

# Early Jewish Law and University Education

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Wyclif argued in the 14th Century that if law was to be taught in the English Universities, it should be English and not Roman.<sup>1</sup> His wish is not far from fulfilment. Roman law is a declining academic stock; today some Universities teach it not at all. But perhaps the pendulum has swung too far. We would agree with Wyclif that English law should be the basic education at English law schools, but the burden of this essay is that University undergraduates, embarking upon law studies, should be offered a medium of comparison with English law for the encouragement of their critical faculties, and of their appreciation of an alternative legal treatment of social and commercial issues. Roman law is an excellent medium in this regard, for in the thousand years between the Twelve Tables and Justinian's *Corpus* the student can plot the course and causes of development of a legal system from primitive state to high sophistication.

It may be objected that the training of the critical and historical faculties in relation to law is not the purpose of a University law school. The prime purpose of the University, this argument runs, is to provide academically trained entrants to the professional law schools, and University teaching should be oriented towards that destination. The teaching of the 'core' legal subjects by the Universities, so as to provide exemption from the academic part of the professional examinations for would-be practitioners, causes little diversion from this purpose, since those subjects would probably be in the curriculum on most criteria. But the curricular trend in the recent past in *non-core* subjects has been towards providing further vocationally slanted courses at the expense of the more academic courses, and historical ones in particular. Thus conveyancing, social welfare, taxation and bankruptcy are well established in the undergraduate curriculum. It is understandable that in a society plagued by unemployment, students should have a greater desire to acquire practical knowledge which will enhance their usefulness to an employer, but the claims of practical subjects for a place in the curriculum raise the hoary conflict between utility and the cultivation of the intellect as the main purpose of University education. Locke's contempt for the study of the classics would no doubt extend to Roman and other ancient laws which have little

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1. *De Officio Regis* (ed. Pollard and Sayle) (1887), p. 193.

practical application for the Englishman to-day: "Can there be anything more ridiculous", he writes, "than that a father should waste his own money, and his son's time, in setting him to learn the Roman language, when at the same time he designs him for a trade, wherein he, having no use of Latin, fails not to forget that little which he brought from school . . .?"<sup>2</sup>

Newman, in opposing Locke, argued that general culture of mind is the best aid to professional study, and that the man who has learned "to compare and to discriminate and to analyse" will not at once be a lawyer or businessman or engineer, but "will be placed in that state of intellect" in which he can take up any such calling with a special versatility and success.<sup>3</sup>

In comparing the academic approach to law with the practical Newman writes that a Professor of Law in a non-University environment is "in danger of being absorbed and narrowed by his pursuit" and of giving lectures which are only those of a lawyer. The Professor in a University, however, will "know where he and his science stand, he has come to it . . . from a height . . . he is kept from extravagance by the very rivalry of other studies, he has gained from them a special illumination and largeness of mind . . . and he treats his own in consequence with a philosophy and a resource, which belongs not to the study itself, but to his liberal education."<sup>4</sup>

Now, clearly, Newman is arguing for a breadth of liberal education which few undergraduate law courses could hope to confer in the time available, but the thrust of his contention, namely that the aim of University education is to train the mind to sift, analyse and compare, rather than to instil the mass of detailed niceties necessary for the practice of a profession, is, the present writer believes, fundamentally correct.

Few would deny the stimulus to the powers of analysis which legal studies provide: the determination of whether the consensus of offer and acceptance has occurred, or whether an unexpected event has frustrated a transaction, are ready examples from the English law of contract. But since the student has to digest so much factual knowledge of what the law *is*, there is often too little time to train his critical faculties by consideration of what the law *ought to be*; and it is here that a *tertium quid comparationis* would be valuable. It can also be urged against legal education in general that it allows no room for the use of the imagination – the student's almost exclusive concern is the grasp of what the law is, here and now.

