The Second Jewish Law Fellowship Lecture

THE TEACHING OF JEWISH LAW IN BRITISH UNIVERSITIES

by

Bernard S. Jackson, LL.D., D.Phil., Barrister
Queen Victoria Professor of Law, University of Liverpool
Editor, *The Jewish Law Annual*

The Yarnton Trust

for

THE OXFORD CENTRE
FOR POSTGRADUATE HEBREW STUDIES

and

THE INSTITUTE OF ADVANCED LEGAL STUDIES

Published by
The Oxford Centre for Postgraduate Hebrew Studies
Yarnton Manor, Yarnton, Oxford, England

Typeset by Deborah Charles Publications
Printed in Great Britain

The Teaching of Jewish Law

in British Universities

(A lecture given at the Institute of Advanced Legal Studies on 26th June 1990, sponsored by the Oxford Centre for Postgraduate Hebrew Studies and the Institute of Advanced Legal Studies)

It is an honour and a privilege to deliver this lecture under the joint auspices of the Oxford Centre for Postgraduate Hebrew Studies and the Institute of Advanced Legal Studies, both of them headed by distinguished scholars with whom I have had the pleasure of working as a colleague in the past. This joint sponsorship is also of considerable symbolic importance. The interest of the Oxford Centre for Postgraduate Hebrew Studies in the advancement of study and research in Jewish Law is obvious, necessary, natural, and inevitable. That flows from the centrality of Jewish Law within Jewish culture: to conceive of Jewish Studies without the *Halakhah* is to conceive of western music without the symphony. However, the interest of the Institute of Advanced Legal Studies is not quite so obvious. One could, indeed, conceive of an Institute of Advanced Legal Studies which failed to take an interest in Jewish Law — even though, it must be said, such an Institute would find itself in increasingly isolated company, since the teaching of Jewish Law is to be found, nowadays, at Harvard, New York University, Boston University, Stanford, The Sorbonne (with its Centre de Droit Hebraïque), and Bologna. Nevertheless, Jewish Law can hardly claim the same centrality to legal studies as it can to Jewish studies, outside the State of Israel. True, one may find some relatively esoteric legal systems taught in British law schools, but in most cases the reasons are not too far to seek: Japanese Law, to serve the commercial world; Soviet Law (will it soon revert to Russian Law?) to serve the needs of politics and diplomacy; French Law, no doubt for its gastronomic delight. Doubtless there are other (to some even better) reasons for teaching these systems of foreign law; for the purposes of the present argument, it suffices to say that Jewish Law could hardly

justify a place on the basis of the traditional criteria for the teaching of these, individual systems of foreign law.

My purpose in this lecture is to sketch, partly by way of examples, some of the academic claims of the study of Jewish Law in British universities. I shall not seek to present a survey of present practice: regrettably, the results would hardly justify a lecture. Nor shall I restrict myself to the teaching of Jewish Law in Law Faculties. Indeed, I suggest that Faculty boundaries should not be rigidly deployed in the teaching of Jewish Law within our universities. And to conclude this gloss upon the title of my lecture, I do propose to speak of the teaching of Jewish Law in *British*, not merely English universities. I have had the pleasure of teaching in one of the ancient Scottish universities, the structures of which may turn out to be particularly congenial for our purpose.

Let us now consider some possible paradigms for the teaching of Jewish Law in British universities. I offer the following list of approaches: dogmatic, historical, comparative, apologetic, culturo-historical, ethno-historical, anthropological, theological and philosophical. In each case, I shall try to sketch both the nature of the teaching and the educational objectives which it should serve, as well as providing some examples of the kind of material which might be used in this context. My list should not be read as a prescription — so many doses per day of each particular medicine — but rather as a menu, available to the teacher to choose for the appropriate audience and occasion, and to adapt and re-create in accordance with his or her abilities and resources.

Legal Dogmatics

I start with legal dogmatics. What are the applicable legal rules in Jewish law on particular topics? What legal institutions in Jewish law are of particular interest to the jurist? To answer these questions, of course, we have to adopt a view on the dogmatic foundations of Jewish law: what are the sources of Jewish law, or what are the rules of recognition which allow us to identify a binding rule?

At a different point on our menu we may have occasion to question the pertinence of this approach — the appropriateness of talking about "binding rules" or "rules of recognition" in the context of Jewish

law. We may conclude that these questions themselves derive from an alien intellectual environment, from the context of modern western systems of law viewed through the lenses of legal positivism. Nevertheless, in many academic contexts it is indeed appropriate to use an external approach, provided that we are aware that we are doing so, and are doing so for a particular purpose. There may well be such a purpose in the dogmatic presentation of Jewish law: there are many conflict of law situations, not the least important of which is found in the relationship between Jewish law and Israeli law in the State of Israel, where such a dogmatic presentation of Jewish law — even though it might not be historically 100% authentic — is required for practical purposes. (It is no accident, perhaps, that this type of dogmatic presentation of Jewish law has flourished especially in recent years in the research institutes of the Israeli Universities.)

To some, it may seem strange to present the dogmatic approach to Jewish law as primarily related to its presentation to *foreign* jurisdictions. Surely, the primary purpose is to know what will be applied in a Jewish court, a *bet din*. But there is a powerful argument (one which would appeal to legal realists) that the *bet din* uses legal doctrine as a starting point, not as a definitive means of resolving the individual case.

