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PHILO AND THE ORAL LAW

The Philonic Interpretation of Biblical Law in Relation to the Palestinian Halakah

BY

SAMUEL BELKIN

Assistant Professor of Hellenistic and Rabbinic Literature, Yeshiva College

CAMBRIDGE, MASSACHUSETTS
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To

MRS. IRA J. SOBOL

In Gratitude

PREFACE

PHILO JUDAEUS of Alexandria has been and still is a subject of profound study and research. In the exhaustive bibliography of Philo published by L. Goodhart and E. R. Goodenough (accompanying the latter's monograph, *The Politics of Philo Judaeus*), over sixteen hundred items are listed as dealing with the works of Philo, an indication of the great interest which the Alexandrian Jewish sage has exercised upon human thought throughout the ages. Philo the philosopher, the mystic, the allegorist, the theologian, the forerunner of Christianity, the statesman, the jurist, the Stoic, the Neo-Pythagorean, the gnostic, the man, the stylist — all these subjects are well treated in numerous works by oustanding scholars. Very little has been said, however, of Philo the master of Jewish law. Philo has been studied with great interest, but *Judaeus* has been left unnoticed. While examination has been made of the variety of non-Jewish sources upon which Philo drew for his interpretation of Judaism, little effort has been made to determine how much of Jewish legal erudition his works represent. Generally scholars are inclined to draw a sharp line of distinction between Palestinian and Alexandrian Judaism, between normative and Hellenistic Judaism, between Judaism based on the Oral Law, as formulated by the Pharisees and supplemented by their successors, and Judaism which justified its existence by assimilating Greek thought and ideas only to claim afterward that these ideas were known and revealed to them through the agency of Moses in the Pentateuch and the prophets. Now there is no doubt that the Alexandrian Jewish community which lived among a Greek-speaking population borrowed a great deal from its neighbors, but at the same time it is quite certain that there existed a great interdependency of thought between the Alexandrian and Palestinian Jewish communities and that we cannot regard them as two entirely separate forms of Judaism. Alexandrian Jewry, which remained steadfastly loyal to the practices of Juda-

ism within a foreign and hostile environment, was willing to undergo all the inconveniences these practices must have inevitably involved, not because of the Greek philosophical ideas themselves, but because of the strong and vital hold which Jewish traditional practices had upon the lives of the people. It is precisely these Alexandrian Jewish traditions that I shall investigate in the light of Palestinian literary sources.

It is perhaps useful to offer a brief survey of the attitude taken by the few scholars who have studied this problem.

The pioneer in constructive work on it was Zecharias Frankel in his *Vorstudien zu der Septuaginta* (Leipzig, 1841), his *Ueber den Einfluss der palästinischen Exegese auf die alexandrinische Hermeneutik* (Leipzig, 1851), and his *Ueber palästinische und alexandrinische Schriftforschung* (Breslau, 1854). While Frankel's main purpose in these works was to show the influence of Palestinian Oral Law upon Alexandrian Judaism in general, indirectly he has laid the foundation for the study of the influence of the Oral Law upon Philo's Halakah. The first, however, to deal directly with Philo's Halakah was Bernhard Ritter in his monograph *Philo und die Halacha: Eine vergleichende Studie unter steter Berücksichtigung des Josephus* (Leipzig, 1879). Ritter's main purpose was to contrast the Halakah of Philo with that of the Mishnah and Talmud. He noticed that while some elements in Philonic Halakah are either similar to, or the same as, that of the Mishnah and Talmud, others are quite different from and even contrary to it. He therefore arrived at the conclusion that Philo's Halakah had a quite different source: That source he assumed to be the decision of the Jewish courts, which he believed to have existed in Alexandria in the time of Philo. Ritter's work, distinctive for being the first in the field of study, is, however, fragmentary, incomplete, and inadequate.

In direct opposition to Ritter's argument, the existence of independent Jewish courts in Alexandria was denied by Jean Juster (*Les Juifs dans l'empire romain*, I, 4 ff., II, 157 ff.) and Emile Bréhier (*Les idées philosophiques et religieuses de Philon d'Alexandrie*, pp. 33 ff.).

A direct relationship between Palestinian and Philonic

Halakah is maintained by J. Z. Lauterbach in a special section in the article on "Philo Judaeus" in *The Jewish Encyclopedia*, X, 15–18 (New York, 1905). He gives there a complete outline of the problem, showing by many concrete examples Philo's debt to the Halakah, especially to the earlier Halakah, but admitting that in certain instances Philo's laws are to be traced to the rulings of the Jewish courts in Alexandria. Similar views are also maintained by several Hebrew scholars. Z. Yawitz in his Jewish history, written in Hebrew (*Toledot Yisrael*, V, 115 ff.), pointed out some such relationship and promised to write a special monograph on the relation between Palestinian and Hellenistic Judaism (p. 119, n. 7), with the implication that it would also deal with the legal tradition. But that monograph was never written. Within recent years there have appeared a number of Hebrew articles dealing with some special topics in Philonic Halakah in their relation to the Palestinian Halakah. All of these are listed in the Bibliography. More attention has been given to the Palestinian Midrashic or Agadic elements in Philo, and there is quite an extensive literature on this subject. A list of this type of work will be found in Goodenough and Goodhart's bibliography of Philo under various headings.

Philo's complete independence of Palestinian Halakah and his dependence upon Greek and Roman laws and traditions is maintained by Heinemann (*Philons griechische und jüdische Bildung*, especially pp. 556 ff.). He goes even further by denying that Philo had any acquaintance with the Oral Law as it existed in Palestine. Detailed examination of Professor Heinemann's work, monumental in its scope and a mine of information, is essential for every serious student of Philo. Dr. Heinemann's view of Philo's literary background is as follows: Philo had hardly any knowledge of the Oral Law as it was understood by the Palestinian Rabbis; his reference to the "unwritten law" cannot be identified with the oral traditions of the Palestinian schools; he was ignorant of Pharisaic Judaism and was an incompetent jurist; he drew his information exclusively from non-Jewish sources; for one idea his direct source was Stoicism, for another Plato, for a third Neo-Pythagoreans, etc.

Professor Goodenough's view, as expressed in several works on Philo (especially *The Jurisprudence of the Jewish Courts in Egypt*), may be considered a synthesis of the various views that have been maintained regarding the source of Philonic law. Like Ritter, and in opposition to Juster and Bréhier, he admits the existence of special Jewish courts in Alexandria. Philo's Halakah, according to him, is based upon the decisions of these courts. These decisions, he further maintains, had their origin in Greek and Roman law, but he admits that, since not all of them can be traced to Greek and Roman law, they must therefore have had a Jewish origin. Consequently, unlike Heinemann, he admits that Philo's Halakah, based as they are upon such decisions, also contains Jewish elements. Whether these elements are ultimately identified with the Palestinian Halakah or whether they are a result of an independent development in the Alexandrian Jewish courts is a question he declares to be beyond the scope of his investigation, leaving its solution to rabbinic scholars. Professor Goodenough's work is highly instructive and often convincing. On the whole, I agree with him that the legal decisions in Philo are based upon the actual decisions of the Jewish courts in Alexandria, but in the course of this work it will be shown that some of these legal decisions, those which in Goodenough's opinion have no parallel in Roman and Greek jurisprudence, are based upon Palestinian sources. In places, however, where both the Palestinian and the Alexandrian law as described by Philo is the same as that of the Romans, or in some instances where the Alexandrian law as described by Philo is contrary to Palestinian Halakah but agrees with Roman and Greek law, I accept Goodenough's explanations.

The view developed in this work is that the Oral Law which originated in Palestine was not limited to the borders of Palestine, but was also known and practiced among the Jews who lived outside of Palestine, and that Philo's Halakah is based upon the Palestinian Oral Law as it was known in Alexandria.

I desire to take this opportunity to express my thanks and appreciation to Professor Millar Burrows, now of Yale Uni-

versity, under whom I have done research in the biblical and archaeological field and under whose guidance a portion of this work was written in partial fulfillment for the degree of Doctor of Philosophy at Brown University; to Professor William Thomson of Harvard University, who read the manuscript; and to Professor Erwin R. Goodenough of Yale University, whom I have consulted for the last few years in my work in Hellenistic literature. He was also generous enough to read the whole book in manuscript form before it went to press and to make a number of valuable suggestions which are included in the notes. My particular gratitude goes to Professor Harry A. Wolfson of Harvard University, who has given me constant advice and guidance toward a critical and historical approach to rabbinic and Hellenistic literature. There is hardly a problem in this book which we have not carefully analyzed and discussed together; and though he is nowhere directly quoted, I must acknowledge that many of my conclusions were arrived at through his most valuable assistance.

I also wish to thank my grandfather, B. L. Levinthal, Chief Rabbi of the orthodox Jewish community of Philadelphia, for his inspiration, aid, and encouragement in the preparation and publication of this book. Finally I wish to express my gratitude to President B. Revel of the Yeshiva College for the great interest he has always taken in my work.

SAMUEL BELKIN

NEW YORK CITY
January 30, 1939

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PHILO AND THE ORAL LAW

CHAPTER I

THE ORAL LAW IN ALEXANDRIA

We usually apply the term "lawyers" or "doctors of law" to the Tannaitic scholars of the first century, whereas to Philo we always apply the term "philosopher" or "mystic." Very little stress has been laid upon the philosophical ideas of the Tannaim or the legal knowledge of Philo. When a person trained in ancient Jewish law carefully and sympathetically reads the four Books of Philo's *De Specialibus Legibus,* he can easily find out, however, that Philo was not only an allegorical commentator on the biblical narratives, but also a competent jurist who was deeply interested in expounding and explaining Mosaic law on an ethical and legal basis. The reader may even wonder how Philo, author of the allegorical interpretation of the Bible, which is full of mystical philosophy and Midrashic traditions, could also have written a sober treatise on practical law containing very little allegorical interpretation.

In the four Books of *De Specialibus Legibus* Philo touches upon the most essential laws of Judaism. In the first Book he discusses the more or less religious laws, such as those concerning circumcision, priesthood, and sacrifices. To Philo the priesthood and sacrifices are important factors in Jewish life, although he himself cannot explain the laws of sacrifices without resorting to his allegorical method. In the second Book he discusses oaths, the Sabbath, the Sabbatical year, the Jubilee, and respect for parents. He considers the observance of these laws not only religious obligations, but also moral duties, and he attributes to the Sabbath in particular universal importance. In the third Book he discusses prohibited marriages, adultery, murder, and similar topics. The fourth Book is devoted to civil laws, dealing with such topics as judges, witnesses, theft, and deposits; but in part it deals also with ritual laws. Consequently, in *De Specialibus Legibus* Philo gives a thorough prospective of biblical law as inter-

preted in the first century. Since the *De Specialibus Legibus* is our only guide to the legal system and institution of the Alexandrian Jews, a thorough analysis of the laws discussed therein may not only shed light on the religious beliefs of Philo, but also enrich our understanding of the legal doctrines of the Alexandrian Jewish community.

When one studies Philo, however, the first question that arises is whether the laws dealt with in his work are based upon the same underlying principles as those of the Palestinian Jews as recorded in Tannaitic literature. If they are based upon different principles the question then is whether their origin is to be found in non-Jewish customs or in the oral laws of the Jews in Egypt. If they are to be found in the oral laws of the Egyptian Jews, the question may be further raised whether they are based upon the practical decisions of the Jewish courts in Egypt, assuming there were such courts, or whether they are based upon purely theoretical discussions. Furthermore, a student of Philo has to solve the problem of what motivated Philo to write these special treatises on law; for, inasmuch as his primary interest was philosophy, he would naturally not have written such a stupendous legal treatise as the *De Specialibus Legibus* unless he had some special reason for doing so. Finally, assuming that the Alexandrian Jews had an oral law of their own, we may ask whether, like their contemporary Palestinian Jews, they had among themselves, outside of those who adhered to the worship of the Temple of Onias,[1] some elements who denied the validity of the Oral Law.

[1] The fact that all Hellenistic writers with the exception of Josephus fail to make reference to the Temple of Onias shows that it played a very insignificant part in the life of the Alexandrian Jews. H. Graetz's theory that the Alexandrian Jews looked upon the Onias Temple as their local religious center (*Geschichte der Juden*, 1905, II, 27 ff.) and that in some laws Philo himself followed the priestly legislation of the Temple of Onias (*Monatsschrift für Geschichte und Wissenschaft des Judenthums*, 1877, p. 486) is hardly correct. The group of Jews with whom Philo associated himself looked upon the Jerusalem Temple as the national center of the Jewish cult and upon the Alexandrian synagogues as their local religious center. In *Ad Gaium* Philo speaks in the highest terms about the Temple in Jerusalem. L. Herzfeld seems to be correct in saying that the Temple of Onias never had many adherents (*Geschichte des Volkes Jisrael*, 1847, III, 461 ff.). It may be, however, that the Temple of Onias exercised some influence on the Egyptian

In order to answer these questions, I have undertaken to reanalyze Philo's interpretation of biblical law and determine its relation to the Tannaitic Halakah. In discussing these problems, I have not limited myself wholly to rabbinic literature, but have also considered indirectly the Apocrypha, Josephus, the New Testament, and also, when necessary, non-Jewish law. I have tried to give an idea of Jewish law in the first century and to show the gradual development and changes of the Halakah in Palestine itself. Hence the reader may see how the pre-Mishnaic Halakah often differed from the Mishnaic, and how circumstances and conditions in Palestine in many instances caused a change in the Halakah. Consequently, when Philo's law differs from the Tannaitic or Amoraic Halakah, this does not necessarily mean that he based his laws on non-Jewish sources or that the Jewish communities in Egypt had a different code of law, but that he may represent the earlier Tannaitic tradition. Furthermore, where scholars are unanimously of the opinion that Philo's law has its background in neither Tannaitic nor Greek law and that such laws reflect those which were practiced by the Alexandrian Jews, I undertake to show that they have their background in earlier and later Palestinian Halakah. If, for instance, we take Philo's attitude towards illicit relations with an unmarried woman, perjury, murder by poison, abortion, oaths given to one who denies a deposit, living with a betrothed woman, and so forth, it will be seen that these laws for which most of the scholars have failed to find any source are traceable to the Tannaitic Halakah.

I agree with Ritter and Professor Goodenough that Philo has based his law on the decisions of the local Jewish courts in Egypt, but I do so for reasons entirely different from theirs. According to these scholars, Philo must have followed the laws of the Jewish courts of Egypt because his laws often differ from the Tannaitic and Greek laws, whereas, in my

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Jews who lived in the vicinity of Heliopolis (see A. Hirsch, "The Temple of Onias," *Jews' College Jubilee Volume*, 1906, pp. 39–80; see also the conflicting statements in Josephus concerning the Temple of Onias; *Ant.*, 12, 5, 1; 13, 3, 1; 20, 10, 3; *Bell. Jud.*, 1, 33; 7, 421–41; see also similar Talmudic traditions Men. 109a; 'A. Zar. 52b; Meg. 10a).

opinion, he may have done so precisely because most of his laws agree with the principles of the Tannaitic Halakah. As we know of only one visit of Philo to Palestine, the question naturally arises: how did he become acquainted with Palestinian law? The answer to this question may be that the local courts in Egypt followed Palestinian law and that Philo wrote the four Books of *De Specialibus Legibus* under their influence.[2]

The general view prevalent among scholars that Philo had no interest in communal affairs and was, as is sometimes said, an "individualist" by nature is open to doubt. On the contrary, Philo has been criticized by some of his contemporaries for spending too much time on the affairs of the state. His reply to this charge was that a man must take an interest in the practical affairs of the state before he devotes his time to speculative studies. He writes:

To such men, then, let us say: Do you affect the life that eschews social intercourse with others, and courts solitary loneliness? Well, what proof did you ever give before this of noble social qualities? Do you renounce money-making? When engaged in business were you determined to be just in your dealings? Would you make a show of paying no regard to the pleasures of the belly and the parts below it – say, when you had abundant material for indulging in these, did you exercise moderation? Do you despise popular esteem? Well, you held posts of honor; did you practice simplicity? State business is an object of ridicule to your people. Perhaps you have never discovered how serviceable a thing it is. Begin,

[2] We shall not go far astray in saying that Tannaitic tradition gained ground in Egypt at a very early date. Although the study of the law was pursued in Babylonia from the time of the common era, as the case of Hillel, a native of Babylonia, shows, nevertheless rabbinic learning became widely spread at the beginning of the third century C.E., during the days of Rab and Samuel. Such great scholars as Judah b. Ṭabbai or Joshua b. Peraḥayah, who migrated to Alexandria because of the persecution of John Hyrcanus, may possibly have introduced Palestinian law into Egypt (see J. Lauterbach, "Philo Judaeus, His Relation to the Halakah," *The Jewish Encyclopedia*, 1905, X, 15–18). Judging by the technical and legal questions which the Alexandrian Jews asked Joshua b. Ḥaninah, a Palestinian teacher of the second century (Nidd. 69b), it is evident that the Alexandrian Jews at that time were well acquainted with the principles of the oral traditions. The many references in Tannaitic literature to the interchange of ideas between the Alexandrian and Palestinian Jews indicate that the Palestinian influence on Alexandria was much greater than is commonly assumed (see Tosefta Pe'ah 4, 6; Tosefta Ket. 3, 1, and 4, 9; Tosefta Shab. 2, 3; Tosefta Suk. 4, 6; Yeb. 80a; Suk. 51b; Ket. 25a).

then, by getting some exercise and practice in the business of life both private and public; and when by means of the sister virtues, household-management and statesmanship, you have become master in each domain, enter now, as more qualified to do so, on your migration to a different and more excellent way of life. For the practical comes before the contemplative life; it is a sort of prelude to a more advanced contest and it is well to have fought it out first. By taking this course you will avoid the imputation of shrinking from it through sheer laziness.[3]

It is true that it is hardly possible to ascertain how much legal power the Alexandrian Jewish courts had. Philo says only that the power of the government within the Jewish community was vested in a γερουσία,[4] but he is silent about the exact nature of the Jewish courts. Pseudo-Aristeas says that the local community (πολίτευμα) in Alexandria was governed by elders (πρεσβύτεροι) and magistrates (ἡγούμενοι).[5] The Talmud also refers to the Jewish courts in Alexandria.[6] Again, Josephus cites the testimony of Strabo that the Alexandrian Jews were governed by an ἐθνάρχης.[7] Whether the ethnarch had any political influence or whether he had been responsible only for the collection of the annual poll tax is still a moot question.[8] We have hardly any definite knowledge of the political status of the Jews in Alexandria during the Ptolemaic and Roman period. We are not even sure whether or not the Roman government granted the Alexandrian Jews the rights of citizenship.[9] All that we can say with certainty

[3] *Fuga*, 35–36. Originally I gathered a number of passages in Philo which suggest that he advocated the participation of the philosopher in civil and political affairs. Recently, however, Professor Goodenough published an excellent monograph in which he discusses this problem at length (*The Politics of Philo Judaeus*, 1938). I therefore decided not to go into a thorough discussion of this problem. Briefly, Goodenough argues convincingly that there was a conflict in Philo's mind whether the ascetic or the social life is more profitable, a conflict experienced by many other Greek philosophers. Philo, however, upholds both sides by insisting "that the philosopher's concern with the true state, the world, cut him off from obligation or concern with society, and then insisting just as heartily that this contact with the world-state put the philosopher under special obligation to serve human organization" (p. 69).

[4] *Flac.*, 74.

[5] *Ps. Arist.*, 310.

[6] Ket. 25a.

[7] *Ant.*, 14, 7, 2.

[8] See S. Tracy, *Philo Judaeus and the Roman Principate* (1933), p. 12.

[9] See H. I. Bell, *Juden und Griechen im römischen Alexandreia* (1926), pp. 10 ff.

is that there were Jewish courts in Egypt and that they must have had the power to inflict minor penalties on the members of their community.

To settle cases by pagan courts has always been against the religious feeling of the Jew. Even Paul, after his conversion, reproved his converts for carrying their disputes to those courts. The Alexandrian Jews were subject to discrimination and prejudice. They were humiliated and often persecuted and could have had small trust in the pagan courts. Philo himself had very little respect for the Roman courts:

> For some high officials [he writes] are half-villains, mixtures of justice and injustice, who, though they have been appointed to office to protect people who are being wronged from men who could wrong them, still do not like to write a judgment gratis even for those who deserve the judgment, but declare their decisions on a monetary and purchasable basis.[10]

Regardless of the existence or absence of Jewish courts in Egypt, most students find it difficult to understand the passages in Philo in which he calls for capital punishment, without the sanction of a judicial sentence, if heinous crimes were committed. Juster and Goodenough believe that lynching was a common custom among the Alexandrian Jews, but Heinemann thinks it highly improbable that an ethical philosopher like Philo would have actually encouraged mob violence and lynching. Heinemann also points out that Jewish law, as far as one can judge from rabbinic literature, did not approve of lynching, and that every punishment required a trial and judicial sentence, though undoubtedly single instances of mob violence may have occurred from time to time. I agree with Heinemann that neither Philo nor the Rabbis favored lynching. According to Tannaitic literature, whoever lynches a murderer before a conviction by court is guilty of murder.[11] But the numerous passages in Philo quoted by Professor Goodenough demand an explanation.

In a subsequent chapter in this work (pp. 112 ff.) I cite passages from Philo which show that he strongly opposed any form of lynching, that is, the murder of a criminal before

[10] *Spec. Leg.*, IV, 62.

[11] See Sifre Num. 161; Mak. 12a; *Ant.*, 14, 9, 33.

he was legally convicted. I show, however, that students of Philo must distinguish between the following cases: (1) lynching a person for a crime, however grave, which he has already committed but for which he has not yet been convicted; and (2) killing a person for the purpose of preventing him from committing certain heinous crimes. The former is lynching in the proper sense of the term and therefore prohibited. The latter is looked upon as a form of social self-defense and therefore permitted.

Killing as a measure of social self-defense was sanctioned even by the Jewish courts in the Middle Ages. Ashri states that although, since the dissolution of the Sanhedrin, the Jews had no right to administer capital punishment, they still had the right to resort to such a measure of self-defense in those countries where the government granted them that privilege. This right extended to every Jew.[12] We have, however, no knowledge of what the Roman government would have done to a Jew who put another Jew to death in order to prevent him from committing a capital crime. We are told in the Talmud that Rab Kahana, a Babylonian scholar of the third century, killed an informer to prevent him from betraying his fellow Jew. Rab advised Rab Kahana to go to Palestine, which was under Roman rule, for in Babylon the Persian government might convict him of murder.[13] The inference of this is, as explicitly stated in the Talmud, that while the Persian government did not sanction this feature of Jewish jurisprudence, the Roman government left such matters to the Jewish courts. It is, therefore, quite possible that at the time of Philo the Roman government of Alexandria did not interfere if one Jew killed another Jew as a measure of social self-defense.

It is well known that in the pre-Christian period there were legal and theoretical controversies between the Sadducees and the Pharisees. In studying Philo's interpretation of biblical law I have tried in many places to find out whether he bases himself on Pharisaic or Sadducean principles. After my com-

[12] Responsa Ashri 18, 1; quoted also by D. M. Shohet, *Jewish Courts in the Middle Ages* (1931), p. 136.

[13] B. Ḳ. 117a.

parative examination of Philo and the Tannaitic Halakah, I came to the conclusion that on the whole he follows Pharisaic principles, except that the severity of the penalties he imposes regarding capital punishment is in agreement with the Sadducean policy. Especially striking is the agreement between Philo and the Pharisees with regard to the status of a foreign slave in Israel, the rules of the calendar, the view of immortality, the need of waiting "till even" in case of impurity, the laws of antenuptial unchastity, and the theory that the daily sacrifices were public offerings. In some places where Philo discusses law analyzed by the schools of Shammai and Hillel, I find that he follows the stricter view held by the school of Shammai, although I do not draw any conclusion from this. It is impossible, however, to ascertain whether Philo belonged to the Pharisaic or Sadducean sect, for we can hardly tell whether they even existed in Alexandria. He never makes direct reference to them. The Essenes are the only Palestinian sect he mentions by name, and he speaks of them with great admiration. All we can say is that in the main his interpretations of the law agree with Pharisaic principles.[14]

[14] Professor E. R. Goodenough, in his book, *By Light, Light: the Mystic Gospel of Hellenistic Judaism* (1935), pp. 78 ff., endeavors to prove that Philo inclined more to the Sadducees than to the Pharisees. His main argument is based on the fact that Philo repudiates determinism, makes no reference to resurrection, his angels are only the δυνάμεις of God, and, finally, he quotes only the Pentateuch. Goodenough's conclusion is open to doubt. Both he and G. F. Moore (*Judaism*, 1927, I, 458) have exaggerated Philo's doctrine of free will and the Pharisaic conception of determinism. The term εἱμαρμένη appears in Philo in numerous places without criticism. He opposed only the view of some who believed that the conduct of man, whether good or evil, was determined by destiny, and the Stoic doctrine that nature itself is the cause of human destiny (*Mig. Abr.*, 179). As far as we can judge from Tannaitic literature, the Pharisees never applied the principle of Fate to moral conduct (see Ab. 3, 15; Ber. 33b; Ḥull. 7b; Nidd. 16b). The fact that Philo does not refer to resurrection of the dead is only a negative argument, but innumerable references to the religious and moral significance of immortality show that he had nothing to do with the Sadducees, who believed that the soul perishes with the body. It is true that Philo disregards the anthropomorphic elements of angels, a stand to be readily expected of a Hellenistic philosopher. The fact that he limits most of his biblical interpretations to the Pentateuch is striking, but I cannot see that this has anything in common with the Sadducees. In *Cont. Ap.*, I, 40–41, Josephus states that all Jews believe the twenty-two books to be of divine origin. Moore accurately remarks that "the statement of several of the Fathers that the

Philo frequently refers to two Alexandrian sects with whose method of interpreting the Bible he strongly disagrees: one, called by him the extreme allegorists, who abrogated the law and who interpreted the Bible only symbolically; and another, the literalists, who refused to interpret the law otherwise than literally. He does not make the slightest reference to those who belong to the Temple of Onias. As far as we can judge from Philo, there were, however, actually three sects in Alexandria: (1) the allegorists, who interpreted the Bible allegorically in the sense of the Greek mysteries but remained devoted to the Jerusalem Temple and cult; (2) the literalists; (3) the sect to which he himself belonged, who remained loyal to the entire Mosaic law but who also supplied some kind of allegorical method to the Pentateuch. The passages in which he deals with the allegorists and literalists are very instructive, for they reveal his devotion and loyalty to normative Judaism and his conviction that the allegorical method must also be applied to biblical law. We shall also see that Palestinian sources throw much light on the passages in which he deals with the literalists and allegorists. In one place he writes:

There are some who regarding laws in their literal sense in the light of symbols of matters belonging to the intellect are overpunctilious about the latter, while treating the former with easy-going neglect. Such men I for my part should blame for handling the matter in too easy and too off-hand a manner; they ought to have given careful attention to both aims, to more full and exact investigation of what is not seen and in what is seen to be stewards without reproach. As it is, as though they were living alone by themselves in a wilderness, or as though they had become disembodied souls, and knew neither city nor village, nor household, nor any company of human beings at all, overlooking all that the mass of men regard, they explore reality in its naked absoluteness. These men are taught by the sacred word to have thought of good repute, and to let go nothing that is part of the customs fixed by divinely

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Sadducees (like the Samaritans) acknowledged as Scripture nothing but the Pentateuch may be a misunderstanding of what Josephus says about their rejection of everything but the written law. There is no intimation of the kind in Jewish sources" (*Harvard Theological Review*, 1924, p. 352). For further discussion on determinism in rabbinic literature, see H. A. Wolfson, *The Philosophy of Spinoza* (1934), I, 385–86, 420. Professor Goodenough is undoubtedly correct in his main thesis that the allegories of Philo must be understood in the light of mysticism (see my review of Goodenough in *Jewish Quarterly Review*, 1938, pp. 279–83).

empowered men greater than those of our time. It is quite true that the Seventh Day is meant to teach the power of the Unoriginate and the non-action of created beings. But let us not for this reason abrogate the laws laid down for its observance, and light fires or till the ground or carry loads or institute proceedings in court or act as jurors or demand the restoration of deposits or recover loans, or do all else that we are permitted to do as well on days that are not festival seasons. It is true that receiving circumcision does indeed portray the excision of pleasure and passions, and the putting away of the impious conceit, under which the mind supposed that it was capable of begetting by its own power; but let us not on this account repeal the law laid down for circumcising. Why, we shall be ignoring the sanctity of the Temple and a thousand other things, if we are going to pay heed to nothing except what is shewn us by the inner meaning of the things. Nay, we should look on all these outward observances as resembling the body, and their inner meanings as resembling the soul. It follows that, exactly as we have taken thought of the body, because it is the abode of the soul, so we must pay heed to the letter of the laws. If we keep and observe these, we shall gain a clearer conception of those things of which these are symbols; and besides that we shall not incur the censure of the many and the charges they are sure to bring against us.[15]

This passage more than any other shows how Philo, despite his favoring the allegorical method, condemned the antinomians who refused to accept the literal meaning of the biblical law. He was sober-minded enough to realize that because it also lends itself to symbolic interpretation the practical law of the Bible must not for that reason be abrogated.

