involving more

than two witnesses;[170]

(4) the death penalty and how it may sometimes be avoided.

In this last regard we shall, hopefully, be prepared to deal with a problem which has perplexed generations of scholars, and upon which we hope to be able to shed new light. For it is at that point that we shall come upon what has been thought one of the most bizarre quirks of jurisprudence extant. But we must let this wait for its proper place.

A. Sanhedrin And The Opening Of Makkoth

In the last mishna of Sanhedrin, which, in the Mishna,[171] immediately preceeds Makkoth,[172] the subject under discussion is the case of the (false) witness against the daughter of a כהן and her paramour. A charge of this kind is a capital charge, but a complication enters in: Jewish law, as we have seen, discriminates between different forms of capital punishment. Had the false charge succeeded, the daughter of the כהן would have been put to death by burning, and her paramour by strangulation. If we consider that the penalty of false witness is talio, then how shall we apply it?[173] The question is unanswered.

It is at this point, in spite of the fact that they are not contiguous in the Babylonian Talmud, that

Makkoth takes up the argument started in Sanhedrin: What are the cases in which the talio, the standard punishment for זוממה, is not applied?

In fact, this is the Gemara's reading of the mishna. The reading of the mishna itself is, "How are false witnesses, in a case in which talio is not obvious, to be made subject to it (i.e., to be treated as זוממים)?" How does one apply talio in cases to which talio does not at first glance apply? What is equivalent punishment where literal equivalency is not possible? It is conceivable that the Gemara misunderstands this meaning of the Mishnaic statement, but, if it is so patently available to us, it would be rather presumptuous to suppose that it somehow eluded them. Let us rather say that they preferred, for some reason not evident to us, to recast the question.

B. The Justification of Substitutive Talio.

(1) Primary argument

With reference to the cases which we have discussed in our analysis of the Mishna under the label I, a., q.v.,[174] the Gemara notes the novel intrusion of substitutive penalty,[175] and seeks the justification for it.[176]

(a) Slander of a בתו.

(i) R. Joshua B. Levi, first generation Amora, quoting R. Shimeon b. Lakish, a

second generation Amora, traces it to a Biblical text;[177]

(ii) Bar Pada (R. Judah b. Padayah, first generation Amora and a teacher of R. Joshua b. Levi) traces it to a קל וחמר,[178] thus:

(a') A כהן who enters into a prohibited relationship desecrates the correspondent and issue, but not himself;

(b') The עד זומם intended to desecrate, but did not actually succeed;

(c') Therefore he, being a milder example of the same principle,[179] surely does not desecrate himself.

We may see here the struggle of hermeneutics to gain acceptance as a systematic method of legal analysis,[180] but this is not now directly germane to our interests. Suffice it to say that the last strata of our text conclude that[181] the textual proof is the safer one.[182]

However, at the very conclusion of this point,[183] Ravina alludes (2b רבינא) to the fact that after the execution, the discovery of false testimony does not result in talio.

(b) Unintentional Homicide

The case of unintentional homicide (the crime

of banishment)[184] is handled in a similar way:

(i) Resh Lakish[185] traces it to a Biblical text;[186] הוא ינוס emphasizes the exclusive הוא, he claims;

(ii) R. Yohanan[187] submits the ואמר קל:

(a') A successful murderer who escapes death on technical grounds is not subject to banishment;

(b') The עד זומם is a less serious case: he is an unsuccessful or would-be murderer;

(c') Ergo[188] he should not go into banishment.

Again, the ultimate conclusion[189] is that the proof from the text is better.

(2) Subsidiary Arguments to Justify Substitutive Talio.

(a) Once we have dealt with the case law, we have given two examples of an attempted justification of corporal substitution for talio, or, if preferred, corporal fulfilment of talio. At this point, it is to Talmudic thought appropriate to introduce subsidiary or conditional evidence. One form that this evidence may take is the רמז,[190] "allusion", hint, indirect indication.191

192
Ulla presents the following analysis:

(i) Sources:

1. Deuteronomy 19:19

ועשיתם לו כאשר זמם לעשות לאחיו ובערת הרע
מקרבך.

2. Deuteronomy 25:1-3

כי-יהיה ריב בין אנשים ונגשו אל-המשפט ושפטום
והצדיקו את-הצדיק והרשיעו את-הרשע. והיה אם-
בן הכות הרשע והפילו השפט והכהו לפניו כדי
רשעתו במספר. ארבעים יכנו לא יסיף פן-יסיף
להכתו על-אלה מכה רבה ונקלה אחיך לעיניך.

(ii) Argument:

(a') The plain meaning of 1. is talio; but we presume a case where this cannot be directly applied;

(b') In 2., even though the word זמם in any form does not appear, 193 the text may be discussing such a case:

(1') זוממים incriminated a צדיק

(2') Then a second set of witnesses came והצדיקו את-הצדיק, and by the selfsame act הרשיעו את-הרשע;

(3') The legal consequences then would be, provided that direct talio is a travesty, that והפילו השפט והכהו לפניו ...ארבעים.

(b) What is the influence of the IX Commandment, לא תרצח?[194]

The answer is, that even though the subject of עד שקר and עד שוא[195] may be at the root of the discussion, nonetheless, since the prohibitions deal only with testimony, with words, and not with gross acts, then[196]

וכל לאו שאין בו מעשה אין לוקין עליו

This concludes the analysis of (2) Subsidiary Arguments to Justify Substitutive Talio.

III. Summary.

תנו רבנן ד דברים נאמרו בעדים זוממים אין נעשין בן גרושה ובן חלוצה ואין גולין לערי מקלט ואין משלמין את הכופר ואין נמכרין בעבד עברי משום ד"ע אמרו אף אין משלמין ע"פ עצמן[197]

A. Is there an element which binds these five items, all of which are united only in that they apply to עדים זוממים? Let us summarize their salient features:

(1) זוממים who question the purity of birth of a כהן, are not themselves, assuming themselves to be כהנים, liable solely on these grounds to be similarly impugned;

(2) זוממים who accuse of a crime the penalty for which is banishment, do not upon exposure assume the banishment;[198]

(3) זוממים are not held to pay the כופר that is levied onoone whose neglected beast did damage; (4) זוממים are not sold as indentured servants to meet a fine, even though this would have been the effect of their charge against a defendent; (NB:) R. Akiba (second generation Tanna) held that they do not pay the statutory fines if they confess their guilt in time.

B. We will now proceed to the analysis of these cases, in order.

1. and 2. have been discussed prior to this point.

What is the reasoning behind 3.? Surely the owner of the beast would have had to pay כופר, had he indeed been negligent. How then does the עד זומם escape it? The כופר, in Rabbinic thought, is considered a form of atonement:[199]

ואין משלמין הכופר קסברי כופרא כפרה

deriving its redemptive force from the documentation of Exodus 21:30:

אם-כפר יושת עליו ונתן פדין נפשו ככל אשר-יושת עליו.

Since there is no actual death which has been caused by the beast of the זוממים, there is no need of atonement.[200]

This argument presumes that כופר is to be understood as פדיון. R. Hisda (third generation Babylonian Amora)[201] imputes this view to R. Ishmael (third generation

Tanna)[202] son of Johana b. Beroka (second generation Tanna)[203], who maintained that the כופר was פדיון for the life of the owner of the beast which committed the slaughter, as opposed to being פדיון for the life of the dead person.

(Actually, there may be no opposition here after all, as is explained by R. Papa, a fifth generation Babylonian Amora, but that does not concern us directly,)

What is the reasoning behind 4.? A disputation between R. Hamnuna (third generation Babylonian Amora)[204] and Raba (b. Joseph b. Hama, fourth generation Babylonian Amora)[205] brings out the possibilities:

a. The original defendent had the means to meet the fine without self indenture should he have been convicted;

b. The original defendent did not have the means to meet the fine without self indenture should he have been convicted.

Hamnuna maintains that insofar as the defendent in a. would not have been sold to meet the debt, there is no ground to contest the dictum that an עד זומם is not to be sold into slavery to meet a debt. For the case b., however, he would hold that it is just to do so. Raba engages in a close reading of the text,[206]

אם-זרחה השמש עליו דמים לו שלם ישלם אם-אין לו
ונמכר בגנבתו.

Since the text specifies בגנבתו, it is plain that he cannot be sold for הזמה.

What is the reasoning behind R. Akiba's NB.? On the basis of Exodus 22:8, he considers the compensation as a form of קנס, which is both punitive and not payable on one's own admission.

Before proceeding to a comparison of these five cases so as to arrive at a case definition of הזמה, we must note the presence of an interesting comment by Rav Judah in the name of Rav (first generation Babylonian Amora),[207] in Makkoth 3a:

אמר רב יהודה אמר עד זומם משלם לפי חלקו מאי משלם לפי חלקו
אילימא דהאי משלם פלגא והאי משלם פלגא תנינא משלשין
בממון ואין משלשין במלקות

"Rav Judah said that Rav said, that a false Witness pays according to his portion, share, or part. Now if it be said that the significance[208] of this term is that one of two witnesses pays half and the other pays half,[209] I learned (from an Amoraic source, here infra p. 5a) that the sum of monetary impositions may be divided among the witnesses, but the sum of corporal

impositions (lashes) may not be, but rather is borne in toto by each."

Such a dictum would, as observed, apply to a case where only one witness was convicted of הדמה. But in such a case, (q.v.i.) we know that all charges would be dropped. This must refer to a case of reportage of prior conviction.[210]

- Part VI -

AN ANALYSIS OF AN AMORAIC CASE DEFINITION OF מסרס

I. Orientation

The Talmud presents a case analysis of the case of the in Makkoth, folio 5a, derived from the Mishnaic quotation, as follows:

מתני׳ אין העדים נעשין זוממין עד שיזימו את עצמן כיצד אמרו מעידין אנו באיש פלוני שהרג את הנפש אמרו להם היאך אתם מעידין שהרי נהרג זה או ההורג זה היה עמנו אותו היום במקום פלוני אין אלו זוממין אבל אמרו להם היאך אתם מעידין שהרי אתם הייתם עמנו אותו היום במקום פלוני הרי אלן זוממין ונהרגין על פיהם באו אחרים והזימום באו אחרים והזימום אפי׳ מאה כולם יהרגו ר"י אומר איסטטית היא זו ואינה נהרגת אלא כתהראשונה בלבד.

II. Definition

A. Principal Questions

The questions which arise in connection with this passage are the following:

(1) What is הזמה, and how does it differ from הכחשה?

(2) From what point in the juridical procedure may we consider a false witness liable to penalty under the code of הזמה?

(3) What is the extent of access?

(4) To what extent is הזמה an adjunct case, and to what extent a separate case?

(5) What is the limit of counter-testimony?

The Gemara does not consider these questions in the same order in which we have them above, but they are dealt with on the few folios succeeding the passage given.

B. The Answers and the Definition Inherent in Them

(1) הזמה is differentiated from הכחשה in that, after the Rabbinic restrictions intended probably to make a case of הזמה almost inestablishable, הזמה may only be established on the basis of contradiction of alibi. It would have to be demonstrated, in other words, that the witnesses[211] who brought the charge could not possibly have had access to the evidence which they bring, because (in the case definition) they were at a place other than the scene of the crime at the time of the alleged commission of the crime.

The essence of the distinction is that הזמה involves countertestimony לגופם של העדים, to the testimony proffered; הכחשה however is established by countertestimony לעדות directed against the persons of the witnesses. הכחשה is based on the principal case, since the testimony being countered is primary testimony of the case; הזמה is separable precisely because it does not concern the case: the testimony being introduced is on the

subject of the persons of the prior witnesses, not on their testimony per se. The witnesses who establish a case of הכחשה, by the nature of their evidence, have knowledge of the prior or principal case; the witnesses who establish הזמה need have no such knowledge. They need not say that A did not murder B; they need not say that C did not witness the reported act; they need know of no reported act. They need only testify that C was with them at place X at a certain time.

Thus, their testimony, while it has direct bearing on the principal case, is not directed to it.

(2) There are several possibilities upheld at one time or another by an authority,[212] or suggested by the structure of the procedure:

(a) The moment that the witness delivers himself of a false charge, he has become a false witness. From one point of view, therefore, he is liable from this point on to criminal action as an עד זומם;[213]

(b) The moment of conviction;

(c) The moment of sentence;

(d) The moment of execution.

(3) The case definition of access is given as alibi. That is, the definition of what is considered grounds for stating that the witnesses could not have had access to the information which they present is that they were observed to be somewhere else at the time. But this is a case[214] definition, and the principle embodied in that case is one of access. Therefore the definition is tested:

(a) "At the time" is ultimately a relative term;[215] if I am observed in London at 1:04, and the murder is recorded in Paris at 1:10, then presumably I was not in Paris "at the time". Now, how accurate must the reportage be? Is it reasonable to expect the witnesses of my whereabouts to say "1:04" instead of "about 1:00"? Further, can the murder always be established with such accuracy? And are there not very speedy means of transportation ("Flying Camel" service, on Makkoth 5a)?

(b) "Somewhere else" is ultimately a relative term;[216] two people in one place are never in exactly the same place. Thus, if I am with you, and you cannot perceive from where you are what is occuring at C, it does not follow that I cannot.

(4) Although the case of the עד זומם grows out of the principal case, once the issue has been raised, it is a separate case, and no longer depends, as often in practice does perjury, on the outcome of the principal case. Now, in view of the fact that when the issue of זוממה is raised, the principal case has already begun but has not yet been concluded, there exist the following four possibilities: that

(a) The principal defendant will be acquitted and the זוממים will be convicted;

(b) The principal defendant will be acquitted and the זוממים will be acquitted;

(c) The principal defendant will be convicted and the זוממים will be convicted;[217]

(d) The principal defendant will be acquitted and the זוממים will be convicted.

Although case (d) suggests a separate consideration, case (c) leaves no doubt that we are dealing with totally independent entities. Two distinct crimes are cosidered here, and the action on one does not influence the other.[218]

(5) The extent of admission of successive counterwitnesses is something that was limited in the concluding lines of the Mishna citation.[219] But if

a conspiracy is involved here, then on what grounds may the first set be executed at all?[220] Abbahu submits that a plee may have been unearthed after the first set was executed, but this means that R. Judah's statement adds nothing.[221] Raba[222] suggests that in case of one set, they are executed; where there is more than one, they are not. The fact that the words "only the first set" implies that there are already other sets, and consequently contradicts the principle of economy,[223] seems to present an insoluble problem.