Of course, the dogmatic presentation of Jewish law is of interest for reasons which go beyond practical application, whether in Jewish or other courts. Dogmatics, particularly in its continental sense, is concerned not merely with the outcome, but with the manner of arriving at that outcome. Legal argument may take many forms, but Jewish legal dogmatics has a particular interest, for the following reason: at an early stage in the history of Jewish law, the basic conceptual building blocks became, if not rigidly fixed, at least highly privileged. There was a presumption that new legal institutions should be created through deployment of traditional concepts, rather than through conceptual innovation. I think here particularly of the fascinating study of insurance by Stephen Passamaneck, in which he shows how the traditional categories of bailment — the gratuitous guardian (*shomer ḥinam*), the guardian for reward (*shomer sakhar*), the gratuitous borrower (*sho'el*) and the hirer for reward (*sokher*) — were used in order to build up insurance institutions of a high degree of commer-

cial flexibility, particularly adapted for use in maritime trade.[1]

On other occasions, perhaps, ancient conceptual resources have not, or not yet, proved adequate to meet the needs of modern circumstances. I think here of the modern problems of divorce, where — despite the panoply of conceptual tools available to assist a court in releasing a chained wife (*agunah*) from the bonds of a dead marriage, the husband's veto — sometimes resulting from spite, sometimes from greed — continues to override all other considerations.[2] Despite the mountains of modern halakhic literature discussing the relative merits of agency, of pre-nuptial agreements, of extension by analogy of the areas of legitimate coercion[3] — despite all this, a consensus as to the way ahead is still lacking. It is true, of course, that here we are dealing with a matter which, from the internal dogmatic point of view within Jewish law, falls not within our categories of "civil law" or even "family law", but within that of *hetter ve'iṣur*, permission and prohibition, rather than *dine mamonot* (rules of compensation). Here, a stricter view has often been taken on matters of interpretation and innovation, particularly where, as here, the rule at stake is one which has the status of *de'orayta* (deriving from the Bible) rather than *derabbanan* (deriving from rabbinic enactment). Nevertheless, the biblical text in *Deuteronomy* 24:1-4 is one which, even on its grammatical construction, is capable of more than one interpretation.[4] The

1 S.M.Passamaneck, *Insurance in Rabbinic Law*, Edinburgh, Edinburgh University Press, 1974.

2 The Chairman of the B'nai Brith Canada National Get Committee was reported recently in the Canadian press as claiming that 15% of Jewish males involved in divorce cases (most of them non-practicing Jews) use the *get* as a "bargaining chip". I have not yet been able to ascertain precisely how this figure was arrived at.

3 For an important symposium on the topic, see *The Jewish Law Annual*, vol. IV (1981). Bleich's proposed pre-nuptial agreement at *JLA* IV (1981), 184-187, may be compared with that in Shlomo Riskin, *Women and Jewish Divorce*, New York, Ktav, 1988.

4 The procedure of delivery of the *get* by the husband is mentioned in a series of clauses introduced by vav-conjunctive, which are generally (though not inevitably) regarded as a continuing protasis (leading to the apodosis which rules against restoration of the original marriage). The passage thus mentions the procedure incidentally, implying it to be the normal procedure, but not stipulating that it is the only possible proce-

teaching of the dogmatics of Jewish law in British universities needs to be critical: not only to present successes but also to assess failures.

The Historical Approach

The second item on my menu is the historical approach, the one with which the school of David Daube,[5] to which I am proud to belong, is most closely associated. Jewish law has a history which spans, on almost any view, at least 3,000 years. Despite the influential advocacy, by Supreme Justice Professor Menachem Elon, of "all-period" research in Jewish law[6] — an approach which seeks to trace the history of any particular institution from its inception, often in the Bible, through all its periods, right down to modern responsa, in order to demonstrate the (assumed) bedrock of principle which informs that institution throughout its history, notwithstanding the layers of detailed elaboration and local variation which are to be found — and despite the appearance of a number of monographic works, such as Elon's own treatise on personal freedom of the debtor[7] — I hesitate to ascribe true historical expertise to any one scholar in all periods of the history of Jewish law. I have never, myself, for example claimed an expertise which goes beyond the biblical and tannaitic periods. Nevertheless, a course which concentrated upon the features of this period of Jewish legal history (including, of course, internal historical

---

dure. The rabbinic reading of the text does, however, regard the procedure as normative. See now R. Gordis, *The Dynamics of Judaism*, Bloomington and Indianapolis, Indiana University Press, 1990, 149, 227 n.9.

5 See particularly his *Studies in Biblicl Law*, Cambridge, Cambridge University Press, 1947; *The New Testament and Rabbinic Judaism*, London, Athlone Press, 1956; *Ancient Jewish Law*, Leiden, E.J. Brill, 1981.

6 "More About Research into Jewish Law", in *Modern Research in Jewish Law*, ed. B.S. Jackson, Leiden, E.J. Brill, 1980, 66-111 (and see also the contrary views in that volume).

7 *Herut haperaṭ bedarkhe geviyat ḥov bamishpaṭ ha'ivri*, Jerusalem, Rubin Mass, 1964. Elon's monumental introduction into the sources of Jewish law, *Hamishpaṭ Ha'ivri*, Jerusalem, Magnes Press, 1973, is shortly to appear in English translation.

development within it) would, to my mind, be worth teaching in British universities.

An historical approach is not to be understood as a dogmatic approach applied to some period or other of Jewish law in the past. Rather, it is an attempt to place the dogmatics of an earlier period within an historical context. Thus, for example, the study of biblical law has to take account of the relationships — political and cultural — between ancient Israelite society and its neighbours (frequently, its conquerors). In some cases, we can study such questions as jurisdictional autonomy from actual official, or semi-official, documents.[8] More important, very often, is the comparative study of the "legal cultures" of the societies concerned. To what extent was law a matter of state symbolism?[9] To what extent was it informed by the "wisdom" of literary groups located in the King's court or the Temple?[10] And of course, equally interesting questions arise in the halakhic literature of the Spanish golden age, with its intimate relationship to Islamic legal culture.[11] The recent history of Jewish law affords

8 E.g. the Persian decrees relating to the restoration under Ezra and Nehemia, recorded in the biblical book of *Ezra* (1:2-4, 4:17-22, 5:9-17, 6:3-12, 7:12-26) and the Apocryphal *1 Esdras* (2:3-7, 25-29, 6:24-26, 8:9-24). See E. Bickerman, "The Edict of Cyrus in Ezra I", *Journal of Biblical Literature* 65 (1946), 244-275; Daniela Piattelli, *Concezioni giuridiche e metodi costruttivi dei giuristi orientali*, Milan, Giuffrè, 1981, 11-21.

9 B.S. Jackson, "The Ceremonial and the Judicial: Biblical Law as Sign and Symbol", *Journal for the Study of the Old Testament* 30 (1984), 25-50.