The study of law reform and the solutions of other systems to legal problems, which stimulate the imagination, are not only liberal aspects of legal studies. They do, as Newman claimed of liberal education, foster the agility of mind which facilitates professional success. The lawyer's client, particularly his business client, does not want to be told merely what the law is. He wants to be shown a legal route to securing his business objective. He does not want to be informed simply that he cannot structure a transaction in the way he proposed because it infringes a

2. Quoted in J. H. Newman, *On the Scope and Nature of University Education* (Everyman edn.) (1915), pp. 152-153.

3. *Ibid.*, p. 159.

4. *Ibid.*, p. 160.

statute; he wants to be shown legal machinery whereby he can achieve the same object in a legal way. In other words, the lawyer needs to think constructively, and with imagination, for if he serves only as a 'coin-op' shop for legal information, the computer may render him redundant.

English legal history contains many examples of legal development through lawyers' imaginative use of legal concepts. Karl Renner describes how legal elements, joined to form a complex relationship, can be dissociated and re-combined so as to perform a different social function. He cites the modern hire-purchase agreement. The law concerning the sale of goods whereby a purchaser in possession can make title to third parties, and the law concerning the registration of chattel mortgages (which requires expensive formalities and enables creditors to veto a transaction), created serious obstacles to instalment sales. Creative lawyers solved the problem by putting the instalment sale into the form of a hire for periodic rent with an option to purchase on paying a specified total of instalments.<sup>5</sup> It was the same imaginative cast of mind that enabled Chancery lawyers to devise the floating charge rather than advise their lender-clients that they could not realistically have a charge on the undertakings of borrowing companies because, by fixing on the stock-in-trade, the normal charge would prevent the companies trading. An early example concerns the statute *De Donis Conditionalibus*. This was passed by the landowners in Parliament in 1285 because the Courts had treated a gift of land to "A and the heirs of his body" as a gift of the fee simple conditional only upon an heir being born: when an heir was born, A could convey the fee simple. This practice of the Courts deprived the great landowners of the potential revenues arising from escheat for lack of heir, forfeiture and wardship. *De Donis* therefore laid down that the tenant should have no power to alienate his estate to the prejudice of his issue or the grantor. Creative lawyers then advised their tenant clients to proceed with the sale of their land, notwithstanding, and they inserted in the indenture a warranty by the grantor and his heirs in favour of the purchaser, for title and quiet possession. By virtue of this warranty, an heir who claimed to set aside his ancestor's alienation as unauthorised would find himself bound by the warranty, and though his action for ejectment of the purchaser might be successful, the consequent obligation to provide lands of equal value in satisfaction of the warranty would render success a Pyrrhic victory.

Thus, the present argument is that a University law course should, *inter alia*, attempt to cater for the student who wishes to include in his studies a subject which will minister to his critical faculties, his historical sense and his powers of imagination. For this reason, we urge that, as an alternative to Roman Law, early Jewish<sup>6</sup> law should receive consideration when law syllabi are compiled. Within these criteria it has several merits.



5. *The Institutions of Private Law and their Social Function* (English edn.) (1949).

6. For simplicity, we use the terms 'Jewish' and 'Jews' to indicate the people to whom the terms 'Hebraic' and 'Hebrews' would be more correct in their early history.