III. Sadducean and Pharisaic Considerations

A. Introduction

The Mishnaic citation first given on Makkoth 5b states that the זוממים are not liable to be executed עד שיגמר הדין,[224] until the sentence in the principal case has been obtained. This is labelled the Pharisaic position, and contrasted with that of the Sadducees, which is that the liability to the death sentence of זוממים is not reckoned עד שיהרוש, until the sentence has actually been carried out.

In this case, texts are brought to support both sides,[224b] as we have seen in the Mishna analysis supra. The conflict will be further scrutinized in the Gemara infra.

B. לא הרגו נהרגון-הרגו לא נהרגין

(1) Text

The analysis of this passage in the Gemara opens with the words,[225]

תנא בריבי אומר לא הרגו נהרגין הרגו אין נהרגין

"If they have not yet killed the defendent, then they are killed as עדים זוממים; if however they have already killed the defendent, then they are not themselves killed."[226]

(2) Source

This statement is given in the nabe of Beribi, or B'Rabbi, and has given rise to much scholarly speculation. Rashi heads the list of those who maintain that this is the name of a Tanna: ד"ה בריבי אומר: כך היה שמו.[227] On the other hand, many maintain that it is a designation or title of some kind.[228] Epstein holds that it is a scholar, or a tutor at an academy engaged in teaching senior students under the Principal.[229] Jastrow states that it is a student, possibly a disciple of R. Judah the Prince. Dr. Louis Ginsberg, writing in the Jewish Encyclopedia,[230] differs with the notion that it may be a Tanna, and with Jastrow as well. To him, this title is bestowed upon an authoritative scholar who also was possessed of יחוס, wither of other scholars or even of Judah the

Prince.

Of all views, the most interesting is that of Zeitlin, who maintains that not only is this a private name, but that the entire scholarly world has misunderstood the text.[231] There is no reason to say that the Pharisaic interpretation of the law implied that after the point שיהרג the זוממים were to be released;[232] this has simply been taken as an unfounded assumption on the basis that the Sadducees held the contrary. In fact, says Zeitlin, the Sadducees and the Pharisees agreed that the זוממים were to be dispatched after שיהרג; the difference was only as to whether the witnesses were to be killed at that point (Sadducees) or prior to that point (Pharisees), from the point of the גמר-דין.

However, we may raise this question:

(a) Wilhelm Bacher in the Jewish Encyclopedia makes the point that accepted הלכה is customarily anonymous;[233]

(b) We may even say that a divergent opinion is usually quoted to defeat it, i.e., to show that it was heard, understood, taken cognizance of, and refected;

(c) Now, if, as most scholars seem to hold, בריבי is a title which refers to someone who

who was representing an authoritative position or communicating a binding הלכה,[234] then the total weight of Pharisaic practice may be assumed to have been in accord with תנא בריבי אומר לא הרגו נהרגין הרגואין נהרגין

(d) If however בריבי is the name of an individual, then there exists the possibility that this is a quotation cited in order to reject it, and in this case, we could establish that Pharisaic practice must have included death for the עדים זוממים after the execution.[235]

(3) אין ענשין מן הדין[236]

The Gemara continues to show that the argument a fortiori is to be rejected:

(a) If before the defendent has been executed, the witness is liable to death,

(b) Then after the execution, how much the more so should he be put to death;

(c) But we have a principle that no penalty is inflicted on the basis of inference, without an explicit prohibition and stated punishment;

(d) Ergo the argument a fortiori is rejected.

C. A Case of Judicial Murder

Heinrich Graetz[237] relates a touching story of the efforts of the Tanna Judah b. Tabbai and the Tanna Simeon b. Shetah to revive certain Pharisaic amenities among the Jews. When Tabbai carelessly executed a single עד זומם, prior to the execution of the principal defendent, his confrere confronted him with what he had done, and Tabbai, with noble contrition, accepted his chastisement and vowed nevermore to officiate without b. Shetah being present.

There are a few things in this story which do not seem unquestionable in view of the sources. We will first examine the case which gave rise to this incident.

We read in Makkoth 5b the following cryptic insertion[238] quoting R. Judah b. Tabbai:

חניא אמר יהודה בן טבאי אראה בנחמה אם לא הרגתי עד זומם להוציא מלבן של צדוקים שהן אומרים אין העדים זוממין נהרגין עד שיהרג הנדון[239]

Following is this rejoinder from Simeon b. Shetah:

אמר לו שמעון בן שטח אראה בנחמה אם לא שפכהדם נקי שהרי אמרו חכמים אין העדים זוממין נהרגין עד שיזומו שניהם ואין לוקין עד שיזומו שניהם

Then Tabbai resolved, the Talmud tells us, never to render a legal decision again except in Shetah's presence. This entire story is rendered in Lauterbach, Mekilta,[240] with the names reversed.

The remaining analyses of mishnayoth in Makkoth develop points which have already been subsumed under the discussions supra on the various mishnayoth themselves.[241]

The problem of the murdered single עד זומם is possibly the knottiest with which we deal, but at this point we must lay in evidence further aspects of the issue.

D. Susanna and the Elders

(1) The Story

We turn now to the apocryphal book of Susanna and the Elders,[242] which, according to Zeitlin, antedates Shetah and represents the earlier strata of Pharisaic הלכה . The scene is Babylon, the early period of the captivity.

Susanna, the winsome wife of Joakim, a town official, is observed in the garden by two elders who have occasion to call upon her husband. Their lecherous hearts smitten with her great beauty, the old bawds advance her the proposition that she receive them or they will denounce her for adultery, a capital offense.

When the virtuous Susanna rejects them, the two would-be rakes indeed make good their threat, and she is hailed before the court.[243] There the

elders, who are also judges, accuse her of having had intimacies with a young man who escaped before they could totter over and detain him.

Susanna is a virtuous woman, and further, the daughter of a priest. She is therefore promptly condemned and led out to be executed.

Suddenly there appears a young Daniel, who reproaches the people and essays to establish Susanna's innocence through cross-examination of the witnesses once more. He separates them, and asks each one under which variety of tree did the adultery occur. Their answers disagree.

Susanna is released at this evidence of the malevolence of the false witnesses, the luckless elders are put to death, the public has its execution, and the mysterious young Daniel, of whom Professor Daube hints,[244] slinks cautiously out of the picture.[245]

(2) Comment

Now Zeitlin holds that either the story was composed without motive[246] or that it was to introduce the techniques of חקירה and דרישה.[247]

It would seem that Susanna preserves a layer of Pharisaic הלכה which antedates the available one; possibly this is why it was not included in

the canon. At any rate, observe (1) that it takes two witnesses to make a case;[248] (2) that the witness is the accuser; (3) that we are dealing here with a case of הכחשה: what is disproved is a detail of the observation, not the basic testimony; (4) that talio is applied for הזמה is understood here to mean for הכחשה. That is to say, mistaken witnesses are subject to talio; (5) that cross-examination takes place after the sentencing; (6) that a member of the public may cross-examine; (7) that the decision of the court is reversed; and (8) that the הזמה העדים takes place after that decision but before the execution; lastly and to my mind most important, (9) this story seems in many details to attack selected aspects of pharisaic procedure: a. Susanna the innocent is a daughter of a Priest, and wealth, but this does not make her a Sadducee;[249] b. the term kritai used for the elders is not totally unfamiliar with reference to Pharisees, although it is certainly not a technical term, and it does not make them Pharisee; c. the court scene is barely prevented from being a scene of travesty, although this does not constitute a clear attack on Pharisaic law; d. the mob is presented as brutish and blind, yet in command of the machinery of justice;

e. the Pharisaic canon omits this book, without very clear cause. None of the above will establish that this book was understood to have a strong anti-Pharisaic flavor, but the suggestion is there.

E. Summary: Problems in הזמה.

It is clear that the whole business of haZama is a perplexing problem from beginning to end. We have seen that the literal texts, e.g., כאשר זמם ולא כאשר עשה as opposed to נפש בנפש, seemed to favor the Sadducean position with less contortion; again, the Pharisaic understanding of עדים זוממים to refer to what they called הזמה as opposed to הכחשה is both odd and novel.[250] On what grounds do they differentiate the two?[251] הרי גם בהכחשה הם עדי שקר.

What, furthermore, is the real source - I do not speak here of the 'אסמכתא'[252] - of the business of two witnesses? Our text (supra) read ועמדו שני האנשים אשר להם הריב and further, we continued with references to the singular in an equally unmistakable tone, ונמצא שהעד הוא עד שקר.[253] And what shall we make of עדים זוממים חדוש הוא (Sanhedrin 27a)?

Again, this interesting story of Tabbai and Shetah, especially in the Graetz reading, slips in several unwarranted notions. Are we to assume that a person in

the position of Tabbai really did not know the law? That he forgot the basis of juridical action in a case of this kind, and that he was not corrected? Or that he was prepared to commit juridical murder in order to prove a point?

Finkelstein[254] says that it seems likely that Tabbai (or Shetah in the Mekilta text) was condemning a man under the earlier legislation, still in force at his time, which permitted one witness to give valid testimony, and therefore to become liable for the death penalty. Finkelstein does not explain what, in that case, would be the meaning of Shetah's rejoinder if the law in force held that one witness was enough.

Further, what is the significance of the strange law that the זומם escapes if he succeeds in killing the principal defendent? Who is Beribi, or בריבי, to whose name this law is attached? How widespread was its acceptance?

Again, what is the limit to the power of the witnesses? Can we really accept the notion that two are as a hundred?

- Part VII -

A GENERAL CONCLUSION

255

The problem raised in the preceeding Summary section are problems which remain, with greater or less force, after all of our considerations up to this point. They represent one class of limitations to which our work is subject.

256

There are other limitations as well. It has not been possible to consider in detail all of the relevant evidence from the Tosefta, from Boraitha sources, from the Apocrypha, the Pseudepigrapha, and the New Testament; even in the Talmuds and the precedent matter, we have been highly selective, and have dealt with samples instead of attempting an exhaustive coverage.

257

Of course, some tentative answers have been suggested that might apply to the problems which we have sketched above. On the other hand, new problems have been raised. One may think of the expanding circle of what is known, which by its very expansion increases the periphery of contact with the unknown.

258

Thus, (a) whether the Sadducean position is or is not in line with the texts may be complicated by the fact that the Sadducean position <u>is</u> in line with Roman law on the subject (Finkelstein, <u>The Pharisees</u>, Jewish Publication Society, Philadelphia, 1938, vol. 2, chapter 7, page 671, footnote 76); (b) a possible answer to Tchernowitz' question on why one form of false witness (הדומה) is differen-

tiated from another, (הכחשה) by the Pharisees might be, in view of what we have seen, that this is part of an attempt to limit the whole matter of capital punishment in this regard. Thus, rather than asking why הזמה is considered liable, we should ask why הכחשה was excluded. In that case, an answer might be that it was a principle to exclude as many categories as possible from liability to capital punishment. This hypothesis also explains the business of the institution of a quorum of two witnesses, and finds wonderful support in the Sanhedrin 27a quotation.[259] (c) As to the story of Judah b. Tabbai[260] and Simeon b. Shetah[261], we must note that Shetah had a son, who was himself executed, in full knowledge on the part of all that the boy was innocent;[262] we also are aware of his counsel to judges,[263] "Become accustomed to intensify your investigation of the witnesses, and be cautious in your words, lest from the content of your words they be guided in their lying." Presumably this concern with false witnesses dates from the incident with the boy.[264]

(d) Finkelstein has suggested that Tabbai[265] (the judge) was condemning the one witness to death under an earlier convention, that the case at issue is not at all the question of the number of witnesses, since both Simeon b. Shetah and Judah b. Tabbai accept the validity of testimony from a single witness and the responsibility conse-

quent thereupon; the question is only whether or not a witness may be killed if the principal defendent is still alive.

We must point out that Finkelstein's solution is no solution. He is back to making his judge commit judicial murder to prove a point.[266]

(e) As to the problem of the excape of the false witness after the execution of the principal defendent, we seek an answer to the arbitrariness of the procedure and to the apparent illogic of it upon which many scholars have commented.[267] An answer is proposed by David Daube,[268] who shows that some such law or practice was customary in[269] almost all ancient cultures. The proper formulation, Daube holds, is that the false witnesses are freed, not after the principal is executed, but <u>after the case is closed</u>. The two events are simultaneous, but they must be considered separately. It makes no sense to say that an offense against both God and palace (to use the Babylonian phrase), is to be ignored simply because it has been successfully carried off; on the other hand, it makes a good deal of sense to say that once the state - and the deity operating through it - has officially and formally closed the case,[270] it may not be reopened.[271] In addition, Daube comments,[272] the peculiar practice of making the witnesses-accusers "cast the first stone" makes them tech-

nically agents of the state, and adds a slight complicating factor.[273]

(f) Were two witnesses as a hundred? Was the testimony of two witnesses considered a "legal unit" to establish a case?[274] It would seem that indeed this was true. In fact, this would explain the great concern for the issue of false witness with which this study opened.[275]

For the court was then, and remains now, the expression of the will of a society in its day to day, concrete expressions, in its way of life. The court, no less than the society whose will it expresses, builds upon the past, but cannot remain bound to it, else strangulation will result. The past is continually reinterpreted by and for the present;[276] the present, therefore, is the ultimate custodian of tremendous power: the power to fulfill the past or to destroy it, the power to advance the future (goal), or to vitiate it.

In a formal sense, this power was vested directly in the courts, which therefore had to be - to some extent - autonomous and potent,[277] so that they could truly express the will of the people in a contemporary way.[278] And finally, this expression, upon which, like the centerpin of a timepiece, the whole structure is seen ultimately to resolve, was in the hands of the witnesses. For the witnesses were the cornerstone of the court. They brought

the charge and they carried out the sentence. Their "yes" was yes, and their "no" was no, so that ultimately the power of judgment over the people was turned back into the hands of the people. Which is, all things considered, a good way.

הנחסרים מזהב ומפז רב
ומתוקים מדבש ונפת צופים׃

APPENDICES

APPENDIX A

FURTHER CONSIDERATIONS ON INDICTMENT AND DELIBERATION

Upon the indictment, detention was minimal since court was summoned immediately, to go into immediate session.[280]

Exceptions to indictment

Homicide was not subject to indictment when committed either:

(a) in defense of self, or

(b) in defense of others.