We have no evidence that such a sect as the extreme allegorists existed in Palestine.[16] The extreme allegorists seem to

[15] *Mig. Abr.*, 89–94.

[16] It is probable that the literalists in Alexandria witnessed the dangerous consequences of the allegorical method. They saw that some allegorists had abrogated the law, and, as a reaction against the extreme allegorists, the literalists refused to apply any allegory to the Scripture. To the literalists the main significance of the biblical laws lay in the fact that they were the revealed words of God, even if they did not suggest philosophical or mystical ideas. Tendencies towards the application of an allegorical method to the biblical narratives, and objections to this method are to be found also among the schools in Palestine. Dr. J. Lauterbach argues very convincingly ("Ancient Jewish Allegorists," *Jewish Quarterly Review*, 1910, pp. 291–333; 503–31) that the *Dorshe Reshumot* (דורשי רשומות) and the *Dorshe Ḥamurot* (דורשי חמורות) were two schools in Palestine who made use of the allegorical method. The *Dorshe Reshumot* were allegorists in contrast with those who applied a simple and literal interpretation, while the *Dorshe Ḥamurot*

have renounced Jewish customs entirely and defined the Bible in terms of the Greek mysteries. Philo's argument against the latter, namely, that by abrogating the law they are also ignoring the sanctity of the Temple, suggests that even they were loyal to the Temple in Jerusalem. Since the writer of the Epistle to The Hebrews, who seems to have been an Alexandrian allegorist, is interested in explaining how Jesus could have abrogated the Jewish cult, it is apparent that with the exception of those Jews who belonged to the Temple of Onias all the Alexandrian Jews in the time of Philo looked upon the Temple in Jerusalem as the only center of sacrificial worship.

Philo equally criticized a certain school or group who refused to interpret the biblical law otherwise than literally. It is fruitless to speculate whether these were like the Sadducees in Palestine, who had no use for the Oral Law, or whether their approach to the law was like that of the more conservative element among the Pharisees in Palestine. An analysis of statements reported in their name by Philo in the light of Palestinian literary sources will show that while in some of their views their interpretation of the Bible was the same as the Palestinian Rabbis, in others it reflected a non-Palestinian literal attitude. As an example we shall quote two such statements.

1. In Exod. XXII. 25 we read: "If thou at all take thy neighbour's garments to pledge, thou shalt restore it unto him by that the sun goeth down." The same law is repeated in Deut. XXIV. 12–13, with the additional phrase, "It shall be righteousness unto thee before the Lord thy God." In rabbinic literature a fundamental distinction is made between a depository's keeping a deposit and a creditor's keeping a

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used the allegorical method as a means of finding the purpose and higher ideals of the law. The Rabbis, however, realized that the allegorical method carried with it great dangers and might tend to make the actual fulfillment of the law unnecessary, and therefore strongly protested against the allegorical method. The same motive influenced the Alexandrian literalists to reject the allegorical interpretation of the Bible. Dr. Lauterbach believes that while the allegorical method of the *Dorshe Reshumot* was of Palestinian origin, the method of the *Dorshe Ḥamurot* was of Alexandrian origin. I am inclined to think that both schools were Palestinian.

pledge. In the former case the deposit is always considered the possession of the one who has deposited it, whereas in the latter case the one who has lent the money is considered the owner of the pledge.[17] Hence, debts for which pledges were given are not canceled by the Sabbatical year because the pledge is considered a payment for the debt and belongs to the creditor. When the debtor repays his debt after the Sabbatical year, legally his repayment of the debt is regarded merely as a redemption of his pledge.[18] For the same reason the Rabbis did not consider the law about the nightly return of a pledge to the debtor, in Exod. xxii. 25, to constitute a command and an obligation, but merely an exhortation and a righteous deed, as it is said in Deut. xxiv. 13: "It shall be righteousness unto thee."[19] Though on the whole it was stricter with reference to the payment of debts, non-Jewish law did not consider the pledge as the property of the creditor.[20] In general no *obligatio* on property is to be found in ancient non-Jewish law. It is himself that the debtor pledges rather than his property.[21] Thus, if the debtor fails to pay his debt he can be sold into slavery; his property, however, cannot be taken away by force as a payment of the debt. This view of the pledge as the property of the creditor was held by the literalists in Alexandria, as may be seen from Philo's argument against them. From the same argument it appears that the Alexandrian literalists, like the Palestinian Rabbis, also understood the injunction of the nightly return of the pledge to the debtor, not as an imperative obligation, but

[17] Ḳid. 8b. [18] Mak. 3b.

[19] B. M. 82b and Ḳid. 8b.

[20] According to the Bible, Tannaitic literature, and Philo, slavery was a penalty only for theft. The Romans were very strict in the matters of debts, and if a long time passed and the debtor did not pay his debt "the creditor was empowered to arrest the person of his debtor, to load him with chains. . . . If the money still remained unpaid, he might put him to death or sell him as a slave to the highest bidder." (H. G. Liddell, *The History of Rome*, 1871, pp. 100–01). Roman law did not, however, consider the creditor the owner of the pledge. It was not his, but another's, and if he made use of it he was liable for theft (see H. J. Roby, *Roman Private Law*, 1902, I, 106–09). Philo's discussion of debts and pledges certainly reflects Jewish law, not Roman or any other non-Jewish law.

[21] See also L. Levinthal, "The Early History of Bankruptcy Law," *University of Pennsylvania Law Review* (1917–18), pp. 231 ff.

rather as an exhortation. Philo argues against the literalists on this point that their own interpretation of the verse is inconsistent with their professed literalism:

> And why did he enjoin not the giving (*οὐ διδόναι*) but the returning (*ἀποδιδόναι*) of the garment? For we return what belongs to another, whereas the securities belong to the lenders rather than to the borrowers. And do you not notice that he has given no direction to the debtor, after taking the garment to use as a blanket, when day has come to get up and remove it and carry it to the money lender? And indeed the peculiarities of the wording might well lead even the slowest-witted reader to perceive the presence of something other than the literal meaning of the passage, for the ordinance bears the mark of an "aphorism" (*ἀφορισμῷ*) rather than of a command. A man giving a command would have said, "If the garment given as security be the only one the borrower has, return it (*ἀπόδος*) that the man have it to wrap round him at night. But if he makes an explanatory statement (*ἀφοριζόμενος δὲ οὕτως*) he would put it as it stands: thou shalt give it back to him (*ἀποδώσεις*, a future indicative), for this is the only garment without which he is not decent; what is he to sleep in?[22]

The fact that the nightly return of the pledges cannot constitute a command and that the biblical use of the term *ἀποδιδόναι* is contrary to the Jewish attitude towards the ownership of pledges leads Philo to the conclusion that the passage favors also an allegorical interpretation. He addresses this argument *πρὸς τοὺς τῆς ῥητῆς πραγματείας σοφιστάς*.

2. In Gen. XVII. 14 we read: "And the uncircumcised male who is not circumcised in the flesh of his foreskin, that soul shall be cut off from his people." Taken literally this law would seem to mean that every child who is not circumcised is to be put to death. In Tannaitic literature, however, the term *karet* (that is, being cut off) used in this passage and elsewhere is taken to refer, not to being actually put to death, but to divine punishment. The Rabbis, furthermore, not only freed the uncircumcised child from all legal punishment, but also absolved him from divine punishment if upon reaching maturity he circumcised himself. The father who failed to circumcise his son was absolved even of "divine punishment," for his failure to fulfill this obligation was only a violation of one of the 248 positive commands for which

[22] *Som.*, I, 100–01.

no punishment is prescribed.[23] In contradistinction to this Pharisaic interpretation of *karet* in the passage in question, the Alexandrian literalists, as appears from Philo's argument against them, took the term *karet* (with reference to a child who was not circumcised on the eighth day) to mean actually being put to death. In his comment on Gen. XVII. 14, quoted from the LXX, Philo says:

The law never declares a man guilty for any unintentional offense; since those who have committed an unintentional homicide are pardoned by it, cities being set apart into which such men may flee and there find security . . . and no one has the right to drag him forth, or cite him before the tribunal or the judge for the deed. Therefore, if the boy is not circumcised on the eighth day after his birth, what offense will he have committed that he is to be held guilty and suffer the penalty of death? Some people may perhaps say that the form of the command points to the parents themselves, for they look upon them as despisers of the command of the law. But others say that it has here exerted excessive severity against infants, by imposing this heavy penalty in order that adults who break the law may thus be irrevocably subjected to most severe punishment. This is the literal meaning of the words. . . . But that this language is not to be applied to the man, but to the intellect, he tells us in subsequent words, saying, That soul shall be cut off, not that human body or that man, but that soul and mind. — Cut off from what? From its generation; for the whole generation is incorrupt. Therefore the wicked man is removed from incorruption to corruption.[24]

[23] Ḳid. 29a.

[24] *Quaes. in Gen.*, III, 52. The significant part in this passage is that though Philo quotes the LXX, still he does not seem to favor the Greek text of the Bible and refers to other traditions. The LXX at Gen. XVII. 14 reads: *ὃς οὐ περιτμηθήσεται τὴν σάρκα τῆς ἀκροβυστίας αὐτοῦ τῇ ἡμέρᾳ τῇ ὀγδόῃ ἐξολεθρευθήσεται ἡ ψυχὴ ἐκείνη ἐκ τοῦ γένους αὐτῆς.* According to the LXX, if the child was not circumcised on the eighth day, he was put to death. Origen says that this passage is to be understood in a mystical sense (*Philocalia* c.I.), while Z. Frankel characterizes the addition of the LXX as "*unsinnig*" (*Ueber den Einfluss der palästinischen Exegese auf die alexandrinische Hermeneutik*, 1851, p. 61, note f.). The Book of Jubilees XVI. 26 has, however, the same reading as the LXX (see V. Aptowitzer, "The Rewarding and Punishing of Animals," *Hebrew Union College Annual*, 1926, III, 127–29, n. 23). A disagreement similar to that of Philo's contemporaries, as to whether the penalty for the violating of the law of circumcision befalls the parents or the child, is found in Tannaitic literature. Commenting on the biblical phrase in Exod. IV. 24, "the Lord met him and sought to kill him," Joshua b. Ḳarḥa says that God wanted to kill the child, while others say that he wanted to kill Moses (Ned. 31a, 32b). I doubt whether we may infer from this passage that some Tannaitic scholars held a father who fails to circumcise his child pun-

Philo, it will be observed, equals the Rabbis in the skillful playing on words by which he mitigates the severity of some of the biblical legislation.[25]

Besides these literalists who, as we have seen, were not consistently such, though perhaps overzealous in their devotion to Judaism, Philo refers to another type of literalist whom he describes as impious (*τῶν ἀσεβῶν*), wicked (*ἀνόσιοι*) informers (*συκοφάνται*). I regard these as references less to a sect within Jewry than to those pagan enemies of the Jews who, in their frequent denunciation of Judaism, held up the Bible to ridicule by quoting passages in their literal sense, without regard to the meaning given them by the Jews themselves. It is quite possible that among these slanderers of Judaism there were some who were of Jewish descent, for we know that there were converts to paganism among the Jews of Alexandria. Philo's nephew was one of them. But there is no doubt that most of them were of pagan descent who became acquainted with Judaism through the Greek translation of the Bible. We know that in the campaign against Judaism during Philo's days the leaders were pagan and that they used as a vilifying weapon biblical passages taken in their literal sense. Apion and his predecessors, Apollonius Molo, Posidonius of Apamea, Chaeremon and Lysimachus, are typical examples, and it is these whom Philo calls literalists and impious and wicked informers.

Other controversial opinions regarding the interpretation of certain laws are sometimes ascribed by Philo rather vaguely to "some people." Such references occur in connection with marriage contracts, penalties for perjury, and many other important laws, and many scholars have debated whether he meant Gentiles or Jews. It is my opinion that he was

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ishable by death. The disagreement between Joshua b. Ḳarḥa and the other Tannaitic scholar is rather Midrashic in character and has no legal significance.

[25] Though the Targum Onkelos translates the Hebrew term נפש into אנפשא, nevertheless, when the term *nefesh* is used with *karet*, he usually translates it into אנשא. It is highly probable that Philo's interpretation of *karet* was known to the Targum, which disagrees with this interpretation, and he emphasizes that the word *nefesh* with regard to *karet* does not merely mean "soul." We cannot ascertain whether the Targum actually favored the punishment of death by court.

speaking of Jews of the Palestinian schools. In some instances there is unmistakable evidence that the references are to Palestinian scholars or to Alexandrian adepts in the traditional Jewish law. As a typical example of such an instance, one may cite his comment on Gen. IX. 3:

> What is the meaning of the expression, "as the green herb have I given you all things"? Some persons say that by this expression, "as the green herb I have given all things," the eating of flesh was permitted. . . . The power of this command is adapted not to one nation alone among all the select nations of the earth which are desirous of wisdom, among whom religious continence is honored, but to all mankind, who cannot possibly be universally prohibited from eating flesh. Nevertheless, perhaps the present expression has no reference to eating food, but rather to the possession of the power to do so; for in fact every herb is not necessarily good to eat nor again is it the uniform and invariable food of all living animals; since God said that some herbs were poisonous and deadly and yet they are all included. Perhaps, therefore, I say, he means to express that all brute beasts are subjected to the power of man as we sow herbs and take care of them by the cultivation of the land.[26]

A similar interpretation is to be found in the Talmud. Laws contained in the book of Genesis were given, according to Talmudic traditions, to mankind as a whole. One of these laws is the permission to eat animal flesh. According to rabbinic views, mankind originally was not allowed to eat the flesh of animals, but after the flood permission was granted to the Sons of Noah (that is, to mankind as a whole). The Rabbis derived this law from the same phrase quoted by Philo, namely, Gen. IX. 3, "as the green herb have I given you all." [27] This interpretation, as we have seen, is mentioned by Philo in the name of "some people." I have chosen only this one passage from the *Quaestiones et Solutiones in Genesim*. But, as a matter of fact, the whole book is a typical Midrash written for Jewish readers. The treatise probably is a digest of the sabbatical discussions which took place in the Alexandrian synagogues. In *Quaestiones et Solutiones in Genesim* we have Philo both as a Jewish Greek mystic and as a typical Palestinian Rabbi who expounds a biblical text on a Midrashic basis.[28]

[26] *Quaes. in Gen.*, II, 58.

[27] Sanh. 59b.

[28] The numerous parallels in Midrashic literature to that of the *Quaes. in*

Thus, I believe it is a mistake to assume that Philo's writing was based entirely on Roman and Greek principles or that Philo was ignorant of the Jewish Oral Law. His knowledge of Jewish law as interpreted by the Palestinian Rabbis was very wide, as I shall endeavor to prove throughout this work. But it is fruitless to convert Philo into a Pharisee or Sadducee, or into an allegorist or literalist. He was an eclectic interpreter who drew from many sources and who could hardly have belonged to any particular sect. One may repeat, however, the statement that most of the material in Philo, especially in *De Specialibus Legibus*, has its origin in Palestinian sources which are found in Tannaitic literature. Undoubtedly, there are passages in Philo based on the practice of Greek and Roman courts. Thus, when he says that an oath is administered to a judge [29] he must have had in his mind Roman usage. In some cases the origin is uncertain. Thus, for instance, his statement that unmarried daughters who have no fixed dowries share equally in the inheritance with the sons [30] is not in accordance with Jewish law, but it was not taken, so far as we know, from non-Jewish jurisprudence.[31]

Gen., found in Professor L. Ginzberg's notes to *The Legends of the Jews* (1909–28), vols. V and VI, show that the *Quaes. in Gen.* in itself is a Midrash. The writing of Philo as a whole was not designed for one type of reader. The *Hypothetica* was written for the Gentile world as an apology against the slanders of the Jewish constitution. The *Quaes. in Gen.* was written for Jews who were not in favor of the allegorical method but cherished the Palestinian comments on the biblical narratives. The allegory was primarily written for those more inclined towards the figurative and mystic interpretation of the Bible. Other writings of Philo are miscellaneous. We are, therefore, not surprised even if we find contradictory statements in Philo, since they were written for different types of readers and for different purposes. Thus, the law of the *Hypothetica* seems to me to contradict some of the laws in *Spec. Leg.*; the treatment accorded to the character of Joseph in *Jos.* is different from that given to him in the allegorical writing. (See Goodenough, "Philo's Exposition of the Law in His *De Vita Mosis*," *Harvard Theological Review*, XVI, 109 ff. See also M. J. Shroyer, "Alexandrian Jewish Literalists," *Journal of Biblical Literature*, 1937, LVI, 261–84.)

[29] *Decal.*, 138–41.

[30] *Spec. Leg.*, II, 124 ff.

[31] In connection with this passage see Goodenough, *The Jurisprudence of the Jewish Courts in Egypt* (1929), pp. 66 ff.; I. Heinemann, *Philons griechische und jüdische Bildung* (1932), pp. 320 ff. Heinemann and Goodenough argue that in the matter of inheritance Philo was deeply influenced by his Greek and Roman environment. But Philo's statement that the girl

It may be, however, that the Alexandrian law is an extension of the Palestinian decision rendered in the first century C.E.: "Admon gave seven decisions. If a man died and left sons and daughters, and the property was great, the sons inherit and the daughters receive maintenance, but if the property was small the daughters receive maintenance and the sons go begging." [32] We are dealing here with a law which was made for the sake of protecting the unmarried woman; the Alexandrian Jews went one step further and gave her a share in the inheritance, if she was not provided for by her father. Such laws do not require precedents, for they are necessary innovations for the protection of minor orphans.

There are also some biblical laws which Philo explains in Greek and Roman terminology. The principle he applies to them is Jewish, but he shows in his discussion as a whole that he was either strongly influenced by his Greek environment or that he had a Gentile reader in mind. A striking instance is his comment on the law of Deut. XXIII. 16–17, which forbids the restoration of a runaway slave. On this Philo comments:

If a third generation slave of another man, says Moses, because of threats of his master, or because of his consciousness of some offenses (which he has committed) or in case he has done nothing wrong, but is only subject to savagery in a harsh master, shall in terror flee to thee to get

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unprovided with a dowry shares in the inheritance with her brothers has no parallel in ancient law. It is true that in Roman law the unmarried daughters share in the inheritance with their brothers because they were still considered as a part of their father's family. In Ptolemaic law a daughter had a legal right to share in the inheritance with her brothers if the father died intestate. But as far as I know, non-Jewish law does not make the distinction between the girl who has a dowry and a girl without a dowry. Philo himself did not favor the idea of giving a woman a share in the inheritance. He says that even the daughter of Zelophehad did not have the inheritance by the right of kinship but as an "external ornament." The inheritance was a δόμα not an ἀπόδομα (*Vita M.*, II, 243). The logical assumption is that Philo, following Jewish law, does not recognize the girl as a legal heir to her father's estate, especially if there is a male heir. But when the girl was left entirely unprovided for, the Alexandrian courts, in a way similar to the innovation of the Palestinian courts, gave the girl a share in the inheritance so that she might not remain helpless.

[32] Ket. 13, 3. In this work I have not discussed the problem of the legal rights of inheritance in Philo, for the subject has been thoroughly treated by Ritter, Heinemann, and Goodenough.

thy help, do not reject him. For to deliver up a suppliant is not pious, and even a slave is a suppliant when he flees to thy hearth as to a Temple, where he ought rightly to have asylum, until he either be brought into open and complete reconciliation (with his master) or until, failing that, as a last resort be sold. For the consequences of any change of masters are of course uncertain, but an uncertain evil is better than a certain one.[33]

Now the statement in Philo that the slave may run to the hearth as "an altar" is a principle entirely foreign to Jewish law. The question, therefore, is whether this passage implies that the Alexandrian Jews recognized the hearth as an altar or an asylum. Professor Goodenough says: "The law gives us one of the particularly striking instances of the assimilation of Hellenistic practices and conceptions into Jewish life and thought." [34] I agree with him that the background of Philo's discussion is Greek, but I doubt his conclusion that the Alexandrian Jews, who recognized only the altar in the Jerusalem Temple, took over from their pagan neighbors the non-Jewish and pagan idea that the hearth is a sacred altar and an asylum. It seems to me that what Philo does here is merely explain the Jewish law of asylum in the case of a fugitive slave, which is expressed in terms of "the servant . . . who escaped unto thee" (Deut. xxiii. 16), that is, to thy house, by the analogy of the Greek law that one's house constitutes an asylum for a fugitive slave as if it were a temple. The analogy must have seemed to him especially apt in view of the fact that in certain instances traditional Jewish law regarded the altar in the Temple as an asylum.[35] In fact, we know of other instances where Philo draws analogies between the laws practiced among pagans and the laws of the Jews.

In Philo's discussion of the Jewish ethical laws even towards

[33] *Virt.*, 124.

[34] *Jewish Courts in Egypt*, p. 55.

[35] See I Kings, ii. 59. The law in Exod. xxi. 14 does not recognize the altar as an asylum, "thou shalt take him from mine altar that he may die." Talmudic Halakah, however, limits the law of Exodus only to an intentional murderer, but recognizes the altar as an asylum if the refugee had killed unintentionally (Mak. 12a). This Talmudic law is also accepted by Maimonides in *Mishneh Torah*, "Hilkot Rozeah," 5, 12: שנאמר בהורג המזבח קולט. בזדון מעם מזבחי תקחנו למות מכלל שהורג בשגגה אינו נהרג במזבח. Thus, the idea that the altar is an asylum is not foreign to Jewish tradition.

irrational animals he criticizes his Alexandrian brethren for not observing some of the ritual laws. The law in Exod. XXIII. 19 forbids to "seethe a kid in its mother's milk." The Rabbis did not take this law literally, but they interpreted it as a prohibition against dressing milk and flesh together.[36] The law is called in rabbinic terminology "flesh and milk" (בשר וחלב). This rabbinic interpretation was not known to Philo, but, as Ritter accurately remarks, this Halakah was virtually unknown in Babylonia even as late as the Amoraic period.[37] When Rab heard one woman asking another how much milk is necessary for cooking a portion of meat, he asked, "Is it not known here that dressing milk and flesh is forbidden?" [38] In Alexandria the biblical law even in its literal form was not observed by all. Philo advises the Alexandrian Jews that if they want to dress flesh with milk, they should at least use some other animal and not a kid in its mother's milk.[39] In Palestine the prohibition against dressing flesh with milk according to the halakic interpretation seems to have been a standard law during Philo's time.[40]

There are other laws in Philo which do not agree with the standard Halakah of the Tannaitic sources. I discuss most of them in this work and show that though they do not agree in every detail, still the "principles" involved in them are Jewish. There is no doubt that the pagan environment must have had an influence on the customs of the Alexandrian Jews, but not to so great an extent as has been commonly assumed by scholars in this field.

I have also tried to compare the laws discussed by Philo with the same laws found in the works of Josephus. On the whole I believe that Philo, the Alexandrian, knew more

[36] Ḥull. 115b.

[37] *Philo und die Halacha* (1879), p. 128.

[38] Ḥull. 110a.

[39] *Virt.*, 142.

[40] In the Mishnah Ḥull. 8, 1, we find the undisputed law that no flesh may be cooked in milk. The Hillelites are of the opinion that even fowl may not be served on the table together with cheese or eaten with it. The Shammaites also admit that these foods may not be eaten together. The fact that the Mekiltah Mishpatim 20 endeavors to deduce from the biblical passage that the prohibition against cooking flesh with milk applies also to the Diaspora Jews suggests that they hardly observed it.

about Palestinian law than Josephus, the Judean. Philo does not state that he was thoroughly versed in Jewish traditions. He tells us, rather, of his education in grammar, philosophy, geometry, music, and poetry,[41] but is silent about his Jewish training. He refers in many places to the fact that Jewish children were brought up from their infancy in Jewish customs and laws, but he never boasts about his own accomplishments, nor does he claim to be superior to others. Josephus, on the other hand, says in his autobiography that while he was still a young man he acquired an unusual reputation for knowledge in legal matters. He came in contact with the Pharisees, Sadducees, and Essenes and finally became a follower of the Pharisaic sect. He was also a member of an outstanding priestly family.[42] In short, Josephus regards himself not merely as an historian but as an extraordinary scholar in Jewish laws and customs. Though Philo does not claim to be a lawyer, his work reveals that he was both a man of "geometry and music" and thoroughly acquainted with the legal field, while Josephus' accounts of Jewish law are disappointing. Josephus, for example, is in error in expounding the laws concerning the Jubilee, which were no longer practiced in Palestine during his time, but Philo carefully follows biblical and Tannaitic law. This may possibly be owing to the fact that Josephus knew the law only through acquaintance with the customs of his time. G. F. Moore correctly states that though we might get a conception of Jewish theology in Alexandria through reading the works of Philo, we should know very little about Palestinian Judaism if we were entirely dependent on the works of Josephus.[43] We may assume that Josephus, who belonged to the aristocratic priesthood, had a very limited knowledge of Jewish theology and law.

Some scholars have even tried to prove that the paraphrase of the Jewish policy in the *Antiquities* was taken by Josephus from an Alexandrian predecessor, perhaps from Philo.[44]

[41] *Cong. Erud.*, 72–76. [42] *Vita*, 1 and 2.

[43] *Judaism*, I, 210–11.