By 'early Jewish law' is intended the period from about 400 B.C. when the Pentateuch took final form, to about 200 A.D. when the next document, specifically written to record the law, the Mishnah,<sup>7</sup> was finally revised. The stimulus to the student's imagination in being transported to an ancient religious legal system, still retaining links with taboo and the influence of demonic force, can hardly be exaggerated. A useful contrast with modern law whose sources lie at hand in statutes and law reports, is that Jewish law's development within that 600 year span has to be charted with the aid only of occasional references in later Old Testament books, such as Haggai and Daniel, in books from between the Old and New Testaments, such as Jubilees and Enoch, the Dead Sea Scrolls and Philo, in Josephus and in the New Testament documents ranging from *circa* 50-150 A.D. This historical study has attracted, amongst legal historians, such eminent scholars as David Daube,<sup>8</sup> Haim Cohn,<sup>9</sup> Duncan Derrett<sup>10</sup> and Bernard Jackson.<sup>11</sup> On the whole, though, Pentateuchal and subsequent Jewish law has received much greater attention from theological than law Faculties. The apparent reluctance of English legal historians to investigate religious legal systems is disappointing, but not new; Maine noted that the connection with Scripture had militated against acceptance of the Patriarchal Theory of the primeval condition of society. "Inquirers", he wrote, "were either influenced by the strongest prejudice against Hebrew antiquities or by the strongest desire to construct their system without the assistance of religious records."<sup>12</sup> Yet this law is a proper subject for study both by theologians and lawyers, since it is, on its own claims, both the Word of God and a legal system. The combined insights of both disciplines would surely produce the most fruitful results. For even if the legal historian defines his territory cautiously and denies that religious and ceremonial ordinances are truly 'law', there is much law of a secular nature sanctioned by punishment from a Court (the *Sanhedrin* of later times).

Anthony Phillips is a notable example of a scholar who is able to apply to early Jewish law the disciplines both of the lawyer and of the theologian. Although professionally a theologian, he is also a trained lawyer, and his studies of Pentateuchal law seem to have benefited from his legal knowledge: important features of his best-known work, *Ancient Israel's Criminal Law: A New Approach to the Decalogue*,<sup>13</sup> are his discernment that ancient Israel distinguished between crimes and torts, and that the Ten Commandments in an original shortened

7. The date of the *Tosephta*, another collection of *halakhoth*, is much disputed by scholars. Literally, *Tosephta* means 'additions' (to the Mishnah), but some of its sources are old. It is traditionally considered to have been compiled shortly after the Mishnah.

8. See, e.g., his *Studies in Biblical Law* (1947).

9. See, e.g., his "Prolegomena to the Theory and History of Jewish Law", in *Essays in Jurisprudence in Honor of Roscoe Pound* (1962).

10. See, e.g., his *Law in the New Testament* (1970).

11. See, e.g., his *Theft in Early Jewish Law* (1972).

12. *Ancient Law* 5th ed. (1894), pp. 122-123. His Patriarchal Theory has since been strongly doubted: see Stein, *Legal Evolution*, pp. 101-103.

13. Oxford, 1970.

version given at Sinai, were Israel's criminal law before the Exile. In a recent article,<sup>14</sup> Phillips has maintained that in the earliest legal traditions in the Old Testament offences against the person, such as murder and assault on parents, are punishable by the community with the imposition of the death penalty, while offences against property are civil offences for which compensation is payable. Here again his insights as a lawyer have surely assisted his research.

Admittedly, the lawyer, untrained in Biblical criticism, meets the difficulty of determining what in a particular text is probably original, and what is later revision, but here he can build upon the literary-critical researches of his theological fellow-workers in the field.

The Jewish law covers every aspect of life: there is no distinction between the religious and the secular, since God's will, revealed in the Law, extends to the whole of life. In that the law thus includes the personal areas of life within its control, for those who, like this writer, still identify a legal rule by its accompanying sanction, the sanctions within these areas challenge the very definition of law. For example, the sanction for breach of the laws of ceremonial purity was the disqualification of the impure person from entry to the Temple, unless he or she had first undergone the appropriate lustration and period of waiting.<sup>15</sup> But how could these laws be policed? The male and female sexual discharges are a potent source of impurity, yet who was to know, except the sufferer, whether he or she had sustained impurity through such an occasion? Jehoiada, a 9th Century Chief Priest, is reported at 2 Chronicles 23, 19 to have placed keepers at the gates of the Temple so that nobody unclean should enter, but the aim seems incapable of realisation. Probably the only sanction was the sufferer's conscience or fear of divine retribution. *The Fathers According to Rabbi Nathan*,<sup>16</sup> a 3rd or 4th Century A.D. collection of *haggadah*,<sup>17</sup> explains the sanction thus: ". . . one has suffered a pollution. If he is so minded he bathes; if he is otherwise minded he does not bathe. Does anyone see him, or does anyone know to tell him ought? He fears only Him who commands ritual immersion."<sup>18</sup> This sanction appears to be within Austin's "eventual evil annexed to a command", if "evil" be rather interpreted as "penalty".<sup>19</sup>