Defense of self refers to warding off attempted violence,[281] reacting to the threat of violence,[282] and reacting to theft.[283] In any case in which it is permissible to kill were one oneself the object of the action, it is permissible to kill in order to save some-one else who may be the object of the action. That is, what is at stake is not the right to kill, but the liability to be killed. In terms of the right to kill, the attacked person A may have the right to kill his attacker B, but that right might not be extended to witness X. When, however, the matter is put into terms of the liability to be killed, then B may be killed either by A or by X.[284] Preventive legal homicide is, of course, a last resort.[285]

Trial and Deliberation

After the indictment, the trial begins. The court was built in the form of a semicircle, so that all participants could see each other and all angles of the proceedings.[286] The secretaries kept running records of the case as it unfolded.[287] The judges entered into the rows of 23 seats, and their pupils arranged themselves; then the judicial personalities entered, and the witnesses were presented.[288]

The deliberation, as described in Talmudic sources, opened with the arguments for acquittal,[289] which were open to the participation of the students of the rows.[290] The debate was open, and opinions could be changed in the course of it if one were persuaded.[291] The ultimate tally was a tally of - not votes - substantial reasons. So that if one person presents two arguments, or bases his case on two authorities, he is preferred to two persons who concur in one argument or authority.[292] In order to prevent trend and influence, the youngest members argued first.[293] In this way, those who stood most to be impressed with the opinions, swayed by the views of their masters were called upon to commit themselves before they heard those views.

Acquittal could be reached immediately. Condemnation could not, as a verdict, be accepted until the next day of sitting.[294] Indeed, human life was considered sacred, and for the state to take it, even from a murderer, was so hedged

about with restrictions that one may well believe that a court that managed one death penalty in seven years was a rarity.[295]

APPENDIX B

THE PROBLEM OF THE QUORUM OF WITNESSES

Based on Baehr, Oskar, Op. Cit.

The basic text upon which the majority of the work in the area of false witness is based, the text upon which the laws of false witness depend, is Deuteronomy 19:16-21. "When a witness of violence,[296] a false witness, shall arise in court in order to give incriminating evidence against the defendent,[297] then the two parties to the dispute shall stand before the Lord,[298] before the priests and the judges who will exercise due authority in those days; then let the judges investigate the matter thoroughly. If it should develop that he is a false witness, one who has given false testimony against his brother,[299] then shall you do to him that which he had plotted to do (אשר זמם לעשות) to his brother, with the result that you eradicate this evil thing from your midst. And consequently those spectators who remain behind him[300] will hear this, and will fear this, and will no more continue to do acts similar to this evil deed in your midst. Therefore do not let your eye take pity upon the false witness, but take retaliation of life for life,[301] eye for eye, tooth for tooth, hand for hand, foot for foot."

כי יקום

The verse immediately preceeding this one makes it

clear that it is not possible or admissible for one witness to give evidence in cases of עון or חטאת[302] How then is it possible for the passage above to refer several times to one witness?[303] It is doubtless this paradox which is responsible for the translation of this verse as it appears in the Jerusalem Targum ad loc.: ארי יקומון סהדין שקרין "when false witnesses will arise", in the plural form.

In any case, the Talmudic pronouncements dealing with this issue are in no doubt. Makkoth 5b not only reads this text as a plural, but in accordance with verse 15 prohibits action against a single witness, and, by presumption, validity of evidence so offered: אין העדים זוממין נהרגין עד שיזומו שניהם the ostensible false witnesses are not subject to execution until and unless both of them have been convicted of false witness.[304]

עד חמס באיש לענות בו סרה

Some find in this the statement of a specific charge,[305] but we are inclined to think that it was meant to be - as indeed it becomes in the later interpretation,[306] a generic term. The Septuagine reads here katalegōn autou asebeian,[307] alleging iniquity against him, which also seems to bear out the brouder view of the text.

The ultimate argument, however, which seems to indicate that חמס does not refer to specific transgression in spite of Ibn Ezra is the mediate context, verse 21, where

are mentioned not only capital cases but "eye for eye, tooth for tooth, hand for hand, foot for foot", or in other words, personal injury cases.[308] It would seem then that we have here more evidence that מרה refers to general transgression.

CRITICAL BIBLIOGRAPHIES

I. Introduction

In the Critical Bibliographies, an effort is made to explain the contents and relevance of each text considered. Sometimes the authors' contentions are discussed in view of the material thus far presented, in the hopes that our understanding may deepen in the process. The bibliographies are styled "Critical" in that an effort is made to appraise texts in terms of their value to us.

The four Bibliographies are divided into two groups each, so:

I. Primary Sources

A. In Hebrew

B. In Other Languages

II. Secondary Sources

A. Special in Scope

B. General in Scope

An author's Hebrew titles are given before his titles in the Roman alphabet.

. Listing of Bibliographies

II. Primary Sources

A. Hebrew

1. --, The Holy Scriptures, Jewish Publication Society, Philadelphia, 1917 (1956 printing), xvi 1136 p.

An old standard, based on the King James version with many of the faults of that text. In some cases, it corrects errors of the KJV, but often is influenced to let archaic structures remain on grounds of - presumably - habituation. A new version of the Bible is in the casting under the hand of the Society, which seems, from advance galleys, to be a significant improvement.

2. Leeser, Isaac, trans., The Holy Scriptures, Hebrew Publishing Company, New York, n.d., 2 vol. 1384 p. Eng. - 1384 p. Heb.
This is a totally uninspired translation, the aim of which was to present some sort of English lexical equivalent for the Hebrew words of the Biblical text. Leeser customarily sacrifices English style and structure for conformity to the Hebrew; his translation has a mechanical ring to it. As a sequential lexicon, it is useful, and considering that it was likely the first translation to gain general acceptance among American Jewry, its importance is not to be slighted.

3. ספר תורה נביאים וכתובים, M. H. Letteris, ed., Negrew Publishing Company, New York, n.d., 1390 p.
Beautifully printed and carefully checked accord-

ing to a masoretic tradition, the Letteris edition has been a standard Hebrew Bible for many generations of scholars. The plates of recent printings show great wear, however, and recent editions are in spots almost illegible. The only apparatus available is selections from the masoretic apparatus.

4. Kittel, Rud., ed., Biblia Hebraica, Priv. Wuerttemb. Bibel., Stuttgart, 1929, liii 1434 p. Still the best and clearest print easily available, and on rare occasions the critical apparatus has something of value to offer. Kittel's weird cantillative graphamata are easily learned, and his novel vowel symbols present no difficulty.

5. מקראות גדולות, Pardes, New York, 1951, 10 vol. This edition of the Rabbinic Bible gives the masoretic Habrew text of the Bible, with the several Targums opposite, and 32 rabbinic commentaries, of whom the major ones are Rabbi Solomon b. Isaac of Troyes (רש"י), Abraham ibn Ezra, Rabbi Moses b. Nahman (רמב"ן), Sephorno, and Rabbenu Asher (בעל הטורים).

6. Mishna: ששה סדרי משנה, with the customary commentators, including Obadiah of Bartinora (Bertinoro), Schulsinger, New York, 1948, 2 vols.

7. Tosephta: תוספתא תוון יחזקאל, ed. Ezekiel Abramski, Ha-Sefer, Jerusalem, 1925, 42 folio p. Totality of the Tosephta with intɒoduction, commentaries, תרושים, and critical apparatus.

8. Talmud: תלמוד בבלי, with all customary commentators, etc., תורה לעם, Jerusalem, 5717- 1957, 13 vols. including Jerusalem Talmud.

B. Other Languages

9. (Baum, Henry Mason), "The Laws of Hammurabi, King of Babylonia", in Records of the Past, March, 1903, 2:3. A free translation of the Code and the original plates follows a brief introduction. This translation is best used in conjunction with a more literal one so as to get some idea of the range of understandings which attach to the original, for one who cannot handle the original.

10. Clay, Albert, ed., Babylonian Records in the Library of J. Pierpont Morgan, Yale, New Haven, 1923, 4 vol. We have here the original stones plus transliteration and translation. Mr. Morgan must have been an insatiable reader indeed. The Babylonian records, however, significantly make no reference to the laws of false witness.

11. Edwards, Chilperic, The Hammurabi Code and the

Sinaitic Legislation, Watts, London, 1904, xiii 168 p.
This text presents a clear translation of the whole of the Hammurabi code together with a sketch of the historical background out of which it comes. The comparison with the Hebrew Bible is limited to one chapter at the end.

12. Falkenstein, Adam, Die Neusumerischen Gerichtsurkunden, Beck, Munich, 1957, 3 vol.
An outstanding collection of late Sumerian legal documents, analyzed and reproduced, which notably fail to consider the problem of false witness. See the discussion of this book in the "Prebiblical Instances of the Laws of False Witness" supra, notes.

13. Gelb, Ignace, Old Akkadian Inscriptions, Chicago Natural History Museum, Chicago, 1955, pp. 161-338. In this massive collection of Akkadian texts of legal interest, there is no material which bears upon the issue of false testimony.

14. Handcock, Percy, The Code of Hammurabi, Society for Promoting Christian Knowledge, London, 1920, 46 pp. A clear and very conservative presentation including a brief analytic introduction and the

whole text of the Code subdivided according to the usual sectional numeration. Mr. Handcock has incorporated at appropriate places references to Biblical parallels, but not with sufficient consistency to be worthwhile.

15. Johns, C. H. W., Babylonian and Assyrian Laws, Contracts, and Letters, Scribner's, New York, 1904, xviii 424 p. Classification and thorough indexing of legal practices and modes.

16. Kohler, Josef, and Arthur Ungnad, Hammurabi's (sic.) Gesetz, Pfeiffer, Leipzig, 1910, vi 128 p.

17. Leemans, W. F., Legal and Administrative Documents of the time of Hammurabi and Samsuiluna (mainly from Lagaba), Brill, Leiden, 1960, 120 p. This text provides additional negative evidence, in that it brings into perspective another body of documents, specifically, contracts and economic records, and shows that there was no provision for false testimony made in them.

18. Neufeld, E., The Hittite Laws, Luzac, London, 1951, xi 209 l (50)p. No Old Testament references are recorded in connection with the Hittite Laws that might cast light on Deuteronomy 19:15-21.

19. Rahlfs, Alfred, Septuaginta, Priv. Wuerttemb. Bibel., Stuttgart, 6th ed., no date, 2 vol., xlviii 1184 941. A clear text, with critical apparatus, and an introductory history of the formulation of the Septuagint.

20. Schwab, Moise, Le Talmud De Jerusalem, Maisonneuve, Paris, 1890, 11 vols. plus volume of introductory, tabular and index material, including a most useful subject index (Faux Temoignage", p. cxxxi b), an index of Biblical citations (p. cli) to the whole work, and an index of all proper names (p. cxxxv a) occurring in the text, both Rabbinic and otherwise.

21. Smith, Sidney, Babylonian Historical Texts, Methuen, London, 1924, xi 164 p. (photocopied edition).

22. Winckler, Hugo, Die Gesetze Hammurabis, Hinrichs, Leipzig, 1902, 42 p. This is a translation of the Code of Hammurabi with a brief introduction and notes to the text.

III. Secondary Sources

A. General

23. Berlin (Bar-Ilan), Rabbi Meyer, ed., Talmudic Encyclopedia, Jerusalem, 5717- 1957, 9 vols. now

available, Hebrew. Indexes and digests halakhic literature from the tannaitic period to the present time. The article תלמוד and references thereon are of special use (8:609 ff), although unsigned.

24. Brederek, Emil, Konkordanz zum Targum Onkelos, Toepelmann, Giessen, 1906, x 193 p. A brilliant example of grundlich German scholarship at its best. Each term is carefully considered, many are analyzed and compared with the Hebrew, and what appear to be selected textual references to Onkelos are provided. Unfortunately, the value of the book is substantially impaired by the fact that the author neglected to explain his voluminous abbreviations.

25. Brown, Francis, S. R. Driver and Charles A. Briggs, A Hebrew and English Lexicon of the Old Testament, Oxford, London, 1907 (1957 printing), xix 1127 p.
Even for its age, still considered by many the finest scholarly lexicon on the OT, the BDB is analytic in structure. It operates by root meaning system. In each case, a triliteral root is analyzed and compared with Assyrian, Ethiopic, Arabic, and other roots related to it. Family

structures are built up, and in many cases, listings are made of the words' occurences in the Hebrew Bible.

26. Danby, Herbert, The Mishnah, Oxford, London, 1933, xxxii 844 p. A fine translation whose notes, scriptural and subject indices, and introductions add depth to a clear and comprehensible presentation which remains at a high level of scholarship. In some ways, Danby is still preferable even to Blackman, notably in his use of the English medium, although of course the extensive notes of Blackman and the advantage of a facing Hebrew text cannot be countered.

27. Eisenstein, J. D., ed., Ozar Yisrael, Pardes, New York, 1951, 10 vol., Hebrew. An Encyclopedia of general Jewish knowledge. The article on עד שקר by Eisenstein (8:10b ff) is useful.

28. EPstein, I., ed., The Babylonian Talmud, Soncino, London, 1935-52. The clearest and most complete English translation of the Talmud, this edition has also notes, indices and glossaries to each volume and to the set as a whole. The notes are sometimes confusing, the indices are always incomplete and the glossaries are sketchy, but

these few drawbacks are more than offset by the magnificent proportions of the work. Epstein surpasses Rodkinson for the scholar by vitue of completeness and exactness of translation. Rodkinson is the more comprehensible. Occasionally too, there are blatant misreadings, such as the lovely business in vol. Sotah, p. 111 on Sotah 22a: the אשה פרושה, from the root פרש to separate or abstain (incidentally also the root of the work Pharisee) is being discussed as one of the things that bring destruction on the world. Reference is made to frustrated nuns who fast, pray constantly, and abstain from sex. How in the world one can in this context translate abstinent woman, אשה פרושה, as "a female Pharisee" is difficult to understand; all the more difficult when one thinks that the Talmud is a Pharisaic product.

29. Goldschmidt, Dazarus, אזנים לתורה, ed. Rafael Edelmann, Munksgaard, Copenhagen, 1959, 607 p. A subject concordance to the whole of the Babylonian Talmud, this is a primary source on עדות, עדים זוממים, הזמה, הכחשה, and related topics. The subject is followed by one-line quotations from each source where it occurs. Designed for

use with Goldschmidt's German translation of the Talmud, this work is referenced to be used with any edition.

30. Graetz, H., History of the Jews, Jewish Publication Society, Philadelphia, 1893, 6 vol. This is the standard history for generations of scholars. In a careful analysis, Graetz tries to follow the threads of Jewish history in a variety of cultures. His vision is not always clear, and bias plays a role, and his grasp of socioeconomic forces is not always evidenced, but his presentation is masterful, lucid and interesting.