[44] See the comparative study of Josephus and Philo by H. Weyl, *Die jüdischen Strafgesetze bei Flavius Josephus*, Berlin, 1900; Ritter, *Philo und die Halacha.*

Josephus, for instance, writes: "Let no one blaspheme the recognized gods of other states, nor plunder strange temples, nor take a treasure dedicated to any god." [45] The same law is found in Philo,[46] and Weyl suggested that Josephus had taken it directly from Philo. There is no doubt that Philo and Josephus had the same motive in mind for writing this law, but it by no means proves the dependency of Josephus on Philo. Neither Philo nor Josephus considered the blaspheming of idols as a biblical prohibition, but life among pagans in the Diaspora made the formulation of such a law imperative for the safety of the Jewish communities. I am inclined to think that when Josephus wrote the *Antiquities* he was not acquainted with the works of Philo. The similarity of thought between the *Antiquities* and Philo is very small and there is no reason to believe that Josephus took the *De Specialibus Legibus* as a source for his survey of the Jewish constitution. Elsewhere [47] I have shown that Philo gives us two surveys of Jewish law and ethics. One account is in the *De Specialibus Legibus,* discussed here. The other is in the *Hypothetica,* where the discussion of the law shows Philo no longer as a lawyer, but as a defender and apologist of the Jewish law against the reproaches of Apion and his predecessors.

Josephus, like Philo, also wrote two treatises on Jewish law: one in the *Antiquities,* which was written in order to acquaint the Gentile world with the history of the Jews and their institutions; the other in *Contra Apionem,* which served as a repudiation of the false accusations brought by the pagan world against the whole system of Jewish ethics and religion of the Alexandrian community. The *Contra Apionem* of Josephus and the *Hypothetica* of Philo are undoubtedly based on the same Alexandrian source. It would be vain to endeavor to reconcile the *Contra Apionem* with the *Antiquities,* and it would be equally hopeless to attempt to harmonize *De Specialibus Legibus* with the *Hypothetica.* One must distinguish carefully between Philo the practical lawyer and

[45] *Ant.*, 4, 8, 10. [46] *Spec. Leg.*, I, 53.

[47] *The Alexandrian Halakah in the Apologetic Literature of the First Century C.E.* (1936).

Philo the apologist, and Josephus the Palestinian Jew and the Josephus who is dependent upon Alexandrian apologetic sources. In the *Hypothetica* of Philo and *Contra Apionem* of Josephus the violation of any of the commandments appears to be a capital offense, and many laws in *Contra Apionem* that either contradict the laws in the *Antiquities* or are not mentioned there can easily be traced to the *Hypothetica* of Philo. Thus, though I believe there is no reason to suppose that Josephus in the *Antiquities* took *De Specialibus Legibus* as a source for his survey of the Jewish law, still I am convinced that the survey of the law in *Contra Apionem* is directly dependent either on the *Hypothetica* of Philo or on one of its sources.

It would be a great mistake to assume that Philo represents the religious belief of the Alexandrian community as a whole. The extent of his following is not a fruitful matter for speculation. He came into conflict with many Jewish sects in Egypt. On the one hand, he bitterly opposed the Jewish allegorists who abrogated the practical law and held themselves exempt from literal compliance with the commandments. On the other hand, there was a group of Alexandrian Jews whom he called the literalists, because they refused to accept any symbolic or mystic interpretation of the Bible. He disagreed with their approach to the Bible, although he did not condemn them so much as he did the extreme allegorists. He knew that Judaism without a philosophy and mystery could hardly have existed in a pagan world. He was faithful to normative Judaism according to its Palestinian interpretation, but he added a new chapter in Jewish theology.

There was also a group of Alexandrian Jews who refused to subordinate themselves to the Jerusalem cult. They built their own temple in Heliopolis, commonly known as the Temple of Onias. Philo did not belong to this group either. To him there was only "one temple of God" – the Temple of Jerusalem, and to that Temple he journeyed "to offer prayers and sacrifices." His devotion to and admiration for the Palestinian Jews and Temple were beyond measure. He writes:

But all who attempt to violate their laws, or turn them into ridicule, they detest as their bitterest enemies, and they look upon each separate one of the commandments with such awe and reverence that, whether one ought to call it invariable good fortune, or the happiness of the nation, they have never been guilty of the violation of even the most insignificant of them; but above all observances, their zeal for their holy Temple is the most predominant, and it is a universal feeling throughout the whole nation.[48]

Philo's description of the spiritual joy which the Diaspora Jews experienced when they came to Jerusalem to offer sacrifice shows that the devotion of the Hellenistic Jews towards the Palestinian cult was not merely a matter of loyalty, but that, in spite of all the forces of assimilation which exercised a profound influence on them, they still felt an inner urge to travel to Jerusalem in order to rededicate themselves to the God of their fathers and to reunite themselves with their brethren. Such religious experience and national unity the Diaspora Jews could find only in Jerusalem. A passage in Philo well illustrates this point:

But he provided that there should not be temples built either in many places, or many in the same place, for he judged that since God is one, there should be also one Temple. Further, he does not consent to those who wish to perform the rites in their houses, but bids them rise up from the ends of the earth and come to this Temple. In this way he also applies the severest test to their dispositions. For one who is not going to sacrifice in a religious spirit would never bring himself to leave his country and friends and kinsfolk and sojourn in a strange land, but clearly it must be the stronger attraction of piety which leads him to endure separation from his most familiar and dearest friends who form as it were a single whole with himself. And we have the surest proof of this in what actually happens. Countless multitudes from countless cities come, some over land, others over sea, from east and west and north and south at every feast. They take the Temple for their port as a general haven and safe refuge from the bustle and great turmoil of life and there they seek to find calm weather, and, released from the cares whose yoke has been heavy upon them from their earliest years, to enjoy a brief breathing space in scenes of genial cheerfulness. Thus filled with comfortable hopes they devote the leisure, as is their bounden duty, to holiness and the honouring of God. Friendships are formed between those who hitherto knew not each other, and the sacrifices and libations are the occasion of reciprocity of feeling and constitute the surest pledge that all are of one mind.[49]

[48] *Ad Gaium*, chap. 31.

[49] *Spec. Leg.*, I, 68–70.

Besides Philo's opposition to the groups of Jews who belonged to the extreme allegorists, literalists, and to those who belonged to the Temple of Onias, he also saw clearly how disparaged and misunderstood Jewish customs and laws were in the non-Jewish world. It was the serious schisms within the Jewish community itself and the unpleasant attitude of the Roman world towards Jewish law that inspired Philo to write the four books of *De Specialibus Legibus*, as well as many other treatises on Mosaic law. These comprehensive treatises of Mosaic law were based on oral traditions. They might have been used in argument against the heretical Jewish sects, but were primarily designed for Gentile readers which brought forth the missionary spirit in Philo.

Throughout the pages in Philo which deal with Mosaic law the following characteristics may be noticed: (1) his loyalty to Mosaic law according to its oral tradition; (2) his devotion to Palestinian Judaism and to the Jerusalem Temple; (3) his bitter opposition to the extreme allegorists who abrogated the law, and his unsympathetic attitude towards the Jewish literalists; [50] (4) his endeavor to show to the non-Jewish world the ethical value of Jewish laws and customs. Finally, we may characterize Philo as a *Pharisaic Halakist*, that is, one who applied the principles of the oral law in interpreting the Bible; a *Palestinian allegorist*, that is, one who used the allegorical method as a means of explaining the higher purpose of the practical law; an *Alexandrian mystic*, that is, one who sought union with an infinite reality which transcends human limitations.

We may also summarize the following Jewish sects or schools who differed in their approach to the Law: (1) Sadducean literalists; (2) Pharisaic Halakists; (3) Alexandrian Jewish inconsistent literalists, to be distinguished from the non-Jewish literalists whom we have identified with the anti-

[50] The late Mr. Justice Cardozo in his address before the New York State Bar Association in January 1933 read a paper on "The Judicial Process up to Now" in which he said: "The judicial process is one of compromise between certainty and uncertainty, between the literalism that is exaltation of the written word and the nihilism that is destructive of regularity and order." Philo in his days was exactly in the same position, for he also had to find a happy compromise between literalism and nihilism.

Jewish writers in Greek; (4) Palestinian practical allegorists; [51] (5) Alexandrian theoretical allegorists, whom we call the extreme allegorists, and whose allegorical method was based upon mystical principles; (6) Alexandrian Jews who, like Philo, combined Pharisaic Halakism, practical allegorism, and mysticism.

[51] I use the term "Palestinian allegorist" in the sense referred to in note 16. The Palestinian allegorists such as the *Dorshe Reshumot* and *Dorshe Ḥamurot* sought to understand the truth and higher purpose of the law without abrogating its actual practice. These allegorists, however, were not mystics who sought union with some metaphysical principle. Hence they differed from the mystical school of Alexandria, as well as from Philo.

CHAPTER II

THE TERMINOLOGY OF THE ORAL LAW IN PHILO: HIS KNOWLEDGE OF HEBREW

BEFORE making a detailed analysis of the legal material in Philo in the light of Palestinian literary sources, it will be helpful to answer a few important questions. Assuming the correctness of the contention that a great deal of Philo's law is based upon oral traditions as recorded in Tannaitic Halakah, and that no longer may a sharp line of distinction be drawn between Palestinian and Hellenistic Judaism, one may ask, however, whether Philo himself knew of any distinction between the written and the oral tradition or between biblical and rabbinic prohibitions. We know that in Palestine a hermeneutical apparatus was used to explain and expound the Torah. Was Philo acquainted with the Palestinian method of interpretation? Was he entirely dependent upon the LXX for his biblical knowledge or did he also have some knowledge of the Hebrew text? The answer to these questions may have a bearing not only upon Philo as an individual but also upon the Alexandrian community as a whole.

Judging by Philo's discussion of the law in *De Specialibus Legibus* and many other treatises, one can find no evidence to support the supposition that Philo knew of any distinction between the written law and the oral traditions. The term *νόμοι ἄγραφοι* as used by Philo has not the meaning of oral law in the Palestinian sense,[1] and the terms *ὁ νόμος* or *ἡ νομοθεσία* he employs indiscriminately for all the traditions recorded in his work. But the fact that he does not make such distinctions does not necessarily prove his ignorance of the difference between the written law and the oral traditions. We must remember that Philo was primarily interested in explaining to

[1] See I. Heinemann, "Die Lehre vom ungeschriebenen Gesetz im jüdischen Schrifttum," *Hebrew Union College Annual*, IV (1927), 149 ff.

a Gentile world the ethics of the Jewish constitution, and it was not part of his purpose to give a detailed explanation of what is biblically forbidden and what is merely a prohibition fixed by oral standards. In fact, when Philo addressed himself directly to a Jewish audience, he was well aware that not all prohibitions and ordinances were of biblical origin. As a loyal Jew he demanded that the prohibition fixed by divinely inspired men should be observed equally with the laws specifically stated in the Bible. In his sharp criticism against the extreme allegorists who abrogated the biblical law and favored only a mystical interpretation, Philo said: "These men are taught by the sacred word to have thought for good repute and to let go nothing that is part of the *customs* (ἔθεσι) *fixed by divinely empowered men* greater than those of our time." [2] He afterward enumerated acts prohibited on the Sabbath, such as instituting proceedings in court, acting as jurors, demanding the restoration of deposits, or recovering loans. Not one of these prohibitions is mentioned in the Bible. They were fixed by the oral tradition in Palestine, or, as Philo puts it, by "divinely empowered men."

Most of the hermeneutical rules of interpreting the Bible come down to us through the teaching of Hillel, R. Nahum of Gimzo, R. Akiba, and R. Ishmael. Hillel, who flourished about the time of Philo, laid down seven hermeneutical rules for the purpose of extending and expounding the written law.[3] These rules were later supplemented and developed into a more elaborate system by R. Ishmael and R. Akiba. It is highly probable, however, that though these men standardized the hermeneutical rules, the rules themselves were known in an unfixed and unsystematized form at earlier dates. Controversies about the method of employing the rules which are ascribed to Palestinian teachers of the second century C.E. seem to have existed in Alexandria in the days of Philo. Furthermore, Philo seems to have employed some of the standardized Palestinian hermeneutical rules both to make deductions from the written law and to explain it. We know, for instance, that R. Ishmael and R. Akiba disagreed about the method of interpreting the Bible. R. Akiba thought the

[2] *Mig. Abr.*, 92 ff. [3] Tosefta Sanh. 7, 11.

language of the Torah could not be treated in the same light as human speech. In the ordinary language of men, words, syllables, and letters are often inserted either for grammatical form or for emphasis. In the divine language of the Torah every word, syllable, and letter have a special meaning and significance. Many legal deductions can, therefore, be made from every biblical letter which is not indispensable for the understanding of the Torah.[4]

R. Ishmael, however, took a more rational attitude. He said that the words of the Torah are spoken in the ordinary language of men.[5] Hence, no deduction can be made from superfluous syllables and letters.[6] He accepted only such deductions as could be justified by the spirit of certain phrases of the passage under consideration, or by conflicting statements in the law, or by tautology of statements, or by analogy of expression. R. Ishmael, therefore, laid down thirteen hermeneutical rules upon which the biblical law could be interpreted.[7] The purpose here is not to give a detailed analysis of R. Ishmael's rules, but to show the difference between R. Akiba and R. Ishmael in their method of interpreting the Bible.

Similar disagreements seem to have existed among the Alexandrian Jews. Certain Alexandrian schools or individuals emphasized the importance of biblical syllables and letters. To them every syllable conveyed a special meaning. Philo, like the later R. Ishmael, disapproved of such methods. He writes in one place:

> Those men who happen to devote themselves to the study of the holy writing (*τοῖς ἱεροῖς γράμμασιν*) ought not to argue about syllables (*οὐ δεῖ συλλαβομαχεῖν*) but ought first to contemplate on the meaning of nouns and verbs (*ὀνομάτων καὶ ῥημάτων*) and the occasions on which and the manner in which every expression is used; for it often happens that the same terms (*αἱ αὐταὶ λέξεις*) are applied to different things at different times, and on the contrary, opposite terms are at different times applied to the same thing.[8]

[4] See Yeb. 68b; Sanh. 34b; Ket. 103a; Pes. 5a.

[5] Ber. 31b; Jer. Tal. Yeb. 8d; Ned. 36c.

[6] See Sanh. 51b, where R. Ishmael says to R. Akiba, "Will you decree death by fire, because you interpret single letters?"

[7] The first Baraita in the Sifra.

[8] *Philonis Judaei Opera Omnia* (Richter ed., 1828–30), VI, 214.

Philo seems here to oppose the method of interpreting the Bible which was later elaborately developed by R. Akiba, and to favor the hermeneutical rule of analogy of expression, called by Hillel *Gezerah shawah*, that is, an analogy based on the same expression used in two different passages of the Bible and the application of certain provisions of one to the other. Philo, it is true, writes in such general terms, we cannot definitely ascertain what method of interpretation he favored. But it does seem clear that he differed from those in Alexandria who believed that even biblical syllables have a special meaning.

One of the rules frequently employed by the Tannaim and occupying first place in the hermeneutical rules of Hillel is that of a *Ḳal wa-ḥomer* (קל וחומר), which is used as an inference from the less to the more important, and vice versa. If, for instance, a biblical law, because of his greater importance, applies more directly to B than to A, though the law does not specifically refer to B in the Bible, we infer that the law of A applies also to B. In other words, a *Ḳal wa-ḥomer* is an inference from minor to major, and vice versa. The laws deduced by inference were considered as binding as the laws explicitly stated in the Bible. This hermeneutical principle was known to Philo, who, like the Tannaitic scholars, made use of the *Ḳal wa-ḥomer* in order to deduce laws not stated. Num. xxvii. 7–11 enumerates the kinsmen who have a right of succession to the inheritance but does not mention the right of parents to inherit the property of their children. Philo, however, says that by means of a *Ḳal wa-ḥomer* we can infer that, according to biblical law, parents inherit the property of their children:

> He declares the father's brothers to be the heirs of their nephews, a privilege doubtless given to the uncle for the sake of the father, unless only one is foolish enough to suppose that a person who honors A for the sake of B is deliberately dishonoring B. On the same principle the law, when it nominates the father's brother to share in the inheritance because of his relationship to the father, much more nominates the father, not in actual words it is true for reasons already stated, but with a force more recognizable than words, leaving no doubt of the intention of the law-giver.[9]

[9] *Spec. Leg.*, II, 132.

In Tannaitic literature, as in Philo, the right of the father to inherit the property of his children is also deduced by a *Ḳal wa-ḥomer*.[10]

The third hermeneutical rule laid down by Hillel is that of *Binyan Ab*, which is the generalization of a special law. If, for instance, the law is specific but the reason for the law is general, the law is to be applied whenever the general reason exists. The Bible forbids taking the mill or the upper mill for a pledge.[11] The Mishnah applies the biblical prohibition to any utensils which one may need for the preparation of food, because the reason which the law gives for this prohibition is general, namely, "for he taketh a man's life to pledge." Hence, any utensils which one needs for his maintenance cannot be taken away as a pledge.[12] Sometimes the Tannaitic scholars apply this hermeneutic rule of *Binyan Ab* even when the Bible states definitely that the law is to be applied in one special case but not in another. Since, however, the reason for the law is general, the law is understood generally wherever the general reason can be applied. This hermeneutical rule is illustrated by the Tannaitic interpretation of Deut. xxii. 23–27, which states that if a man lies with another man's betrothed in the city, both parties shall be stoned. If, however, he lies with her in the field the man alone is to be punished by death. The general reason given in the Bible for the punishment of the woman taken in the city is: "she cried not, being in the city." But the reason for freeing the woman from punishment if the act is committed in the field is given: "the betrothed damsel cried, and there was none to save her." The Rabbis, therefore, said that, irrespective of the place, the girl was punishable by death only if she consented to the act, expressed in the general reason

[10] Sifre Num. 134.

[11] Deut. xxiv. 6.

[12] B. M. 9, 13. Philo seems also to have understood the law in the same light as the Mishnah. In *Spec. Leg.*, III, 204, he says: "And therefore elsewhere the lawgiver forbids creditors to demand that their debtors should give their mills or upper millstone as a surety and he adds that anyone who does so takes the life to pledge. For one who deprives another of the instruments needed to preserve existence is well on the way to murder." Here Philo does not limit the biblical law to a mill alone, but to any instrument needed for support.

given in the Bible "because she cried not." If, however, she was forced to commit the act, though it took place in the city, she was free from any punishment, because "there was none to save her." [13] That Philo also knew of this hermeneutical rule can be easily proved by his own interpretation of the same biblical passage:

> and therefore the law in defending the case of a woman deflowered in a solitude is careful to add the very excellent proviso: "The damsel cried out and there was none to help her," so that if she neither cried out nor resisted but coöperated willingly, she will be found guilty, and her use of the place as an excuse is merely a device to make it seem that she was forced. Again what help would be available in the city to one who was willing to use all possible means to protect her personal honour, but was unable to do so because of the strength which the ravisher could bring to bear? In a sense such a one, though living in the city, is in a solitude, being solitary so far as helpers are concerned. The other, even if no one was present to help, may be said, in view of her willing coöperation, to be exactly in the same position as the offender in the town.[14]

Here Philo, like the Rabbis, disregards the special provisions and distinction of the Bible between the city and the field precisely because the reason for such special provisions is general.

Another hermeneutical rule which was known to Philo and which Tannaitic literature attributes to R. Ishmael is that of tautology. R. Ishmael laid down the rule that if any biblical law or passage is stated once and repeated, the repetition contains a new principle. There are, according to him, no purposeless tautologies in the Bible.[15] C. Siegfried [16] has noted that this rule was known to Philo, who said:

> Now it is worth considering carefully why in this place Moses again calls Sarah the wife of Abraham, when he has already stated the fact several times; for Moses did not practice the worst form of prolixity, namely, tautology.[17]

We can therefore say with certainty that though Philo may not have used a standardized form of hermeneutical

[13] Sifre Deut. 243 יכול בעיר חייבת בשדה פטורה תלמוד לומר צעקה ואין מושיע לה אם אין לה מושיעים בין בעיר בין בשדה פטורה ואם יש לה מושיעים בין בעיר בין בשדה חייבת.

[14] *Spec. Leg.*, III, 78.

[15] B. Ḳ. 84b.

[16] *Philo von Alexandria als Ausleger des alten Testaments* (1875), pp. 170 ff.

[17] *Cong. Erud.*, 73.

rules of legal interpretation, nevertheless he used in an unsystematized form many of the principles of the hermeneutical rules which were also used by the Palestinian teachers of the law.

As to the question whether Philo was entirely dependent upon the LXX for his biblical references or whether he also made use of the Hebrew text of the Bible, it may be stated at the very outset that all his direct quotations are from the LXX. From this it may perhaps be inferred that if he had possessed an extensive knowledge of Hebrew he would not have been constantly dependent on the LXX. Furthermore, his statement that those who know Hebrew and Greek regard the Greek and Hebrew texts of the Bible as one and the same "both in matter and words" [18] suggests that Philo hardly knew of the great differences in many laws between the two texts. Siegfried [19] and Ryle [20] have shown that some variations from the LXX to be found in Philo can be explained from the Hebrew text, but these are too insignificant to be used as an argument that Philo based some of his reading upon a Hebrew text. It is rather more logical to assume that phrases nearer to the Hebrew were based upon the Greek readings in use in Philo's day, since even the oldest Codex of the LXX belongs to a much later period than his. Yet one cannot ignore a fundamental element in his work: that while the direct quotations are from the LXX, a great many biblical passages he paraphrases differ so widely from the LXX and are so much nearer to the Hebrew text as interpreted by Palestinian teachers that one is bound to conclude (a) that in many instances he intentionally ignored the reading of the LXX and used the Hebrew text as commonly interpreted in his day; or (b), that if he himself had no knowledge of Hebrew, he must have been informed of the Hebrew text by Alexandrian adepts of Hebrew scripture.[21] Perhaps it

[18] *Vita M.*, II, 40.

[19] "Philo und der überlieferte Text der LXX," *Zeitschrift für wissenschaftliche Theologie*, XVI (1873), 217–38, 411–28, 522–40.

[20] *Philo and the Holy Scripture* (1895), pp. 35 ff.

[21] Dr. Goodenough seems to disagree with my contention that Philo knew Hebrew. He wrote me the following note: "Your argument about the LXX is weak. Recent LXX study shows that there was not a standard LXX text,

will suffice to cite a few biblical phrases, terms, expressions, and legal explanations found in Philo's work which could have been based only upon Hebrew passages of the Bible as interpreted by the Palestinian teachers of the law.

1. First, a few words must be said about Philo's use or misuse of the Greek term *νόμος*. The ordinary meaning of *νόμος* in the Greek-speaking world was either of statutory enactment or the legal corpus, whether produced by the compilation of existing customs enacted by a lawgiver or by a constitutional authority. C. H. Dodd [22] quotes a passage from pseudo-Demosthenic *Contra Aristogitonem*, 774, where the following definition of the term *νόμος* is given: "Every law is the invention of the gods, the judgment of the wise men, the correction of transgressions, and the common covenant of a state, in accordance with which all members of the state ought to live." Hence the term *νόμος* is used in Greek literature in the sense of established custom or statutory law. Philo, however, applies it as no Greek ever would, even to the non-legal material of the Bible. The narratives of the Bible he calls *ὁ νόμος* or *οἱ νόμοι*. The stories of the Patriarchs, of the Tower of Babel, of the Flood are "laws." [23] The question arises, why does Philo use the term *νόμος* in a way that is meaningless in Greek. No other explanation is plausible than that he knew that the term *νόμος* used in the LXX repre-

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but a variety of texts and in different places some more and some less literal translations of the Hebrew. Philo obviously did not know this, and follows his own text carefully and literally, but what text is it? When Philo reads nearer to the Hebrew than to the LXX one conclusion, which cannot be refuted, is that his text was more literal than the one we have in the sixth century codex. Conclusions of independent knowledge of Hebrew in view of Philo's general dependence upon his Greek text is dangerous." Although I can see the possibility of Dr. Goodenough's suggestion, still the fact remains that we have no Greek texts with the readings parallel to those quoted from Philo. The assumption that the Greek text he used was nearer the Hebrew in the instances discussed is possible, but in the absence of such a text, we have no proof that it ever existed. G. F. Moore (*Judaism*, I, 322) is inclined to think that Philo and his Alexandrian contemporaries knew Hebrew, but "that in Philo's time knowledge of Greek was more common among the upper classes in Jerusalem than of Hebrew in Alexandria."

[22] *The Bible and the Greeks* (1935), p. 26.

[23] See Goodenough, *By Light, Light*, pp. 73–74.

sents the Hebrew word תורה,[24] which was used in Palestine not only for the biblical law in its proper sense, but for all the writing of the Bible, as well as oral tradition, whether rules of conduct or religious teaching. Hence, the term *νόμος* as employed by Philo represents the technical Hebrew term *Torah* as it was used in Palestine. Furthermore, in one place where Philo uses the term in its proper meaning he also uses Palestinian terminology. He says that law is nothing else but the *logos* prescribing what one should and should not do (*νόμος δὲ οὐδέν ἐστιν ἢ λόγος προστάττων ἃ χρὴ καὶ ἀπαγορεύων ἃ μὴ χρή*).[25] Here Philo uses the term *λόγος* in the sense sometimes found in the LXX, namely, a commandment (miẓwah), and Philo's definition of *νόμος* is the same as the Tannaitic division of biblical law into positive and negative commandments (מצות עשה מצות לא תעשה). Philo's words almost appear to be a translation of the Hebrew definition of "law" as found in Tannaitic sources. This definition of the term could have been used even by a Greek and was known to the Stoics. The fact is, however, that the terminology of the definition seems to be Palestinian.

2. In Num. xxxv. 31–32 we read: "Moreover ye shall take no ransom for the life of a murderer, that is guilty of death, but he shall surely be put to death. And you shall take no ransom from him that is fled to the cities of refuge" (לנוס לעיר מקלטו). The LXX translates verse 32 as follows: *οὐ λήμψεσθε λύτρα τοῦ φυγεῖν εἰς πόλιν φυγαδευτηρίων*, which corresponds to the English translation of the Hebrew. Philo, however, in paraphrasing Num. xxxv. 31–32, says: "The law forbids the acceptance of ransom money from a murderer deserving death, in order to mitigate his punishment or substitute banishment for death, for blood is purged with blood." [26] Colson on this point accurately remarks that the statement, "or substitute banishment for death," shows that Philo understood verse 32 to refer to an intentional murderer, namely, that no ransom should be taken from the intentional murderer in order to substitute banishment for the death penalty. Colson suggests

[24] The Hebrew term תורה is usually translated in the LXX by *νόμος*.
[25] *Praem.*, 55; see also *Immut.*, 53.
[26] *Spec. Leg.*, III, 150.

that Philo "wrongly" so understood the LXX. The fact is, however, that Philo's construction agrees with the Hebrew text as interpreted in Tannaitic sources. The Hebrew term לנום was understood by the Sifre, not in the sense given in the LXX and the English translation "from him that is fled to the cities of refuge," but "that he may flee," meaning that no ransom may be taken from the intentional murderer in order for him to flee to the cities of refuge.[27] This Tannaitic interpretation is grammatically correct, for the term לנום is used in the Bible in this sense in Gen. XIX. 20. Hence, Philo's interpretation of Num. XXXV. 32 is in agreement with the Hebrew text as it was interpreted by the Palestinian school.