Not only is the distinction between the secular and the religious absent in a religious system, but there is also identity between law and ethics. Since Jewish law is the revealed Will of God who is perfect holiness,<sup>20</sup> the law, in addition to command, must represent the highest moral good.<sup>21</sup> To this statement one

14. "The Decalogue – Ancient Israel's Criminal Law", *34 Jo. of Jewish Studies* (1983), pp. 1-20.

15. See, e.g., Leviticus 15,28-31. Cf. *The Code of Maimonides* (tr. Danby) (1954), Bk. X, p. 393.

16. (Tr. Goldin) (1955), p. 18.

17. Spiritual, homiletical and legendary material generally linked to a Scriptural text.

18. Pursuant to Leviticus 15,16.

19. *Lectures on Jurisprudence* 4th ed., Vol. I, pp. 182-183.

20. See, e.g., Isaiah 6,3-5.

21. See, e.g., Micah 6,8; Amos 5,14-15. Maine, *supra* n.12, writes at p. 16 concerning the ancient Codes that the severance of law from morality, and of religion from law, belongs to the later stages of mental progress. However, in the case of a divinely revealed law, its unity with religion and morality cannot be severed.

qualification must be made: in the Jewish religion there was a tension between its two aspects, the Temple and cult, and the prophets, between the service of God through the performance of correct ritual, and his service through righteous conduct.<sup>22</sup> Although the prophetic ideals clearly influenced the Book of Deuteronomy, on the whole, the emphasis in the Pentateuchal law was on the ceremonial service of God. A social system in which law can possess such an elevated status surely merits study in its practical application, for even Courts of Equity in England do not usually claim that equitable duty is co-terminous with moral duty. Thus in *Re Cawley & Co.*<sup>23</sup> Fry L. J. admitted, "If we were sitting in a court of honour, our decision might be different", and in *Buttle v. Saunders*,<sup>24</sup> by requiring trustees to 'gazump' in the financial interest of the beneficiaries, the Court prevented trustees from following the acknowledged practice of honourable businessmen. The reputation of Equity as a modern arbiter of ethics was pithily encapsulated by the Judge whose name we salute in this *Journal*, when, commenting on the suggestion that a father was entitled to recover dividends which he had caused his company to declare, and pay for the benefit of his children, he exclaimed, "Even a Court of Equity would not allow him to do anything so inequitable and unjust."<sup>25</sup>

However, even in Israel the law, and the moral values which it reflected, developed with its history; and the history of Jewish law is a fascinating account of how Codes were adapted by means of commentary<sup>26</sup> and of fiction, to serve the changing needs of a primitive agrarian society gradually growing more civilised.

The most primitive Code is usually considered to lie in Exodus 34, since it contains a list of ten, mainly short, commandments, most of which relate to religious festivals and sacrifices appropriate to a pastoral community. Unlike the Decalogue in Exodus 20, there are no moral commands. It is thought to date from the 9th Century. The later part of the Covenant Code, Exodus 20-23, is dated in the 8th Century, and examples of its ethical provisions are that widows and orphans shall not be afflicted,<sup>27</sup> or usury taken from the poor.<sup>28</sup> The Deuteronomic Code (Deuteronomy 12-26) is believed to be the book of the law discovered in the Temple in 621 B.C.;<sup>29</sup> it is more comprehensive, is suited to a more civilised society, and contains charitable and humanitarian provisions. For example, the man who has just built a house, or planted a vineyard, shall not be conscripted for war. The same applies to the faint-hearted and the recently

22. See, e.g., Amos 5,21-24; Isaiah 1,12-17; Jeremiah 7,1-7, 21-23.

23. (1889) 42 Ch.D. 209, 236.