10 An issue to which I have devoted considerable attention in recent years: see "Law" in *Harper's Bible Dictionary*, ed. P.J. Achtemeier, San Francisco, Harper & Row, 1985, 548-551; "Some Semiotic Questions for Biblical Law", *The Oxford Conference Volume*, ed. A.M. Fuss, Atlanta, Scholars Press, 1987, 1-25 (Jewish Law Association Studies III); "Ideas of Law and Legal Administration: a Semiotic Approach", in *The World of Ancient Israel: Sociological, Anthropological and Political Perspectives*, ed. R.E. Clements, Cambridge University Press, 1989, 185-202; "Legalism and Spirituality: Historical, Philosophical and Semiotic Notes on Legislators, Adjudicators, and Subjects", in *Religion and Law, Biblical-Judaic and Islamic Perspectives*, ed. E.B. Firmage, B.G. Weiss and J.W. Welch (Winona Lake: Eisenbrauns, 1990), 243-261; "Law" in *A Dictionary of Biblical Interpretation*, ed. R.J. Coggins and J.L. Houlden, London: SCM Press and Philadelphia, Trinity Press International, 1990, 383-386.

11 See José Faur, *Golden Doves with Silver Dots: Semiotics and Textuality in*

further examples of opportunities for this kind of historical approach. Norman Solomon has pioneered the analytical approach to the legal reasoning of the Lithuanian school of the late 19th and early 20th century, where some echoes of Germanic *Pandektenrecht* appear to be evident.[12] Nor should we turn away from grappling with the responsa of the Holocaust, notwithstanding the difficulties of academic detachment.[13]

But are such courses appropriate in British universities, and if so, do they have a place in British Law Schools? The latter really depends upon the orientation and objectives of the particular Law School. I frequently hear lip-service paid to the ideal of a "liberal arts education in law". Regrettably, once decoded, this often means no more than a desire to expand or maintain the range of dogmatic legal subjects which may be taught, despite the effective control which the profession enjoys over the content of approximately half the courses taught in a typical English law degree. There are, however, some law schools which more genuinely aspire to a "liberal arts" education in law, and for them, the historical approach is unproblematic. From *this* vantage point, the historical teaching of Jewish law is no less valuable (but also no more valuable) than the study of Roman Law in the period of the Republic, or of the French Law of the Ancien Régime. I say, from this vantage point. There are also others, as we shall see.

The Comparative Approach

I turn now to the comparative approach. Perhaps its most systematic expressions are found in Boaz Cohen's *Jewish and Roman Law*[14]

Rabbinic Tradition, Bloomington, Indiana University Press, 1986.

12 See "Hilluq and Haqira: A Study in the Method of the Lithuanian Halakhists", *Diné Israel* 4 (1973), lxix-cvi, and other articles listed in Phyllis Holman Weisbard and David Schonberg, *Jewish Law: Bibliography of Sources and Scholarship in English*, Littleton CO., Fred B. Rothman & Co., 1989, 189-190.

13 Irving J. Rosenbaum, *The Holocaust and Halakhah*, New York, Ktav Publishing House, 1976; H.J. Zimmels, *The Echo of the Nazi Holocaust in Rabbinic Literature*, New York, Ktav Publishing House, 1977.

14 New York, Jewish Theological Seminary of America, 1966, 2 vols.

and Rabbi Dr. Isaac Herzog's (sadly incomplete) *Main Institutions of Jewish Law*.[15] Anglo-American law reviews have for many years carried occasional articles seeking to compare modern American law with Jewish law on particular topics. Torts seems to have been particularly favoured in this context.[16] This is not an item on the menu which I myself would frequently be inclined to choose. All too often, it seems, the dish is either over-cooked or prepared without the appropriate set of ingredients. "Over-cooked" here means that there is an assumption, frequently unstated, that the Jewish "solution" is either inherently better than the Anglo-American or of particular interest simply because it is Jewish. "Preparation without the proper set of ingredients" means that the cook has not had adequate training, or has failed to use all the ingredients necessary for the recipe. To produce the Jewish "solution" for comparative purposes involves *full* evaluation of the sources of Jewish law, not a selective approach or one based primarily on secondary sources. It also involves asking a basic theoretical question: whether the two systems perceive the problem in the same way, since only then is it meaningful to compare their solutions. I should add that many would recognise in these strictures characteristics of the practice of comparative law in general. But let me add: provided that the criteria implied in these strictures are satisfied, comparative study can be very rewarding. Its reward lies not so much in the answers it might provide to the question: "what does Jewish law do about X?", but rather in the differences it may reveal between Jewish law and modern western law, differences at the level of basic structure and values. I do not see, for example, how a comparative study of a topic like easements could be pursued — if the dish is

15 London, Soncino Press, 1965-67, 2 vols.

16 Going back as far as B.B. Lieberman, "Torts in Jewish Law", *Journal of Comparative Legislation and International Law* 9 (1927), 231-240. As early as 1929, George Webber (later Reader in English Law at University College London and himself a contributor to the JCLIL on Jewish law), compiled a "Bibliography of Recent Works on Jewish Jurisprudence", *The Law Journal* 69 (1929), 82-83. The recently-established *National Jewish Law Review*, in its first four issues (1986-89), has shown a particular bias towards torts questions. See further Weisbard and Schonberg, *supra* n.11, at 437-443; N. Rakover, *The Multi-Language Bibliography of Jewish Law*, Jerusalem, The Library of Jewish Law, 1990, ch.13.

properly cooked — without casting light upon notions of community within the two cultures. The immense value of this kind of study is not what it tells us about Jewish culture (a matter which may be regarded as of relatively parochial concern) but rather what it tells us about the legal culture of the western society with which comparison is made — and this is a vital concern for the non-Jewish audience of Jewish law courses.