31. Grayzel, Solomon, A History of the Jews, Jewish Publication Society, Philadelphia, 5712- 1952, xxv 843 p. A well-written, clear one-volume history of the Jews which provides a background to the discussions in our text supra. It is not, however, as smoothly done as Sachar, q.v.

32. Gulak, Asher, תולדות המשפט בישראל בתקופת התלמוד, Hebrew University, Jerusalem, 1939. Gulak traces the possible connections between Jewish law of the Talmudic period and Greco-Roman conceptualizations. He also points out the limitations of

this procedure. This is a very heavily documented book, and a major source for deeper work.

33. Hyman, Aaron, תורה הכתובה והמסורה, Dvir, Tel-Aviv, 1936, 3 vol.
A magnificant reference work, this text takes piecemeal every significant phrase of the Hebrew Bible and traces its occurences in the Babylonian and Jerusalem Talmuds and in many other sources including the writings of several of the major commentators.

34. Jastrow, Marcus, A Dictionary of the Targumim, the Talmud Babli and Yerushalmi, and the Midrashic Literature, Pardes, New York, 1950 (reprint), 2 vols., xviii 1736 p. The standard authority in its area. While it is not all that might be desired, nothing better exists at this time.

35. The Jewish Encyclopedia, Funk and Wagnalls, New York, 1904, 12 vols. The finest work of its kind ever produced, in any tongue. The men who contributed to its pages were the scholarly sanhedrin of their day, and the monument they created has been but little affected by the passage of half a century. The editorial board reads like a listing of the greatest minds of the

century, each in the area of his specialty: Cyrus Adler, Gotthard Deutsch, Richard Gottheil, Emil G. Hirsch, Kaufmann Kohler, Solomon Schechter, and hundreds more. It is odd that it has never been reissued, so that it is now rapidly becoming entirely unobtainable.

36. Mandelkern, Solomon, Veteris Testamenti Concordantiae, Hebraicae, atque Chaldaicae, Shoken, Jerusalem, 1959 (reprint), 2 vol., Hebrew. The best concordance to the Hebrew Bible now available.

37. Michaelis, John David, Commentaries on the Laws of Moses, trans. Alexander Smith, Rivington et al., London, 1814, 4 vols. The English translation of Michaelis' monumental Mosaisches Recht reads like a literal translation from the German, an illusion dissipated by the translator's preface, which, employing interminable and in German perfectly acceptable sentences in connection with a to an English reader difficult to follow structure, makes of a wonderful book something of a chore. Nonetheless, and in spite of the fact that Michaelis' strong Tendenzen come through and that the Moses he presents seems at times to be a sort of German Solon, whose work

was perverted by the Rabbins, the value of this work can hardly be given its due.

38. Moore, George Foot, Judaism, Harvard, Cambridge, 1927, 3 vol. This is the classic work by Jews or gentile on the Tannaitic period. Although of necessity the room that Moore can allot to questions of a halakhic nature is highly limited, the hand of a fine scholar is everywhere in evidence. No work of this kind is more warmly praised for a thorough and sympathetic treatment of the entire tannaitic melieu than this work.

39. Rodkinson, Michael L., New Edition of the Babylonian Talmud, New Talmud, New York, 1899. Still the most comprehensible edition of the Talmud in English, the Rodkinson has fallen into undeserved disuse because it is imcomplete and incorporates numerous errors. It is scrupulous in identifying and differentiating sources and strata, which Epstein (q.v.) does not always do.

40. Strack, Hermann L., Introduction to the Talmud and Midrash, Jewish Publication Society and Meridian, New York, 1959 (reprint), xvii 372 p. The classic introduction to the subject, incorporating tables and references for further work.

41. Tchernowitz, Chaim, חולדות ההלכה, חמשבר, New York, 1936, 3 vol.
Dr. Tchernowitz (רב צעיר) has written a history of the development of the Jewish juridical structure from its earliest appearances through the conclusion of the Talmud. His work is considered a classic reference in its field.
His critical treatment of הדמה shows thorough acquaintance with all the sources and perspective insight into social and legal principles.

B. Special

42. Alt, Albrecht, Die Urspruenge des israelitischen Rechts, Hirzel, Leipzig, 1934, 72 p. Although he concerns himself with many aspects of Jewish law, Alt touches upon false witness in comparative studies at several points. Useful also is his chart of comparative instances of legal concepts, which shows the penalties attached in other Biblical sources to decalogic infractions.

43. Auerbach, Charles, The Talmud, Western Reserve, Cleveland, 1952, 49 p. Auerbach has attempted to show points of contact between common law and Talmudic law, and has done a restrained, creditable job where the tendency to drown in apolo-

getic has claimed many. His analysis of Talmudic principles are valuable to one trained in modern modes of legal thought.

44. Baehr, Oskar, Das Gesetz ueber Falsche Zeugen, Itzkowski, Berlin, 1882, vi 102 p. Baehr has presented a rather sketchy survey of the significance of certain Biblical passages. He begins with exhaustive analysis, and becomes less thorough as the work progresses, massing a host of sources together without regard to disparate times and climates of composition, Tendenzen, and the like.

45. Benny, Philip Berger, The Criminal Code of the Jews, Smith Elder, London, 1880, 133 p.
Mr. Benny traces, in nontechnical form and in language geared to the lay reader, the development of Mosaic and Talmudic codes in their broadest formulations. Benny sketches the structure of the courts and the rules of evidence, with particular emphasis on capital cases. He enjoys drawing parallels from modern procedure, but avoids using his theme as a ground for polemic or apologetic activity. The text is useful for the very broadest sort of introduction to the Rabbinic codes.

46. Blau, Rabbi Joel, "Lex Talionis," in Yearbook, Central Conference of American Rabbis, Cincinnati, 1916, Vol. 26, 32 p.
Rabbi Blau has traced the lex talionis, "the law of like for like," in several of its appearances through Jewish jurisprudence. At times manifesting a fondness for a psychological approach, Rabbi Blau seems to lapse into apologetics, and concludes his presentation with an application of his findings to contemporary penology. Nonetheless, his work is clear and well organized.

47. Chavel, Charles, The Book of Divine Commandments (The Sefer Ha-Mitzvoth of Moses Maimonides), Soncino, London, 1940, vol. 1, xxv 443 p. The listing and classifying of the divine commandments is preceeded by an illuminating essay on aspects of the "Concept of the Mitzvah".

48. Clark, H. B., Biblical Law, Binfords, Portland, 1944, xxii 338 p. Mr. Clark has run Biblical law through the mental categories with which a modern attorney operates, and has compared it to American case law. His organization is phenomenal. His effort lacks in selection, however, and principles of law are juxtaposed that find their origin in Deborah and in the New Testament.

49. Cruden, Alexander, Cruden's Unabridged Concordance, Baker, Grand Rapids, 1957, xv 719 p. Will do if a Mandelkern is not available or accessible. (Cf. number 36 above)

50. Daiches, Samuel, Altbabylonische Rechtsurkunden aus der Zeit der Hammurabi Dynastie, Pries, Leipzig, 1903, 62 p. In his doctoral dissertation, Daiches has produced a seriatim textual analysis and work of lower criticism on basic legal documents of the Hammurabi period in Babylonia.

51. Daube, David, "Rabbinic Methods of Interpretation and Hellenistic Rhetoric", in Hebrew Union College Annual, Hebrew Union College, Cincinnati, 1949, 22:239-264. Professor Daube makes and demonstrates the point that Rabbinic exegesis may represent an application of methods of interpretation current in the Hellenistic world of that time. The Rabbis, he maintains, were masters of this method, and not enslaved to it. Thus they could use it freely as a tool, in fact, as their primary tool, to put across that which needed putting, e.g., new laws to cover new cases. One misses the use that would have been served by a short summary to tie the argument up.

52. Daube, David, Studies in Biblical Law, Cambridge, London, 1947, viii 328 p. Professor Daube has produced five essays, of which the third, 'Lex Talionis', demonstrates that the principle of compensation is legitimately to be seen in the earliest strata of this law. The essay is a clear and convincing use of Daube's approach to form-criticism and word-analysis.

53. Daube, David, "Texts and Interpretation in Roman and Jewish Law", in The Jewish Journal of Sociology, 3:1, June 1961, pp. 3-29. Professor Daube deals with legis actio, Pharisees and Sadducees, Hillel, and the Samaritans. In connection with the Pharisees, he delves quite piercingly into the laws of false witness, avoiding the customary pitfalls of simplifying the Sadducean position to dogged literalism. Sometimes he presents ideas that we would wish were better supported, e.g., that the purpose of the Susanna story was to secure acceptance for separate questioning of witnesses. But in all this article is a coherent and rational presentation, clear and informative.

54. Driver, S. R., An Introduction to the Literature of the Old Testament, Meridian Editions, New

York, 1956 (republication), xxv xi 577 p. A classic analysis of formal and documentary considerations in scholarship of the Hebrew Bible.

55. Edwards, Chilperic, The Hammurabi Code and the Sinaitic Legislation, Watts, London, 1904, xiii 168 p. Edwards provides a careful translation of the Code and certain facts of the historical period. His concern with the Sinaitic legislation is limited to one chapter appended at the rear.

56. Finkelstein, Louis, הפרושים ואנשי כנסת הגדולה, Jewish Theological Seminary of America, New York, 5710-1950, xv 102 p. Dr. Finkelstein has produced an analysis of the Great Synagogue, the Hasideans, and the Pharisees. Ezra set in motion what may be considered the Society of the Hasideans, with the intention of carrying into practice the idea of a kingdom of priests. The Great Court (not Great Synagogue) was the organ of its operation. Later tensions caused the high priestly faction (Sadducees) to break away from the Society, which was to become the Pharisees, themselves operating with a pro-priestly faction and an anti-priestly faction. Although the

evidence sometimes is not as convincing to me as it seems to Finkelstein, his brilliance is undoubted.

57. Finkelstein, Louis, "The Pharisees: Their Origin and Their Philosophy", The Harvard Theological Revue, 22:3, July 1929, pp. 185-261. Dr. Finkelstein brings to the Pharisees a vision of noble and progressive leaders of a liberal urban movement, not unlike the American Conservative Movement, which fought with the diehard reactionaries and are responsible for the survival of Judaism. The work is a piece of scholarship of a most persuasive order, but in spite of this, his treatment of the false witness seems superficial. He begins by raising certain obvious problems on the sources, but never really resolves them; at the end, one wonders just what the problem was raised for, and what place the discussion has in the larger issue he is trying to establish.

58. Gordon, Cyrus H., Hammurapi's Code, Rinehart, New York, 1957, 28 p. Dr. Gordon has written a clear and concise introduction to the Hammurabi Code and a systematic analysis of it, which tends at times to present it with a strong and not

always justified bias in its favor. So that one begins to suspect that Gordon is sometimes advocating the Code rather than discussing it from a scholarly point of view.

59. Greenberg, Simon, "The Multiplication of the Mitzvot", Mordecai M. Kaplan Jubilee Volume, English section p. 381-397. Mr1 Greenberg sketches the derivation and force of the term "Mitzva" in the Biblical and Talmudic literature.

60. Gulak, Asher, לחקר תולדות המשפט העברי בתקופת התלמוד, Ha-Sefer, Jerusalem, 1929, xvi 145 p. Although the place of witness is discussed in connection with forms of transfer of lands and properties, the issues of false witness proper are not directly considered.

61. Gulak, A., Rechtsvergleichende Studien, Institute Francais d'Archeologie Orientale, Cairo, 1932, pp. 97-104. A collection of seven brief essays which examine various aspects of comparative law in Talmud and Papyri, but do not contribute directly to our understanding of false witness.

62. Guttmann, Alexander, "foundations of Rabbinic Judaism", Hebrew Union College Annual, Cincinnati, 1950-51, 23:1:453-473. This is a basic treatment which lays down the principle of tension between dynamic sociointellectual life and basically static religious creedal and practical life. Rabbinic Judaism, by interpretation of the old, brings it and the new into relationship. Hillel emphasized this mode, and a close analysis of his actions in Pesahim 66a forms a nucleus for Guttmann's study. This material is directly relevant to all questions of Rabbinic understanding of biblical and other texts.

63. Guttmann, Alexander, "The Problem of the Anonymous Mishna: A Study in the History of the Halakah", Hebrew Union College Annual, Cincinnati, 1941, 16:137-155. Professor Guttmann establishes that the problem of the anonymous mishna or mishnaic halakah is a vital one, since so many strata are represented in the halakot of the tannaitic period. The higher critical interest of the Talmudists is shown by their attempts to label certain halakot as "Halakot le-Mosheh mi-Sinai" or alternately as "Mishnah Rishonah." Guttmann is forced to explain the principles of

oral transmission in order to deal with first-level contradiction in his sources, and finds proof ultimately that controverted Setam statements originate most likely with the Rabbanan or Hakamim in both Talmuds.

64. Guttmann, Michael, "בחינת המצות," Jahresbericht 1928, Juedisch-Theologischen Seminar, Breslau, 67 p. Professor Guttmann deals with the מצות here in respect to the manners in which they have been arranged, classified and studied. He considers the Saadianic arrangement of the total מצות system according to the Ten Commandments; before Saadia's time the מצות were not arranged in decalogic order, and even later then were arranged not clearly and without thoroughness of system.

65. Guttmann, Prof. Dr. Michael, "בחינת קיום המצות", in Jahresbericht 1930, Juedisch-Theologischen Seminar, Breslau, 1931, 112 p.
An exhaustive analysis of the practice of the Mosaic commandments in its historical development. The text, clearly written and tightly organized, takes up in order (a) bases of practice and temporal limits inherent in commandments; (b) internal character of commandment and when they are voided; (c)internal distur-

bances in the Jewish body politic and the consequences for the commandments; (d) comparison of the מצוה system to other ancient religious systems; (conclusion) a comparison of מצוה and dogma, a study in two forms of revelation.

66. Guttmann, Michael, היהדות וסביבתה, in Loewinger, Samuel, ed., Jewish Studies in Memory of Michael Guttmann, Neuwald, Budapest, 1946, Hebrew Section, p. 3-93. In the first part of this study, Professor Guttmann discusses the interpretations of the nascent Jewish society with its contemporaries of 2600 B.C.E. and later.