24. [1950] 2 All E.R. 193.

25. *Re Vandervell's Trusts (No. 2)* [1974] 3 All E.R. 20.

26. Both ancient and modern Codes have thus received an extended life; see the commentaries on the Roman Praetor's Edict and on the French *Code Civile* in Allen, *Law in the Making* 7th ed. (1964), pp. 165-187.

27. Exodus 22,23-24.

28. Exodus 22,25.

29. 2 Kings 22,8.

married.<sup>30</sup> A similar kindness is to be shown to animals; the ox is not to be muzzled while threshing.<sup>31</sup> The remission of debts in the 7th year,<sup>32</sup> the rules of primogeniture in inheritance<sup>33</sup> and the law of levirate<sup>34</sup> (a man's obligation to marry his deceased brother's widow) are examples of increasingly civilised 'lawyers' law. This Code largely repeats and supplements the Covenant Code, but the additions and variations exhibit a more sophisticated society. Thus, the compensations to be paid for various injuries<sup>35</sup> are omitted from the later Code, which presumes the sitting of permanent judges<sup>36</sup> to decide such matters.

The Priestly Code, probably written during the Exile in the 6th Century B.C. is, apart from its core, the Holiness Code of Leviticus 17-26, law in the form of history; what happened in the past is recounted so that it may regulate what is done to-day.<sup>37</sup> This creation of precedent by historical narrative is an intriguing variation of *stare decisis*. The Priestly Code fills Leviticus and most of Numbers, and is scattered through Genesis and Exodus. Not surprisingly, it enhances the rôle of the priesthood, and elaborates the ceremonial law.<sup>38</sup> Genesis 2,1-3 and 9,1-17, illustrates the way in which the Priestly authors make law by their writing of supposed history. Institution of the Sabbath rest is attributed to Yahweh in creation, and the basic laws considered to be binding even on Gentiles (not to eat blood and not to shed it), are inserted in a covenant with Noah. Similarly, a decision by David concerning the distribution of spoil between combatants and non-combatants (1 Sam. 30,24) reappears in the Priestly Code (Numbers 31,27) as an alleged part of the Mosaic laws.

The achievement of the Sopherim<sup>39</sup> and scribes in adapting this ancient written law to the changing *mores* and circumstances of later times, by means of the interpretation of it, should commend itself to the student of legal history. Following neglect of the law by generations of the exiled who had been allowed by

30. Deuteronomy 20,5-8.

31. Deuteronomy 25,4.

32. Deuteronomy 15,1-3.

33. Deuteronomy 21,15-17.

34. Deuteronomy 25,5-10.

35. As at, e.g., Exodus 21,18-24,32.

36. Deuteronomy 17,8-11.

37. Judaism is an 'historical' religion for the faith is founded on 'salvation' events; that Yahweh delivered Israel from slavery in Egypt, and delivered the law to Moses on Sinai. The former historical root is reflected in the latter. The reason for the Jew, his servants and his cattle not working on the Sabbath, for releasing slaves and furnishing them liberally in the seventh year, and for not denying justice to the sojourner or fatherless, is that "you were a slave in Egypt and the Lord your God released you from there": Deuteronomy 5,12-15; 15,12-15; 24,17-18.

38. The Code is, in part, idealised law, representing what its authors would like to prevail. Cf. Maine, *supra* n.12, p.17 speaking of the religious oligarchies of Asia: "Their complete monopoly of legal knowledge appears to have enabled them to put off on the world collections not so much of the rules actually observed as of the rules which the priestly order considered proper to be observed."

39. Traditionally the Sopherim (literally 'Writers') are identified with the Men of the Great Synagogue (led by Ezra) to whom the Law is said at Aboth 1,1 to have been committed by the Prophets. However the Sopherim and the scribes are often grouped together as 'the scribes', since Ezra is himself described as 'the scribe' (Nehemiah 8,1).