Particularly important, in this context, is the comparative study of legal argument, a topic on which there are some excellent studies — I think particularly of the work of Louis Jacobs for Jewish law[17] — but relatively few genuinely comparative treatments, Robert Brunschvig's Jewish-Islamic comparison representing an important starting point.[18] The reason for this lack is not too difficult to find. A western-trained lawyer will readily sink in the sea of the legal argument of the Talmud, and may have difficulty in floating even in such simpler commentaries upon legal texts as may be found in the *Mekhilta*. Indeed, even the great Jewish master of Islamic Law, Joseph Schacht, suggested a distinction between the "analytical" approach of Western law on the one hand with the "analogical" approach of Islamic law on the other, with the implication that the latter was somehow a looser, less scientific or advanced form of legal reasoning.[19] Now that we observe the march of literary criticism into the formally pure temple of legal reasoning — and even, I should say, without this apparent intrusion — Schacht's view on this matter may appear superficial. For the issue here is the range of permissible modes of analogy, and the basis of analogising. The Common Law processes of construction of precedent have themselves been regarded by some as analogical, though without too precise a definition of this term. Translators of Jewish legal dogmatics tend to restrict the term "analogy" to one particular form of Jewish legal reasoning, *heḳesh* — equivalent to the

17 *Studies in Talmudic Logic and Methodology*, London, Vallentine Mitchell, 1961; *The Talmudic Argument*, Cambridge, Cambridge University Press, 1984.

18 "Herméneutique normative dans le Judaïsme et dans l'Islam", *Accademia Nazionale dei Lincei*, 8th Ser., 30 (1976), fasc.5-6, pp.1-20.

19 "Law and the State — (a) Islamic Religious Law", in J. Schacht and C.E. Bosworth, *The Legacy of Islam*, 2nd edition, Oxford, Oxford University Press, 1974, 397.

Islamic *qiyas*.[20] This form of reasoning is regarded, itself, as somewhat extreme, perhaps even marginal. Nevertheless, forms of comparison — such as the *gezerah shavah* — are used in Jewish law which, even if not described by the term "analogy", do appear to be quite different from acceptable modes of reasoning in the West.

I would suggest that this is a puzzle well worthy of academic attention, and indeed of teaching to certain types of law student — perhaps the more jurisprudentially oriented. For a deeper examination of it will reveal that these differences in rationality stem not from degrees of intellectual capacity (a view seemingly favoured by some traditions of social evolutionism) but rather from a combination of theological and linguistic assumptions. Not even the secular lawyer can ignore the fact that the biblical text has been regarded, by the vast majority of those involved with Jewish law throughout its history, as a divinely dictated text. The question then arises: what language was God supposed to speak? Self-evidently, Hebrew — *lashon haḳodesh*. But that was only the beginning of the problem. What kind of Hebrew did God speak, and particularly what kind of language was used when dictating the Pentateuch to Moses? For the answer to this question will significantly affect the nature of permissible — even, required — interpretation of the biblical text. Like modern linguists who ask what are the peculiar features of the language of modern statutes, and who in some cases even go so far as to claim that "legislative language" should be conceived as a special, partially autonomous, language, and not merely a register of natural English,[21] so too the Rabbis had to find linguistic models which would serve on the one hand to explain how divine language reflected divine omniscience, while on the other hand how it succeeded in communicating to a human audience.[22] And even within the latter conception of the function of divine language, encapsulated within the famous dictum: *hatorah nikhtevet bilshon*

20 See L. Jacobs, "Hermeneutics", *Enclyopedia Judaica*, Jerusalem, Keter Publishing House, 1972, VIII.368.

21 See further B.S. Jackson, *Semiotics and Legal Theory*, London, Routledge & Kegan Paul, 1985, 46-50.

22 B.S. Jackson, "The Concept of Religious Law in Judaism", *Aufstieg und Niedergang der römischen Welt*, Berlin, W. de Gruyter, 1979, Bd. II.19.1, 51-52.

benei adam,[23] there was still room for discussion. Was the Torah written so as to be intelligible — even, fully intelligible — to the *average* person, or was it written in a semi-technical, or allusive language which would be accessible to the scholar, but not to the lay-person? This is just one sense given to the famous distinction between *peshaṭ* and *derash*. But leaving aside questions of classification, it is clear that the Rabbis identified *themselves* as the *benei adam*, as having a unique capacity to interpret the meaning of the divine words to the lay audience.

In proceeding from the theological assumption of the perfection of the divine text, the Rabbis adopted three postulates: first, that there could be no contradiction in the text; second: that there could be no redundancy in the text; third: that nothing in the text was accidental. This conception of the perfect text extended to literary features which even a modern parliamentary draftsman might regard as unimportant, and therefore capable of being decided arbitrarily. Suppose, for example, that you were the draftsman of a new criminal code — one which, unlike the present draft of the Law Commission,[24] purported to be truly comprehensive, not only of general principle but also of all the substantive criminal offences. Certainly, you might group a number of offences together, under such categories as offences against property, offences against the person, sexual offences, etc. But within each group you might have some difficulty in arriving at a rational basis of arrangement. Not so, for the Rabbis. For them, even such decisions as these could not have been arrived at by the divine draftsman arbitrarily. Simple collocation therefore became a basis for analogical argument — a form of analogy quite foreign to our way of thinking, being based upon *literary* positioning, rather than *substantive* similarity.[25] If, then, we are to adopt a comparative approach to the teaching of Jewish legal reasoning, we cannot do so without paying attention to such systemic and theological underpinnings. To misuse the currency of modern linguistics, we have to look at the deep structure

23 *Sifre Bamidbar*, on *Numbers* 15:31 (R. Ishmael).

24 *A Criminal Code for England and Wales*, London, HMSO, 1989, 2 Vols., Law Com. No.177.

25 B.S. Jackson, "Analogy in Legal Science: Some Comparative Observations", in *Analogy in Legal Science*, ed. P. Nerhot, forthcoming.

of legal argument and not merely at its surface manifestations.