3. The priestly legislation in Lev. XXI. 18 enumerates the following priests who are not allowed to approach the altar: a blind or a lame man or he who has anything maimed or anything too long (שרוע). In the LXX the word corresponding to the Hebrew term is ὠτότμητος, meaning with a "split ear." Contrary to our expectation, Philo uses a Greek term which corresponds to the Hebrew שרוע rather than to the Greek of the LXX. He writes: "It is ordained that the priest should be perfectly sound throughout, without any bodily deformity. No part, that is, must be lacking or have been mutilated, nor on the other hand redundant (μήτε κατὰ πλεονασμόν) whether[28] the excrescence be congenital or an aftergrowth due to disease."[29] There is no doubt that πλεονασμόν is the literal translation of the Hebrew term שרוע.[30]

4. A similar instance in which Philo seems to follow the Hebrew, rather than the LXX, is his enumeration of the animals permitted as food. The law in Deut. XIV. 4–7 enumerates ten animals, while the LXX lists only eight. Philo, following the Hebrew text, gives ten.[31]

[27] Sifre Num. 161 לא תקחו כופר לנום אל עיר מקלטו חרי שהרג את הנפש במזיד שומע אני יתן ממון ויגלה ת"ל לא תקחו.

[28] Philo's statement that the deformity, whether acquired or inherited, would still bar the priest from office agrees with the Sifre Emor on Lev. XXI. 18.

[29] *Spec. Leg.*, I, 80.

[30] In his notes in the appendix Colson noticed that Philo does not follow the LXX.

[31] *Spec. Leg.*, IV, 105. In this particular case it is quite possible that Philo had the same reading as that of Cod. AF, which closely follows the Hebrew.

5. In Lev. XIX. 28 we read: "Ye shall not make any cuttings in your flesh for the dead, nor imprint any marks upon you." When Philo speaks about idolatrous worship he paraphrases this passage as follows:

> But some labor under madness carried to such an extravagant extent that they do not leave themselves any means to escape to repentance, but press to enter into bondage to the works of man and acknowledge it by indentures not written on pieces of parchment, but, as is the custom of slaves, branded on their bodies with red hot iron. And there they remain indelibly, for no lapse of time can make them fade.[32]

The LXX translates Lev. XIX. 28 by *γράμματα στικτὰ οὐ ποιήσετε*, which means that you shall not make a written mark upon you. Philo understands this law to be a prohibition against an indelible imprint dedicated to an idol. Such an interpretation could not have been deduced from the LXX. The Rabbis understood the Hebrew term קעקע used in this passage in the same sense as Philo, namely, an indelible imprint on the flesh for the sake of idol worship.[33]

6. In many places Philo gives one reason why the tribe of Levi merited the office of the priesthood. He writes:

> The nation has twelve tribes, but one out of these was selected on its special merits for the priestly office, a reward granted to them for their gallantry and godly zeal on the occasion when the multitude was seen to have fallen into sin through following the ill-judged judgment of some who persuaded them to emulate the foolishness of Egypt and the vainly imagined fables current in that land, attached to irrational animals and especially to bulls. For the men of this tribe at no bidding but their own made a wholesale slaughter of all the leaders of the delusion and thus carrying to the end their championship of piety were held to have done a truly religious deed.[34]

Philo's allusion is undoubtedly to Exod. XXXII. 29: "Consecrate (מלאו) yourself today to the Lord, for every man hath been against his son and against his brother; that he may also bestow upon you a blessing this day." The Hebrew term מלאו literally means "fill" but is often used in the Bible

[32] *Spec. Leg.*, I, 58.

[33] See Tosefta Mak. 4, 15, ואינו חייב עד שיכתוב ויקעקע לע"ז ואינו חייב עד שיכתוב שם עכו"ם. See also Mak. 21a. Philo's phrase, "as the custom of slaves," is also found in Maimonides, *Mishneh Torah*, "'Abodah Zarah," 12, 11 כאלו עבד מכור לה.

[34] *Spec. Leg.*, I, 79.

in the metaphorical sense of "consecrate." The LXX translates the Hebrew term מלאו by ἐπληρώσατε, which does not suggest any notion of consecration. Thus Philo's interpretation seems to have been based upon the Hebrew reading. As a matter of fact, his words are found verbatim in Rashi. On the phrase "consecrate yourself" Rashi says: "As a reward for your killing them you will be consecrated to be priests to God." [35] All this shows that the Rabbis, like Philo, have understood the passage to contain a promise of the priesthood to the tribe of Levi for slaughtering the worshippers of the Golden Calf. Had not Philo known the Hebrew text and its traditional interpretation he could not have written this passage.

7. The law in Deut. xxii. 13–18 states that if a man is found by court falsely to have accused his wife of antenuptial unchastity, "the elders of that city shall take the man and chastise him" (ויסרו אותו). The Hebrew term *yasser* in this passage was understood by the Palestinian Rabbis to mean punishment by stripes.[36] The LXX, however, translates the Hebrew by παιδεύσουσιν αὐτόν. The Greek term primarily means "instruct" or "correct." Philo says that the offender is punished by bodily degradation in the form of stripes (διὰ πληγῶν εἰς τὰ σώματα).[37] Philo could hardly have based this interpretation upon the reading of the LXX. It is identical with the common Palestinian construction of this verse.

8. According to the law of Lev. xxv, no property can be sold for a longer period than fifty years. The law commands (xxv. 16) "according to the multitude of years thou shalt increase the price thereof, and according to the fewness of years thou shalt diminish the price of it; for the number of crops doth he sell unto thee, and the land shall not be sold into perpetuity." [38] The Bible forbids permanent ownership

[35] אתם ההורגים אותם בדבר זה תתחנכו לחיות כהנים למקום. A reference in the printed texts of Rashi to Zeb. 115a for this tradition is a mistake, for no such statement is found there. With the exception of Philo and Rashi, I am ignorant of any other Jewish source where such a tradition appears. Yet Rashi's phraseology appears to be a Midrashic quotation.

[36] Sifre Deut. 238.

[37] *Spec. Leg.*, III, 82.

[38] Lev. xxv. 15.

of property by the purchaser, but does not state who is the owner of the property while it is sold. In Palestinian legal terminology the purchaser of the property enjoys the "ownership of fruits" (קנין פירות), while the original vendor maintains the ownership of "real property" (קנין הגוף).[39] Hence, the purchaser is forbidden to do any damages or make changes in the real property, since it does not belong to him.[40] In paraphrasing this law Philo uses, not the terminology of the LXX, but that of the Rabbis. He writes: "Do not pay the price, he says, of 'complete ownership' but for a fixed number of years and a lower limit than fifty." For the sale should represent not real property (*κτημάτων*) but "fruits" (*καρπῶν*).[41] The Greek terms of Philo which are not found in the LXX seem like a literal translation of the terms used by the Palestinian Rabbis.

9. In describing the High Priest's vestments, Philo makes the following comment: "A piece of gold plate, too, was wrought into the form of a crown with four incisions, showing the name which only those whose ears and tongues are purified may hear or speak in the holy place, and no other person nor in any other place."[42] Thus, according to Philo, the tetragrammaton was inscribed on the golden plate. His source for this statement is Exod. xxviii. 36, "engrave upon it, like the engraving of a signet: Holy to the Lord." The LXX translates the Hebrew phrase, "Holy to the Lord," by *ἁγίασμα κυρίου*. The LXX, following the oral tradition (*Ḳere*), uses the word *κύριος* in translating the tetragrammaton of the Hebrew text. The English translations following the LXX translate it by "Lord." Hence, Philo's statement that the tetragrammaton was inscribed on the gold plate shows that he knew of the Hebrew term, represented in the LXX by *κύριος*.

There is, however, the following difficulty: Even if Philo knew that *κύριος* of the LXX represents the tetragrammaton of the Hebrew, the phrase, "Holy to the Lord," does not assert more than that the thing engraved on the golden plate is holy to the Lord, but not the "sacred name of the tetragram-

[39] Giṭ. 48a.
[40] Jer. Tal. Giṭ. 46b.
[41] *Spec. Leg.*, II, 113.
[42] *Vita M.*, II, 114.

maton." This tradition of Philo is also found in Josephus,[43] Origen, and Bar Hebraeus.[44] Colson therefore raises the question:

> Is it a Rabbinic tradition? The German translators, generally well versed in such Parallels, quote nothing from this source. The question suggests itself, "Did Josephus also merely follow Philo?" If so, though it is not given among Cohn's examples of coincidence between the two, it is the strongest evidence I have yet seen of Josephus's use of his predecessors.[45]

Josephus, in my opinion, never saw the works of Philo nor would he, a priest by birth, need any information from Philo concerning the priestly vestments, but it would appear that both Josephus and Philo based their statement on the common Palestinian interpretation of the Hebrew phrase, "Holy to the Lord." According to Tannaitic tradition, the golden plate had engraved upon it the tetragrammaton without any prefix,[46] but under the tetragrammaton was engraved the word "Holy," the term "Holy" presumably referring to the tetragrammaton.[47] This tradition was accepted against the testimony of R. Eleazar b. Jose, a Tanna of the second century, who testified that on his visit to Rome he saw the golden plate which Titus had carried away from Jerusalem and that upon it was engraved the phrase, "Holy to the Lord."[48] Hence the passage in Philo shows that he disregarded the reading of the LXX and followed a Palestinian interpretation of the Hebrew text.

The other statement of Philo that only those whose ears and tongues are pure may hear or speak the tetragrammaton and only in the Temple is also fully in agreement with Tannaitic tradition. The Mishnah says that in the Temple the priests pronounced the name as it was written, but in the provinces a substitute was used.[49] According to a Palestinian

[43] *Bell. Jud.*, 5, 235.
[44] See Thackeray's note to *Bell. Jud.*, 5, 235.
[45] Appendix to *Vita M.*, II, 114.
[46] Shab. 63b.
[47] See Jer. Tal. Yoma 41c: קודש מלמטן שם מלמעלן כמלך יושב על קתדרין שלו.
[48] Suk. 5a.
[49] Sot. 7, 6.

tradition, when laxity in religious observance became prevalent, the High Priest pronounced the tetragrammaton in a low voice, lest the name may be heard by those who are unworthy to hear it.[50]

10. Concerning the responsibility of the owner of an injurious beast, Philo makes the following comment:

> If the owner of the animal knowing that it is savage and wild has not tied it up (*μήτε καταδήσῃ*) nor kept it under guard (*μήτε κατακλείσας φυλάττῃ*) or if he has information from others that it is not manageable, he must be held guilty as responsible for the death by allowing it to range at large.[51]

Philo's statement that either tying up or keeping the beast under guard frees the owner from all obligation is based upon the biblical phrase, "and he has not kept it in" (לא ישמרנו). The LXX translates the Hebrew phrase ישמרנו by *μὴ ἀφανίσῃ*, meaning "removed" or "kept him out of the way." Heinemann has noticed that here Philo is nearer to the Hebrew. It appears also that his interpretation of this phrase is the same as that of the Palestinian Rabbis. According to the Mishnah, if a man brought his flock into a fold and shut it in properly and it nevertheless came out and caused damages, he is not culpable.[52] This part of the Mishnah corresponds to Philo's term *καταδήσῃ*. The other statement in the Mishnah is that if the owner delivered the animal to a guardian, the owner is freed from all obligation.[53] This Halakah corresponds to Philo's phrase *κατακλείσας φυλάττῃ*. Philo's interpretation, therefore, reflects the Hebrew text as it was commonly interpreted in Palestine.

11. The law in Exod. XXI. 20 states, "If a man smite his bondman, or his bondwoman with a rod and he die under his hand, he shall surely be punished." The Hebrew phrase נקם ינקם is translated in the LXX by *ἐκδικηθήσεται*, which may mean either "he shall be condemned by justice" or, as the English translation of the Hebrew phrase reads, "he shall surely be punished." The Palestinian Rabbis understood the

[50] Jer. Tal. Yoma 40b.
[51] *Spec. Leg.*, III, 145.
[52] B. Ḳ. 6, 1.
[53] B. Ḳ. 4, 9.

Hebrew term נקם, which literally means "revenge," to mean death, and the Hebrew phrase נקם ינקם is translated "he shall surely die." In support of their theory that נקם in the Bible means death, the Rabbis quoted Lev. xxvi. 25: "And I will bring a sword upon you that shall execute the vengeance of the covenant" (נקמת נקם).[54] The Greek term of the LXX does not suggest such an interpretation. In paraphrasing the law of Exod. xxi. 20, Philo uses in place of the Greek phrase of the LXX *ἐκδικηθήσεται*, the term *θνησκέτω*,[55] meaning "let him die," which is an agreement with the Palestinian interpretation of the Hebrew word נקם.

12. In Deut. xxi. 11–14, it is stated that if a man takes a captive woman with the intention of marrying her, he must keep her in his house for a month, but if afterward he changes his mind, the law forbids the captor to "sell her at all for money, thou shalt not deal with her as a slave." [56] (לא תתעמר בה). The Palestinian Rabbis,[57] Saadia, Rashi, and Ḳimḥi, like the modern English translators, understand the Hebrew term עמר to be of the same meaning as עבד. The LXX translates the Hebrew term עמר by *ἀθετέω*, meaning "to set aside" or "disregard." Philo follows the Hebrew text instead of the LXX. He says: "For he (Moses) commands him in such a case not to sell her, nor to retain her any longer as a slave" (*μήτε δούλην ἔχειν*).[58]

13. The law in Num. xxviii. 3 and 6 orders that two sacrifices should be offered daily for a "continual burnt-offering" (עולה תמיד and עולת תמיד). In the LXX the Hebrew עולה תמיד is translated by *ὁλοκαύτωσιν ἐνδελεχῶς*, and the Hebrew עולת תמיד by *ὁλοκαύτωμα ἐνδελεχισμοῦ*. Philo, however, refers to the daily sacrifice simply as *ἐνδελέχεια*.[59] His use of the simple substantive "continuity" as a description of what the Hebrew Bible, as well as the LXX, calls a "continual burnt-offering" can be explained only as reflecting the Tannaitic use of the simple substantive *Tamid* as a description of the daily sacrifice.

14. The law in Lev. xix. 33–34 says: "And if a stranger sojourn with thee in your land ye shall not do him wrong.

[54] Mekilta Mishpatim (Exod. xxi. 20).
[55] *Spec. Leg.*, III, 141.
[56] Deut. xxi. 14.
[57] Sifre Num. 214.
[58] *Spec. Leg.*, IV, 115.
[59] *Spec. Leg.*, I, 170.

The stranger that sojourneth with you shall be unto you as the home-born among you." The LXX translates the Hebrew term גר either by προσήλυτος or by ξένος or by πάροικος. The signification of the term proselyte as a religious convert is not suggested by the LXX, for even the phrase, "ye were strangers in the land of Egypt," is translated by προσήλυτοι ἐγενήθητε. The unanimous interpretation of the Tannaitic scholars is that the Hebrew term *ger* means a religious convert, but the Rabbis spoke of two types of converts: one called *ger toshab*, that is, a person who renounced his polytheistic religion and embraced monotheism, but did not accept the observance of the ritual law; the other called *ger zedek*, one who became a full-fledged convert into Judaism.

According to Simeon b. Eleazar, a Tanna of the later part of the second century, the semi-converts were accepted only during the time when the Jubilee was in existence,[60] but this restriction may merely reflect the Jewish reaction against Christianity, which required from its converts only the renunciation of polytheism. The Rabbis who lived in the second and third centuries C.E. seem to have taken an unsympathetic attitude towards semiproselytes.[61] Yet some individuals demanded that such a proselyte should receive full protection.[62] It is highly probable that while semiproselytes were rare among the Jews in the Christian period, in the pre-Christian period such converts were accepted wholeheartedly.

These two types of proselytes were known to Philo, and though, as already admitted, the term προσήλυτος of the LXX does not suggest any religious convert, still, like the Palestinian Rabbis, he understood the Hebrew term *ger* to mean a full or semiconvert to Judaism. Commenting on Lev. XIX. 33–34, he says:

> All who spurn idle fables and embrace truth in its purity, whether they have been such from the first or through conversion to the better side have reached that higher state, obtained his approval, the former because they were not false to the nobility of their birth, the latter

[60] 'Arak. 29a.
[61] 'A. Zar. 65a; Pes. 21a.
[62] See Jer. Tal. Yeb. 8d.

because their judgement led them to make the passage of piety. These last he calls "proselytes" or newly joined because they have joined the new and godly constitution (καινῇ καὶ φιλοθέῳ πολιτείᾳ). Thus, while giving equal rank to all incomers with all the privileges which he gives to the native-born, he exhorts the old nobility to honor them not only with marks of respect but with special friendship and with more than ordinary good-will and surely there is a good reason for this; they have left, he says, their country, their kinsfolk and their friends for the sake of virtue and the observance of divine law (ὁσιότητα). Let them not be denied another citizenship or other ties of family (οἰκείων) and friendship.[63]

Hence, to Philo, προσήλυτος does not mean a newcomer to a country, but a religious convert. The fact, however, that Philo treats a Jew by birth and a proselyte alike, characterizing the latter as one who accepted the godly constitution and observance of the divine law and offering him family ties with Jews by birth, makes it highly probable that by προσήλυτος Philo does not mean a semiconvert who embraced monotheism. He means, rather, a full convert to Judaism, which in his view consists of three things: (1) citizenship; (2) the observance of the same law; (3) the belief in one God.[64]

G. F. Moore accurately remarks:

An examination of all the passages in Philo shows conclusively that προσήλυτος and its synonyms designate a man who has not merely embraced the monotheistic theology of Judaism, but has addicted himself to the Jewish ordinances and customs, and in so doing severed himself from his people, friends and kinsmen.[65]

There is, however, another passage where Philo, again discussing this law in Lev. XIX. 33–34, gives a different definition of the term προσήλυτος. Taking for his topic of discussion the phrase "for ye were strangers in the land of Egypt," he says:

He shows most evidently that he is a proselyte, inasmuch as he is not circumcised in the flesh of his foreskin, but in the pleasures and appetites, and all other passions of the soul; for the Hebrew race was not circumcised in Egypt. . . . On this account Moses adds "For you know the soul of a proselyte." Now what is the mind of a proselyte? A forsaking of the opinions of the worshippers of many gods and a union with those who honor one God, the Father of the universe. In the second place, some people call foreigners also proselytes and those are strangers

[63] *Spec. Leg.*, I, 51.
[64] *Spec. Leg.*, IV, 159.
[65] *Judaism*, I, 328.

who have come over to the truth in the same manner with those who have been sojourners in Egypt; for the one are strangers newly arrived in the country, but the last are strangers also to the customs and laws, but the common name of proselyte is given to both alike.[66]

What Philo says here is this: The term προσήλυτος may mean a foreigner in the literal sense of the word and a foreigner in the religious sense. The Jews were proselytes in Egypt in a double sense. First, they lived in a strange land; second, they were uncircumcised. Hence, the uncircumcised pagan who has forsaken his polytheistic belief and embraced monotheism is also a religious proselyte or stranger, because, like the Egyptian Jews, the laws and customs are strange to him. Lev. XIX. 33–34 deals with a religious proselyte. This passage in Philo suggests that he did not require of proselytes circumcision and observance of the law, but only the belief in a monotheistic deity. He does not, however, consider them full-fledged Jews; he rather puts them in the same status with the Jews who lived in Egypt. This type of proselyte corresponds to the *ger toshab*, namely, a semiconvert who has only embraced monotheism but has remained a stranger to the laws and customs of the Jews.

The fact that Philo characterizes the non-observing proselytes as "the uncircumcised" suggests strongly that those who accepted Judaism in the full sense of the term were initiated by the rite of circumcision. Paul's advice to his pagan converts against circumcision, on the grounds that if they accept it they will have to observe all the commandments, also shows that it was considered the official rite of initiation into Judaism.[67] In Tannaitic sources we hardly find a unanimous opinion about the rite of conversion. R. Eliezer b. Hyrcanus considered circumcision the main act of conversion, while R. Joshua said that baptism is sufficient.[68] Hellenistic sources make not the slightest reference to baptism. Hence, Philo knew of two types of proselytes: (1) those who accepted Judaism with all its obligations (such proselytes seem to

[66] Mangey (1742), II, 677; Moore (*Judaism*, I, 328, n. 1) misunderstood this passage in Philo.

[67] Galatians v. 3, "I warn every man that gets himself circumcised that he is under obligation to fulfill the whole law."

[68] Yeb. 46a.

have become Jews by the rite of circumcision); and (2) those who embraced the monotheistic belief in God but remained strangers to the customs and law of the Jews. Such converts Philo calls uncircumcised proselytes. These deductions he could not have made from the term προσήλυτος used by the LXX, but he must have been acquainted with the Palestinian explanation of the Hebrew term גר. In this instance we have no evidence of Philo's knowledge of Hebrew, but only of his acquaintance with the terminology and interpretation of the oral law.

CHAPTER III

THE TEMPLE RITUAL

PHILO'S treatise *De Victimis* is entirely devoted to the laws of sacrifices and to the Temple service in general. It is through his discussion of the ritual law that we may learn more accurately whether or not he was acquainted with the Oral Law, since some parallels to Palestinian Halakah, with reference to civil law, may also be found in Roman and Greek jurisprudence. Even if we find a parallel in the Halakah to the view held by Philo, it is often difficult to determine whether he drew it from Jewish or non-Jewish sources. There is no doubt, however, that the Jews developed a unique system of Temple ritual whose principles were quite foreign to the pagan world, and our main problem is to determine whether Philo was acquainted with the laws of sacrifices as interpreted in Tannaitic Halakah, or whether he only repeats the biblical text with some philosophical interpretation of his own.

Philo begins his book on sacrifices with an explanation of the law which limits the animals fit for sacrifices only to oxen, sheep, and goats. He believes that these animals were designated by the law chiefly because they are the most gentle and manageable of all irrational creatures. They can easily be driven by a child, and at the same time they are the most useful for human necessities.[1] In rabbinic literature there are parallels to Philo's explanation. The common explanation given in most of the Midrashim is that the three animals which the law enumerates as fit for sacrifices are not pursuers after the blood of other animals. They are the hunted, and God commanded that sacrifices should be offered only from among the nonpredatory animals, in order to teach mankind that He is always on the side of the pursued.[2] Another reason

[1] *Spec. Leg.*, I, 163.

[2] Midrash Tanḥuma Emor 12; Pesiḳta Rabbati 172 ff. The same explanation is found verbatim in *Ps. Arist.*, 145: "With respect to the forbidden

given is that He did not wish to trouble men to search for animals in the fields and mountains, but preferred that they take for sacrifices tame ones fed at the crib.[3]

The biblical law also stipulates that the three animals fit for sacrifices must be "without blemish." Philo tells us how they were examined before they were sacrificed and what constituted a "blemish" according to biblical law. The accuracy of his information may be better appreciated if one is acquainted with the Tannaitic interpretation of this law. In rabbinic literature many principles were derived in interpreting the phrase "without blemish." Among them was the stipulation that animals with external mutilation were definitely unacceptable and that, to avoid the risk of hidden defect, all the animals had to be examined before any sacrifice.[4] According to some Tannaitic scholars, if the daily sacrifices were offered first without having been examined, they were considered defiled even though it was found afterward that the animals were fit.[5] The biblical law in Exod. XII. 3–7 that the Paschal lamb must be set aside four days before Passover was also interpreted in the Halakah as a way of insuring against any physical defect.[6] For this work special men were employed, and their wages were paid from the treasury of the Temple.[7] All these Tannaitic principles are the result of one Mishnaic law. In Lev. XXII. 8 a *ṭerefah* is forbidden for food. Literally the term means "torn beast." In Tannaitic terminology *ṭerefah* is also applied to an animal that has received such a serious injury, it could not continue to live for another twelve months,[8] or to one that suffered

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winged creatures thou wilt find that they are wild and carnivorous, and with the strength that is theirs they oppress the rest of their kind and gain their food by cruelly preying upon the aforesaid tame creatures. And not only this, but they carry off also lambs and kids, and injure men, both dead and living. By these creatures, then, which he named unclean, Moses established a *sign* that those for whom the legislation was ordained should practice righteousness in their hearts and oppress no one in reliance on their own strength." The same reason is given in *Ps. Arist.*, 170.

[3] Midrash Tanḥuma Emor 13.

[4] Sifra Wayyiḳra 3 (1, 3).

[5] Tosefta Pes. 5, 5; compare the Tosefta with the Sifra Wayyiḳra 3 (1, 3).

[6] Pes. 96a; see also the Scholion to Megilat Ta'anit, 1.

[7] Ket. 106a; see also Heinemann, *Philons Bildung*, pp. 28 ff.

[8] See Ḥull. 3, 1.

from any other internal defects.[9] Such animals were also forbidden to be offered as sacrifices. A criticism against offering such beasts is echoed in the words of Malachi: "And when you offer the lame and the sick, it is no evil!" [10] In order to prevent the demoralization of the Temple sacrifices, special veterinarians were appointed to examine every beast before it was offered as a sacrifice. The Talmud also relates that invisible defects were considered a "blemish" in the Jewish cult but not among the pagans.[11] This might also be a reason why every animal was carefully scrutinized before it was offered as a sacrifice. These Tannaitic traditions are reflected in Philo's words:

> And the victims must be whole and entire, without any blemish on any part of their bodies, perfect in every part, and without spot or defect of any kind. At all events, so great is the caution used with respect not only to those who offer the sacrifices, but also to the victims which are offered, that the most eminent of priests (δοκιμώτατοι τῶν ἱερέων) are carefully selected to examine whether the animals have any blemishes or not, and to scrutinize them from head to foot (ἀπὸ κεφαλῆς ἄχρι ποδῶν), examining not only those parts which are easily visible (ὅσα τε ἐμφανῆ) but also all those parts which are hidden (ἀποκέκρυπται), such as the belly and the thighs, lest any slight imperfection should escape notice.[12]

In another place Philo is even more explicit:

> Take care that the victim which thou bringest to the altar is perfect and without any blemish, selected from many on account of its excellency, by the uncorrupted judgments of priests, and by their most acute sight, and by their continual practice which is exercised in the faultless examination of faultless victims.[13]

His statement that the sacrifices are examined by the "most eminent" priests is an exaggeration, but the two passages as a whole are undoubtedly based on the Tannaitic Halakah to which we have referred.

After Philo finishes his discussion of the laws which regulate the animals fit for sacrifices, he explains the purpose and the laws of the daily Temple sacrifices and of those offered by individuals.

[9] Tem. 6, 1.
[10] I. 8.
[11] Giṭ. 56a.
[12] *Spec. Leg.*, I, 166.
[13] *Spec. Leg.*, I, 259.

The Bible enumerates four kinds of sacrifices which are to be offered by individuals on certain occasions: (1) the *Olah* (עולה), which is commonly translated "whole burnt offering"; (2) the *Shelamim* (שלמים), usually given as "peace offering"; (3) the *Ḥaṭat* (חטאת), "sin offering"; (4) the *Todah* (תודה), translated either "thank offering" or "praise offering." The translation of *Shelamim* by "peace offering," which means that it is derived from the word שלום, is hardly correct. The plural of שלום is not שלמים but שלומים. *Shelamim* is rather the plural of שלם, which means "thank offering." Josephus accurately translates *Shelamim* by *χαριστηρίους θυσίας*.[14] The LXX, however, renders *Shelamim* by *σωτήριον*, which may mean either "safety" or "peace offering," [15] and *Todah* is translated by *αἰνέσεως*, which means "praise offering." Neither the Bible nor the LXX explains the purpose or occasions of each of these four sacrifices. Philo, however, makes reference to a number of traditions regarding them, and we may now turn to these to determine how much of his explanation is based upon Palestinian traditions.