67. Guttmann, Michael, "תורה במלחמה", Festschrift Adolf Schwarz zum siebzigsten Geburtstage, Loewit, Berlin, 1917, Hebrew Section p. 1, 8 p. Dr. Guttmann here analyzed the appearances of תורה in the Talmud, both תורה in its more general sense and תורה in its specific reference to the scriptural texts. Further, he considers general positions in regard to the תורה שבעל-פה, and miscellaneous uses of what ceases in time to be a technical concept.

68. Guttmann, Michael, "Maimonides ueber das biblische 'Jus Talionis'," Jubilee Volume in Honour of Edward Mahler, Budapest, 1937, p. 415-426. The

question is raised as to whether the Talio was ever observed at all, and Maimonides' comments on the manner of its observance in the Biblical period are discussed.

69. Hallo, William W., revue of Dietz Otto Edward, Die Zweite Zwischenzeit Babyloniens, in Bibliotheca Orientalis, 16:5/6, September-November 1959, p. 234-238. Cf. supra, in text.

70. Higger, Michael, "A Yerushalmi View of the Authorship of the Tosefta," from Proceedings, American Academy for Jewish Research, New York, 1941, vol. 11, p. 43. Mr. Higger presents evidence from the sources that at least some sages, for example R. Ze'orah, a pupil of R. Yohanan, assumed that R. Hoshaiah was the author of the Tosefta. Insofar as the Tosefta enters into our calculations, this presentation should be considered germane to our endeavors.

71. Horovitz, Jakob, Zur Lehre von der Zeugenueberfuehrung (חזמה), Kauffmann, Frankfurt/M, 1914, xiv 23 p. The first half of a study in hazama, this text begins with an analysis, brief and sketchy, of the biblical sources, rapidly passing to discussion of secondary sources. See his

Zur rabbinischen.... below.

72. Horovitz, Jakob, Zur rabbinischen Lehre von den falschen Zeugen (הזמה), Kauffmann, Frankfurt/M, 1914, xiv 24-90 pp. This is the second volume by Horovitz, which takes up the discussion of הזמה from the standpoint of לא תרגו נהרג-תרגו לא נהרג and traces the views of Geiger, Mortiera, et al. The style is difficult, and one is left at the end not quite persuaded of the relevancy of the use of such disparate sources as Maimonides, Geiger and the Gemara in order to explain a mishna without categorizing them in terms of chronology. One gets the impression that Horovitz bogs down in secondary material.

73. Hyamson, Moses, Mosaicarum et Romanarum Legum Collatio, Frowde, Oxford, London, 1913, lvi 300 p. Hyamson establishes that there was no intimate relation between Roman law and the Hebrew law of false witness, cf. especially Titles 8 and 9, pp. 97-102.

74. Jastrow, Morris, Hebrew and Babylonian Traditions, Scribner's, New York, 1914, xv 376 p. Dr. Jastrow uses points of comparison between the two systems to indicate the differences which

each gave to a basic notion, such as Sabbath or creation.

75. Johns, C. H. W., The Relations between the Laws of Babylonia and the Laws of the Hebrew Peoples, Oxford, London, 1914, xv 96 p. Reverend Johns finds no significant relation here as regards the laws of false witness.

76. Kramer, Samuel Noah, From the Tablets of Sumer, Falcon's Wing, Indian Hills, Colorado, 1956, xxv 293 p. Kramer records 25 important "firsts" in man's history with keen and infectious delight in the unfolding.

77. Linfield, Harry Sebee, The Relation of Jewish to Babylonian Law, University of Chicago Library, Chicago, repr. fr. American Journal of Semitic Languages and Literatures, 36:1, October 1919, p. 40-66. In this doctoral dissertation, Linfield makes the rather obvious point that there is a relation, but just what it is, he "plans to deal with in another place."

78. Lutz, Henry Frederick, "Old Babylonian Letters", p. 279-365 in 9:4, February 28, 1929; "Neo-Babylonian Administrative Documents from Erech, Parts 1 and2", p. 1-115 in 9:1, December 15, 1927;

and "Legal and Economic Documents from Ashjaly", p. 1-184 in 10:1, June 6, 1931; all cited from University of California Publications in Semitic Philology (journal), University of California Press, Berkeley.

79. Mercer, Samuel Alfred B., The Oath in Babylonian and Assyrian Literature, Geuthner, Paris, 1912, xii 120 p.

80. Orlinsky, Harry M., Ancient Israel, Cornell, Ithaca, 1954, viii 193 p. This is an interesting and readable account of Israel's origins written at the lay level or slightly above, and helps provide a historical background for our study. The Chronology at the rear is a useful feature.

81. Rubin, Simon, Das Talmudische Recht, Steinmann, Vienna, 1938, 253 p.

82. Sachar, Abram Leon, A History of the Jews, Knopf, New York, 1958, xvi 455 xvii p. A highly readable and authentic general text, useful for background material on the period of the Tannaim, and for the picture of Biblical Palestine.

83. San Nicolo, Marian, Beitraege zur Rechtsgeschichte

in Bereiche der Keilschriftlichen Rechtsquellen, Aschehoug, Oslo, 1931, xiv 272+9 plates+table.

84. San Nicolo, Marian, Zur Nachbuergschaft in den Keilschrifturkunden und in den graeko-aegyptischen Papyri, Beck, Munich, 1937, 50 p.

85. Smith, J. M. Powis, The Origin and History of Hebrew Law, University of Chicago, Chicago, 1931, ix 285 p. A poorly indexed but well constructed book, it brings to bear representative ancient codes and concludes that Hebrew Legislation was a dynamic, which it attempts to trace through time. A noble and partly successful effort.

86. Sulzberger, Mayer, The Ancient Hebrew Law of Homicide, Greenstone, Philadelphia, 1915, 160 p. This is a series of lectures which attempts in part to trace a connection between the Homicide laws and the Hammurabi Code. The indices at the back enhance the utility of the book, with the exception of one index which lists Hebrew concepts in transliteration. A few tilts against suspended letters and surrealistic accent marks is enough to make one abandon the effort.

87. Walther, Arnold, Zum Altbabylonischen Gerichtswesen, Pries, Leipzig, 1915, 105 p. Walther's

most constructive contributions are in word study of significant terms.

88. Waxman, Meyer, "Civil and Criminal Procedure of Jewish Courts", Students Annual, Jewish Theological Seminary, New York, May 1914, p. 259-309. This is a creditable job of assembly of materials and synthesis. In the short space allotted to him, Waxman has tried to cover a great deal of ground, and his account suffers from transparency.

89. Weiss, Abraham, Court Procedure - Studies in Talmudic Law, Horeb and Israeli Institute, New York, 1957, 257 p., Hebrew. This is a systematic analysis of Talmudic court process, reviewed by Dr. Alexander Guttmann in Jewish Social Studies, 23:1, January 1961, p. 50-51, q.v. Guttmann finds most vulnerable Weiss' treatment of false witness. Weiss tries to show that הרגו לא נהרגין is the proper Pharisaic interpretation of the law, as opposed to most modern scholars since A. Gaiger who, as Guttmann mentions, would hold that the עד זומם is to be killed even after the defendent has been executed. Weiss also maintains that capital talio is reserved for חמס , but Guttmann throws in evi-

dence the Susanna story, a clear case of הכחשה. הזמה (alibi) and the Beribbi statement are both tannaitic modifications subsequent to the Pharisaic halakha, probably intended to limit literal talio as well as capital punishment. As Guttmann says, "The Pharisees, while in charge of the administration of the law, could not afford to be as lenient as were their spiritual successors, the Rabbis of the Academy, or an administration which had no jurisdiction in capital cases.

90. Wiener, Harold M., Studies in Biblical Law, Nutt, London, 1904, ix 128 p. A clear presentation which, however, is superficial for our purposes.

91. Yahuda, Joseph, Law and Life According to Hebrew Thought, Oxford, London, 1932, 229 p. This book is a systematic survey of topics in the Hebrew Bible, the New Testament, and selected Rebbinic material. False witness too is discussed, but because he has spread himself so thin, Yahuda cannot give it very deep treatment.

92. Zeitlin, Solomon, הצדוקים והפרושים, פרק בתולדות ההלכה Horeb, 1936, 3:56-89. Dr. Zeitlin presents here a brilliant essay on false witness in relation to the Pharisaic-Sadducean struggle.

He shows that the Pharisees agree with the Sadducees that the עד שקר is to suffer the capital penalty in a capital case. The only difference is:

Sadducees: the עד may be killed after the execution;

Pharisees: the עד may be killed after the sentencing;

The Pharisaic statement accentuates the implication, "but not before the sentencing"; in this both are agreed. The release after the execution is non-Pharisaic, and given in the name of Beribi to so indicate. Both Pharisees and Sadducees must read כי יקום עד as referring to one witness, yet Tabbai accepted Shetah's interpretation. This presents a problem that Zeitlin "pushes away with a read," to which he has no substantial answer.

93. Zeitlin, Solomon, An Historical Study of the Canonization of the Hebrew Scriptures, Proceedings of the American Academy for Jewish Research, 1931-2, JPS, Phila, 1933, 38 p.
An intelligent and stimulating analysis of the historical implications of canonization and exclusion. Some of his arguments, as in chapter

3: "The Holy Scriptures Defiles the Hands," have been better developed since. His treatment of the exclusion of Susanna is characteristically clear, and, for a change, conservative.

94. Zeitlin, Solomon, "Midrash: A Historical Study", Jewish Quarterly Revue, 44:121-36, July 1953. Dr. Zeitlin presents in the second part of his study a keen analysis of the postulates of the Midrash and their relation to those of other exegetic literatures.

95. Zeitlin, Solomon, "A Note on the Principle of Intention in Tannaitic Literature", Alexander Marx Jubilee Volume, Jewish Theological Seminary, New York, 1950, p. 631-636. Dr. Zeitlin makes the point that many of the Hillel-Shammai disputes may be understood in terms of acceptance or rejection of the principle of intention, e.g., preparation before an event specifically for the event, as in Betza 2a ff.

96. Zeitlin, Solomon, The Semikah Controversy Between the Zugoth, Dropsie, Philadelphia, 1917, repr.: Jewish Quarterly Revue new series, 7:4. Professor Zeitlin shows, in a brilliant tour de force, that one of the major elements of conten-

tion between the Zugoth, the pairs of officers who served as units of נשיא and אב בית דין, was the question of hermeneutic derivation of new law. The entire question of novelty and law is germane to Zeitlin's argument, and helps us to understand the positions of those laws with which we have to deal.

FOOTNOTES

1. Cmp. Encyclopedia Britannica, art. "Law"; When laws arise that deal with the relation of man to God, there remains a sense in which law deals with the relations of men, since God in a theocracy has until now been represented by some human agent.

2. Either in the breach, as the Chicago law which prohibits anyone from approaching any of the streetcar tracks which crisscross the city, or through lack of power to enforce, like prohibition of aspects of the homosexuality code in America.

3. On the confluence of מנהג and דין, see the Jewish Encyclopedia, art. "Custom" by Julius Greenstone, 4:3956.

4. A member or unit in the complex of a given system (code) which is characteristic or concretely exemplary of that abstraction which we call Law, with capital "L."

5. Some would hold that law enters the picture when dictates are violated; i.e., law can exist only in the presence of concrete friction. Prior to that point, anticipatory dictates are classed "taste," "conscience," "consideration" or what have you. Why the necessity for terminological multiplicity I cannot say. All these amount to Law by other names.

6. Otherwise we have an issue of conscience, and we shall soon find that

   (a) quantitatively we cannot deal with this: too many such issues are about to be publicly considered, even if their holders would so desire; and

   (b) qualitatively, how shall we establish any footing for a system whose authority is totally the individual rather than the corporate entity?

7. A structure of categories marked by comparative value (Nietzsche's Rangordnung) expressive of logical priorities of the various related parts.

8. So that an element can be appraised within a system1 A system cannot be appraised, q.e.d., unless it be considered a part of a larger system. The ultimate justification is going to be one of arbitrary decision.

9. I.e., between individuals who, each one a system to himself, agree to enter into a larger system (and, as in Rousseau's Contract, give up some of their autonomy) for their mutual or common benefit. This is the way a society is formed (in an analytic rather than a chronological sense).

10. I do not assume ethical conformity here. The distinction may lie in the stronger agent thinking himself strong enough to carry off a coup and the weaker one contesting it, thinking him not strong enough. In

this case, each man could be conscious of the other's thoughts and motivation, and perceive these realistically. This is not usually the case.

11. A real or fancied wrong, for the whole course of a case, any wrong is in doubt as to whether it exists or not; and the state can be, in the legal sense, a person, as can the religion for that matter.

12. As a corporate entity of ranked members. Cf. footnote 7 supra.

13. The acts, positive and negative, the performance of which is conditional only upon their stations, vs. priviliges, which are conditional upon more than their station, and may the more easily be rescinded. The notion of "natural rights" would then be rights before God, dependent only upon one's station in the sight of God, therefore, until such time as He shall inform us to the contrary, presumed for this reason permanent.

14. So called because he institutes the proceedings.

15. Cases of private delict. The distinction appears to be arbitrary since laws considered private delict at one time and in a given culture are often considered in other cultures and even in the same culture at

another time a matter for state prosecution. Cf. Zeitlin, Who Crucified Jesus?, pp. 116 ff. and footnote 18 below.

16. State, judge, priest, panel of peers, etc.

17. Decider, interpreter, judge.

18. A separable and generally separated function, although not in some primitive and fascist societies.

19. Which is further in Jewish law divided into Capital offense and Punitive offense. In certain cases, flagellatio is employed in civil law as well as in p punitive offenses under the criminal system.

20. The classic example is the reversal of theft and adultery: whereas in the Mosaic legislation theft was cause for action and recovery, adultery was a crime against the state (not always totally differentiable from God); now, however, in the presence of more riches and more leisure, such western states as America discover theft to be a crime against the state and adultery merely cause for action.

21. That is to say,

(a) civil, or more properly monetary law, דיני ממונות;

(b) capital law, דיני נפשות, whether criminal or re-

ligious, since the two were not as clearly differentiated as they are today; and to a lesser extent,
(c) Corporal law, again either criminal or religious .

22. 16:18

23. Vide Infra for numbers and functions.

24. Sanhedrin 2 Tosephta; Sanhedrin 3:9, R. Nehemiah. But see Sanhedrin 17b.

25. Mentioned in Josephus, Ant. IV:8: 14; Bell. 11:20:5; in Thackeray, H. St. J., trans., Josephus, Heinemann, Condon, 1927 (Loeb Classical Library); Respectively Vol. 4 pp. 578 and Vol. 2 pp. 542. It is more than possible that three is a minimal number. Seven judges is conceivable.