The Apologetic Approach

Somewhat tendentiously, I have included an apologetic paradigm in my list. This is *not* to suggest that there is any place in an academic institution for the teaching of Jewish law motivated either by a desire to demonstrate its superiority, or through its teaching to fortify the ethnic or religious identity of Jewish students. Indeed, my assumption throughout is that the audience for Jewish law in British universities is mixed, if not predominantly gentile. Yet there is one very special sense in which issues which have been used polemically in the past, and which still inform the cultural subconscious in its image of Jews and Jewish law, do call out for proper academic study — even if the result may be, in a certain sense, apologetic. I realise that I tread here on very sensitive ground. But let me use an historical parallel. The medieval disputation was not initiated by Jews. It was a forum within which Jews were required to defend themselves and their culture. The records of such disputations — as both modern scholarship[26] and some dramatic representations indicate — were not without didactic interest. The modern teaching which would correspond to this is not unconnected with the medieval disputation. For the whole history of Jewish-Christian relations is informed by Christian perceptions of Jewish law, and the views taken of it in the New Testament. The New Testament takes a view — several, in fact — of the operation of Jewish law in the trial of Jesus, generating an image then given popular form in the deicide charge, which even the scholarly diplomacy of Vatican II cannot, of its nature, suddenly remove from the popular consciousness.

I include an analysis of the trial of Jesus in my course on Jewish law. The object is not to show, as has been done with perhaps over-brilliant advocacy by Justice Haim Cohn of the Israel Supreme Court,[27] that it was the Romans, not the Jews, who did it, but rather to display the immense complexity of the problem, and the huge gaps and uncertain-

26 *Encyclopedia Judaica*, VI.79-103, and literature there cited.

27 Haim Cohn, *The Trial and Death of Jesus*, London, Weidenfeld and Nicolson, 1967.

ties in our knowledge.[28] This is not to say that the New Testament is a valueless document for historical purposes. Quite the contrary; in some respects, it is the best — even the only — direct evidence we have for the state of Jewish law in the first century CE. But on this issue, as many Christian scholars now recognise, the account given by some of the New Testament writers was necessarily informed by the post-70 relationship of the early church to both the Roman empire on the one hand and the now-disempowered priestly Jewish leadership on the other.

Another aspect of the problem is the relationship of the "trial" before the Sanhedrin (if that it be) with normative statements of criminal procedure found in the Mishnah and other early Jewish literature. But how do we know that the rules contained in the rabbinic documents, none of which reached their final form before the early third century, do actually date back to the period of Jesus? In some respects, it is possible to argue that Jewish law underwent internal modification *precisely in response* to the events associated with the birth of Christianity. The argument has been made, for example, that the rabbinic downgrading or diminution of the powers of the "prophet" was a response to the claims made by Jesus under that very title.[29] In short, the trial of Jesus presents perhaps the most difficult problem of ancient legal history, and here, to prove what we do not, and cannot, know is at least as valuable — for both academic and inter-faith purposes — as the making of more positive claims.

Of course, not everyone is still fighting the battles of the first century CE, even though it is not so long since these battles had their deleterious effect on universities, and not only in Germany. Just as significant is the modern secularisation of these very issues. Frequently, we speak about the difference between interpretation according to the letter of the law, and interpretation according to its spirit. There remains an impression that Jewish law is characterised by in-

28 See also S.G.F. Brandon, *The Trial of Jesus of Nazareth*, London, Batsford, 1968; E. Bammel, ed., *The Trial of Jesus*, London, SCM Press, 1970; J.D.M. Derrett, *Law in the New Testament*, London, Darton, Longman and Todd, 1970, ch.17; Jean Imbert, *Le Procès de Jésus*, Paris, Presses Universitaires de France, 1980.

29 B.S. Jackson, "Jésus et Moïse: le Statut du Prophète à l'égard de la Loi", *Revue historique de droit français et étranger* 59 (1981), 341-360.

terpretation according to the letter (which somehow sounds rather different from the "literal interpretation" which most Common Law judges regard as the norm). But it is, as I tried to show in a lecture some years ago,[30] a blatant misunderstanding of the theological context and import of the original distinction. When Paul discarded his Pharisee background, and attacked Jewish law in the name of the "spirit" rather than the "letter", this was not a plea for some "Grand Style" of interpretation of the biblical text (and indeed, some of the analogical interpretation of the biblical text, to which I alluded some moments ago, could hardly be grander in the Llewellyan sense); rather, it was an argument for the continuation of direct revelation from God into the heart of the individual subject, rather than revelation by means of *any kind of* interpretation of the written word. I doubt that this conception of interpretation according to the spirit would appeal to many modern judges, even those blessed with a highly self-conscious sense of justice, such as Lord Denning.

The Culturo-Historical Approach

The next item on my menu is labelled, somewhat pretentiously, "culturo-historical". Jewish law can be presented as a kind of golden thread which links together much of the legal history of the Western world. As such, it is part of English legal history, of Scottish legal history, even of Irish legal history. I do not wish to overemphasise this feature; indeed, it is a phenomenon which I find difficult to evaluate. In very general terms, the story is this. The biblical roots of Jewish law emerged within the culture of the ancient Near East. The nature of the biblical codes bears remarkable resemblance to, as well as important differences from, those of Hammurabi and his lesser-known predecessors and successors. Indeed, there are some striking substantive parallels, such as the almost verbatim adoption by *Exodus* 21:35 of a rule found in the Laws of Eshnunna regarding an ox which is *tam* goring to death another ox.[31] But the cultural focus of Jewish law naturally changed, in the wake of the conquests of Alexander and his Seleucid

30 B.S. Jackson, "Legalism", *Journal of Jewish Studies* 30 (1979), 1-22.

31 Discussed in B.S. Jackson, *Essays in Jewish and Comparative Legal History*, Leiden, E.J. Brill, 1975, 130-141.

successors. Hellenistic culture brought an interest in Hellenistic rhetoric and modes of interpretation,[32] and eventual Roman rule brought daily contact with Roman jurisdiction (and generated some fascinating conflict of law rules).[33] In all these cultural relations, Jewish law was largely the recipient rather than the donor. But then the situation changed. *Judaea vincta victorem vinxit*, one might say. The Roman empire did not turn Jewish (though at one point it was not too far from doing so), but it did turn Christian. The church fathers were not averse to consulting Rabbis on matters of scriptural interpretation, though I would take this normally to have been consultation in a rather weak sense. Just as significant, the Roman conquest gave immense impetus to, if it did not entirely create, the Jewish Diaspora, and the possibility of cultural contact, at first hand, between Jewish lawyers and the legal authorities of the host nations. The example of Maimonides, and the relationship between his code and those of the contemporary Islamic world, is only one example.[34]