Philo considers first the daily sacrifices, and his discussion is significant, because one of the controversies between the Sadducees and Pharisees had reference to the nature of the Tamid. In Exod. xxix. 38–39, we read: "Now this is that which thou shalt offer upon the altar; two lambs of the first year day by day continually. The one lamb thou shalt offer in the morning and the other lamb thou shalt offer at dusk." The Bible does not state whether the daily sacrifices were private sacrifices provided by individuals, or public sacrifices provided at the public expense. The Sadducees maintained that they were private, while the Pharisees held that they were public.[16] Josephus, following the Pharisaic Halakah, says: "The law ordains that at the public expense a lamb of a year old shall be slain daily, both at the opening and close of the day." [17] We have no record in Talmudic literature

[14] *Ant.*, 3, 9, 2.

[15] The Tannaim seem, like the LXX, to have understood *Shelamim* to mean a peace offering. The Sfra Wayyiḳra 16 says כל המביא שלמים מביא שלום לעולם. See also Zeb. 98b כשהוא שלום הוא מביא ואינו מביא כשהוא אינו מביא.

[16] Scholion to Megilat Ta'anit 1, 1; Men. 65a.

[17] *Ant.*, 3, 10, 1.

which sheds more light on the nature of this controversy. Since the text in Exodus and Numbers may be interpreted either way, the Sadducees certainly did not derive their point of view from the literal statement of the Bible.

It is highly probable that the Sadducees and the Pharisees disagreed not only about the expense of the daily sacrifice, but about the basic rite of the cult. According to the Pharisees, the daily sacrifices were considered atoning ceremonies for the whole people. In various Tannaitic sources it is said that never had there been a transgressor in Jerusalem during the existence of the Temple, for the first Tamid (the technical term for the daily sacrifices), performed in the morning, atoned for the sins committed at night, and the second Tamid, carried out in the evening, atoned for the sins committed during the day.[18] The conservative Shammaites said that the Tamid sacrifices merely "subdued" the sins of the Israelites; the Hillelites believed that the Tamid washed off the sins; and Ben Azzai held that after the Tamid was offered, everyone became as free from sin as a child a day old.[19] All played on the words of the biblical verse, but their interpretations are evidence of the fact that the Tamid was considered the *sacra publica*,[20] an atoning sacrifice for the nation as a whole. So much was it associated with the symbol of the Jewish cult that, according to the Tosefta, after the destruction of the Temple many Pharisees abstained from eating meat and drinking wine, because the Tamid, the symbol of atonement, was no longer offered on the altar.[21]

We may easily realize that the priests, whose income depended largely on the sacrifices, could hardly have favored the Pharisaic conception, for once we assume that the lambs offered daily were a sufficient atonement for the sins committed, there was no longer a deep urge in every person to offer thanksgiving or sin offerings. The Sadducees, who belonged to the aristocratic priesthood, maintained that the Jewish cult does not contain a daily atoning or thanksgiving sacrifice for the nation as a whole and that the Tamid is a sacrifice offered by individuals. Thus the opposition of the

[18] Midrash Tanḥuma Pinḥas 12.
[19] Pesiḳta Rabbati 84a.
[20] See Moore, *Judaism*, I, 251.
[21] Soṭ. 14, 11.

Sadducees to the Pharisaic definition of the Tamid was an outgrowth of their social position in Palestine.

Philo does not say at whose expense the daily sacrifices were offered or whether they were primarily atoning sacrifices, but his description of them shows that he sided with the Pharisees in regarding them as offered for the whole people:

> It is commanded that every day the priests should sacrifice two lambs, one at the dawn of the day and the other in the evening; each time on account of thankfulness. One for the kindness of the day, and the other for the good deeds of the night which God is incessantly and uninterruptedly pouring upon the race of men.[22]

He reveals a difference, however, between himself and the Pharisees: the Tamid is to him a thanksgiving sacrifice, rather than an entirely atoning one.

The Bible also includes in the daily sacrifice the burning of incense, but does not state the exact time when this offering is brought. Philo gives it explicitly: "Moreover, the most fragrant of all incenses is offered up twice every day in the fire, being burnt within the veil, before (*πρὸ*) the morning sacrifice and after (*μετὰ*) the evening sacrifice." [23] The Tosefta also states that in the morning the incense was offered first and then the Tamid, while in the evening the Tamid was offered before the incense.[24]

It is rather interesting to notice the distinction Philo makes between the sprinkling of blood of the Tamid sacrifice and the offering of incense. The latter he regards as the symbol of thankfulness for the national spirit, while he considers the sacrifice of blood as manifesting our own gratitude, because we are composed of blood (*ὑπὲρ ἡμῶν τῶν ἐναίμων*).[25] A parallel to Philo's comments is found in the words of R. Simeon b. Yoḥai, who says that the law required the sprinkling of the blood when the daily sacrifices are offered in order that it may atone for the sins of men, who are made of blood.[26]

[22] *Spec. Leg.*, I, 169: *τὸν δ' ὑπὲρ τῶν νύκτωρ εὐεργεσιῶν, ἃς ἀπαύστως καὶ ἀδιαστάτως ὁ θεὸς τῷ γένει τῶν ἀνθρώπων χορηγεῖ.*

[23] *Spec. Leg.*, I, 171.

[24] Tosefta Pes. 4, 2.

[25] *Spec. Leg.*, I, 171.

[26] Pesiḳta Rabbati 174b.

1. The Burnt Offering

Philo considers the burnt offering the most important and the highest type of sacrifice. According to him, it is made neither as an atonement for sins committed, nor as a token of gratitude for the benefits bestowed by God upon the sacrificer. It is directed solely at honoring God.[27] This statement agrees with his general theology that the man most acceptable to God is one who honors Him for His own sake, neither hoping to win blessings nor expecting to obtain remission of sins.[28] The burnt offering in his view is not, therefore, essentially an atoning sacrifice. Even more striking is his statement that the laying of the hands on the head of the burnt sacrifice is not, as in the sin offering, for confession of sins committed. Philo enumerates various crimes which the sacrificer ought to deny by words of his mouth or in his heart that he had ever committed. The hands that offer the sacrifice of the burnt offering ought never to have accepted a gift for an unjust cause (*οὔτε δῶρον ἐπ' ἀδίκοις ἔλαβον*), or committed robbery (*ἐξ ἁρπαγῆς*), or shed innocent blood, or injured anybody (*οὐ τραῦμα*).[29] Let us now see whether or not Tannaitic literature offers any parallels to Philo's view of the purpose of the burnt offering.

Tannaitic literature reveals many disagreements regarding the purpose of this sacrifice. R. Jose, the Galilean, says that it atoned in case one forgot to leave the sheaf of corn in his field, a sin which the sacrificer had to confess when he laid his hands on the sacrifice. R. Akiba regards it as atonement for the violation of the biblical commands for which no penalties by court were provided,[30] while others held that it atoned for sinful intentions.[31] Contrary to the view held

[27] *Spec. Leg.*, I, 197.

[28] *Abr.*, 128. The idea is also found in rabbinic literature. Some Rabbis, of the opinion that the praise offering was brought for the sole purpose of honoring God, said: אמר הקב"ה זו הביבה עלי מכל חתודה שהיתה בא על החנם. הקרבנות. אמר דוד זובח תודה יכבדוני. (Midrash Tanḥuma Ẓaw 9).

[29] *Spec. Leg.*, I, 204. Professor Goodenough has brought to my attention the fact that Philo's words recall the negative confessions found in the Book of the Dead. Whether Philo could have been influenced by such a source is hard to determine.

[30] Tosefta Men. 10, 12.

[31] Midrash Tanḥuma Ẓaw 9.

by Philo, these sources imply that the burnt offering was primarily an atoning sacrifice followed by a confession of sin.

There are, however, other Tannaitic sources which seem to agree with Philo. The Mishnah says:

> What is more holy than another precedes that other. The blood of the sin-offering precedes the blood of the burnt offering since it [the former] makes atonement; the parts of the burnt-offering precede the sacrificial portions of the sin-offering since they are given wholly to the fire.[32]

The Mishnah suggests that as the burnt offering was not an atoning sacrifice, the blood of the sin offering was sprinkled first. On this account the Talmud calls the burnt offering a gift (דורון = δῶρον) to God and, as explicitly stated by R. Simeon Yoḥai, the sacrifice was offered only after the sins were atoned by repentance and a sin offering.[33] The Tosefta also relates that once a pious man forgot a sheaf of corn in his field and, in accordance with the law in Deut. xxiv. 19, he left it for the poor. He felt so happy to have fulfilled this biblical law that he told his son to offer one bull as a thanksgiving sacrifice, a second as a burnt offering, and a third as a peace offering.[34] This story shows that a burnt offering, like a peace offering, was not considered an atoning sacrifice. In Midrash Tanḥumah we find a statement paralleling Philo's that the burnt offering is acceptable to God only if the hands of the sacrificer have never participated in robbery. Only one who has "clean hands and a pure heart" can offer the burnt sacrifice.[35] As a rule, sacrifices were accepted even from transgressors, but the Midrash and Philo suggest that before making a burnt offering, one must be certain of never having committed any serious crime.

It may be doubted whether, despite the ideal of the Jewish cult, such rigid regulations were applied in practice. Thus, the source which we have just quoted shows that Philo is correct in saying that the burnt offering is brought only for the sake of honoring God, not for the sake of atonement. When therefore one lays his hands on the head of the sacri-

[32] Zeb. 10, 2.
[33] Zeb. 7b.
[34] Pe'ah 3, 8.
[35] Ẓaw 2 ואימתי אתה מעלה עולה ואני מקבלה כשתנקה כפיך מן הגזל.

fice he ought to feel certain in his heart that his hands have not participated in robbery or any other such serious offense. Only under such circumstances can one honor God.

2. The Shelamim and Sin Offering

The *Shelamim* is called by Philo, as in the LXX, a sacrifice of preservation or of safety (σωτήριον), the purpose of which he explains as that of a thank offering for benefits received.[36] In this interpretation he agrees with the Halakah,[37] but he goes beyond the purely individualistic view of the sacrifice, looking upon it as applying to mankind as a whole. Other comments of Philo on the *Shelamim* can be better understood if we are acquainted with similar comments made by the Tannaim. The fact that the peace offering was eaten outside of the Temple and the sacrificer had the privilege of giving a part of his sacrifice to any person he wished, brought about a disagreement in Tannaitic literature as to whom the sacrifice belonged. R. Jose, the Galilean, said that the sacrificer is the real owner. The majority held that though the sacrificer had the privilege of sharing the offering with whomever he pleased, the sacrifice itself was Temple property.[38] Thus, the Mishnah says that if a man betroths a woman with his portion of the sacrifice, the engagement is not valid.[39] Though the priest and the sacrificer have the privilege of sharing their part with others, still neither of them is considered the real owner of the thing, which thus could not be called a gift from the man to the woman. The view held by the majority is the accepted Halakah. Philo also says that the sacrifice is not the property of the one who had offered it:

> Two days only are allowed for the use of the preservation sacrifice, and nothing is to be left on the third day . . . because it is fitting that the sacrifice should not be stored up for food, but should be free and open to all who have need of it, for the sacrifice is no longer the property of the person who has offered it (οὐκέτι τοῦ τεθυκότος) but belongs to Him to Whom the victim has been sacrificed. He, the benefactor, the bounti-

[36] *Spec. Leg.*, I, 197, 239.
[37] See note 15.
[38] Sifra Wayyiḳra 22 (Lev. v. 20); B. Ḳ. 12b.
[39] Ḳid. 2, 8.

ful, Who made the convivial company of those who carry out the sacrifices partners of the altar whose board they share. And he bids them not to think of themselves as the entertainers but as the stewards (ἐπίτροποι) of the good cheer, not the hosts (οὐχ ἑστιάτορες). The Host is He to Whom the material provided for the feast has come to belong.[40]

Philo summarizes in one paragraph the similarities and differences between the laws which regulate the offering of the *Shelamim* and the sin offering. According to him, three factors distinguish the sin offering from the sacrifice of preservation, place, time, and the partakers:

The parts of the sin offering which are placed upon the altar are the same as those of the sacrifice for preservation, namely the lobe of the liver, the fat, and the kidneys, for the man who repents is preserved or saved by escaping from the soul sickness which is more grievous than any which affects the body. But the conditions under which the other parts of the sacrifice are assigned to be eaten are different, and the difference consists in three points, in the place, in the time, and in those who partake of it. The place is the Temple; the time is one day instead of two; and the persons who partake of it are the priests, but not the men who offer the sacrifices. The prohibition against carrying the sacrifice outside of the Temple is for the purpose that, if the man who repents has committed an offense previously, he may not now be made notorious by the ill-judgments and unbridled tongues of malicious and acrimonious persons, and blazed abroad as a subject for reproachful and censorious talk, but confined within the sacred precincts which have also been the places of purification.[41]

The Bible says only that the sin offering belongs to the priest, but does not stipulate that it must be eaten in one day or that the sacrifice of preservation may be eaten outside of the Temple precincts. Josephus also says that the priest consumes the sin offering on the day it is sacrificed, "for the law does not permit it to be left until the morrow." [42] These three distinctions between the *Shelamim* and the sin offering are to be found in the Halakah. The Mishnah says: "The *Shelamim* could be eaten anywhere in the city, by any man and cooked for food after any fashion during two days and one night." [43]

[40] *Spec. Leg.*, I, 220–21. Philo's words κοινωνὸν ἀπέφηνε τοῦ βωμοῦ καὶ ὁμοτράπεζον τὸ συμπόσιον τῶν τὴν θυσίαν ἐπιτελούντων are the same as the words of the Rabbis in Ḳid. 52b כי קא זכו משלחן גבוה קא זכו.

[41] *Spec. Leg.*, I, 240–41.

[42] *Ant.*, 3, 7, 4.

[43] Zeb. 5, 7.

With regard to the sin offering, as distinguished from the *Shelamim*, the Sifra states that the former, unlike the latter, is eaten only on the same day that it is sacrificed.[44] A parallel to Philo's explanation that the sin offering is to remain in the Temple so that the person who brings it may not suffer reproach by "slanderous and malicious men" is found in the Talmud:

Why have the authorities instituted that the prayer (of the Eighteen Benedictions) should be recited silently? So that the sinners may not be reproached, just as the Law for the same reason has assigned the same place for the slaughtering of both the sin-offering and the burnt-offering.[45]

3. The Sacrifice of Praise

The sacrifice of praise (*αἰνέσεως*) is, according to Philo, offered under the following circumstances:

He who has never at all met with any untoward happening, either of soul or of body or things external, who lives a life of peace undisturbed by war, placed in an environment of every comfort and good fortune, free from disaster and cause of stumbling, sailing in straight course over the long sea of life amid the sunshine and calm of happy circumstances, with the breeze of prosperity ever behind the helm, has as his bounden duty to requite God his pilot, Who gives him safety untouched by disease, benefits carrying no penalty, and in general good unmixed with evil — requite Him, I say, with hymns and benediction and prayers and sacrifices and the other expressions of gratitude as religion demands. All these collected and summed up have obtained the single name of praise. For the consumption of this sacrifice one day only is allowed, not two as in the former case of the preservation-offering, that those into whose hands benefits have fallen so readily should make repayment with readiness and without delay.[46]

It seems that, according to Philo, the sacrifice of praise was offered by men who had never suffered any misfortune. In Tannaitic literature, however, we have no reference to the particular application of the sacrifice. According to the Midrash, it was offered only for the sake of honoring God, as it is written in Psalms L. 23, "Whoso offereth the sacrifice of thanksgiving honoreth me."[47] The emphasis which Philo

[44] Ẓaw 12 (7, 15), Zeb. 36a.
[45] Soṭ. 32b; Jer. Tal. Yeb. 9c.
[46] *Spec. Leg.*, I, 224.
[47] Midrash Tanḥuma Ẓaw 9 (Lev. VII. 12).

lays on the praise offering, the Midrash lays on the thanksgiving offering.

The Talmud, however, enumerates four groups of people who have to offer praise to God; those who cross the ocean in safety; those who visit the desert; those who are healed from sickness; and those who are released from prison.[48] These obligations are derived from Psalm CVII, which explicitly required the offering of thanksgiving sacrifices to God on such occasions. It seems to me beyond doubt that the Talmudic scholars have preserved for us accurate information about the circumstances under which the thanksgiving sacrifices were offered in the Temple, and that Psalm CVII must have been the hymn recited on such occasions. Philo and Josephus both bear this out. The latter writes:

> The law further forbids us to sacrifice any animal on the same day and in the same place as its parents, and in no case before eight days have elapsed since its birth. There are also other sacrifices offered for escape from sickness or for other reasons; upon these, along with the victims, sweetmeats are expended, of which nothing may be left over for the morrow, the priests receiving a special portion.[49]

Josephus does not state what sacrifice is offered when one is healed of sickness, nor does he tell us the relation between the prohibition of sacrificing on the same day the animal and its parents and the sacrifice offered after illness. There is no doubt, however, that Josephus here follows the biblical order:

> When a bullock, or sheep, or a goat, is brought forth, then it shall be seven days under the dam; but from the eighth day and thenceforth it may be accepted for an offering made by fire unto the Lord. And whether it be a cow or ewe, ye shall not kill it and its young both in one day. And when ye sacrifice a sacrifice of thanksgiving unto the Lord, ye shall sacrifice it that ye may be accepted. On the same day it shall be eaten; ye shall leave none of it until the morning.[50]

Thus we have a definite statement in Josephus that the thanksgiving sacrifice which may be eaten only on the day it is sacrificed was offered when one escaped sickness or some other danger. Reference was made above to the statement

[48] Ber. 54b.
[49] *Ant.*, 3, 94.
[50] Lev. XXII. 27–30.

in the Talmud that being healed from sickness is one of the four occasions for offering thanks to God.

Philo, on the other hand, must have known of the rabbinic tradition that one who crossed the ocean in safety had to offer a thanksgiving sacrifice. The reference which he makes to the hymn recited on such an occasion must have been the part of Psalm CVII, which pictures God as one who calms the waters of the sea in order to bring the traveler to his desired haven. God is depicted in the most anthropomorphic terms, an individual who raises the stormy winds at His desire and stills the waves when He pleases. Philo could hardly have accepted such a prayer of thanksgiving in its literal sense, but with his natural ingenuity for symbolic interpretation he gives another conception of the sacrifice of thanksgiving, and he also allegorizes the hymn recited at that time. The thanksgiving sacrifice is offered by men who have never fallen into disaster, for God, the pilot of the ship, leads them through the ocean of life in calmness and stillness. When we carefully compare the passage of Philo and the Psalm we may see that the former is a figurative interpretation of the latter. If our interpretation is correct, we have here one of the striking instances in which Philo actually gives a figurative interpretation of an oral tradition.

Philo's discussion of sacrifices appears not only in *De Victimis* but also in many other treatises. The sacrifice of the Paschal lamb he discusses in several places. In *De Vita Mosis* he says:

> In this month, about the fourteenth day, when the disc of the moon is becoming full, is held the Hebrew Pascha, on which the victims are not brought to the altar by the laity and sacrificed by the priests, but as commanded by the law, the whole nation acts as priests (*σύμπαν τὸ ἔθνος ἱερᾶται*), each individual bringing what he offers on his own behalf (*ὑπὲρ αὐτοῦ*) and dealing with it with his own hands (*χειρουργοῦντος*). Now, while the rest of the people were joyful and cheerful, each feeling that he had the honor of the priesthood, the others passed the time in tears and sorrow.[51]

He seems to make a fundamental distinction between the Passover sacrifice and other sacrifices. In the case of the

[51] *Vita M.*, II, 224–25.

Paschal lamb the slaughtering of the animal could be done by the people, whereas in the case of other sacrifices the slaughtering had to be done by the priests.[52]

It is generally held that the Tannaitic Halakah knows nothing of this distinction. According to Tannaitic literature, every person may slay his own sacrifice. Lev. 1. 5, "And he shall kill the bullock before the Lord; and Aaron's sons, the priests, shall present the blood." was interpreted as meaning that the owner of the sacrifice might slay the animal, whereas the priestly duty was to take the blood and sprinkle it around the altar. Graetz believes that Philo's description of the sacrifice of the Paschal lamb, with its implication that other sacrifices were slaughtered by priests, is based upon the custom practiced in the Temple of Onias.[53] Others, however, say that Lev. 1. 5, which in the Hebrew reads "and he shall kill" ("he" referring to the owner of the sacrifice), is interpreted by Philo according to the LXX, which reads: "and they shall slay" ("they" referring to the priests).[54] That Philo believed that the slaughtering of animal sacrifices was done by priests may also be inferred from his statement, "let one of the priests take the victim and sacrifice it." [55]

It seems to me that the disagreement commonly assumed to exist between Philo and Palestinian tradition on the slaughtering of animal sacrifices is unduly exaggerated. There is no definite evidence that in actual practice the slaughtering of sacrifices in the Temple was done by the laity. The fact that the Mishnah found it necessary to declare the validity of a sacrifice, even if the slaughtering was done by non-priests, women, and bond servants,[56] indicates that this was not the common usage. A similar inference may also be drawn from the statement in the Talmud that the scholars who taught the priests the ritual laws of slaughtering the sacrifices were paid from the Temple treasury.[57] If priests

[52] See also *Spec. Leg.*, II, 145 ff.

[53] "Das Korbfest der Erstlinge bei Philo," *Monatsschrift für Geschichte und Wissenschaft des Judenthums* (1877), pp. 436 ff.

[54] See Heinemann, *Philons Bildung*, pp. 33 ff.; Ritter, *Philo und die Halacha*, pp. 110–13.

[55] *Spec. Leg.*, I, 199.

[56] Zeb. 3, 1; Yoma 29a.

[57] Ket. 106a. The Talmudic passage reads as follows: ת"ח המלמדים את הכהנים

were taught the laws of slaughtering they must have evidently practiced that rite in the offering of sacrifices. Furthermore, there was no common agreement among Palestinian authorities as to whether in law the laity was ever permitted to slaughter the animal sacrifices. Thus, R. Johanan, a Palestinian Amora of the third century, says explicitly that there is no evidence that the slaughtering of sacrifices by non-priests was valid.[58] Less explicit, but evidently expressing the same view, is the following statement of R. Ishmael: "Because secular meals of meat were forbidden in the wilderness to Israel, the written Law commands that they should bring their sacrifices to the priests and the priests shall slay the sacrifices and present the blood thereof." [59]

Thus, Philo's reference to the slaying of sacrifices by priests reflects either the common usage in the Temple of Jerusalem or the legal opinion of some of the Palestinian authorities.

Still more openly in agreement with Palestinian tradition is Philo's direct statement that the Paschal lamb was slaughtered by the laity. Thus, Exod. xii. 6, "And the whole assembly of the congregation of Israel shall kill it at even," is interpreted in Tannaitic literature as meaning that every Jew was obliged to slaughter his own Paschal lamb sacrifice, and if he could not do it himself he had to appoint an agent to do it for him.[60] We are also told in early Tannaitic sources that the Jews used to carry their knives to the Temple for the slaughtering of the Paschal lamb, a duty incumbent upon every person who offered the sacrifice.[61]

It should be noticed, however, that whenever Philo says

חלכות שחיטה חלכות קבלה. חלכות זריקה היו נוטלין שכר מתרומת הלשכה. It may be, however, that by the term חלכות שחיטה the Talmud does not mean the actual laws of how the sacrifice is to be slaughtered, but the laws regarding the sprinkling of the blood and many other priestly duties. The passage is more explicit in the Jer. Tal. Shek. 48a תלמידי חכמים חמלמדים את הכהנים חלכות שחיטה חלכות קבלה חלכות זריקה נוטלין שכר מתרומת הלשכה. This Talmud enumerates the particular duties of the priest, among which is also included the slaughtering of the sacrifice. This statement is a parallel to the view held by Philo.

[58] Jer. Tal. Yoma 40d לא מצאנו שחיטה בזר כשרה. The Palestinian Amoraim either ignored the Mishnah Zeb. 3, 1 or did not know of it.

[59] Yalḳut Aḥare 17.

[60] See Ḳid. 40b.

[61] Tosefta Pes. 4, 2.

the laity sacrifices the Paschal lamb, he uses the same term which he does for the slaying of a sacrifice, but that he is silent as to whether the priests or the laity sprinkled the blood. According to the Halakah, the blood was sprinkled by the priests.[62] This view is also reflected in II Chronicles xxx. 16–17:

> And they stood in their place after their order, according to the law of Moses the man of God; the priests sprinkled the blood which they received of the hand of the Levites. For there were many in the assembly that had not sanctified themselves; therefore, the Levites had charge of killing the sacrifices for everyone that was not clean.

This passage indicates that while the killing of the Paschal lamb was the duty neither of the priests nor of the Levites, the sprinkling of the blood was a priestly function, the exercise of which is beyond doubt. We have no reason to assume, however, that Philo's silence about this matter implies a belief that the laity also sprinkled the blood.[63]

After Philo's comment on the significance of the sacrifice of the Paschal lamb, he goes into a long discussion about the biblical provision that those who could not offer the Paschal lamb in the prescribed time "by reason of a dead body" should offer the sacrifice in the second month on the fourteenth day.[64] He writes:

> Now while the rest of the people were joyful and cheerful, each feeling that he had the honor of the priesthood, there were others passing the time in tears and sorrow. They had lost relations lately by death, and in mourning them they suffered a double sorrow. Added to their grief for their dead kinsfolk was that which they felt at the loss of the pleasure and honor of the sacred rite. For they were not allowed to purify

[62] Pes. 5, 6.

[63] With regard to Paschal sacrifices Philo agrees in another point with the Halakah. The Bible says that the Paschal lamb should be brought "between the evening" (בין הערבים) a phrase which is very ambiguous. The hours assigned by Philo seem to agree with the Halakic determination (Pes. 5, 1). He says, "the fourth festival is that of the Passover which the Hebrews called Pascha, on which the whole people offer sacrifice, beginning at noonday and continuing till sunset" (*Spec. Leg.*, II, 145). Although he does not give us an account of the exact hour, still it is quite clear that he agrees with the Rabbis that the Paschal lamb was brought in the afternoon. Josephus, however, states even the exact hours as given in the Mishnah (see *Bell. Jud.*, 6, 9, 3).

[64] Num. IX. 9–10.

(καθάρασθαι) or besprinkle themselves with holy water that day, since their mourning had still some days to run and had not passed the appointed term (μήπω τοῦ πένθους ὑπερημέρου καὶ ἐκπροθέσμου γεγονότος). These persons after the festival came to the ruler full of gloom and depression and put the case before him — the still recent death of their kinsfolk, the necessity of performing their duty as mourners and their consequent inability to take part in the sacrifice of the crossing feast.