Cyrus to return from Babylon to Jerusalem (*circa* 535 B.C.), Ezra publicly read the law in 444 B.C.<sup>40</sup> and Scripture emphasises that the Levites “helped the people to understand” the law, and “gave the sense so that the people understood the reading” (Nehemiah 8,7-8).<sup>41</sup> At first, the adaptation was effected by exegesis of particular verses of Scripture, and examples of this method (‘Midrash’) are preserved in the Rabbinical commentaries, Mekhilta, Sifre and Sifra.<sup>42</sup> But with the advent of Hellenistic ideas and customs, following Alexander’s Eastern conquests, the Sopherim were unable to relate them to the Codes, and the influence of the Sopherim consequently waned. At this point Jewish jurisprudence by means of a remarkable fiction, at least to the secular mind, sowed the seeds of an unstoppable growth and development. Since some of the new ideas were good and sensible, even though no support for them could be found in the written Codes, some teachers argued that there must be divine authority for them, and that some laws must therefore have been delivered to Moses at Sinai by word of mouth. Attempt was still made by these teachers (‘scribes’) to base a legal ruling (‘halakhah’) upon a Scriptural text, even if only tenuously,<sup>43</sup> but much freer interpretation of the text was permitted.<sup>44</sup> Where the meaning of the text could not be stretched far enough even by this method the favoured practice was deemed to be a law handed down by Moses at Sinai.<sup>45</sup> However, a rule or custom was only accepted by the scribes as traditional law in this sense if its authenticity was guaranteed by the pronouncements of earlier scribes.<sup>46</sup>

The authority which this mythical origin at Sinai gave to the Unwritten Law, enabled the scribes to interpret the Written Law in ways which sometimes

40. It is uncertain whether the whole Pentateuch was read or simply the Priestly Code, but “it is clear that only after Ezra’s activity did the priestly source come out into the daylight”: M. Haran, “Behind the Scenes of History: Determining the Date of the Priestly Source”, *Jo. of Biblical Literature* (1981), at p. 324.

41. This probably signifies that the Sopherim both translated the text into the vernacular Aramaic, and explained it.

42. On Exodus, Numbers and Leviticus respectively. In their original form they are dated in the 2nd Century A.D.

43. Thus, Leviticus 11,40 provides that he who eats the carcass of a beast which has died naturally shall be unclean. This was interpreted to mean not that non-kosher meat defiled the eater, but that the minimum amount of unclean meat which a person has to bear or touch, to be defiled, is the minimum amount that could be termed ‘eating’, *i.e.* a piece the size of an olive (Sifra; Niddah 42b).

44. Nevertheless, permissible methods for extracting further rules (*halakhoth*) from the written text were laid down; the first such set of rules, the 7 Middoth, were attributed to Hillel (Tosephta, Sanhedrin 7,11).

45. R. Joshua b. Hananiah, prominent in the academy established at Yavneh after the destruction of the Temple in A.D.70, criticised *halakhoth* with little Scriptural support: a nailmaker by trade, he said, “Tongs were made with tongs, but who made the first tongs?” (Tosephta, Hagigah 1,9). He was referring (*inter alia*) to the Sabbath laws which “are like mountains hanging by a string, for they have little Scripture for many laws” (*ibid.*).

46. *E.g.*, at Mishnah, Eduyoth 9,7 the said R. Joshua declared: “I have received as a tradition from Rabban Johanan b. Zakkai, who heard from his teacher, and his teacher from his teacher, as a *Halakhah* given to Moses from Sinai that . . .”

conflicted with its common-sense meaning.<sup>47</sup> Thus, Exodus 22,1 provides that if a man steals an ox or a sheep and kills or sells it, he must restore five or four-fold respectively. The scribes ruled that if he stole according to the evidence of two witnesses, but killed or sold according to only one person's evidence, then the tariff of restoration was only two-fold (which applied to theft of entrusted money or goods: Exodus 22,7).<sup>48</sup> This scribal freedom was often exercised to alleviate the severity of the Written Law,<sup>49</sup> and sometimes without attempt at Biblical interpretation. The *lex talionis* (Exodus 21,23) which was intended to restrict unlimited private revenge, was repealed by the scribes' substitution of pecuniary damages (Mishnah, Baba Kamma 8,1). Jewish history accordingly offers a rich account of the development of law through commentary upon Code and through fiction.