26. Mishna Sanhedrin I:1; Tosephta Sanhedrin I:1/

27. Not primarily a case trial body. The analogy may be made to a supreme legislative body.

28. Cf. Sanhedrin 2a ff.; 88b.

29. Cf. Tosephta Sanhedrin 8.

30. Zeitlin, Who Crucified Jesus? and other works on the subject from time to time in the Jewish Quarterly Re-

vue, Pub. Dropsie College, Phila.

31. Indictment, as regards Jewish law, is the initiatory process within the complex of criminal procedure, and is to be understood in terms of definitive accusation, not in terms of cause for investigation. It is not a tentative process. If this is understood, it will follow that the trial is really more of a presentation: to put it in a rudimentary form,

(a) the witnesses present evidence

(b) which is in itself an accusation;

(c) they are examined by the decisive powers,

(d) who then reach their decision.

(e) After further safeguards, the decree is handed down, and

(f) in a capital case, where the decision is for death, the defendent is executed. It is in the area after

(e) according to the Pharisaic position, and after

(f) according to the Sadducean position, that the problem of false witness may arise, q.v.i.

32. But not by oath. Their word is accepted, and oath is required only if they do not testify: an oath to the effect that they have not seen the incident, i.e., that they are in fact not witnesses at all.

33. Directly, with their own eyes; and they must see each other as well. Cf. the admonition of the witnesses in Makkoth, supra.

34. Sanhedrin 80a. An involved process which may account for the dearth of capital cases recorded in the Rabbinic period:

(a) The criminal is warned in the presence of the witnesses, cf Sanhedrin 80a, 40a;

(b) He acknowledges the warning in such a way as to indicate that he understands it, cf. Sanhedrin 8B;

(c) The legal consequences of the crime are explained to him, Hullin 81 B;

(d) He must acknowledge the information in (c) in such a way as to indicate that he understands it;

(e) The would-be criminal commits the crime in unobstructed eye view of the (same) witnesses; in this case, circumstantial evidence is rejected. Circumstantial evidence is, for example, the evidence presented by witnesses who say they saw A running from B and accusing B of intent to kill, and saw A run into a cave which was a cul-de-sac, and saw B dash after him with brandished blade. After hearing shouts and screams, B emerged holding the bloody dagger, and A was found within, stabbed to death.

Since there was no witness to the actual insertion of the knife, this is a circumstantial case. This does not mean that the murderer will go free, but it means for all practical purposes that it would be unrealistic to think in terms of the death penalty. (From Baehr, op. cit., p.49, note 36.)

35. Sanhedrin 40a. Cf. Mishna Makkoth 6b

36. Makkoth 4b; Makkoth 13b; Sanhedrin 72a. It is perhaps presumed that the thief, surprized, would be ready to kill. Possibly the thinking is that since he cannot be seen clearly, he is presumed armed. On another level, the thief (גנב) is distinguished from the robber (גזלן) in that the latter, in taking by violence, respects neither God nor man, since he flouts the laws of the One and challenges the power of the other; whereas the former, in taking by stealth or craft, shows that he fears man but disdains God. (Cf. Bialik, ביאליק וראבניצקי, ספר האגדה, הוצאת "דביר", תל-אביב, 1956, דף 509 ב.

Here and elsewhere, there is a certain Rabbinic respect for the outright or forthright transgressor, e.g., between those who eat proscribed foods להכעיס, as a matter of volition, rather than לאנוס, because they they are incapable of controlling their appetites.

37. Partly based on Baehr, Oskar, Gesetz ueber Falsche Zeugen Nach Bibel und Talmud, Itzkowski, Berlin, 1882, p. 1 ff.

38. Ginsberg, Trinitarian, London, 1894, 1808 p. is an excellent critical edition of the Tanakh which compares 34 early editions and versions, is beautifully set and printed, and is available gratis upon application to the "Society for Distributing the Holy Scriptures to the Jews, Inc.," 237 Shaftesbury Avenue, London W.C.2.

39. All interpretations are original unless other-wise noted. This is one of many possible interpretations to which the Hebrew lends itself.

40. Cf. Brown, Driver, Briggs, p. 39a.

41. 22:12.

42. Brown, Driver, Briggs, Loc. Cit. Compare in this regard A. E. Cowley revision of E. Kautzsch, ed., Gesenius' Hebrew Grammar, Oxford, London, 1956 printing of 1910 edition, section 152, pp. 478 ff.

43. Genesis 32:29.

44. Deuteronomy 5:17b-beta.

45. תענה would be read in the Rabbinic period, of course, as "never shall you accuse your fellow falsely," and probably was so read even here.

46. The significance of which is dealt with in Gesenius Loc. Cit. in connection with the negative adverb. The special treatment of the various significances of the maqqeph is detailed in section 16, beginning on page 63 of the Gesenius.

47. Third person masculine singular imperfect יפ.

48. Cf. Brown, Driver, Briggs, 877b - 879a.

49. Vide infra.

50. Ibid.

51. Ibid.

52. 16:8b

53. Following שנה in Brown, Driver, Briggs, p. 471b (top).

54. Job 19:25b-beta.

55. Reading with Brown, Driver, Briggs, p. 877b (bottom).

56. The ...ב is the opposite of the..יע. The one is an accusation or denunciation. As shown above, this is inseparable from a giving of testimony. This is a ..ב, and it is answered with an...יע, a vindication, a

defense. Whether we have here a real case of form structure or not we cannot say. The evidence is statistically insignificant except for functions of pilot investigations.

57. D document.

58. F. Delitzsch, Assyrisches Handworterbuch section 32, in Brown, Driver, Briggs, p. 728b ff., Cf. prob. As. Shaph ush - id, he solemnly affirmed.

59. Brown, Driver, Briggs, p. 729b.

60. As in Genesis 31:44.

61. As in Exodus 22:12.

62. As in Deuteronomy 31:26.

63. As in Numbers 35:30.

64. As in the Song of Moses, Deuteronomy 31:19.

65. Job 16:8.

66. The political designation. Until the turn of the millenium, Jew was as Josephus' usages and those of others tell us, the designation of the ethnos. Israel was the term used to describe a member of the religious community.

67. A member of a different ethnos. I avoid the term ethnos

because this has religious overtones. This whole question becomes important because in some cases the testimony of non-Jews was valid later.

68. "Of course, these benefits applied only to members of the ethnic group. The Jews did not think in terms of the larger picture of mankind."

69. A greater concern or even one's ultimate concern.

70. Beyond the borders of.

71. Incidently, this is the official N.S.D.A.P. view of what it was doing.

72. 1- אי, 2- דילמא, 3- אלא, 4- דהא.

73. Delitzsch devotes to כי, sections 157-9, 163-4, 107, and 166; to כל he gives sections 117, 127, 146, 116, and 152.

74. Cmp. Syr. Shaph. שכלל, to complete or finish.

75. Brown, Driver, Briggs, p. 481a ff.

76. This is a peculiarity of the English idiom. In Genesis 3:1, the serpent is cleverer מכל חיה השדה, than any beast of the field. The Hebrew idiom deals with the class, the English idiom deals with a collection of individuals. What, therefore, is logically "all" in

Hebrew must be rendered "any" in English.

77. From נוע, meaning to err, stray from the right way, and not from the entirely different word נוע, meaning to bend or twist.

78. In the technical sense, i.e., to delimit, to define.

79. On 1 Samuel 20:30.

80. Brown, Driver, Briggs, ad loc.

81. But there seems no conclusive evidence as yet that at this period an analytic distinction was made between cultic transgressions and what we call civil transgressions. The administration of the civil authority was not totally separated from the cultic system.

82. Verse 43.

83. It is a questionable point in method that not all of the selections are from the same document. One might reasonably maintain that there was a certain growth of the concept to be expected. One might also observe that the redaction of the documents involved a certain levelling or integration of them, even though a skilled analyst can still differentiate sources. Even in this differentiation, however, there is as yet no unanimity.

84. Recognizing that these usages also do not come from the same time, we may point out that they indicated a certain conformity or continuum, if not unity, of understanding.

85. Exodus 34:7.

86. Brown, Driver, Briggs, p. 308a.

87. Exodus 32:31.

88. Cf. supra in the notes.

89. And all examples are from E and J E material.

90. For lack of evidence to the contrary.

91. The setting of our original Deuteronomy 19:16 passage.

92. Exodus 34:27 ויאמר יהוה אל-משה כתב-לך את-הדברים האלה
כי על-פי הדברים האלה כרתי אתך ברית ואת-ישראל.

for according to these words have I made a covenant with you and Israel.

93. But cf. Deuteronomy 32:1, אמרי-פי ; the structure is in any case post-Biblical as regards learning orally, or memorizing, or transmitting an Oral Doctrine.

94. Brown, Driver, Briggs, p. 753b.

95. Cmp. As. dabaru; cmp. דֶּבֶר in the sense of pestilence; cmp. the pest-god Dibbara.

96. As דביר, the hindmost part of the temple;

97. Cf. מדבר, pasture or wilderness.

98. Cf. 18:22 and 22:8.

99. Cf. 2 Chronicles 19:6.

100. Two or three is a formula, so seen by the Rabbis, for "more than one". It would therefore not exclude four, but would exclude one, even without the a part of verse 15.

101. See note on כי above with the fourfold Rabbinic definition.

102. Or can these be subsumed in the following definition?

103. The precise term does not exist in English.

104. As in Proverbs 8:36.

105. Verse 12.

106. As e.g., Deuteronomy 13:6:

והגביא ההוא או חלם החלום ההוא יומת כי דבר-סרה על-יהוה
אלהיכם המוציא אתכם מארץ מצרים והפדך מבית עבדים להדיחך
מן-הדרך אשר צוך יהוה אלהיך ללכת בה ובערת הרע מקרבך.

107. Compare the standard parliamentary picture in its earlier forms.

108. Numbers 23:21.

109. Rabbi Solomon B. Isaac of Troyes, the commentator par excellence; ad loc. in מקראות גדולות, Pardes Publishing Howse, New York, 1951, volume 5.

110. After such examples as 1 Chronicles 28:9.

ואתה שלמה-בני דע את-אלהי אביך ועדהו בלב שלם ובנפש חפצה כי כל-לבבות דורש יהוה וכל-יצר מחשבות מבין אם-תדרשנו ימצא לך ואם-תעזבנו יזניחך לעד.

Or again, Deuteronomy 13:15; further, 17:4 and 17:9.

111. The hermeneutic system is partly based on the idea that no element of the received text is superfluous. The apparently extra word is here to teach us something, in this case possibly that there must be two false witnesses before the charge of false witness can be pressed.

112. Rahlfs, Alfred, ed., Septuaginta, Priv. Wuerttemb. Bibelan., Stuttgart, n.d., 6th edition, vol. 1, p. 332

113. Underscores for emphasis in intended reading.

114. In Zechariah 8:15, in opposition to verse 14.

115. ערות אשה ובתה לא תגלה את-בת-בנה ואת-בת-בתה לא תקח לגלות ערותה שארה הנה זמה הוא.

116. אל-תחלל את-בתך להזנותה ולא-תזנה הארץ ומלאה הארץ זמה.

117. כי-הוא זמה והיא עון פלילים.

118. Cmp. Jeremiah 11:15 et passim.

119. As in Judges 15:14, or again in the incident of the burning bush (Exodus 3:2):

וירא מלאך יהוה אליו בלבת-אש מתוך הסנה וירא והנה הסנה בער באש והסנה איננו אכל.

120. Deuteronomy 13:6, 17:7, 17:12, 9:13, 9:19, and 21:21; Confer also 21:9, 22:21, 22:22, 22:24, 24:7, and see also other examples (non-D) in Brown, Driver, Briggs p. 129a.

121. It occurs 96 times in the Hebrew Bible with this meaning.

122. A point of great significance to which we shall return.

123. Exodus 21:22 - 25. Confer Leviticus 24:19, a shorter talio.

124. Later this becomes applicable to all personal damage, whether to a pregnant woman or to anyone else, in Leviticus.

125. But see the brilliance of the Rabbinic mind: the eye you are entitled to must be precisely the same in every detail as the one lost, e.g., so-and-so large,

with precisely such-and-such color iris, set just so deep, with such a degree of vision, involving the loss of so much blood and no more. So much have the Rabbis ringed this law with restrictions that it no longer existed on the practical level. The plaintiff was thus more than willing to settle for damages in the modern sense. In this way Portia beomes a Talmudist.

126. Because the welfare of the state was in the balance.

127. One of the legitimate readings of תחת is "instead of", and the Rabbis, pouncing on this, read as follows in order to justify the law of pecuniary damages:

(a) instead of the probable reading before us, "an eye" of the one who does the damage shall be given to the one injured "in place of" or so as to make up for "an eye" which was lost to the party originally injured.

(b) the Rabbis read, "an eye", that is to say, the economic value of an eye, shall be paid by the inflictor of the damage to the one originally injured "instead of (the) an eye" which the damager owes the injured one, i.e., instead of the alternative in (a) above.

In the (a) case, the first "eye" belongs to the damager, the second "eye" to the injured party, and

both eyes are physical eyes; in the (b) case, both eyes belong to the damager, but the first "eye" is a technical term for דמי עין, the damages or value of an eye. Cf. Baba Kama p. 84a.

128. We may mention the following classification, preferred by some scholars:

(1) The K Decalogue: Exodus 34:14 (Judah, 899 BCE.)

a. Cf. 1 Kings 15:11-15;

b. Cf. 2 Chronicles 15;

(2) The C Decalogue: (Israel, 841 B.C.E.)

a. Exodus 20:23-26;

b. Exodus 23:10-19;

(3) The D Decalogue of Hezekiah

a. Exodus 20:1-17;

b. Deuteronomy 5:6-18;

(4) The H Decalogue: Leviticus 19:2b-18

(5) A curse-form of decalogic significance (V Century B.C.E.)

a. Deuteronomy 27:15-20

b. Deuteronomy 27:22-25

In the above table, (1) and (2) are primarily ritual decalogues; (3) by way of contrast is social; (4) is a simplified social decalogue. The Roman Catholic numeration of (3) differs from the earlier tradition

in combining the I and II Commandments, and in dividing the X Commandment into two. One reason may be a misunderstanding reflected in the use of the word "Commandments." The Hebrew words עשרת הדברות or הדברים do not imply "command" but rather "statement". It is customary in ancient legal indices of this kind for the first statement to present the authority upon which the other statements rest. Consequently the usage "Commandment" in this regard is very late, and not entirely accurate.