Philo then describes the answer Moses gave to this inquiry:

Mourning for kinsfolk, he said, is an affliction which the family cannot avoid, but it does not count as an offense. While it is still running its appointed course, it should be banished from the sacred precincts which must be kept pure from all pollution, not only that which is voluntary but also that which is unintentionally incurred. But when the term is finished let not the mourners be denied an equal share in the sacred sacrifices, and thus the living be made an appendage to the death. Let them form a second set to come on the second month and also on the fourteenth day, and sacrifice just as the first set and observe a similar rule in dealing with the victims.[65]

It is quite obvious that Philo is in disagreement here with the traditional Palestinian interpretation of the biblical phrase, "unclean by reason of a dead body," unanimously interpreted by Tannaitic scholars as meaning that a man became defiled by touching a dead body and, by the law of levitical impurity, was thereby disqualified from bringing the Paschal lamb.[66] Philo, it will be noticed, does not say that the law deals with a man who touches a dead body, but rather with one who is mourning after deceased relatives. Still, while his view of the phrase is undoubtedly at variance with the Palestinian interpretation, his statement that a mourner may not offer the Paschal lamb or other sacrifices is in agreement with the Tannaitic Halakah.

According to the Tannaitic Halakah, there are two periods of mourning: one during the day of the death of the near kin, or as long as the body is not buried, in which period he is called an *Onen*; [67] the other during the first seven days following the kin's death. When the mourner is an *Onen* he is free from all obligations.[68] He is allowed neither to

[65] *Vita M.*, II, 225–27.
[66] Sifre Num. 68.
[67] See Jer. Tal. Pes. 36b.
[68] Ber. 2, 1.

offer sacrifices nor to eat them.[69] All Tannaitic sources agree upon this law with reference to sacrifices in general. Concerning the Paschal lamb, however, there is a difference of opinion between the Mishnah and Tosefta. The Mishnah says: "An *Onen* who is obliged to mourn for a near relative may eat of the Paschal lamb after taking a legal bath but he must not eat of any other holy sacrifice." [70] In the Talmud this difference between the Paschal lamb and other sacrifices is explained thus:

> Why may a mourner eat the Paschal lamb? Because while on the day of the death of the relative, the mourner is, according to Biblical law, exempted from the performance of religious duties, on the night of that day the Tanna holds that he is exempted only by Rabbinical law and on account of Rabbinical law they would not assume the responsibility of avoiding a commandment, the non-observance of which is punishable by *karet*. As for the other holy sacrifices which do not involve punishment, if not partaken of, they hold the Rabbinical law effective.[71]

In opposition to this view, the Tosefta extends the term *Onen* to the whole period of seven days, during which no sacrifices. even of the Paschal lamb, are accepted.[72]

Philo's view, therefore, that during the entire period of mourning neither general sacrifices nor the Paschal lamb can be offered by the mourner, is in agreement with the Halakah. as stated in the Tosefta. Though he does not explicitly speak of the seven days of mourning, there is no reason to doubt that when he says, "Their mourning had still some days to run and had not passed the appointed term," he had reference to the customary period.

[69] Zeb. 12, 1; see Talmud Zeb. 100b.
[70] Pes. 8, 8.
[71] Pes. 92a; see also Zeb. 100b.
[72] Tosefta Zeb. 11, 1.

CHAPTER IV

THE PRIESTHOOD

1. The Tithes

The biblical law in Num. xviii. 1–32 regulates the laws of the *terumah* and *ma'aser*. The *terumah* belongs to the priests and the *ma'aser* to the Levites. The Levites must separate a tenth from the *ma'aser* given to them and turn it over to the priests. In biblical and rabbinic terminology the latter is called *terumat ma'aser*. In other words, according to biblical law, the *terumah* and *terumat ma'aser* belong to the priests and the *ma'aser* to the Levites, as a reward for their services in the Temple. Philo refers in several places to the revenues of the priests and Levites, but apparently contradicts himself.

In his treatise on the priesthood he says:

> Having given all these sacred supplies to the priests he did not neglect those who were in the second rank of the priesthood; and those are the keepers of the Temple, and the tenths (δεκάται) were assigned as the wages of all these men. At all events the law did not permit those who received the tenths to make use of them, until they had again offered up as first fruits other tenths as if they were from their own property (ὡς ἀπὸ κτημάτων ἰδίων ἀπάρξασθαι) and given them to the priests of the superior rank. At that time the law permitted the Levites to enjoy the tithes, but before that time the law did not permit it (πρότερον δ' οὐκ ἐᾷ).[1]

In this passage Philo closely follows the biblical law which gives the *terumah* and a tenth of the tithe to the priests, and the tithes to the Levites. It is to be noticed, however, that his statement contains also a rabbinic tradition. He says that the Levites are not allowed to make use of the tithes until they have separated the required tenth as *terumat ma'aser*. He considers the duty of the Levites to give the tenth of the tithes to the priests equivalent to the duty of the owner to

[1] *Spec. Leg.*, I, 156–57.

give the *terumah* to the priests. This is also the undisputed Tannaitic Halakah. According to the Halakah, fruits which are brought into the house may not be used until the priestly and levitical shares are separated. Such fruits are called in rabbinic terminology *ṭebel*. The term *ṭebel* is also applied to the tithes in the possession of the Levite before he has separated the *terumat ma'aser*.[2] Philo departs, however, from the Halakah in saying that the Levite may not *use* the *ma'aser* before the *terumah* is actually *given* to the priest (δοῦναι τοῖς τῆς ἀμείνονος τάξεως ἱερεῦσι). The duty to separate the *terumah* from the *ma'aser*, according to the Halakah, is independent of the duty to give *terumah* to the priests. Once the *terumah* is separated, the fruit may be eaten and is no longer called *ṭebel*. In closer conformity with the Halakah is Philo's statement elsewhere that before the tithes are separated the law forbids anyone to taste thereof (οὐδενὶ γεύσασθαι . . . πρὶν διακρῖναι τὰς ἀπαρχάς).[3] Hence, he follows the biblical law that the *terumah* and *terumat ma'aser* belong to the priests and the *ma'aser* to the Levites. He is also acquainted with the Halakah that the Levites may not use the tithes until they have separated the tenth which belongs to the priests.

In another passage Philo gives us a different view: "The law commands to offer a tenth (δεκάτας) of corn, of wine, of domestic flock and give them to the priests" (τοῖς ἱερωμένοις).[4] He now states that the tenth belongs to the priests instead of to the Levites, and it is highly improbable that Philo is here using the term δεκάτη as a synonym for ἀπαρχή. Furthermore, his statement with regard to a tenth of θρεμμάτων ἡμέρων is inexplicable. We have no reference in the Bible to his declaration that the tenth of the domestic flock belongs to the priests. The Law in Lev. XVII. 32 says: "And all the tithes of the herd or the flock, whatsoever crosseth under the rod, shall be holy unto the Lord," but does not state that this tithe belongs to the priests. According to the Tannaitic tradition, the tithe of the flock is offered as a sacrifice, while the first-

[2] See Tosefta Zeb. 12, 17; Soṭ. 13, 10; Mishnah Ter. 8, 2; Beẓ. 13a; Soṭ. 48.

[3] *Spec. Leg.*, IV, 99. Philo also adds a prohibition against μεταλαβεῖν, which may mean either sell or exchange for something else. The same law is found in the Mishnah Demai 5, 8 אין אדם רשאי למכור טבל.

[4] *Virt.*, 95.

born of the domestic flock belongs to the priest.[5] Josephus also says that the first-born of the flock belongs to the priest, but is silent about the δεκάτη of the domestic animals: "The people are required to offer first fruits of all the produce of the soil, and again of those quadrupeds which the law sanctions as sacrifices they are to present the first born, if a male, to the priests for sacrifice, to be consumed by them with their families in the holy city." [6] It may be, however, that Philo understood the passage in Lev. XVII. 32, to imply that the tenth of the flock also belongs to the priests.[7] In another place he says that the ἀπαρχή is offered of wine, corn, and cattle. The cattle are offered as sacrifices (θυσίας), while the others are given to the priests as a reward for their sacred work in the Temple.[8] Philo says that the first fruit of the flock is offered as a sacrifice, but he is silent about whether the sacrifice belongs to the priest, as stated in Josephus, or to the owner thereof. Hence, judging by the passages in Philo, we do not know whether the tenth of the domestic flock belonged to the priests or were only offered as sacrifices by the owner. We see, however, a definite contradiction regarding the *ma'aser*; in one place he says that it belongs to the Levite, and in another passage he states that it belongs to the priest.

Similar contradictions in the laws of the first fruits and tithes are found in the works of Josephus. In one place he writes, "He ordained that the people should pay the tithe of the annual produce of the ground to the Levites and to the priests." [9] Elsewhere he says that the tithes belong to

[5] See Num. XVIII. 17–19; Sifre Num. 119; Zeb. 5, 8.

[6] *Ant.*, 4, 4, 4.

[7] In *Spec. Leg.*, I, 135, Philo says that the first born belongs to the priest. His statement, however, that the law of פטר חמור applies also to horses and any other unclean beasts is contrary to the Halakah, which specifically states that the biblical law is applicable only to an ass. The same mistake is also made by Josephus in *Ant.*, 4, 4, 4, who says that the law deals with all animals prohibited for food (*τῶν δ' οὐ νενομισμένων ἐσθίειν*). It is possible that Philo is dependent here on the LXX, which translates the Hebrew word חמור by *ὑποζύγιον*, or that Philo and Josephus had a different tradition.

[8] *Spec. Leg.*, IV, 98.

[9] *Ant.*, 4, 4, 3: *ἐξέταξε τῶν ἐπετείων καρπῶν δεκάτην αὐτοῖς τε τοῖς Λευίταις καὶ ἱερεῦσι τελεῖν.*

the Levites,[10] while in his autobiography he declares that his colleagues amassed a large sum of money from the tithes which they received for their priestly duty in Galilee.[11] This last passage suggests that at Josephus' time the Galileans gave the tithes to the priests, but this need not necessarily have been the custom in Judah.

Nor does one find a unified system of distribution of tithes in the Apocryphal books. In Tobit we read:

> But I alone went often to Jerusalem at the feasts, as it was ordained unto all the people of Israel by an everlasting decree, having the first fruits (ἀπαρχάς) and the tenths of increase (δεκάτας) with that which was first shorn; and them I gave at the altar to the priests (τοῖς ἱερεῦσιν), the children of Aaron. The first tenth (τὴν δεκάτην) I gave to the children of Levi who minister at Jerusalem.[12]

This author states that the *terumah* he gave to the priests and the *ma'aser* to the Levites, as the biblical law prescribes. In Judith, however, it is stated that the ἀπαρχή as well as the δεκάτη belongs to the priests:

> And are resolved to spend the first fruits (τὰς ἀπαρχάς) of the corn and the tenths (τὰς δεκάτας) of the wine and oil which they had sanctified and reserved for the priests (τοῖς ἱερεῦσιν) that serve in Jerusalem before the face of our God.[13]

All these contradictory statements in Philo, Josephus, and the Apocrypha bearing upon the laws of *terumah* and *ma'aser* need an explanation.

Philo makes another statement about tithes for which no origin is to be found in the biblical law. As we have seen, Num. XVIII. 1–32 says that the tithe and first fruits belong to the Levites and priests. Taken literally, the law suggests that the layman himself must separate the tithes and the first fruits and give them directly to the priests and the Levites. Philo, however, gives us new information about the manner of distributing the tithes:

> And to prevent anyone of those who give the offering from reproaching those who receive them, he commands that the first fruits should first of all be carried into the Temple (τὰς ἀπαρχὰς εἰς τὸ ἱερὸν κομίζεσθαι), and

[10] *Ant.*, 4, 8, 22.
[11] *Vita*, 12.
[12] Tobit I. 6–7.
[13] Judith XI. 13.

then orders that the priests shall take them out of the Temple; for it was suitable to the nature of God that those who had received kindness in all the circumstances of life should bring the first fruits as a thank offering, and then he, as a Being who is in want of nothing, should with all dignity and honor bestow them on the servants and ministers who attend on the service of the Temple; for to appear as receiving these things not from men, but from the great Benefactor of all men, appears to be as receiving a gift which has in it no alloy of sadness.[14]

Is this passage based upon actual usage? Views contrary to Philo's are found in Mishnaic literature, where it is held that the layman may give the tithes and first fruits to any individual Levite or priest he likes. The Mishnah, for instance, says that if a man lends money to a priest or Levite, he may stipulate that, in payment of the debt, he may keep the borrower's share of the tithe and first fruits.[15] Obviously, if the tithes had to be brought to the Temple and were not given by the owner to the individual personally, the lender would not be able to withhold them as a payment of the debt. According to the school of Hillel, it is lawful to carry the tithes to the priests on the festival days.[16] The Mishnah relates that on one occasion Gamaliel II gave the tithes to Joshua, who was a Levite, and the first fruits to Eleazar ben 'Azariah, who was a priest.[17] These sources indicate that the transaction could be made on an individual basis.

In order to understand the conflicting reports concerning the distribution of the *terumah* and *ma'aser*, we must analyze a number of Tannaitic passages which deal with the historical development of the laws of tithes and first fruits.

According to the biblical law in Num. XVIII. 1–32, the tithes belong only to the Levite, but they have to give a tenth part of their tithes to the priests. The priests also receive the first fruits. The first fruits and the tithes are given by the laymen to the individual priest and Levite. Many Tannaitic statements on this matter, however, fail to harmonize with the biblical law. The Talmud refers to a tradition that Ezra deprived the Levites of the right to take the tithes because they had not participated in the restoration

[14] *Spec. Leg.*, I, 152 ff.
[15] Git. 3, 7.
[16] Bez. 1, 6.
[17] M. Sh. 5, 7.

of Palestine.[18] It must be said, however, that even if this tradition is of historical significance, it applies only to the Levites who lived during the time of Ezra and does not mean that he took away from all the Levites the privilege of the tithes. Some of the Tannaitic scholars even state that the term Levites in Num. XVIII. 1–32 refers to the priests, who are called Levites in twenty-two biblical passages.[19] The priests, who always held a higher position than the Levites in the Temple service, seem to have secured the tithes for themselves at a very early period in Jewish history. The Rabbis endeavored to find an excuse for such a practice. Even after the destruction of the Temple, some Palestinian Jews gave the tithes to the priests, while others gave them to the Levites. The anxiety of some Rabbis to reinstate the law of Num. XVIII. proved to be fruitless.[20]

A full account of how the tithes were distributed during an early period of the Second Commonwealth is found in the Jerusalem Talmud: "In the former days the tithe was distributed among the priests and Levites of his acquaintance (מכירי כהונה); one part was put into the treasury of the Temple; and one part was distributed among the poor men and the associates, i.e. scholars (חברים)." [21] This passage shows that the law of Numbers which commands that the Levites

[18] Yeb. 86b.

[19] *Ibid.*

[20] Jer. Talm. M. Sh. 56b.

[21] Jer. Tal. Soṭ. 24a. יראשונה היה מעשר נעשה לשלש חלקים. שליש למכירי כהונה ולוויה ושליש לאוצר ושליש לעניים ולחבירים שהיו בירושלים. Dr. S. Libermann ("Tikkune Yerushalmi," *Tarbiz*, 1932, p. 211) argues that the phrase מכירי כהונה does not mean "priests of his acquaintance," but priests who held an administrative position in the Temple. He also quotes *Cont. Ap.*, I, 188, which says that about fifteen hundred priests received the tithes. These priests also administered public affairs. Libermann understands τὰ κοινὰ διοικοῦντες to be equivalent to מכירי כהונה. The passage in Josephus does not suggest such an interpretation. It is Josephus' policy, especially in *Cont. Ap.*, to represent the priests as the administrators of the Jewish constitution. In *Cont. Ap.*, II, 187, Josephus says, "The appointed duties of the priests includes general supervision, the trial of cases of litigation, and the punishment of condemned persons." The question in Jer. Tal. Giṭ. 45a ויש מכר לעני may be interpreted differently. The Jer. Tal. raises the question how can one stipulate that as a payment of the debt he may keep the share of the tithe of the poor man of his acquaintance when the creditor can never be certain whether the tithe will ever belong to the poor man. The latter may become rich, or may die, in which case his children have no right to the tithe.

were to receive the tithes was not accepted in Palestine, but that in those "former days" the owner of the products could give the tithes either to the priests or to the Levites, or else the priests and Levites might share them equally. The tithes in full were not given directly to the priests and Levites. A part of them was deposited in the Temple treasury and the High Priest may have had full control over this portion. A third part was used for the support of scholars and for men who were in need of charity. It is hardly possible to determine how long this system of distribution of tithes functioned.

Other reforms bearing on laws of distribution of tithes took place during the reign of John Hyrcanus, who, according to many Tannaitic passages, instituted these changes: First, he abolished the law requiring a farmer to declare he had separated the tithe and given it to the Levite; [22] second, he appointed inspectors or "pairs" (זוגות) to see that the tithes were properly separated, presumably to bring them to the Temple.[23]

The purpose of these changes may be explained as follows: In ancient times, when the tithes were brought to the Temple, the Levites who worked at the Temple shared the tithes equally with the priests. The Levites also took a part of the tithe from the laymen of their acquaintance. The High Priest had full control over the third part, which was deposited in the Temple. The scholars in need of assistance also benefited from it. In short, the system of distribution of tithes as described in the Jerusalem Talmud quoted above had been of great benefit to all parties concerned, but it became demoralized at the time of John Hyrcanus. The priests by then had obtained full control over the tithes, even, according to the Talmud, going so far as to collect them from the individual by force.[24] Hence, whereas in the pre-Hyrcanus period the farmer could honestly make a declaration that he had given the tithes to the Levite as prescribed in the biblical law, in the time of Hyrcanus the priests could secure the tithe from

[22] Soṭ. 9, 10; M. Sh. 5, 15.

[23] Jer. Tal. Soṭ. 24a; M. Sh. 56d; Bab. Tal. Soṭ. 24a. I agree with Allon that the זוגות were appointed to collect the tithes and bring them into the Temple (*Tarbiz*, v, 34 ff.). Allon's argument as a whole is very convincing.

[24] Jer. Tal. Soṭ. 24a שהיו נוטלין אותן בזרוע.

an individual before it was brought to the Temple. The farmer was then required to make a false declaration that he had given the *ma'aser* to the Levite. It was to prevent such corrupt practice that the requirement was abolished.[25] Furthermore, with the disruption of the entire system of distributing tithes, many farmers could evade separation of them altogether.[26]

This reform naturally led to the second – the appointment of inspectors charged with the duty of seeing that the tithes were properly separated and brought to the central distribution point, the Temple. Hence, the Mishnah says that during this period it was not necessary to inquire whether the farmer was trustworthy in matters of the tithes.[27]

During Josephus' lifetime the centralization of tithes was no longer in existence, and every priest and Levite collected the tithes directly from the laymen. The Mishnah gives the same right to the priest and Levite, but probably this privilege reflects the existing customs after the destruction of the Temple, when there was no centralized place of worship. In such circumstances many farmers must have failed to separate the tithes, since there was no longer any way of enforcing the fulfillment of such an obligation. It is, therefore, no wonder that a whole tractate of the Mishnah is devoted to the laws of *Demai* (fruits not certain of having been tithed). It is also highly probable that the centralization of tithes in the time of Hyrcanus was a necessary reform, though it became eventually a cause of great corruption. Josephus tells us that shortly before the war with Rome the high priests used to take away the tithes for themselves, and the ordinary priests were allowed to die of starvation.[28] The Mishnaic scholars, therefore, seeing the disadvantage which the centralization of the tithes caused, permitted the priests and Levites to take their portion direct from the laymen.

Bearing in mind all the sources mentioned, we may sum-

[25] *Ibid.* משנחשדו להיות נותנין מעשר לכהונה.
[26] Tosefta Soṭ. 13, 10.
[27] Soṭ. 9, 10.
[28] *Ant.*, 20, 8, 8.

marize the historical development of the system of the distribution of tithes along the following lines:

In biblical times the priests enjoyed the first fruits (*terumah*) and the Levite the tithes (*ma'aser*). Of the tithe the Levite separated a tenth and gave it to the priest. Proportionately, the Levites' income of the ingathering was greater than that of the priests, who must have looked with envy on the income of those holding inferior rank in the Temple service. During the Second Commonwealth the priests gradually assumed control over the tithe, though the Levites also had a share in it. At one time during the pre-Hyrcanus reign the tithes were divided into three parts: one, shared by the priests and Levites; a second, used to support the scholars in need of help; and the third, deposited in the Temple treasury, which was under the supervision of the High Priest. This system of distribution of tithes seems to have failed during the days of John Hyrcanus. The priest deprived the Levites of their rights to the tithes and collected them by force, before any part was brought to the Temple. Many farmers entirely neglected to separate the tithes. Hence, the High Priest and the Levite both lost all control over the tithes, and the farmer made a false declaration in the Temple that he had given the tithe to the Levite. In order to impress upon the farmer the illegality of giving the entire tithe to the Levite, John Hyrcanus abolished the farmer's declaration. He then appointed inspectors to see that the tithes were properly separated and brought into the Temple. The priest and Levite no longer took the tithe from the individuals but from the Temple treasury. This system of the distribution of tithes may have lasted for a long time. A short while before the war broke out with Rome, the high priests took advantage of the fact that the tithes were under their control and kept them for their own use. Since this deprived the priests and Levites of their sole means of livelihood, they secured the tithes directly from the laymen.

It is, therefore, not surprising to find statements in Philo which, contrary to biblical law, imply that the tithes were given to the Levites. Nor is there reason to doubt the historicity of his statement that the tithes were not given to in-

dividual priests and Levites but centralized in the Temple. The contradictions in Josephus and Philo on the problem of the recipient of the tithes and on other points relating to the laws of tithes merely show that these men define the laws according to the differing practices of their respective periods.

Not only is Philo accurate in his statement that the tithes were centralized in the Temple, but he also gives us first-hand information about the delivery of them to the Temple in Jerusalem. One of the revenues was the Shekel dues, with which sacrifices were bought and which formed the basic income for the upkeep of the Temple.[29] These dues were obligatory on both the Palestinian and the Diaspora Jews.[30] The first day of Adar was fixed for announcement of the collection.[31] The Alexandrian Jews seem to have been very faithful in meeting these obligations. Speaking of the Shekel dues, Philo says:

> . . . and almost in every city there is a storehouse for the sacred things in which place it is customary for the people to deposit their first fruits. At fixed seasons priestly ambassadors (ἱεροπομποί) are selected to convey the offering. And the most esteemed men (δοκιμώτατοι) are elected to this office.[32]

The tithes and the first fruits seem to have been delivered to the Temple in the same manner as the Shekel dues.[33]

The Book of Jubilees, however, gives us an entirely different conception of the tithes:

> And Levi was constituted priest at Bethel before Jacob his father, in preference to his ten brothers, and he was priest there, and Jacob gave his vow; thus he tithed again the tithe to the Lord and sanctified it, and became holy unto Him. And for this reason it is ordained on the heavenly tables as a law of tithing before the Lord from year to year, in the place where it was chosen that His name should dwell.[34]

[29] See Exod. xxx. 13 ff.; Mishnah Shek. 4, 1.

[30] Shek. 3, 4.

[31] Shek. 1, 1.

[32] *Spec. Leg.*, I, 78.

[33] As to the question whether the Diaspora Jews were required, according to the Halakah, to separate the tithes, see Yad. 4, 3; Tosefta Pe'ah 4, 3; Ket. 25a; Ḥallah 2, 1; Pe'ah 1, 3. The works of Philo (*Spec. Leg.*, I, 153–55) and Josephus (*Ant.*, 14, 9, 21) suggest that the Diaspora Jews separated the tithes and sent them to Jerusalem.

[34] Book of Jubilees xxxii. 9–11.

In connection with this passage one authority says:

> Perhaps nowhere does the Book of Jubilees reflect a Halakah differing more widely from that of the Rabbis than in the tithes. . . . The system of tithes in the Book of Jubilees is entirely different. The first tithe is given not to the Levite but to the priest. The latter must then set aside one tithe of this tithe and take it to the Temple, where it must be eaten by priests within a definite time, namely, before the arrival of the crop. This tithe of the tithe is called "the second tithe." [35]

From the text itself, however, it seems that not the priest but Jacob offered a tenth of a tenth, for the Book of Jubilees says, "Jacob gave his vow; thus he tithed again the tithe to the Lord." Furthermore, it does not state definitely whether the first tithe was given to the priest or to the Levite. In verse 2 one reads: "And Jacob rose early in the morning, on the fourteenth of this month, and gave a tithe of all that came with him," but to whom he gave it is not specified. The Book of Jubilees, therefore, does not necessarily depart from the Bible or from the Tannaitic Halakah. The meaning of the passage can be explained in the light of the customs which existed when the Book of Jubilees was written.

According to Num. XVIII. 26–32 the Levite must separate a tenth of the tenth which he has received from the Israelite and give it to the priest. The custom during the time when the Book of Jubilees was written was different. In the time of Hyrcanus the custom was that the laymen first separated the first tithe for the Levites; and instead of leaving it to the Levites to separate "the tithe of the tithe" for the priest, the layman used to do it himself.[36] The Mishnah also says that the declaration which the layman made in the Temple included a statement that he had separated the *terumah*, and the *terumah* of the tithe (the tithe of the tithe).[37] The Book of Jubilees merely says that Jacob separated first the tithe, the (*ma'aser*) which was probably given to the Levite, and secondly, "thus he tithed again the tithe" for the priest, for when this Book was written, the custom or law was that the

[35] L. Finkelstein, "The Book of Jubilees and the Halakah," *Harvard Theological Review*, XVI (1923), 52–53.

[36] Tosefta Sot. 13, 10; Sot. 48a.

[37] M. Sh. 5, 10.

layman should also separate the second tithe for the priest (*terumat ma'aser*). The reason that the author considers the second tithe more holy than the first is that it must be eaten in the Temple. This fact can be explained in a very simple way. According to the Tannaitic Halakah, the first tithe, given to the Levite, may be eaten by an Israelite and has no sanctity in itself, while "the tithe of the tithe," given to the priest, may be eaten only by the priest; therefore, the Book of Jubilees considers it as holy as any other sacrifice eaten by the priest. Philo, however, follows closely the biblical law in insisting that the tithe of the tithe be separated by the Levite instead of by the layman. He says, "At all events the law did not permit those who received them to make use of them until they had again offered up as first fruits other tenths as if from their own private property." [38]

2. The High Priesthood

A comparative study of the status of the High Priest in Philo and rabbinic literature must be divided into three parts: (1) Philo's conception of the High Priest as an indi-

[38] *Spec. Leg.*, I, 156–57. Philo has also devoted a short treatise to the tithe of *bikkurim* (*Spec. Leg.*, II, 215 ff.). Graetz found the agreement between Philo and the Halakah so extensive that he came to the conclusion that Philo must have witnessed the ceremony while he visited Palestine ("Das Korbfest der Erstlinge bei Philo," *Monatsschrift*, XXVI, 433–42). I doubt whether the treatise warrants such a conclusion. We shall summarize, however, the following parallels. First Philo says that only those who possess their own land bring *bikkurim* (ἕκαστος γὰρ τῶν ἀγροὺς καὶ κτήσεις ἐχόντων). The same statement is also found in the Mishnah Bikk. 1, 2 (שיהיו כל מאדמתך הגדולין). Philo also makes the following statement: "And standing in the front of the altar gives the basket to the priest, uttering at the same time a very beautiful hymn for the occasion; and if he does not happen to remember it he listens to it with attention while the priest recites it" (ἀκούων παρὰ τοῦ ἱερέως). The Mishnah in Soṭ. 7, 1 says that one must recite in Hebrew the declaration of the *bikkurim*. There is no doubt that many farmers were not able to recite it. Hence, the Mishnah in Bikk. 2, 7, like Philo, says that all who could not recite rehearsed the words after the priest. The same Mishnah says, however, that this custom was abolished at a later time, because the farmers felt embarrassed to show their ignorance in this way. The Rabbis therefore ordained that both those who could recite them and those who could not should rehearse the words of the priest. This tradition either was not known to Philo or was not in existence during his time. He also says that the bringing of the *bikkurim* starts from the beginning of the summer to the end of the autumn (ἀπὸ θέρους ἐνισταμένου μέχρι μετοπώρου). The same statement is also found in the Mishnah Bikk. 1, 6.

vidual free of sin; (2) his description of the laws which the High Priest must observe; (3) the judicial function of the High Priest. We are not interested, however, in Philo's allegorical interpretation, in which the High Priest appears as the symbol of the Logos. One must not confuse Philo the allegorist with Philo the legalist, interested in explaining the Mosaic law on an ethical basis. In fact, it is hazardous to explain Philo, the sober commentator on the biblical narrative, by Philo the mystic.