To the student of legal history, the humanitarian trends of the Pharisaic law afford a noteworthy comparison with the influence of Equity on the English Common Law. As just discussed, the rigour of the Written Law was often avoided by the use of the rules of evidence. The evidence of at least two witnesses was required in a capital case.<sup>50</sup> If the evidence of the witnesses disagreed even on minor points, *e.g.* if one said the offence took place at the fifth hour and another the seventh hour (Mishnah, Sanhedrin 5,3), their entire evidence was rejected.<sup>51</sup>

Study of the Unwritten Law reveals many examples of that creative approach to law which the University should seek to inculcate. One effect of the release of debts every 7 years (Deuteronomy 15,9) was the difficulty of borrowing money in, say, the 6th year. Thus the famed Pharisee, Hillel (founder of one of the two competing schools of Pharisaic thought), instituted the *prosbul* which, through a declaration by the creditor before the Court, negated the operation of that law.<sup>52</sup> Again, Deuteronomy 24,1 provides that a man may divorce his wife simply by delivering a bill of divorce, but the scribes, by requiring detailed formalities affecting this document<sup>53</sup> and by institution of the *ketubah* (whereby the husband had to charge his assets to secure payment of the dowry to the wife on widowhood or divorce),<sup>54</sup> sought to protect the wife's position.

47. The scribes varied in degrees of conservatism according to their willingness to accept new *halakhoth*. R. Eliezer b. Hyrcanus (a contemporary of the said R. Joshua, and a frequent disputant with him) would not pass on an *halakhah* to his students, unless it had been handed down by teachers of two previous generations. R. Joshua is thought to have disapproved of the multiplication of *halakhoth*, for he would say of a recent ruling cited to him, "The Scribes have invented a new thing, and I cannot make answer (to them that would gainsay them)"; *e.g.*, Kelim 13,7.

48. Baba Kamma 7,4.

49. A guiding principle of the scribes was not to impose a rule which most people would be incapable of observing (Baba Bathra 60b).

50. Deuteronomy 17,6.

51. Shebiith 9,3-4. In the History of Susanna the capital conviction of Susanna by the Jewish elders for adultery was quashed when Daniel, in separate examination of each of the two witnesses, elicited from one that the act was done under a mastick tree, and from the other under a holm tree.

52. Shebiith 10,3-4.

53. Gittin, *passim*.

54. Shab. 14b and see the Soncino Talmud, Moed I, p. 59, n. 6.

The rôle of intent in Jewish law also repays study. Indeed, one would expect internal state of mind to be important in a religious law. Intention was an essential component in the legal effect of an act from an early stage, and the old Common Law rule that a man may be presumed to intend the natural consequences of his acts,<sup>55</sup> does not usually operate. Deuteronomy 19,4-13, provides that if a man kills his neighbour unintentionally, as where the head of the tree-cutter's axe slips from the handle and kills, he may flee to a city of asylum. But where a man lies in wait for, and attacks his neighbour fatally, and then flees to a city of asylum, the elders may recover him and hand him over to the avenger. Pollock's claim that "Even manifest intention is hardly treated as a possible or proper subject-matter of judicial proof in archaic systems of law"<sup>56</sup> accordingly appears open to question. In Mishnaic times, state of mind has the same importance both in religious and civil matters. If a man recites the *Shema* (daily prayer) without directing his heart to it, he has not fulfilled his obligation (Berakoth 2,1). Again if a man only intends to strike another on the loins, but the blow lands on his heart and kills him, the striker is not liable for killing (Sanhedrin 9,2).<sup>57</sup> Liability for injury by even an ox is determined by what the ox intended (Baba Kamma 5,4)!