129. Cf. Jewish Encyclopedia, Funk and Wagnalls, NYC, art. "Hammurabi". It is not the most ancient. Its place is further discussed in Orlinsky, Harry M., Ancient Israel, Cornell, Ithica, 1954, pp. 14-18.

130. Pritchard, James B., Ancient Near Eastern Texts Relating to the Old Testament, Princeton University Press, Princeton, 1950, "Index to Scriptural Passages".

131. ibid. Numbers 166b and 166d.

132. ibid. Number 166a:4. In regard to talio, or the law of equivalent reaction, based on the עין תחת עין principle (Exodus 21:24 P), cf. Solomon Zeitlin's masterful Who Crucified Jesus, Harper, New York, 1942, pp. 115 ff., beginning with the discussion on Matthew 5:38.

133. Further information on other codes, early and late, may be found in A. Walther, Zum Altbabylon. Gerichtswesen, Preis, Leipzig, 1915. For the purpose of establishing the absence of false witness, either with or without talio, in the ancient or pre-Hammurabi codices, cf. in addition to the above Steele, Francis Rue, on the Code of Lipit-Ishtar, University of Pennsylvania, Philadelphis, 1948; in this connection, a good general source is Samuel Noah Kramer's From the Tablets of Sumer, Falcon's Wing Press, Indian Hills Colo., 1956; certain relations of economic and legal data of the Old Babylonian Period to Hammurabi' reign are discussed in William H. Hallo's revue of Edward's Die Zweite Zwischenzeit Babyloniens in Bibliotheca Orientalis, 9-11 1959, pp. 234-8. For the Eshnunna material, see Goetze, A., The Laws of Eshnunna, American Schools of Oriental Research, New Haven, 1956, p. 197.

Other codes and fragments of codes are dealt with by Kramer and Falkenstein in Orientalia vol. 21-2 (the Unamu material), and by Lambert in the Revue d'Assyriologie (1955), with reference to the Uru Kagina.

For Old Assyrian Studies, reference may be made to Driver, G.R., and Miles, J.C., The Assyrian Laws, Clarendon, Oxford, 1935 (cf. The (Accad) Babylonian

Laws, 1952-5). The Early Old Babylonian judicial method is analyzed in Analecta Orientalia (Vol. 12); cf. also the "Homicide Trial in Nippur" in Oriens Anticus by Thorkild Jacobsen; and the recent study by Falkenstein, Die Neusumerischen Gerichtsurkunden, Beck, Munich, 1956-7. Further material on old Babylonian documents is found in Horst Klengel's writings in Orientalia (59-60) on the "Shebutu-Witnesses in Old Babybnian Texts."

134. Because all of the earlier sources above are negative on this subject.

135. Gordon, Cyrus H., Hammurabi's Code, Rienhart, New York, 1957, p.4.

136. But cf. Section 6 supra, where theft of property from God or Palace was capital.

136a Compare Sections 229 and 230 with Deuteronomy 25:16 and Exodus 21:31. It is possible that entirely too much has been made of the fact that there obviously was contact between the Hebraic codes and the Hammurabi Code; perspective demands that we note that the reaction to the contact was that often the Hebraic code rejected the Hammurabi code point by point. The case cited is that of a builder who builds a house which inflicts a mortal wound, for which he is subject

to death; if the wound be on the son of the owner, however, then not the builder but his son is to be killed. The Hebrew law uses the quizzical phrase, "whether it be a son or whether it be a daughter," thus shall be done to him. One can only make sense of the Hebrew phrase in terms of the Hammurabi code, i.e., that it specifically rejects the Hammurabian principle of relation.

137. This idea in its full development is not new in modern scholarship; it is sometimes associated with the "Scandinavian school."

138. Just prior to the opening of the Civil Era. Cf. the clear presentation by Solomon Zeitlin, "An Historical Study of the Canonization of the Hebrew Scriptures", in Proceedings, American Academy for Jewish Research, 1931-2, p. 38.

139. About four centuries. Cf. Danby, Herbert, The Mishnah, Oxford, London, 1933 (1950 edition), xxxii 844 p., "Introduction".

140. ibid.

141. As in the opening argument of Berakoth on the יום.

142. In the same place.

143. For example Berakoth 2:1, or 1:1, with the understanding that it is the Gemara which supplies the Biblical grounds, and not the Mishna.

144. Literally, "Women".

145. "Deviant", from סרר, "to deviate, turn from the right path, be faithless (of a wife)."

146. Literally, "damages."

147. Literally "stripes, blows"; i.e., crimes subject to corporal punishment.

148. Cf. Danby, Op. Cit., ad loc.

149. Had he died, say.

150. For example, if a woman has a כתובה of $10,000, it might be worth investing $2,000 against the כתובה, which would become the investor's in its totality in the event that the husband died or divorced the woman (and thus had to pay). This estimated $2,000 value is the fine levied against the false witnesses.

151. Because this is the actual value of which they would have deprived the defendant had they succeeded in their plot. The aim in all of this is exact retribution instead of punitive retribution as in case of theft. Thus the principle of talio is still being applied.

152. I.e., class.

153. We will have to consider certain different subclasses of false witnesses:

a) הזמה - the case of those who are here called false witnesses, עדים זוממים, who could not have been in position to observe what to which they testify. Their testimony is premeditated and

unquestionable perjury, with no aim but to do damage to the principal.

b) הכחשה - the case of contradicted witnesses. Their evidence is merely mistaken. They have misidentified someone, or misunderstood what they saw. This is not perjury necessarily, but may be simply an honest error in perception or transmission of evidence.

154. הזמה, as opposed to הכחשה, is to be defined here.

155. See the Susanna story below.

156. In Biblical usage it can mean to deceive with intention.

157. Two witnesses establish a case, as well as a hundred. Cf. Danby, Loc. Cit.

158. Under Pharisaic rule, we could have one gala execution for all.

159. They are formally obliged to do so, in order to demonstrate that they accept the validity of the Tanakh itself, that it is not the verse they question, but only the erroneous interpretation of the Sadducees. They therefore must fit the verse into their own interpretation, advancing the "correct" interpretation.

159b It will be recalled that false witness is one of the cases where the ritual of prior warning does not apply. We are trying to say that this is a serious death threat, and not a legal fiction. It becomes that only later, via circumscription of the time when הזמה may be brought forward (period e' in the temporal breakdown of the trial into periods).

160. E.g., a kinsman of the accused. Cf. Sanhedrin 3:3-4.

161. This does not apply in other than capital cases, according to Rabbi Yosi (Jose); Rabi (Rabbi) maintains that it does, provided that all witnesses joined in warning the transgressor.

162. Epstein, ed., The Babylonian Talmud, Soncino, London, 1952, Index Volume, p. 545a.

163. ibid., p. 462a.

164. In Epstein's listing, (1) Baba Qama 122; (2) Baba Qama 433; (3) Baba Qama 506; and (4) Kerithoth 179. References are to pages in Epstein, op. Cit.

165. Goldschmidt, Lazarus, אזנים לתורה, Munksgaard, Copenhagen 1959, p. 403b and c. See also Hyman, Op. Cit., p. 317a in vol. 1.

166. Redaction of Talmud by Ashi and Ravin, phps. end of V Century C.E. But we must not confuse redaction with

composition. Strata of the Talmud may antedate the millenium.

167. Dealing with corporal crimes.

168. Cf. supra, the analysis of this problem in the Mishna.

169. Cf. supra, the analysis of this problem in the Mishna.

170. Cf. supra, the analysis of this problem in the Mishna.

171. The Mishna is our term for the total anthology, of which each member is called a mishna.

172. Danby, Op. Cit., p. 400 f., the fourth and fifth treatises of the IV Division, Nezikin.

173. But the Tosephta, according to Danby, Loc. Cit., states that he is subject to burning, the severer of the two. Cf. also mishna 9:4 in Sanhedrin.

174. The index numbers here correspond to those in the Mishna analysis. כיצד העדים נעשים זוממין

175. Of 40 lashes, cf. supra.

176. Folio 2 recto: יש עדים זוממים אחרים שאין עושין בהן דין הזמה כל עיקר אלא מלקות ארבעים

177. Deuteronomy 19:19, reading "to him" so as to exclude his children, who would be affected were we to de-

clare him (assuming him to be also a כהן) desecrated. But isn't it true that his charge would have affected the innocent children of the original כהן whom he declared desecrated? Does it not therefore follow that it is only proper talio to declare his children desecrated?

It does follow. And since it does, it becomes clear that it is really possible to apply a literal talio in this case; but it is plain that this would lay an unjustifiable burden upon the false witness' innocent children. For this reason to avoid this travesty, we must reject the literal talio in favor of the 40 lashes.

178. One of the principal hermeneutics of deduction, by means of which legislation was expanded. It is described as the argument a fortiori, or minus ad maius:

1. A relatively serious case is attached to a fixed outcome;
2. A less serious case is presumed to imply a less serious outcome, or, at least, not a more serious one, or v.v.

The presumptions implicit in the argument are:

1. The graduation of the cases;
2. The graduation of the consequences;
3. The inclusion of both cases in the same category.

The argument may be attacked on any of the three grounds, however, it is generally used only in sanction of an existing precedent. Cf. Lautarbach's art. Talmud Hermeneutics" in Jewish Encyclopedia, discussion on on and bibliography thereon, 12:30b ff.

179. Of the case of a desecrator.

180. Cf. Zeitlin, Solomon, "The Semikhah Controversy", in Jewish Quarterly Revue.

181. Quoted (2a) in the name of Ravina:

מתקיף לה רבינא א"כ נטלת תורת עדיס זוממין ומה הסוקל אינו נסקל הבא לסקול ולא סקל אינו דין שלא יסקל אלא מתורתא כדשנינן מעיקרא.

182. Because there are more checks attached to its usage.

183. Ravina I, six generation Babylonian Amora. Cf. Strack, Loc. Cit.

184. As has become apparent, reference to cases in Jewish law if generally in terms of legal consequences. This refers to classification of crimes as well, e.g. - "דיני נפשות", etc.

185. R. Simeon b. Lakish, cf. supra i., a'. A second generation Amora, cf. Strack, loc. cit.

186. But in Schwab, Moise, Le Talmud de Jerusalem, ad. loc., vol. 11, p. 77, the argument is given in the name of

Bar-Padieh explique aussi pourquoi selon la Mischna, le temoin convaincu de faux dans son accusation envers quelqu'un d'etre passible d'exil ne subira pas cette peine: il fuera, est-il dit (Deuteronomy 19:5), non le temoin convaincu de faux a son egard.

187. Bar Nappeha? If so, second generation Amora. Cf. Strack, loc. cit.

188. The analysis of the קל וחמר above may be applied here, cf. Footnote 178

189. Found, incidently, by an extension of the קל וחמר to the point where it flies in the face of the law. This is what is meant by the text being safer: a קל וחמר, once admitted as a legitimate form of legislation, can be carried to unlimited lengths.

190. According to Epstein, ed., Loc. Cit.

191. The second of the Four מדות of Exegesis:

1. פשט: The literal meaning of the text;
2. רמז: The allegorical allusion behind the text;
3. דרש: The exegetic significance of the text; and
4. סוד: The secret, often mystical overtones attached to the text.

These four are a progression, often indicated mnemonically by their initials, so: PaRaDiSe: פרד"ס Cf. Strack, Op. Cit., p. 114. Cf. also W. Bacher Art. "Bible Exegesis" in Jewish Encyclopedia, 3:171a.

192. Third generation Babylonian Amora; Strack, Op. Cit., pp. 357 ff.

193. Which is why this is only a רמז.

194. Exodus 20:13.

195. The Deuteronomic and Exodus formulations of the Commandment.

196. Makkoth 2b.

197. Makkoth 2b.

198. There is a certain element of atonement for the homicide involved in the banishment, which is clearly inapplicable to the זדונות. Cf. Epstein, Loc. Cit.

199. Makkoth 2b.

200. Could it not just as easily have been argued, that since they would have done damage to the defendant by depriving him of a certain sum, whether for כופר or not, they must pay the sum but it is not considered a כופר?

201. Strack, loc. cit.

202. ibid.

203. ibid.

204. ibid.

205. ibid.

206. Exodus 22:2

207. Strack, Loc. Cit.

208. A technical term indicating stratum and logical position as translated. Cf. ע"ז מלמד, אשנב התלמוד, קרות ספר Jerusalem, 1957, p. 9 ff.

209. ibid.

210. Since it takes two to make a case at all. The only possible use of this dictum, which the Talmud endeavers so carefully to place in its proper historical-legal context, is the case where one of two witnesses stated that both of them had been convicted and fined in another place. Since such a witness could not commit his confederate, Rav's dictum comes to teach us that he can commit himself insofar as he is guilty.

211. The plural is used to indicate that it requires two to establish a case. This too (v.i.) is a Rabbinic imposition upon the Biblical text, which speaks of a case of one witness only.

212. Cf. the discussion of this question supra in connection with the structure of precedure.

213. Cf. in this regard Weiss, Abraham, סדר הדיון, Yeshiva University, New York, 1957, p. 107.

214. That is, a case which is settled on the concrete level and which embodies in that settlement the abstract principle of its legal structure.

215. Even before Einstein, although some of the same problems are dealt with:

ואמר רבא באו שנים ואמרו בסורא בצפרא בחד בשבתא הרג פלוני את הנפש ובאו שנים ואמרו בפניא בחד בשבתא עמנו הייתם בנהרדע חזינן מצפרא לפניא מצי אזיל מסורא לנהרדע לא הוו זוממין ואי לאו הוו זוממין פשיטא מהו דתימא ליתוש לגמלא פרחא קמ"ל

216. This example is also proferred by Raba, a fourth generation Babylonian Amora (Strack, loc. cit.), on folio 5a:

אמר רבא באו ואמרו במזרח בירה חרג פלוני את הנפש ובאו ב ואמרו והלא במערב בירה עמנו הייתם חזינן אי כדקיימי במערב בירה מיחזא חזו למזרח בירה אין אלו זוממין לאו הרי אלו זוממין פשיטא מהו דתימא ליתוש לנהורא בריא קמ"ל

217. The case where, in spite of the fact that the principal defendant actually committed a (or the) murder, witnesses brought charges against him and submitted evidence which they could not have possessed.

218. The same principle applies in cases of סנה cf. Makkoth 5a.

219. Supra not 52, "R. Judah holds that this is apparently a conspiracy (Greek: stasiastes, "a faction"), and only the first set is to be executed."