It was, however, through Canon law, rather than through Roman law, that the major influence of Jewish law has been brought to bear upon the West. It is a story best told from detailed examples. Allow me to allude to just two. The first is the goring ox, which we first know from the laws of Eshnunna, then in Hammurabi and the Bible, and which reappears as the kicking horse in the code of Justinian and the biting dog in the laws of Alfred (to name but a few). Of course, we might expect any early code to deal with kicking horses and biting dogs. It is not, however, inevitable that every society will adopt a rule comparable to the Jewish distinction between *tam* and *mu'ad*, nor that they will do so in words which indicate continuing *literary* dependence. Indeed, the Roman formulation in the example of the kicking horse runs so far counter to classical Roman doctrine as to have been labelled an interpolation by modern scholars.[35]

32 See, e.g., David Daube, "Alexandrian Methods of Interpretation and the Rabbis", *Hebrew Union College Annual* 22 (1949), 239-264.

33 See note 40, below.

34 On Maimonides' codification, see the articles in Vol. I (1978) of *The Jewish Law Annual*.

35 B.S. Jackson, *supra* n.33; for the medieval reception of this distinction see "On the Origins of *Scienter*", *The Law Quarterly Review* 94 (1978), 85-102, xvi; "Travels and Travails of the Goring Ox: The Biblical Text in British

Again, the two-witness rule of the Bible has been widely adopted in countries influenced by Canon law, as indeed have some of the necessary means of avoiding its rigours. When the medieval Canon lawyers sought to construct an institution of corroboration by similar fact evidence (*testes singulares*), they justified their argument by analysis of the facts of the story of Susannah, found in the Apocrypha to the Hebrew Bible. True enough, they said, Susannah could not be rightly convicted when one elder said that she committed adultery under an oak tree while the other said it was under a holm tree. But that was only because the two elders had claimed to have observed the event *together*. Had they not made this claim, their evidence would not have been regarded as logically contradictory: for though adultery may not be committed simultaneously under two different trees, it may be so committed successively. Moreover, we all know (so the Canon law doctors argued) that adultery with the same lover is an act which is prone to be repeated — *factum iterabile* — unlike some other crimes against Canon law, such as the murder of a Bishop (especially the same Bishop). I have traced the use of this argument for corroboration by similar fact evidence from a Canonist *Summa* of the mid-12th century, written in Bologna, to English treason trials of the 17th century, and a famous Scottish divorce case of the same period, which then became one of the principal foundations for the so-called *Moorov* doctrine which Lord Hailsham so fully read into his speech in the House of Lords in the modern leading case of *Kilbourne*.[36]

I do, as I indicated, have some difficulty in evaluating such phenomena. They are threads of literary transmission, comparable perhaps to the inter-textuality one would find in the literary world. But are they only this? Were the writers of these legal texts concerned only to show their own cleverness, to make literary allusion for the sake of literary allusion, or did their choice of that to which they alluded show something deeper, about not only their own cultural values but also those of the milieu in which they wrote? The study of

---

Sources", *Studies in Bible and the Ancient Near East Presented to S.E. Loewenstamm*, ed. Y. Avishur & J. Blau, Jerusalem, Rubinstein, 1978, 41-56.

36 "Susanna and the Singular History of Singular Witnesses", *Acta Juridica* (1977), 37-54 (Essays in Honour of Ben Beinart).

Jewish law, viewed in this way, becomes part and parcel of our overall cultural history, the study of which needs no justification in British universities, nor even — I speak perhaps as an optimist — in British law schools.

The Ethno-Historical Approach

By contrast, the next item on my menu is particularist. Within Jewish studies, the teaching of Jewish law has a crucial part to play, not merely as an element of Jewish culture (and it is, I re-emphasise, a central facet of Jewish culture, which no degree of modern secularisation can obscure); it is also a crucial indicant of the history of Jewish identity on the one hand, and of the nature of Jewish relations with the outside world on the other.

It is not only in the modern state of Israel that the question "Who is a Jew?" has come to be important;[37] indeed, one of our leading historians of Jewish antiquity recently published a book entitled "Who *Was* a Jew?", dealing with Jewish identity in the early Rabbinic period.[38] It may not have been the pressures of emancipation, and secularisation, which prompted identity crises in the ancient world; nevertheless, conversion was a recurrent issue (and a central one, of course, in the rupture between Judaism and the early church), and the modern argument about patrilineal as against matrilineal descent quite naturally arises when one considers the marital history of some of the Biblical figures, not least Moses.

Jewish attitudes to the outside world also receive some of their most concrete expressions in the context of the *halakhah*. It is not merely a matter of *dina demalkhuta dina*, and the manner in which it was interpreted and applied in particular contexts.[39] There is also the Jewish tension between particularism and universalism: how could the Jews on the one hand proclaim their status as a "special people", while

37 A recent semi-popular treatment is Oscar Kraines, *The Impossible Dilemma: Who is a Jew in the State of Israel?*, New York, Bloch, 1986.

38 L.H. Schiffman, *Who Was a Jew? Rabbinic and Halakhic Perspectives on the Jewish-Christian Schism*, Hoboken NJ, Ktav, 1985.

39 See the monograph of S. Shilo, *Dina demalkhuta dina*, Jerusalem, Academic Press, 1974.

at the same time seek to get on with the rest of humanity? There are some rules of Jewish law which *are* discriminatory: according to Jewish law, the owner of a Jewish ox (if I may so put it) which was killed by a gentile ox could claim full damages whether the gentile ox were *tam* or *mu'ad*, while the owner of a Jewish ox which killed a gentile ox would pay only half damages, if the ox were *tam*.[40] Yet immediately, such discriminatory rules, perhaps based upon a conflict of law rule which favoured the defendant's law, were perceived to be problematic in the context of inter-communal relations, and the overriding principle of *ḳiddush hashem* was brought into play. But such legal principles, as Dworkin would remind us, are merely guides; they do not determine outcomes, and they do not necessarily ensure consistency. It therefore becomes necessary to look at such rules within the context of the particular historical context of inter-communal relations in each case.