Jewish law offers the student interesting insights into the function of custom in the growth of law. Although the Jews believed the Covenant Code to be the Word of God, it seems probable that, like the Twelve Tables of Rome, it comprised accumulated custom. Although the Deuteronomic Code contains hortatory matter, and the Priestly Code idealism, later custom is surely embedded there too. And in the traditional law enunciated by the scribes, there is reason to believe that many rules were giving legal sanction to customs. Thus, Hillel was asked whether it was permissible for the worshippers on the Passover to bring knives to the Temple for the slaughter of their sacrificial lambs, even when the Passover fell on a Sabbath, since on the Sabbath the carrying of articles may constitute a breach of the prohibition of work.<sup>58</sup> Hillel told his questioners to observe what, in fact, the people were doing on such a Sabbath, and they noticed that the worshippers had attached the knives to the animals they were leading. The rule was, therefore, that to this extent the Passover over-rode the Sabbath.<sup>59</sup>

A most significant feature of this different thought-world, for the imaginative student, is the Jewish joy in fulfilling the commands of the law which contrasts with

55. *R. v. Harvey* [1823] 2 B.&C.257. Winfield in *A Textbook of the Law of Tort*, 5th ed. (1950) wrote at p. 20: "If I fire a gun at your dog, wishing merely to scare it, and in fact some of the pellets hit it, it does not lie in my mouth to say that I intended only to scare it and not to hit it. And it would be equally idle for me, at any rate in the law of tort, to say that I never wished to hit you, if in fact some of the shot glanced off the ground and wounded you who were standing near your dog."

56. *A First Book of Jurisprudence* 6th ed. (1929), p. 159.

57. Admittedly, there is liability in some cases, particularly in matters of ritual, irrespective of knowledge of the act or intent: see, e.g. Leviticus, 4,13; 5,1-6.

58. Shab. 1,1-3. Concerning the influence of custom and the folkways in the formation of law in a theocratic society, see also the present writer's *Jesus and the Laws of Purity* (JSOT Press, Sheffield, 1986).

59. Tosephta Pisha 4,14.

the often reluctant and critical attitude towards the law's requirements in a secularly based system. Expressions such as the Psalmist's "Oh, how I love thy law! It is my meditation all the day" and "Blessed is the man . . . his delight is in the law of the Lord, and on his law he meditates day and night"<sup>60</sup> indicate the devotion of the orthodox to a religious legal system.



This writer is not aware of any text-book of early Jewish law written specifically with the law-student in mind, but we have mentioned most of its literary sources above, and it would not be beyond the competence of the teacher to give in his lectures the necessary historical background and explanation of those sources.

This trumpeting of the claims of early Jewish law to a place as an optional course in academic legal syllabi is not intended to deprecate the claims of other systems of ancient religious law, such as the Hindu or the Moslem, which we understand already to be optional courses in the LL.B. curriculum at the School of Oriental and African Studies of London University. Indeed, the greater current prevalence of those systems in Britain's multi-racial society, will enhance their attraction for the proponents of utilitarianism. We are submitting only that the purpose of a University ought to be the conferment of a liberal education upon its students and that, within the context of an academic legal education, early Jewish law's embrace of religion, jurisprudence, ancient history and literature, renders it a suitable medium to that end, stimulating, as it will, the student's imaginative and creative powers no less than his historical and critical faculties.

60. Psalms 119,97; 1,1-2. The element of joy in Judaism is sometimes overlooked. The early law stipulated, "you shall rejoice before the Lord" at the feast of Weeks, and "you will be altogether joyful" at the feast of Booths (Deuteronomy 16,11 and 15). This spirit extended into later times. The said R. Joshua declared that on a Festival day a man should devote half his time to God and half to merrymaking (Bezah 15b), and at Shab. 118b we read, "He who delights in the Sabbath is granted his heart's desires."