220. Third generation Amora (Strack, loc. cit.).

221. And the presumption is that nothing is superfluous here, though not to the extent that this principle is employed in the Torah.

222. Fourth generation Babylonian Amora (Strack, loc. cit.)

223. As explained above, cf. note 221.

224. Understanding דין here as פסק-דין, sentence. Cf. Jastrow, Marcus, A Dictionary of the Targumim, the Talmud Babli and Yerushalmi, and the Midrashic Literature, Pardes, New York, 1950, p. 1199b.

224b Cf. art. Guttmann, Michael, אסמכתא, Breslau, 1924, which deals with the technique of finding a post hoc Biblical basis for an already existing practice.

225. Makkoth 5a.

226. The witnesses, by authority of the court.

227. Also Horowitz, Jakob, Zur rabbinischen Lehre von den

falschen Zeugen, Frankfurt/M, Kauffmann, 1914, p. 24ff. in his discussion of Friedmann and Geiger.

228. Op. Cit. p. 25 (Makkoth).

229. Op. Cit., ad. loc.

230. 3:52a.

231. This is not an unusual position for Zeitlin.

232. Maimonides, יד החזקה, עדות, 20:2.

233. 12:15a ff.

234. See Rashi on Hullin 11b ד"ה והתניא.

235. Which is substantially Zeitlin's position.

236. Zeitlin would add here, "misunderstanding the position that according to Pharisaic jurisprudence the witness is put to death evenafter the defendent,..." Makkoth 5b.

237. History of the Jews, Jewish Publication Society, Philadelphia, 1893, vol. 2, p. 53.

238. "It was taught in a well-known Baraitha that R. Judah b. Tabbai said, 'May I not live to see the consolation of Israel (cf. Luke 2:25) if I didn't kill an עד זומם in order to wrest from the hearts of the

Sadducees that which they used to say, viz., that עדים זוממים may not be killed (sentenced) until and unless the defendent has been killed.'"

239. "R, Simeon b. Shetah said to him, 'May I not live to see the consolation of Israel, if you have not indeed shed innocent blood, because the Sages said the עדים זוממים are not sentenced to death - i.e., liable to the death penalty - unless both of them can be proved such, nor are they subject to flogging unless both are proved such.'" (Because unless there are two, their testimony is not legally acceptable testimony, ergo they are not "witnesses."

240. Jewish Publication Society, Philadelphia, 1949, vol. 3, p. 170.

241. Whereas Baba Qama 78b ff. begins the exposition of material in the areas of theft and civil law which we have already met in capital law.

242. Zeitlin, Solomon, "An Historical Study of the Canonization of the Hebrew Scriptures," Proceedings, American Academy for Jewish Research, 1931-2, pp. 30-31.

243. A formal court, or a popular court?

244. Daube, David, art. "Texts and Interpretation in Roman and Jewish Law", in the Jewish Journal of Sociology,

3:1, p. 13; how does Daniel come to know the layout of the garden?

245. After, all no one has explained what Susanna was doing alone in the garden when she was interrupted by the elders in the first place.

246. Zeitlin, Canonization, p. 30.

247. Zeitlin in תורה, loc. cit.

248. We call again to the reader's attention the singular reading in the original Biblical law, כי יקום עד, et passim.

249. Rahlfs, Op. Cit,, vol. 2, p. 864.

250. Asks Tchernowitz, Chaim, תולדות ההלכה, vol. 2, p. 330 ff.

251. ibid.

252. Cf. Guttmann article, footnote 224 supra.

253. Tchernowitz, p. 331, referring to והנה עד שקר העד.

254. Finkelstein, Louis, "The Pharisees: Their Origin and Their Philosophy", in the Harvard Theological Revue 22:3, July 1929, p. 256.

255. Part VI/, section IIIE., overleaf.

256. Limitations in depth, as opposed to what follows.

257. Limitations in breadth, or scope.

258. Reference is to questions raised in Part VI/, III E.

259. Describing the Pharisaic concept as an "innovation"; cf. supra.

260. Who, according to the Mekilta, was the one who executed the false witness.

261. According to the complete account of the story in Jerusalem Talmud Sanhedrin 6:5 (23a in the Zhitomir edition); it is true that this story immediately succeeds the indentification of Tabbai as the judge who condemned the witness, but it seems likely to me that the latter was inserted here because of the mnemonic influence of Shetah's name in the former account, because the false witness story, in Hebrew, represents a certain stratum of composition, and the son story, in Aramaic, may represent a differentiable stratum. It is still possible that the Mekilta identifications are the more accurate, and at the same time that the story of the man who sacrifices his son to a principle is correctly tacked to Shetah. It would certainly explain why Shetah defended the

false witness (although it would in turn raise the question of why he waited until after the execution to do so).

262. Mishna Sanhedrin 6:4 informs us that 80 members of a witch-cult were sentenced to death by Simeon b. Shetah in Ashkelon. Their relatives, hate-filled and seeking revenge, brought false witness against Simeon b. Shetah's son on a capital charge. Lauterbach in The Jewish Encyclopedia (11:358b) takes up the story:

> As a result of this charge, he was sentenced to death. On the way to the place of execution, the son protested his innocence in so pathetic a manner that even the witnesses were moved to admit the falsity of their testimony. When the judges were about to liberate the condemned man, he called their attention to the fact that, according to the Law (a very much earlier halakhah, in sharp contrast to procedure we have considered), a witness must not be believed when he withdraws a former statement, and he said to his father, 'If you desire that the welfare of Israel shall be strengthened by thy hand, then consider me as a beam (i.e., a bridge) on which you may tread without regret.' The execution then proceeded.

We cannot accept -- nor could the developing Halakha - the moral implications of this sort of thing; but we cannot help wondering: how magnificent, how dedicated, how powerful a man must Simeon have been to have raised up such a son!

263. Aboth, 1:9. Paraphrases mine unless otherwise noted.

264. And therefore the assignment of names in our Talmud text may be preferable to the Mekilta reading.

265. Except that Finkelstein, following the Mekilta, holds Simeon b. Shetah to be the judge.

266. Finkelstein, Louis, "The Pharisees: Their Origin and Their Philosophy," pp. 256-257. And it will not do to say as he does that the witness was really guilty all the time, for then we have Shetah (Tabbai to Finkelstein) to contend with: was he suddenly representing the Sadducean approach (and if so, then why is he included in the argument at all) in calling the execution of the witness "like shedding innocent blood"?

267. Including Tchernowitz, loc. cit.

268. Interview with Professor David Daube, Monday 19 February 1962. Cf. also his art. "Texts and Interpretation in Roman and Jewish Law", pp. 10-11 ff. Cf. discussion on the same in Critical Bibliographies, section III infra.

269. That is, to free false witnesses discovered after the accused had been executed.

270. By the act of executing the accused. Sanhedrin procedure of execution (v.s.) makes it plain that the case is not closed until that moment.

271. Even for new evidence. Otherwise, the decisions of every court would be impermanent. Cf. Megillah 2b, Gitin 36b; for Mosaic authority cf. Rosh Hashanah 25a.

272. Cf. supra. note 268.

273. In that they may be considered as accused for an act which they performed in their capacity of agents of the state, i.e., at the direction of the state. Since this is not possible, the charge of physical murder cannot be brought against them, and they are once more subject to prosecution only for misleading the state. But the state has already established its decision, which is beyond recall (since the accused is beyond recall). Therefore the case cannot be reopened.

274. We are inclined to suspect that two witnesses being a balance for a hundred is a Talmudic hyperbole; I confess that I cannot picture a public crime, with a hundred witnesses, being discharged because the accused can find two witnesses who will contradict the testimony of the hundred. It seems more likely that what is meant is that (a) evidence is not dependent

for its value on the rank or the status of the witness (barring, of course, legal irresponsibles, e.g., minors); and (b) validity or weight of evidence does not depend upon numbers (ile., the court does not automatically accept whichever opinion can marshall a plurality of partisans; truth is not determined by numbers, even though a minimum number is necessary for consideration).

275. Part I/, A General Introduction.

276. In our case, we may add, "so as to serve some further or ongoing goal, seen in the perspective given us by the past to lie in the future." For the Rabbis, this goal at least at certain stages was expressed in the concept of the Messianic Era (ימות המשיח). The terms "the past" and "the future" refer, therefore, to parts of a program, not merely to areas of chronology.

277. Cf. note 271 supra; N.B.: autonomous authority of courts after Mosaic legislation, Rosh Hashanah 25a.

278. That is, the will as it met new situations arising on the political, cultural, religious, and socioeconomic horizons.

279. Which gives rise to the tension we have seen so many times: (a) the need on the one hand to protect this,

the very foundation of society, from abuse; and (b) the need - more than a mere desideratum - to express a certain humanity in one's dealings with a transgressor, here, with the false witness. This is a basic problem of Law. And its larger aspect, the tension of justice (which of course must include mercy, or else it becomes a travesty), is a basic problem of society as a whole.

280. Sanhedrin 78b speaks of holding a defendent pending the consequences of his attack on another person.

281. Not necessarily murder; rape may be considered capital violence, as in some cases may idolatry. See art. "Capital Punishment" in Jewish Encyclopedia by S. Mendelsohn, 3:554 ff.

282. "Warding off" refers to a case where the threatened act may be totally prevented; "reacting" refers to action taken after the inception of the provocation.

283. The thief (cf. supra) forfeits his right to life. According to Sanhedrin 72a, the בעל הבית or any witness may kill him.

284. Cf. Sanhedrin 72a.

285. Sanhedrin 74b. Justifiable homicide depends for its status on the supposition that the criminal could not be stopped by physical violence by those present.

286. Sanhedrin 36b.

287. Twenty-three primary judges at least; the distinction is clear between the predicates of a legal system which calls for a jury of laymen, and one which calls for a jury of judges. In the former case, the sheer number of votes cast in a given direction determines

or reflects the opinion of the state. In the latter case, the legal reasons are likely to be more significant, q.v.i.

288. דרישׁה and חקירה and בדיקה. Cf. the discussion supra.

289. Sanhedrin 32b, סופא. What could the point be here? Does Rabi mean us to understand that the judges hear arguments for release before they know what he is being accused of? Hardly. The confusion is again one of imposing modern courtroom practice on the subject before us. Evidently there has already been a preliminary investigation. Further, these are the same judges who examined the witnesses. So that what we have here is not really a trial, but a summary argumentation of proper interpretation of evidence, and it presumes that all the evidence is in. And the proof is, that there is no evidence that from this point the judges hear fresh testimony in the normal course of things. They merely deliberate openly among themselves. Why then do Epstein Ed., Talmud (I Sanhedrin p. 205 f.) and others persist in giving the impression that this is the hearing?

290. Sanhedrin 40a.

291. Sanhedrin 32a. From the condemnation to defense, not v.v.

292. Sanhedrin 34a.

293. Sanhedrin 32b.

294. For this reason, no case that might eventuate in condemnation could be begun before those days upon which the court did not sit. Cf. in this regard the versions of the time of the inception of the trial of Jesus. Cf. Zeitlin, "Who Crucified Jesus," p. 71-2. Cf. Capa 4-6 (pp. 199-330) in Epstein, ed, Talmud, Sanhedrin I.

295. And if some say seventy, they may be forgiven. Both numbers, of course, are hyperbolic and homiletic. Seventy was simply "very many", like our common expression, "a million", prior to inflation. Cf. Mendelsohn, Loc. Cit.

296. The exact meaning of סמך in this context is speculative. The interpretation given here is based on context. Cf. Sifre ad loc: א"ר סמך אלא נדון.

297. There is no idea of state's attorneyship here. Most of the crimes recognized in ancient Israel fell into the category of private delict, matters which were not directly the concern of the state, but which were to be prosecuted by the individual wronged. In this way, as Zeitlin demonstrates clearly (Who Crucified Jesus, Loc. Cit.) (Cf. also Zeitlin, S., "Canonization

of the Hebrew Scriptures," in Proceedings of the American Academy for Jewish Research, 1931-2,) not only furtum (theft) but many other crimes were considered, alike by Roman and Jewish law, issues in private delict. Evidence that this may have applied to murder as well is seen in the blood vengeance, from which one could be protected in cases of accidental homicide by flight to a city of refuge (עיר מקלט). In those cases in which a murderer was to be remitted for punishment, he was to be remitted to the blood avenger, no to state execution. Hence, the position of the witness, in contrast to contemporary American criminal proceeding, partook of functions which we would assign to the state prosecution and execution agencies. In a very literal sense, one who brought a capital charge against someone was placing himself in a position to commit public murder, and the very charge itself was nothing less than - literally - attempted murder.

298. Understand, "who is represented by..."

299. Neighbor, fellow citizen. Cmp. "seignoir" in Hammurabi Code (Pritchard, Loc. Cit.)

300. Behind the murderer. Those who might have been tempted to do this themselves, or following a closer read-

ing of the text, those who have already done it and propose to continue false denunciation.

301. There is no evidence that this was ever, in fact, practiced. It would seem to me reasonable that it was, but an ancient line of argument classes it with those statements which are made to impress people with their moral force, i.e., as threqts which are not translated into practice.

302. "Trespass and transgression"; the precise form and significances of these terms change from the Biblical usage to the Talmudic one, until finally all that can be said is that their fusion indicates the broad area of legal transgression.

303. It need not be a paradox. It may be, in fact, merely a stylistic matter: the use of the singular with plural intent. This critical position is presented in Sota 2b, where it is stated, כל מקום שנאמר עד הרי כאן שנים, in any juridical context in which the term witness in the singular form is employed, it is properly to be understood as referring to two witnesses. Some commentators maintain (with Rashi, לשון עדות that the concept "witness" which is intended here is not the physical witness, but the testimony which is given by the person, as in "to bear witness", "to give witness" and the like.

304. הדמה here is used in its technical sense, as opposed to הכחשה. The latter is related to the class of what we would call erroneous evidence; the former is related to what we would call premeditated perjury. The distinctions however are great, and they should not be identified with these contemporary legal categories, q.v.i.

305. As Ibn Ezra, who considers it a term for revolt against God. Others see in it a specific reference to other acts of blasphemy also.

306. Cf. Makkoth 1a - 5b, on the basis of which one could hardly maintain that a specific reference to any form of blasphemy is meant here.

307. The Septuagint Version of the Old Testament, With an English Translation and with Critical Notes, Bagster, Harper, New York, n.d., p. 257.

308. We do not believe that any connection need be made with the later pronouncements about striking off of the hand, as in the case of a woman who, coming upon a tussle of her husband with another man, siezes the opponent in an unseemly manner.