The Anthropological Approach

Next, the anthropological approach. At its most general, the argument might proceed thus: Jewish law is different and esoteric, and that in itself is good enough reason to study it. But of course, many systems of law are strange and esoteric, but we do not include them all within the curriculum. Yet I dare to suggest that Jewish law has something which is of particular interest to the anthropologist. Its origins go back to a largely pre-literate era, but its elaboration became immensely scholastic; its origins were associated with small-scale political autonomy, but much of its subsequent history was in the context of dispersion within an alien environment. Not surprisingly, perhaps, modern structural anthropologists have found plenty within Jewish law to manifest a particular interest in boundaries: the boundaries between the holy and the profane, between the pure and the impure, between the permitted and the prohibited as reflections — so Mary Douglas has argued[41] — of a heightened concern with the boundaries of the social. The tendency has been to apply this

40 *Tosefta Baba Kamma* 4:2; see B.S. Jackson, "Liability for Animals in Roman Law: An Historical Sketch", *The Cambridge Law Journal* 37 (1978), 138-140.

41 *Purity and Danger*, London, Routledge & Kegan Paul, 1966.

approach primarily to the ritual law. The object is not to provide some simple "decoding" of individual symbols, but rather to gain access thereby to the deeper values of the society, of which the particular rules are manifestations. There is a difference between a "rationalist" search for legal principles — as reflected in the work of Moshe Greenberg in Biblical law or Ronald Dworkin in modern western law — and the approach of the structural anthropologist or semiotician. The latter is not content with the principles which reside within the consciousness of the legal culture concerned, whether made explicit or not, but rather with deeper, taken-for-granted unarticulated values which reside — if one may use this metaphor — in the collective unconscious.[42] I believe that this approach is fruitfully applied also to the civil law, and have tried to demonstrate this in relation to the Biblical laws of slavery.[43] Others have done the same as regards the status of women in Jewish legal texts — a problem prone to attract apologetics on the male side and hysteria on the female, both of which, however, have been successfully avoided in what I regard as the best of the modern studies, that by Judith Romney Wegner.[44]

The Theological Approach

Jewish law may also be taught within a theological framework. I have already commented, in the context of the comparative approach, upon the vital importance of appreciation of the theological assumptions of rabbinic interpretation of Biblical legal texts. But the theological agenda goes far beyond this. I am not thinking here of such works

42 As argued in "Some Semiotic Questions for Biblical Law", *The Oxford Conference Volume*, ed. A.M. Fuss, Atlanta, Scholars Press, 1987, 1-25 (Jewish Law Association Studies III), at 16-18; more generally, "Conscious and Unconscious Rationality in Law and Legal Theory", in *Reason in Law, Proceedings of the Conference Held in Bologna, 12-15 December 1984*, ed. Carla Faralli and Enrico Pattaro, Milan, Giuffrè, 1988, III. 281-299.

43 "Biblical Laws of Slavery: a Comparative Approach", in *Slavery and other Forms of Unfree Labour*, ed. L. Archer, London and New York, Routledge, 1988, 86-101 (History Workshop Series).

44 *Chattel or Person? The Status of Women in the Mishnah*, New York and Oxford, Oxford University Press, 1988.

as Louis Jacobs, *Theology in the Responsa*[45] — which seeks to extract theological observations from the corpus of the responsa literaure, but rather of the influence upon the *halakhah* of such theological concepts as *imitatio dei*, personal redemption, and messianic restoration.[46] These may appear at first sight rather remote from the concerns of the lawyer, especially the one who arbitrarily reduces the *halakhah* to *mishpaṭ ivri*, to civil law as against religious law, in order to construct Jewish law in parallel to a modern secular legal system. Yet even in the civil law, theological concepts cannot be excluded. Lamm and Kirschenbaum have argued, for example, that *ḳedoshim tiheyu* is used in Jewish legal argument as a kind of Dworkinian principle,[47] and Ben Zion Wacholder has shown how messianic beliefs shape the rabbinic conception of time itself, such that the present becomes merely an instant in the gap between the ideal state (with both a small and a capital s) — identified with the period of the first Jewish commonwealth — and its ultimate restoration.[48] This has its effect not merely in the concern to prepare for the legal constitution of the future commonwealth, but also in the definition of some present institutions. The literary re-presentation of Jewish law in different periods is also informed by a temporality which looks forward to restoration. Repetition of the ideal (even in the non-literal conception of repetition which is implicit in the use of the title *mishneh torah* for both Deuteronomy and the Code of Maimonides), becomes a sacred moment in both reviving the past and anticipating the future.

45 London, Routledge & Kegan Paul, 1975.

46 On the relationship of the *aggadah* to the *halakhah*, see the stimulating writings of David Novak: *Law and Theology in Judaism*, New York, Ktav, 1974; *Law and Theology in Judaism*, Second Series, New York, Ktav, 1976; *Halakhah in a Theological Dimension*, Chico CA, Scholars Press, 1985.

47 N. Lamm and A. Kirschenbaum, "Freedom and Constraint in the Jewish Juridical Process", *Cardozo Law Review* 1 (1979), 132-133; see also B.S. Jackson, "Secular Jurisprudence and the Philosophy of Jewish Law: A Commentary on Some Recent Literature", *The Jewish Law Annual* 6 (1986), 32.

48 *Messianism and Mishnah: Time and Place in the Early Halakhah*, Cincinnati, Hebrew Union College Press, 1979 (The Louis Caplan Lecture on Jewish Law); Jackson, *supra* no. 47, at 39-41.