The law in Lev. IV. 3 says that if the High Priest sinned "according to the sin of the people" he must offer a bullock without blemish as a sin offering to God. Philo makes the following comment on this verse:

> "If the High Priest," it says, "sins involuntarily"; and then adds, "so that the people sin"; words which almost amount to a plain statement from which we may learn that the true High Priest who is not falsely so called is immune from sin (*ἀμέτοχος ἁμαρτημάτων ἐστίν*); and if ever he stumbles, it will happen to him not for his own sake but for the errors of the nation.[39]

This statement is generally taken to mean that Philo considered the High Priest an exceptional human being who was incapable of sin. Heinemann believes that Philo's view here is based on the reading of the LXX, which translates the Hebrew phrase, "according to the sin of the people," by "that the people sin" (*τοῦ λαὸν ἁμαρτεῖν*).[40] Ritter goes still further by saying that the same view of the sinlessness of the High Priest is to be found in Rashi and suggests that Rashi must have drawn it from some Hellenistic Midrash.[41]

But it seems to me that there is nothing in Philo's statement that the "High Priest . . . is immune from sin" to suggest that he is absolutely sinless. Quite the contrary, his subsequent phrase, "and if he ever stumbles," definitely implies capacity for sin. Still less is there in Rashi's statement anything to justify Ritter's conclusion that he held the High Priest incapable of sin. What Rashi says is simply this: If the High Priest makes an incorrect decision, the people sin

[39] *Spec. Leg.*, I, 230.
[40] *Philons Bildung*, p. 60.
[41] *Philo und die Halacha*, p. 31, n. 1.

unintentionally by following his decision. This does not necessarily mean that the High Priest does not also share in this unintentional sin. Nor is Heinemann correct in his interpretation of the verse in LXX, which he takes to be the source of the supposed view of Philo. The statement "that the people sin" in LXX corresponds exactly to Rashi's interpretation of the Hebrew reading, "according to the sin of the people."

The real meaning of Philo's declaration that the "High Priest . . . is immune from sin" can be established by the following passage in the Mishnah. "If he that says the prayers falls into an error unintentionally it is a bad omen for him; and if he is the agent of the congregation it is a bad omen for the congregation, for a man's agent is like himself." [42] What the Mishnah says is quite clear. If the representative of the congregation in prayer services makes an error, the error is not owing to his own sinfulness but to the sinfulness of the congregation.

As prayers took the place of sacrifices after the destruction of the Temple, many laws about prayers reflect ancient laws of sacrifices. Consequently, the Mishnaic statement that an unintentional error by the agent who delivers the prayers for the congregation is owing to the sinfulness of the congregation reflects the common belief in Palestine regarding sacrifices during the existence of the Temple. Thus, if the High Priest made an involuntary error in offering sacrifices, or in any other part of the Temple ritual, he is personally considered "immune" from that sin, inasmuch as the error is the nation's. It is only in this limited sense that Philo speaks of the immunity of the High Priests. As a private individual the High Priest, in Philo's view, was not sinless. Quite the contrary. In a passage dealing with the High Priest's private life Philo does not absolve him of responsibility for an unintentional sin; he says merely that as a mediator between God and men the Priest must be careful to observe the biblical law so that he may not stumble in an unintentional way and disgrace his office.[43]

[42] Ber. 5, 5.
[43] *Spec. Leg.*, III, 134–35.

Of the many restrictions placed on the High Priest, Philo discusses thoroughly the law of Lev. XXI. 10–13 which prohibits the High Priest from approaching a dead body:

> And the priest that is the highest among his brethren, upon whose head the anointing oil is poured and that is consecrated to put on the garments, shall not let the hair of his head go loose, nor rend his clothes, neither shall he go in to any dead body, nor defile himself for his father or his mother, neither shall he go out of the sanctuary of his God, for the consecration of the anointing oil of his God is upon him.

Philo sees in this law a double prohibition: the first, the High Priest is not to defile himself even for his nearest relations; the second, he must not mourn for them. Furthermore, Philo takes the statement, "neither shall he go out of the sanctuary of his God," as a command that the High Priest should continue his ministration in the Temple in spite of his mourning. He explains the injunction thus:

> For the services of the other priests can be performed by deputy so if some are in mourning none of the customary rites need suffer. But no one is allowed to perform the functions of a High Priest and therefore he must always continue undefiled, never coming in contact with a corpse, so that he may be ready to offer his prayers and sacrifices at the proper time without hindrance on behalf of the nation.[44]

In Tannaitic Halakah, however, there is a discussion concerning the right of the High Priest in mourning to offer sacrifices. "The Rabbis taught: The High Priest may sacrifice when he is an *onen* [i.e., when one of his relatives has died and has not yet been interred] but he may not eat of the sacrifices." In another Boraita in the same place we read: "When he stands sacrificing at the altar and he is informed that one of his relatives dies, he must interrupt the service and go. So says R. Judah. R. Jose says: He must conclude the services and then go." [45]

[44] *Spec. Leg.*, I, 113.

[45] Yoma 13b; see also the disagreement between Rashi and Tosafot whether the dispute in the Boraita refers to an ordinary priest or the High Priest. I follow the interpretation given by Tosafot. Rashi's interpretation is very difficult, for it is the unanimous opinion of the Tannaim that an ordinary priest must stop his service in the Temple at the time of mourning. The Boraita to which Abaye makes reference is not found in Tannaitic sources; see also Zeb. 16b.

Although the Talmud quotes the Boraita in stating that even the High Priest is not allowed to perform priestly duties in the Temple during his time of mourning, still, as far as we can judge from Tannaitic literature found in the Mishnah and Tosefta, he was allowed to offer the sacrifices, but not allowed to eat them: "While his dead lies unburied, the High Priest offers sacrifice, but may not consume it, and an ordinary priest may neither offer sacrifice nor consume it." [46] In the Tosefta we find only a disagreement on whether the High Priest may offer sacrifices during the whole day of being an *onen*, or whether he is only permitted to finish his service. All agree, however, that the High Priest may perform his priestly service while he is in mourning, though he is not allowed to eat of the sacrifices.[47] The reason for the distinction seems to be the same that Philo gives, that since no other man can substitute for the High Priest, the High Priest may offer the sacrifices, though not eat of them. Thus, this view agrees with the accepted Tannaitic Halakah, but, in apparent contradiction to it, Philo presents an additional explanation for the right of the High Priest to offer sacrifices:

> Further, since he is dedicated to God and has been made captain of the sacred regiment, he ought to be estranged from all ties of birth and not be so overcome by affection to parents or children or brothers as to neglect or postpone any one of the religious duties which it were well to perform without any delay. He forbids him also either to rend his garments for his dead, even the nearest and dearest, or to take from his head the insignia of the priesthood, or on any account to leave the sacred precincts under the pretext of mourning. Thus, showing reverence both to the place and to the personal ornaments with which he is decked, he will have his feeling of pity under control and continue throughout free from sorrow.[48]

According to this explanation, the Priest must continue his duties during a mourning period, not because substitution for him is impossible, but because, in the highest service of God, he must remain free from the ordinary claims of sorrow and family loss. According to the Mishnah, the people have to comfort the High Priest when he is a mourner. He

[46] Hor. 3, 5; see also Jer. Tal. 47d and 48a.
[47] Tosefta Zeb. 11, 3.
[48] *Spec. Leg.*, I, 114.

must rend his garments, but not as every person does.[49] The exception which the Bible makes with regard to the mourning of the High Priest was interpreted in Tannaitic Halakah to mean, not a prohibition of mourning for his parents, but the necessity to continue his duties as High Priest, regardless of his mourning. The Mishnah says: "If a death occurs in his family, he must not accompany the coffin; but if the coffin with those accompanying it is no longer visible in the street, he may go after them." [50] The High Priest also condoled with other people. When they grieved with him, the people used to say: "We shall be your atonement," and his answer was, "You shall be blessed from heaven." [51] Mishnaic literature seems to have applied the laws of mourning to the High Priest, as well as to an ordinary priest of Israel.

Philo's statement that the High Priest who has dedicated his life to the service of God must be superior to pity and must renounce his relations with his kinsmen has a parallel in Jesus' ideal for his disciples in general. In Luke IX. 59–62 we read:

> He said to another, Follow me. But he said, Permit me first to bury my father. He said to him, Leave the dead to bury their own dead, but go thou proclaim the kingdom of God. Moreover, another said, I will follow thee, Lord, but first permit me to take leave of my household. Jesus said to him, No one who has put his hand to the plough and looks behind is fit for the Kingdom of God.

Jesus required this renunciation of his disciples, who wanted to become the servants of God, and Philo required it of the High Priest, who also dedicated his life to the service of God. The Tannaitic scholars, however, considered even the High Priest an ordinary human being, not exempt from devotion to his relatives or from mourning for them, though he must not allow this to interfere with his official duties.

In the judicial realm, the exercise by the High Priest of such authority in the Sanhedrin is a subject on which a great deal of literature has been written. The problem may be stated briefly as follows: In Mishnaic literature the High Priest

[49] Hor. 3, 5; Sifre Emor 2 (Lev. XXI. 10).
[50] Sanh. 2, 1; Sifre Emor 2 (Lev. XXI. 10–13).
[51] *Ibid.*

never figures as the head of the Sanhedrin, nor does his position as the head of the priesthood make him *ipso facto* a member of that body. The Mishnah refers by name to those who presided over the Sanhedrin but makes no reference to any High Priest.[52] Tannaitic sources merely state that the High Priest can judge and can also be judged,[53] but that no special privileges are granted to him in the Jewish courts. In Josephus and in the New Testament, however, the ἀρχιερεύς appears to be the head of the Sanhedrin. Josephus mentions some high priests by name who seem to have presided over the Sanhedrin. It would hardly be in place here either to give a survey of the various theories formulated to reconcile the contradictory sources, or to present a new one. Of value at this point is mere citation of some passages in Philo which deal with the same problem.

In Deut. XVII. 8–10, we read:

> If there arises a matter too hard for thee in judgment, between blood and blood, between plea and plea, and between stroke and stroke, even matters of controversy within thy gates; then shalt thou arise, and get thee up unto the place which the Lord thy God shall choose. And thou shalt come unto the priests the Levites, and unto the judge that shall be in those days; and thou shalt inquire; and they shall declare unto thee the sentence of judgment.

The Mishnah,[54] Philo, and Josephus interpret this passage with reference to the local court, which cannot come to a decision about a complicated matter. The judges have to present the case before the Sanhedrin in Jerusalem, but Josephus and Philo differ concerning the make-up of the Sanhedrin. Josephus says:

> But if the judges see not how to pronounce upon the matter set before — and with men such things oft befall — let them send up the case entire to the holy city and let the ἀρχιερεύς and the προφήτης and the γερουσία meet and pronounce as they think fit.[55]

What Josephus means by προφήτης is obscure. Both he and Philo employ the term προφήτης with reference to the priests. Josephus' use of the term "prophet," in addition to the term

[52] Hag. 2, 2.
[53] Sanh. 2, 1.
[54] Sanh. 11, 2.
[55] *Ant.*, 4, 8, 14.

"priest," may have reference to an additional name for the High Priest, and this passage, therefore, suggests that he considered the High Priest the head of the Sanhedrin who judged between "blood and blood." Similarly, in *Contra Apionem*, where he has in mind the same verses (Deut. XVII. 8–10), he says that the duty of the High Priest is to "safeguard the laws, adjudicate in cases of dispute, punish those convicted of crimes. Any one who disobeys him will pay the penalty as for impiety towards God himself." [56] According to Philo, the Sanhedrin in Jerusalem consisted of the priests and of a head and leader of this group (ὁ τῶν ἱερέων ἔξαρχος καὶ ἡγεμών).[57] Unlike Josephus, then, Philo does not make the High Priest the head of the Sanhedrin, but rather another person whom he calls in Greek ἔξαρχος, which is equivalent to the biblical term נשיא. It will be noticed also that, according to Philo, the Sanhedrin consisted of priests only. This differs from the Mishnah which says that priests, Levites, and Israelites who give their daughters into marriage to priestly stock are qualified to try capital cases.[58]

Many passages in Philo imply that the King was the head of the Sanhedrin and chose the judges who ruled and judged with him (οἳ συνάρξουσι καὶ συνδικάσουσι).[59] Philo also says that Moses, through the providence of God, became King, lawgiver, High Priest, and prophet. He continues:

> But why it is fitting that they should all be combined in the same person needs explanation. It is the King's duty to command what is right and forbid what is wrong. But to command what should be done and forbid what should not be done is the particular function of law; so that it follows at once that the King is a living law and the law a just king, but a king and lawgiver ought to have under his surview not only human but divine things; for without God's directing care the affairs of kings and subjects cannot go aright. And therefore, such as he needs the chief priesthood, so that fortified with perfect rites and the perfect knowledge of the service of God he may ask that he and those whom he rules may receive prevention of evil and participation in good from the gracious Being who assents to prayer.[60]

[56] *Cont. Ap.*, II, 23; see also Weyl, *Strafgesetze bei Flavius Josephus*, pp. 25 ff.
[57] *Spec. Leg.*, IV, 190.
[58] Sanh. 4, 2.
[59] *Spec. Leg.*, IV, 170.
[60] *Vita M.*, II, 4 ff.; see also *Quaes. in Ex.*, 68.

This passage again shows that Philo considered the King as the symbol of the law, while the High Priest's functions were to deliver the prayers and perform the rites in the Temple. Philo's conception that "the king is a living law" is, as Professor Goodenough has admirably argued, based on Hellenistic sources.[61]

Elsewhere, in discussing the Sanhedrin in Jerusalem, Philo fails to mention the High Priest. He deals there with the case of a husband who suspects that his wife has committed adultery. The husband, he says, must take her to the Jewish court in Jerusalem,[62] obviously to the Sanhedrin, which the Mishnaic Halakah specifies for such trials,[63] but though it is a priestly duty to determine by the ordeal of bitter water the truth or falsity of a husband's suspicion, the High Priest does not appear in the discussion.

There is, however, one passage in which Philo seems to consider the High Priest as the presiding officer of the court. In *De Specialibus Legibus* Philo endeavors to explain the biblical law that if one kills without intent he goes out free from the cities of refuge, on the occasion of the death of the High Priest:

> . . . the High Priest is the relation and nearest kin of the whole nation, who as ruler dispenses justice to litigants according to the law, who day by day offers prayers and sacrifices and asks for blessings, as for his brothers and parents and children, that every age and every part of the nation regarded as a single body may be united in one and the same fellowship, making peace and good order their aim. Everyone, then, who has slain another unintentionally must fear the High Priest as a champion and defender of the slain and keep himself shut up within the city in which he has taken refuge, never venturing to show himself outside the walls, that is, if he sets any value on his safety, or on a life secure from danger. When, then, he says that the exile must not return till the death of the High Priest, it is as much as to say till the death of the common kinsman of all, who alone has authority to arbitrate on the rights of both the living and the dead (*τὰ τῶν ζώντων καὶ τὰ τῶν τετελευτηκότων*).[64]

[61] "The Political Philosophy of Hellenistic Kingship," *Yale Classical Studies*, I (1928), 56–101.

[62] *Spec. Leg.*, III, 53.

[63] Sot. 1, 4.

[64] *Spec. Leg.*, III, 131–33.

Philo here uses the term πρυτανεύω, employed in Greek literature for one who presides over a court. Similarly, in Greece the presidency of the βουλή was called the πρυτανεία. Furthermore, according to Philo, the High Priest passes final judgment in cases of involuntary murder; moreover, his use of the word βραβεύειν shows that he looked upon the High Priest as judge among the Jews. Though these details may seem contrary to the implication of the other passages quoted above, the apparent contradiction may possibly he removed by showing on the basis of rabbinic sources, that even if the High Priest was not the head of Sanhedrin, he did conduct trials for unintentional murder.

The Mishnah in Makkot describes the court procedure in such cases:

If the High Priest dies after the trial is concluded the manslayer does not go into banishment. If he dies before the trial and another High Priest was appointed in his stead and the trial was then concluded the manslayer returns after the latter's death. If the trial was concluded without a High Priest he can never return from his place.[65]

I take the last statement in the Mishnah, "if the trial was concluded without the High Priest," to mean that if the High Priest was not present at the trial, the manslayer was not set free at the High Priest's death.[66] This Mishnaic law

[65] Mak. 2, 6.

[66] The statement in the Mishnah, "if the trial was concluded without the High Priest," may mean either in the absence of the High Priest at the trial or that the trial was concluded when there was no High Priest temporarily in office. However this phrase is interpreted, there is no biblical basis for it. We accept the former interpretation, which is supported by the Mishnaic text appearing in the Jer. Tal. The same Mishnah in Mak. 2, 6 states: "To begin with, a manslayer was sent in advance to the cities of refuge whether he had slain in error or with intent. Then the court sent and brought him from thence and whoever was found guilty of death was beheaded, whoever was found not guilty they acquitted. Whoever was found liable to banishment they sent back to his place (מי שנתחייב גלות מחזירין אתו למקומו). No matter whether the High Priest was anointed with the oil of unction or he was consecrated by many vestments or retired from his high priesthood, all restore the manslayer" (מחזירין את הרוצח). This last phrase is obscure. Does it mean that they restore him to banishment in the sense that the word מחזירין is used previously with reference to the conviction by the court, or does it mean that all on their death free him from banishment and restore him home? R. Isaiah of Trani accepts the former interpretation, namely, that the High Priest sends the manslayer to banishment (Tosafot Rid on

has no biblical basis, since the Bible does not state that there must be a High Priest at the trial. The Tannaitic scholars, like Philo, seem to have associated the freedom of the murderer with his conviction, namely, that if the High Priest's death freed the unintentional murderer, then the High Priest must have participated in the conviction of the manslayer. Hence, if the trial of the manslayer was conducted without the High Priest, the manslayer was not freed at the High Priest's death. This is the only reference in Tannaitic literature to the participation of the High Priest in the judiciary, but the Mishnaic tradition that the High Priest participated or presided in trials of unintentional murder was also known to Philo. The laws of both the Mishnah and Philo, however, dealing with the conviction and freedom of the unintentional murderer are merely theoretical, since the cities of refuge could hardly have been in existence during the Second Commonwealth. But it is not accurate to maintain the general theory that we have no Tannaitic tradition concerning the High Priest's judicial participation.

Yoma 73a). This interpretation has the support of the text in Jer. Tal. There the phrase, "all restore the manslayer," is omitted, and the whole Mishnah deals with the conviction and with the restoring of the unintentional murderer to banishment. It reads as follows: נגמר דינו לגלות מחזירין אותו למקומו אחד משוח בשמן המשחה ואחד מרובה בגדים. The same text is also found in the old printed Mishnahs. Hence, the High Priest actually participated in the banishing of the unintentional murderer, as well as in his conviction. In the same light we may understand the tradition reported in the same Mishnah that the mothers of the High Priests were so anxious to pacify the manslayers that they provided food for them. This was to protect the High Priest, who actually sentenced and banished the murderer, against a grievance and possible harm from the offender.

CHAPTER V

CIVIL AND CRIMINAL LAW

1. Slavery and "Lex Talionis"

One of the fundamental differences between Jewish and non-Jewish law in the ancient world involved the social and legal status of a slave, his individual rights and obligations. In Attic law the slave was considered as a chattel without legal obligation. If, for instance, a slave injured a person he was not held legally responsible for the damages. Even if he were set free, no legal action could be brought against him for what he had done.[1] The entire responsibility fell upon the master. The attitude of the Romans towards slaves was hardly more favorable. According to Roman law, when a crime was committed by a slave a noxal action was brought against the *dominus*, who either had to pay the damages or had to hand over the slave to the injured man. After manumission, however, the offender became liable for the violations of law committed while a slave.[2] It is only natural that a society which did not hold a slave responsible for his crimes, but treated him like an irrational animal, should make no laws for protecting his life. The Stoics, it is true, held the view that slaves were the natural equals of their masters, but this was only an idealistic philosophy that had no bearing upon practical life. Goodenough[3] quotes Seneca's *De Clementia* 1.18, in which he urges masters to treat their slaves kindly, but at the same time Seneca admits that there are no legal restrictions upon what a master may or may not do to his own slave. Even a philosopher like Plato could argue that a distinction must be made between killing one's own slave and killing another's. If the former, the master merely becomes ritually

[1] See J. H. Lipsius, *Das attische Recht* (1915), pp. 793–95 and n. 17.

[2] W. Buckland, *The Roman Law of Slavery* (1908), pp. 89 ff., 112; Roby, *Roman Private Law*, p. 242.

[3] *Jewish Courts in Egypt*, p. 122.

unclean and needs ceremonial purification. If he kills another's slave, he must pay money for damaging another's property.[4] In neither case, however, does Plato consider the act a criminal offense punishable by death.

What was the Jewish attitude towards the social and legal status of slaves?

Under Mosaic law there were two kinds: (1) an Israelite slave, whom the master had acquired for a term of six years or until the Jubilee; (2) an alien slave. In the former case the slave had the status of a hired servant and enjoyed virtually the same privileges in the community life as his master. The foreign slave, however, had a considerably inferior status.[5] Nevertheless, the biblical laws governing the penalties for mistreating slaves offer little light on which type of slave is meant. Exod. xxi. 20–21 says: "And if a man smites his bondman or his bondwoman with a rod, and he die under his hand, he shall surely be punished. Notwithstanding, if he continue a day or two, he shall not be punished for he is his money." Here the general term bondman (עבד) is used, applicable to either an Israelite or alien slave. The law does not specify the exact penalty for killing the slave, but the phrase, "he shall surely be punished," does not necessarily imply that it would be by death, as in the case of killing a freeman. The LXX here translates the Hebrew עבד by παῖς, a general term which may mean son, child, servant, as well as slave. Had the LXX understood עבד to mean only a foreign slave, it would have translated the term by δοῦλος, which primarily means a slave. The LXX, like the Hebrew text, does not state explicitly the exact penalty for killing a slave. The term עבד is also used in Exod. xxi. 26, which states, "And if a man smite the eye of his bondman or the eye of his bondwoman and destroy it, he shall let him go free," but again it does not stipulate the kind of slave. It is to be noted that Josephus does not mention this law at all, while in discussing Exod. xxi. 20, quoted above, he fails to state that it deals with the beating of a slave by his master. He writes: "In a fight without the use of the blade, if one be stricken and die

[4] Laws 865d, 868a.

[5] See Lev. xxv. 45–46.

on the spot, he shall be avenged by a like fate for him that struck him. But if he be carried home and lie sick for several days before he dies, he that struck shall go unpunished." [6] Josephus here amalgamates the law of Exod. xxi. 18, relating to death caused by quarrels, with Exod. xxi. 26, relating to the death of a slave by his master's hand. It is highly probable that, writing for a Roman world, he purposely omitted noting that the law of Exod. xxi. 26 relates to the killing of a slave, for the non-Jewish world could hardly have seen any logic in a law that demanded capital punishment for such an act.

Hence, for more detailed information concerning the legal status of an alien slave in the ancient Jewish community, we are dependent upon oral traditions as recorded in Tannaitic and Hellenistic literature.

With regard to the laws of slavery, the Mishnah relates the following points of disagreement between the Sadducees and Pharisees:

> The Sadducees said to the Pharisees: If I am responsible for damages done by my ox and my ass for whose observance of the ritual law I am not responsible, how much more must I be responsible for the damages done by my manservants and maidservants, for whose observance of the ritual law I am responsible. To this the Pharisees replied: no, you are right in making a master responsible for damages done by his ox and ass, because these animals have no mind, but can you make him responsible for the damages done by his manservant or maidservant who have minds of their own? [7]

We may assume that the disagreement extended beyond the question of the master's responsibility for injuries committed by his slave to the problem of the slave's social status in general. The Sadducees, like the Romans and Greeks, considered the slave the personal property of the master, on a level with the ox and the ass. Even the commandments which the slaves had to observe were not his personal obligations; it was the master's responsibility to see that they were observed. Doubtless if the eye of a slave were struck out, the Sadducees would not have applied the law of "an eye for an eye." In such a case the offender would have

[6] *Ant.*, 4, 8, 26.

[7] Yad. 4, 7.

been obliged to pay damages to the master, as if the injury had been to his ass or any other personal property. The same principle would be applied if the slave injured somebody else. It is highly improbable, as well, that the Sadducees would have punished by death the master or any other person who killed a slave. In other words, the Sadducees differed in no respect from the non-Jewish world in their attitude towards slavery.

The Pharisees, however, regarded the slave as a person with his own responsibilities. He had a mind of his own and differed in no respect from any other member of the community. If he injured somebody, he had to pay for it, and a person who injured a slave had to pay damages directly to the slave without dealing with the master.[8] If someone gave the slave a present and stipulated that his master should exercise no influence over it, his master had no right to take it away from him.[9] In one instance, indeed, the slave was regarded as personal property. The Mishnah says that if the master injured his slave, he did not have to pay damages.[10] Undoubtedly, the master had no right to inflict injury. At the same time, he could not be compelled to pay damages because, according to the Tannaitic Halakah, the slave, as personal property, could not acquire money given to him by his master. The Tosefta says that any transaction between master and slave is like shifting a thing from the right hand to the left.[11] Had the Pharisees taken an eye for an eye

[8] B. Ḳ. 8, 3. According to the Mishnaic law if one injures his friend he has to pay five kinds of damages: (1) for deterioration in value; (2) for his pain; (3) for medical attendance; (4) for loss of time; (5) for mortification. The Mishnah states that if one injures another's alien slave he has to pay also the quintuple kinds of damages, but as to whom the damages belong the Mishnah is silent. The statement in the Tosefta B. Ḳ. 9, 10 החובל בעבדו ושפחתו הכנעניים חייב בכל חוץ מן השבת shows conclusively that the damages belonged to the slave. The term חייב, however, can mean only a moral obligation. According to the Talmudic Halakah, the damages belong to the master (Giṭ. 12b). Many rabbinic sources imply that the early Halakah was more liberal to the foreign slave.

[9] Ḳid. 1, 3; Tal. Ḳid. 23a, b.

[10] B. Ḳ. 8, 5.