The Philosophical Approach

Such theological concerns merge into the final item on our menu, the philosophical approach. The relationship is necessarily a close one, at least if one is to view Jewish law in the context of the philosophical claims of its own culture. For the philosophy of Jewish law is to be found, for the most part, in the pages of the *Aggadah*, itself conceived as part of the Oral Torah. I believe, and have argued, that there is much value to be found in a comparative approach to the philosophy to Jewish law, one which addresses questions posed both within the system and by modern western philosophy.[49] In some cases, and perhaps for reasons which are readily explained on historical grounds, such concerns readily converge: Jewish law, like Western legal philosophy, asks what is the source and status of the universal in law, and offers its own solution in terms of the elaboration of the aggadic concept of the *mitsvot bnei noah*, Noahide Commandments — a topic sensitively treated in a recent book by David Novak.[50] Equally, we can use western jurisprudential models to elucidate aspects of Jewish legal practice, and this has been done to some extent in the field of legal reasoning. Such activities are useful provided that we remain conscious of what we are doing. If we apply a western philosophical model to Jewish law, it must be either because we have good reason, independent of Jewish law, to assert the universality or other pertinence of that model, or because we are using Jewish law as one area of field work within which to test such general claims. Otherwise, the Western model merely has the status of hypothetical description, which — even if we find facts to fit it — may turn out to be quite inauthentic.

This is why use of a casebook seems to me to be inappropriate for the teaching of Jewish law. Jewish law is not structured in the same way as Common Law. It lacks a comparable doctrine of precedent. Its courts are largely private rather than public, and there is no general system of law reporting. Sometimes, an eminent halakhist may pub-

49 "Secular Jurisprudence ...", *supra* n.47.

50 *The Image of the Non-Jew in Judaism, An Historical and Constructive Study of the Noahide Laws*, New York and Toronto, The Edwin Mellen Press, 1983 (Toronto Studies in Theology, 14).

lish a *responsum* based upon a decision in a particular case, but such a *responsum* derives its authority (not as a precedent, but as contributing to the consensus of halakhic views) not because the decision was made in a case, but because the argument has been published by this particular halakhic jurist. To construct a casebook from that genre of halakhic literature is both to misconceive its nature and to extract it artificially from its overall place in the Jewish legal system. For Jewish law is primarily a system of texts, not of cases.

Some Practical Considerations

It is right, perhaps, that I should conclude with such practical concerns. What steps now need to be taken? In my view, there are three broad issues which need to be addressed: human resources, material resources, and course structures.

There are very few "experts" in Jewish law teaching in British universities, whether in law schools or outside. Undoubtedly, the endowment of posts — provided that they are genuinely integrated into their academic environment — would be of enormous assistance. But there are already many scholars who have a good part of the background necessary to teach Jewish law from one or more of the vantage points outlined in this lecture. A practical step would be to institute an intensive summer school. A similar approach was successfully adopted in the United States a few years ago for the teaching of Roman law. It attracted both classicists and lawyers. The result, of course, is not to produce instant experts, but rather a mutually-supportive group of teachers with the basic competence and confidence to offer first-level courses.

Secondly, we need material resources, particularly the sponsorship of a number of Jewish law collections in British university libraries. Such collections would concentrate primarily on material in English, though the basic Hebrew texts would have to be present. The compilation of appropriate lists has recently become much easier, with the publication of Rakover's *Multi-Language Bibliography of Jewish law*,[51] and Weisbard and Schonberg's *Jewish Law: Bibliography of*

51 *Supra* n.16.

Sources and Scholarship in English.[52] A number of the classics of modern Israeli scholarship in Jewish law, Urbach's *Hahalakhah* and Elon's *Hamishpaṭ Ha'ivri*, are or are about to become available in English. But resources are also required in order to translate a whole range of monographic literature produced in the last 20 years by younger Israeli scholars — literature, I may add, much of which falls within the "dogmatic" paradigm and is immensely superior to anything available in English in that genre. Equally, a range of textbooks needs to be commissioned, appropriate to Jewish law courses of different kinds. Despite the recent books of Aaron Schreiber[53] and of Dorff and Rossett,[54] there is an urgent need, in particular, for an historical textbook, with chapters written to a single plan by experts in each of the different periods — a project espoused for a number of years by the Jewish law Association. The resources needed for these purposes are not vast. Some Jewish communities ought to be able to endow Jewish law collections in their local universities, and courses in Jewish law ought to be open to interested members of the public (Jewish and non-Jewish). The commissioning of textbooks is a more substantial problem. A charitable trust has been established for this purpose, but as yet we lack a Maecenas.

Finally, there is the question of course structure. Universities find themselves under pressure either to reduce the length of the degree, or to cram more professional training into it. Many of us consider that this is shortsighted in the extreme, and that it will put us at a disadvantage as against lawyers trained in the universities of other European countries. On the other hand, we hear increasingly of "modularisation" of courses, leading to the possible introduction of half-year courses, more akin to the American semester model. The Jewish law course I shall teach at Liverpool University next year is of this kind. The structure of legal education in Scotland has always appeared to me to be far superior, in affording the option of a four-year honours degree to

52 *Supra* n.12.

53 Aaron Schreiber, *Jewish Law and Decision-Making: A Study Through Time*, Philadelphia, Temple University Press, 1979.

54 E. Dorff and A. Rossett, *A Living Tree: Materials on the Jewish Legal Tradition with Comparative Notes*, Albany, State University of New York Press, 1987.

those who want it, and indeed in allowing for a modicum of specialisation within that degree, so that students may take second-level courses in areas of the curriculum which particularly interest them. It would not, perhaps, be appropriate to argue the case for a four-year degree in England purely in terms of the needs of Jewish law teaching. But I venture to suggest that the type of teaching in Jewish law which I have advocated in this lecture is but an example of a properly academic approach to legal studies in general, which it is the role of our universities to foster. For the academic value of the teaching of Jewish law in British universities is the same as the academic value of any subject worthy of university teaching, namely that it leads to a better understanding, both of others and of ourselves.

My most recent experience of this was quite striking. At Kent, I taught Jewish law to a small group of Shi'ite Muslims. Their openness and interest — even where, as was inevitable, the subject matter impinged on contemporary politics — was remarkable. I have had few more rewarding experiences as a teacher.