[11] Tosefta Ḳid. 1, 6. This principle seems to have been known also in Attic law. See A. Gulak, "Ḳinyano shel 'Ebed Ḳena'ani le-fi Dine ha-Talmud," *Tarbiz*, I (1930), 20–26.

literally, they would have applied the *talio* even to injuries inflicted upon a slave.

In other words, the master who mutilated his slave paid no damages, not because he was under no moral obligation to do so, but simply because he could make no legal transaction with his personal property. The Talmudic scholars could not even understand how the master could grant freedom to his slave, since the slave was treated like personal property. The Amoraic scholars could only reply to this question, "His letter of manumission and his right of self disposal come simultaneously." [12] The opinion of the Tannaim seems to have been, however, that the master had a moral obligation to pay for the injuries he committed, though legally he could never pay his own slave.[13] Hence, the law was different if a master killed his alien slave. In such a case, the master was punished by death.[14] The Tannaim have, therefore, interpreted the term servant (עבד) in Exod. xxi. 20 as referring to an alien slave, and the phrase, "he shall surely be punished," as meaning capital punishment by court. They have also interpreted the term servant (עבד) in Exod. xxi. 26 as relating to an alien slave.[15] Hence, if the master maimed any part of the alien slave, freedom must be granted. Consequently, the Pharisees and the Tannaitic scholars, unlike the Sadducees and non-Jewish world, made no legal distinction between the responsibilities of a freeman and an alien slave. The life and property of the slave were fully protected. It should be understood that these laws were not merely theoretical, for during the Tannaitic period slavery was a living institution.

[12] Ḳid. 25a.

[13] See Tosefta B. Ḳ. 9, 10.

[14] Mekilta Mishpatim on this point. בעבד כנעני הכתוב מדבר נקם ינקם מיתה. See also Sanh. 52b.

[15] The Mekilta Mishpatim on this point says that the law set the slave free in case the master struck him because the master made the slave suffer. Rashi, undoubtedly basing his point of view on a much earlier source, says that the prohibition against injuring a freeman applies equally to an alien slave, and, therefore, the law ordered that in case the master injured his slave he must set him free דשייך במצות ואינו רשאי לחבול בו ואם חבל בו יצא לחירות בראשי אברים אלמא אין רשאי לחבול בו (Giṭ. 21b). We shall see that the same reason is given by Philo.

Discussing the rabbinic attitude towards alien slaves, Moore says: "The legal and social status of slaves was substantially the same as in contemporary pagan countries. It may be remarked that the slave was not a 'chattel' as in the famous American decision, but is assimilated to real rather than personal property." [16] Moore's description of the status of an alien slave in Palestine is not, however, in accord with the Pharisaic and Tannaitic law, though it is true that this was the attitude of the Sadducees.

The next question concerns the attitude of the Hellenistic Jews towards the institution of slavery. Did they side with the Pharisees and Tannaim, or with the Romans and Greeks? I believe that the passages in Philo speak for themselves.

Like the Tannaitic scholars, Philo makes a fundamental distinction between an Israelite and alien slave. He even argues that an Israelite who sells himself into slavery is not in reality a slave:

> For people in this position, though we find them called slaves (δούλους), are in reality hired labourers (θῆτας) who undertake the service just to procure themselves the necessaries of life, however much some may bluster about the rights of absolute power which they exercise over them.[17]

Philo continues to emphasize that no Israelite may be called a δοῦλος. In another place, where he repeats this view, he says:

> But the law does permit the acquisition of slaves from other nations for two reasons: first, that a distinction should be made between fellow countrymen and aliens; secondly, that that most indispensable possession, domestic service, should not be absolutely excluded from his commonwealth.[18]

Oral traditions were not exactly needed for this distinction between alien and Israelite slaves, for Philo might have learned it from Lev. xxv. 43, but his discussion of the laws regarding alien slaves is undoubtedly based upon oral tradition.

After Philo finishes his discussion of the laws relating to free-born persons of citizen rank (ἐπ' ἐλευθέροις καὶ ἀστοῖς), he gives a summary of the laws relating to slaves (περὶ οἰκετῶν).

[16] *Judaism*, II, 135–36.
[17] *Spec. Leg.*, II, 81.
[18] *Spec. Leg.*, II, 123.

There is no doubt, as many writers have noticed, that he introduces here the laws relating to alien slaves whom he does not consider freemen or citizens. He uses the two Greek terms, οἰκέτης and δοῦλος, as synonyms for alien slaves. He writes:

The masters should not make excessive use of their authority over slaves by showing arrogance and contempt and savage cruelty. For these are signs of no peaceful spirit, but of one so intemperate as to seek to throw off all responsibility and take the tyrant's despotism for its model. . . . Such a one must clearly understand that his misconduct cannot be prolonged or widely extended with immunity, for he will have for his adversary justice, the hater of evil, the defender and champion of the ill-used, who will call upon him to give an account for the unhappy condition of the sufferers. And if he alleges that the stripes he inflicted were meant as a deterrent (ἕνεκα νουθεσίας ἐντεῖναι) and not with the intention of causing death, he shall not at once depart with a cheerful heart, but will be brought before the court (εἰς δικαστήριον ἀπαχθεὶς), there to be examined under strict investigators of the truth as to whether he meant to commit homicide or not, and if he is found to have acted with intentional wickedness and with malice aforethought he must die (θνῃσκέτω), and his position as a master will avail him nothing to escape the sentence. But if the sufferers do not die on the spot under the lash but survive for one or perhaps two days, the situation is different and the master is not to be held guilty of murder. In this case he is provided with a valuable plea, namely that he did not beat them to death at the time nor yet later when he had them in the house, but suffered them to live as long as they could, even though that was quite a short time. Furthermore he may argue that no one is so foolish as to try to harm another when he himself will be wronged thereby. And it is true that anyone who kills a slave injures himself far more, as he deprives himself of the service which he receives from him when alive and loses his value as a piece of property. . . . When a slave has committed some act worthy of death his master should bring him before the judges and state the offense, thus leaving the decision of the penalty with the laws instead of keeping it in his own hand.[19]

Hence Philo, like the Pharisees and Tannaitic scholars, makes no distinction between the moral obligations of alien slaves and freemen. If one kills a slave intentionally, the murderer is punished by death. If a slave commits a criminal act he must be brought to court for trial, and the master cannot determine the punishment. If the master kills his own slave, the court must decide whether the criminal act

[19] *Spec. Leg.*, III, 138–42.

was performed with the intention of murder, for the master may argue that he used the stripes as a means of deterrence. If the slave continued to live for a day or two, the master is acquitted on the ground that if he had intended to kill the slave he would have done so at once. Philo seems to use the word "stripes" advisedly, for it was customary to chastise slaves by stripes. In such a case the master might have an excuse, but if he attacked the slave with a deadly weapon, he would suffer the penalty of death even if the victim continued to live a day or two. The same view is also expressed by Maimonides,[20] though the latter could find no sources for it in Tannaitic Halakah.[21]

Philo also says that the penalty of "an eye for an eye" is applied to maiming a freeman as well as a slave. In his discussion of the law of Exod. xxi. 26 he says:

If, then, anyone has maliciously injured another in the best and lordliest of his senses, sight, and is proved to have struck out his eye, he must in his return suffer the same if the other is a free man, but not if he is a slave. Not that the offender deserves pardon or is less in the wrong, but because if the master is mutilated as a punishment the injured slave will find him worse than before. . . . It effected this by enacting that if anyone struck out his servant's eye he should without hesitation grant him his liberty, for in this way the master will incur a double penalty; he will lose the value of the slave as well as his services, and a third affliction more severe than either of these two is that he will be forced to confer a benefit that touches his highest interest on an enemy whom he probably hoped to maltreat indefinitely (*κακοῦν ἀεὶ δύνασθαι*).[22]

[20] *Mishneh Torah*, "Hilkot Roẓeaḥ" 2, 14: יראה לי שהמכה את עבדו בסכין וסייף או באבן ואגרוף וכיוצא בהן ואמדהו למיתה אינו בדין יום או יומים ולכך נאמר בשבט ורצועה וכיוצא בהן ולא בהכאת רציחה. Of course the Mekilta on this point says אינו חייב עד שיכנו בדבר שיש בו כדי להמית. Ritter thinks that this Tannaitic passage is a parallel to the passage in Philo (*Philo und die Halacha*, p. 33). It has, however, nothing in common with Philo's words. He does not discuss the question whether the instrument could cause a deadly blow. He says rather that if the master killed the slave by rod he may argue that he did it as chastisement without any intention to kill.

[21] Philo's statement that in case the slave committed a criminal act the duty falls upon his master to bring him to court is also in agreement with Tannaitic Halakah. If a slave committed a crime the court proceeded with the trial as if the act had been committed by a freeman, but the master was required to bring the slave to court and be present at the trial, since the slave was his property. The master could neither pardon nor punish the slave (Sanh. 19a; see also A. Geiger, *Urschrift* (1857), p. 144 and n. 2).

[22] *Spec. Leg.*, III, 195.

Philo here evidently means an alien slave, for he uses the term δοῦλος. Furthermore, he says that one of the reasons for freeing the slave maimed by his master, instead of inflicting the same injury on the owner, is to make it impossible for such a man to ill-treat his slaves forever. This interpretation would of course apply only to an alien slave, who served his master till death, rather to an Israelite, who served only for a limited time.

The significant point in this passage is that the penalty for injuring a freeman and an alien slave (whether one's own slave or another's) is the same. It is to the slave's advantage that the law preferred his emancipation to his continuing in his former position and applying the penalty of "an eye for an eye" to the master. Parallels to Philo's view are to be found only in the Tannaitic Halakah discussed above.

The subject of penology with regard to slavery leads to the problem of *lex talionis*. In general, we know that one of the points of disagreement between the Sadducees and Pharisees involved the meaning of the biblical phrases, "an eye for an eye," "a tooth for a tooth." The Sadducees interpreted them literally and maintained the *lex talionis*, whereas the Pharisees abrogated the ancient *talio* and interpreted "an eye for an eye" to mean money indemnity.[23] Whether the earlier Halakah also maintained the Pharisaic interpretation cannot be ascertained. The fact that R. Eliezer interpreted "an eye

[23] The disagreement between the Sadducees and Pharisees as to whether the phrase, "an eye for an eye," is to be taken literally is not mentioned in the Mishnah or Talmud. The scholiast to Megillat Taanit makes reference to this controversy. The historical validity of this report has been a matter of dispute among scholars. Geiger doubts whether there was a disagreement between the Sadducees and Pharisees with regard to *lex talionis*, and the statement in the scholiast he considers "sicher bloss als eigne Conjecture" (*Urschrift*, p. 148). His main argument that the Sadducees, who were people of "Praxis," could not have applied a principle of *lex talionis*, is very unconvincing, since it is an undisputed fact that they were more severe in punishing offenders than the Pharisees (see H. Weyl, *Die jüdischen Strafgesetze bei Flavius Josephus*, 1900, p. 156). Geiger's view was later followed by Ritter (*Philo und die Halacha*, pp. 133–34). Graetz, Frankel, Herzfeld, and Weyl, on the other hand, are of the opinion that the Sadducees, who were literalists, did not accept the Pharisaic interpretation of indemnity money. Geiger and Ritter do not seem to me to have proved their argument, but whether the statements in the scholiast are to be taken as historical evidence is another problem.

for an eye" literally [24] does not mean that he represents an earlier Halakah. It may be important to bear in mind that a phrase similar to the biblical "an eye for an eye" is also found in the Assyrian laws, yet means, not *lex talionis*, but money indemnity. In the Assyrian code we read: "If a man strikes a harlot so that she has a miscarriage, blow for blow they impose upon him. He must make restitution for human life." [25] If this law is to be taken literally it means that the offender has to suffer the penalty of *lex talionis*. This, however, is highly improbable, since the penalty for causing abortion even to a married woman is only a fine. Jastrow, therefore, says: "It is hardly to be assumed that in the case of one striking a harlot, the offender is put to death, if by a premature birth a human life is lost. The restitution is probably of a fine to be fixed by court, or by agreement with the woman." [26] If he is correct in his interpretation, this passage would mean that the ancient Semites did not always use such a phrase as "a blow for a blow" or "an eye for an eye" in the literal sense. Hence, the Pharisaic interpretation of money indemnity might not have been an abrogation of the biblical law.

In his interpretation of "an eye for an eye" Josephus seems to have followed partially the Tannaitic or Pharisaic interpretation, for he writes:

> He that maimeth a man shall undergo the like, being deprived of that limb whereof he deprived the other, unless indeed the maimed man be willing to accept money; for the law empowers the victim himself to assess the damage that has befallen him and makes this concession, unless he would show himself too severe.[27]

The difference between Josephus' record and the record we find in Tannaitic Halakah is that the Halakah took away from the injured man the right to fix the sum or to refuse to accept money for mutilation, and put it into the hands of the tribunal, whereas Josephus left the decision to the

[24] B. K. 84a.

[25] This is Jastrow's translation found in G. A. Barton's *Archaeology and the Bible* (1933), p. 433.

[26] "An Assyrian Law Code," *Journal of the American Oriental Society*, XLI (1921), p. 47, n. 43; see, however, G. R. Driver and J. C. Miles, *Assyrian Laws* (1936), pp. 116–18.

[27] *Ant.*, 4, 8, 35.

injured man. It is probable, however, that Josephus confused Jewish law with the law of the Romans, for the passage in Josephus is in agreement with Roman jurisprudence. In Roman law a distinction is made between *membrum ruptum* and *injuria*. In the former case, if the two parties could not settle the matter among themselves, the *talio* was applied. In the latter case the penalty was a fine.[28] The *talio* established by the law of the Twelve Tables was not inflicted unless the delinquent could not agree with the person injured. Josephus' statement about *lex talionis* is the same as the Roman.

Since the passages in Philo dealing with *lex talionis* are rather conflicting, it is hard to determine whether he and the Hellenistic Jews retained it as a legal principle. Philo, it is true, says that if a person struck out the eye of a freeman, "let him suffer the same" (*τὰ αὐτὰ ἀντιπασχέτω*),[29] but it does not imply that he favored the *talio*. He merely uses the biblical phrase "an eye for an eye," but whether money indemnity can take the place of the *talio* is not a question he discusses.[30] Some passages in Philo suggest that he was not in favor of retaining the *talio* at all. Noting that some lawgivers instituted the penalty of cutting off the hands of those who beat their parents, Philo rejects the punishment on these grounds:

> But it is silly to visit displeasure on the servants rather than on the actual authors, for the outrage is not committed by the hand but by the persons who used their hands to commit it, and it is these persons who must be punished. Otherwise, when one man has killed another with a sword, we should cast the sword out of the land and let the murderer go free.[31]

[28] See T. Mommsen, *Zum ältesten Strafrecht der Kulturvölker* (1909), p. 42.

[29] *Spec. Leg.*, III, 195.

[30] Targum Onkelos translates the phrase "an eye for an eye" literally, but, as Weyl argues, there is not a doubt that in Onkelos' time the rabbinic interpretation of money indemnity was already an established fact. (*Die jüdischen Strafgesetze bei Flavius Josephus*, p. 148.) The same may be said about Philo. The only way to ascertain his attitude towards this problem is by a thorough analysis of the passages bearing on it. Dr. Goodenough is the only one who has discredited this prevailing view of *lex talionis*. He thinks that Philo applied corporal penalties for injuries (*Jewish Courts in Egypt*, pp. 135 ff.). Dr. Heinemann believes that Philo favored the *talio* (*Philons Bildung*, pp. 358–60). I am inclined to agree with Goodenough, though I have worked out the whole matter on a different basis.

[31] *Spec. Leg.*, II, 245.

This argument of Philo can be applied not only to the organ which caused the injury but also to the organ injured, that is to say, if a man cuts off someone's hand there is no reason to cut off the hand of the man who caused the injury, since it is not the hand alone which caused the injury.

The only place where Philo indicates definitely that the law of "an eye for an eye" is to be taken literally is the one in which he says that if a master destroys his slave's eye the law substituted freedom of the slave for destruction of the master's eye. I have shown, however, that if a master injured his own slave, even according to the Tannaitic Halakah, he could not pay his slave for the injuries, not because moral obligation was lacking, but because of the slave's status as personal property. The slave could not acquire money from his master for any cause whatever. Philo believes therefore that, had not the law provided for the slave's emancipation, the impossibility of paying a money indemnity would have required the master to suffer the *talio*.

On the other hand, some students find in another passage evidence that Philo favored the *talio*. Here he makes a comparison between Jewish and Attic law regarding punishments for crimes and criticizes the lawgivers who do not inflict penalties appropriate to the offenses:

> The legislators deserve censure who prescribe for malefactors punishments which do not resemble the crimes, such as monetary fines for assaults, disfranchisement for wounding or maiming another, expulsion from the country and perpetual banishment for wilful murder or imprisonment for theft. . . . Our law exhorts us to equality when it ordains that the penalties inflicted on offenders should correspond to their actions, that their property should suffer if the wrongdoing affected their neighbour's property, and their bodies (ἐκ τῶν σωμάτων) if the offence was a bodily injury, the penalty being determined according to the limb, part, or sense affected, while if his malice extended to taking another's life his own life should be forfeit. For to tolerate a system in which the crime and the punishment do not correspond, have no common ground and belong to different categories, is to subvert rather than uphold legality. In saying this I assume that the other conditions are the same, for to strike a stranger is not the same as to strike a father nor the abuse of a ruler the same as abuse of an ordinary citizen. Unlawful actions differ according as they are committed in a profane or sacred place, or at festivals and solemn assemblies and public sacrifices as contrasted with days which have no holiday associations or are even quite inauspi-

cious. All other similar facts must be carefully considered with a view to making the punishment greater or less.[32]

Goodenough and Colson have shown that the penalties not equivalent to the crimes Philo mentions are those of Greek law. Thus for *αἰκία* the penalty was a monetary fine. Intentional murder was often punished by exile, or the murderer could save his life by fleeing the country. Philo states, however, that in Jewish law the penalty always corresponds to the crime committed. If, for instance, a man commits an offense against his neighbor's body he must be punished in the body. If Philo means by the phrase *ἐκ τῶν σωμάτων* that the offender must suffer the same injury he inflicted, then it would imply that Philo favored *lex talionis*.[33] He is not speaking here of mutilation, however, but about injuries in general. He uses the term *ἐξαμαρτάνωσι*, which literally means "if they shall sin," whereas in another passage, discussing the destruction of someone's eye, he uses the term *κόπτω*. For injuries in general the Bible prescribes that the offender shall pay only for the loss of the injured man's time and for healing: the offender does not have to suffer the same punishment he inflicted.[34] It is highly probable that Philo is not really discussing the *lex talionis* in this passage, but is considering bodily punishments, such as stripes, for general injuries. Even according to the Halakah instances appear in which persons are punished by stripes for injuries committed.[35]

Philo's statement that Jewish law distinguishes between striking one's father and striking an ordinary citizen is certainly correct. The distinction, however, which he makes between reviling a magistrate or ruler (*ἄρχοντα*) and reviling

[32] *Spec. Leg.*, III, 181.

[33] A parallel to Philo's words (*Spec. Leg.*, III, 182), "their property should suffer if the wrongdoing affected their neighbour's property, and their bodies if the offence was a bodily injury," is found in Maimonides. In *Moreh Nebukim*, Part 3, Chap. 41, he writes: אם הזיק בגופו ינזק בגופו ואם הזיק בממון ינזק בממונו. He seems to interpret the phase "an eye for an eye" literally (see also Friedlander's note in his translation). In *Mishneh Torah*, "Hilkot Ḥobel u-Mazzik" 1, 3, Maimonides clarifies his statement by saying that the one who maimed his friend "ought" to suffer the same penalty, and, therefore, according to tradition he must pay money indemnity.

[34] Exod. XXI. 18–19.

[35] Ket. 32b.

an ordinary citizen is not in agreement with Tannaitic Halakah. Philo's words imply that the penalty for speaking evil against a judge or ruler is heavier than for maligning an ordinary citizen. The penalty for committing a criminal act, therefore, depends on the social standing of the victim. The Tannaitic Halakah, unlike Philo, states that with the exception of injuring or reviling parents, the penalty for reviling or injuring a king, judge, or ordinary layman is the same. The law in Exod. xxii. 28, for instance, forbids one to curse a ruler. The Halakah understands the prohibition to apply also against cursing an ordinary citizen, and the penalty in both cases is stripes.[36] Only in case of injury, in which instance the offender must pay for the indignity inflicted, does the Mishnah set the amount to be paid according to the social standing of the victim.[37] Even this Mishnaic Halakah was not accepted by all Tannaitic scholars [38] on the ground that all Israelites alike are the children of Abraham. This highly democratic legal principle in the Halakah is, therefore, contrary to Philo's view that the penalty depends on the social status of the person injured, but is in agreement with the Sadducean attitude on this matter.

The Talmud relates that a certain Pharisee spread an evil report that the mother of John Hyrcanus was taken captive and, therefore, John Hyrcanus was not fit to hold the office of the High Priest. When the matter was investigated no ground for such accusations was found. Then a certain Sadducee, who was eager to see the final breach between John Hyrcanus and the Pharisees, said to the King: "Should the penal law of bringing a false accusation against an ordinary man and against a King and High Priest be alike?" [39] Josephus, relating the same story, says that the Sadducees demanded the death penalty, while the Pharisees maintained that stripes were sufficient.[40] This disagreement between the Sadducees and the Pharisees is significant, although, so far as I know, none of the students of the legal conflicts between these two sects have noticed the existence of one here. Both

[36] Mekilta Mishpatim (xxii. 27) אין לי אלא דיין ונשיא שאר כל אדם מניין ת"ל בעמך לא תאור.
[37] B. Ḳ. 8, 1.
[38] B. Ḳ. 86a.
[39] Ḳid. 66a.
[40] *Ant.*, 13, 10, 6.

the Sadducees and Pharisees agreed that for spreading an evil report the penalty was stripes, but they differed on whether it prevailed regardless of the status of the man maligned. The aristocratic Sadducees maintained that it did not — that the penalty depended on the position of the injured or insulted party, and that punishment for reviling an ordinary person and a magistrate or ruler cannot be alike. Stripes may be sufficient in one case, but a heavier penalty, such as death, must be demanded if the offense is against a ruler. The more democratic Pharisees maintained, on the other hand, that Jewish law does not make such a distinction, that the standard penalty for spreading a false accusation, whether against a ruler or an ordinary citizen, is stripes. Philo's statement that according to Jewish law the penalty for κακῶς εἰπεῖν against an ἄρχοντα is not the same as for abusing an ordinary citizen is thus in agreement with Sadducean principles.[41]

To sum up the conclusion at which we have arrived: (1) In the laws of slavery Philo follows closely Pharisaic traditions; (2) in the laws bearing on *lex talionis* there is uncertainty whether Philo favored the ancient *talio*, or whether in certain instances he adopted the Jewish law of money indemnity; (3) in laws relating to other crimes and penalties both Pharisaic and Sadducean principles can be detected.

[41] The meaning of Philo's statement that unlawful action differs according to whether it is committed on sacred or on ordinary days has been discussed by many. Colson offers two explanations, one in opposition to the other. The first is that since all religious rites are prohibited on these days, the action cannot desecrate them. The opposite explanation is that the licenses allowed on feast-days are forbidden on ordinary days (see Appendix to *Spec. Leg.*, III, 182). Neither of these explanations is plausible. It is highly probable that Philo has in mind Jewish law, which considered an injurious act committed on a Sabbath a more serious offense than the same act committed on an ordinary day. If one wounded a person on a Sabbath the act was considered a capital offense punishable by death (B. Ḳ. 8, 3 החובל בחבירו בשבת נדון בנפשו). The Tannaitic principle that by wounding or killing a person on the Sabbath or festival one desecrates the holiday was also known to Philo. In *Vita M.*, II, 214, he says that bloodshed, even when justly deserved, desecrates the sacredness of the Sabbath (*τὴν ἡμέραν εὐαγοῦς μίασμα φόνου, κἂν δικαιότατος ᾖ, προσάψηται*). This interpretation is in agreement with the main trend of thought in the passage, namely, that the serious offense of an injurious act must be weighed according to the circumstances. To strike a stranger is not the same as to strike a father, and the same act committed on an ordinary day is not like one committed on a sacred day.

2. The Death Penalty as a Preventive Measure

It is generally assumed that neither in the Bible nor in rabbinic jurisprudence is there a direct reference to murder by poisoning. Weyl [42] suggests that as a means of inflicting incurable illness or death it was not resorted to by Jews. But the value of such a statement is open to doubt. It may be true that poison was not commonly employed among Jews, but there must have been instances of such crimes. The Rabbis often used to formulate laws for crimes which were rarely or never committed. Thus, those dealing with a "rebellious son" are numerous in Tannaitic and Talmudic literature, though the Rabbis themselves admitted that the laws were never applied in practice.[43] If murder by poisoning had been considered a special crime, we should have found some reference to it. Tannaitic literature does offer one according to which murder by poison is punishable by death only when the poison is put directly into the mouth of the man, but not when it is put into the food.[44]

Philo also speaks of murder by poison, but he makes no distinction between direct and indirect poisoning:

> But there are others, the worst of villains, accursed both in hand and will, the sorcerers and poisoners who provide themselves with leisure and retirement to prepare the attacks they will make when the time comes, and think out multiform schemes and devices to hurt their neighbours. And therefore the law orders that poisoners, male or female, should not survive for a day or even an hour, but perish as soon as they are caught in action (ἅμα τῷ ἁλῶναι τεθνάναι), since no reason can be given for delay or for postponing their punishment. Hostile intention if undisguised can be guarded against, but those who secretly frame and concoct their plans of attack with the aid of poison employ artifices which cannot easily be observed. The only course, then, is that they suffer what they intend to inflict upon others ἃ μελλήσουσι δι' αὐτοὺς ἕτεροι παθεῖν). . . . And therefore it is right that even the most reasonable and mild tempered should . . . lose hardly a moment in becoming their executioners and should hold it a religious duty to keep their punishments in their own hands and not commit it to others.[45]

[42] *Die jüdischen Strafgesetze bei Flavius Josephus*, p. 63.

[43] Sanh. 71a.

[44] B. Ḳ. 47b, 55b; Tosefta Sheb. 1, 3.

[45] *Spec. Leg.*, III, 93 ff. Philo's statement in *Fuga*, 53, that τὸ βουλεύσεως is also murder is in agreement with the view held by Shammai the Elder that

Though Philo speaks of this as a "Mosaic law," no trace of it is found in the Bible. It is true that the LXX translates Exod. xxii. 17, by φαρμακός, which may mean either a sorcerer or a poisoner, but it certainly does not mean both a sorcerer and a poisoner, and since Philo refers to both of them it is very doubtful whether he based his law upon the term φαρμακός used by the LXX.[46]

More striking is Josephus' view with regard to a poisoner: "Let no one of the Israelites keep deadly poison, and if he be caught with such, let him be put to death, himself suffering the fate which he had planned to inflict upon those for whom the poison was prepared." [47] According to Josephus, not only the actual poisoner is treated like a murderer, but also the one who contemplates murder, even if he does not eventually perform the act. What, one may ask, is the source for the laws of poisoning mentioned by both Josephus and Philo?

In Roman, Greek, and Ptolemaic law, murder by poisoning is treated "as a special crime parallel to but not identical with murder." [48] Furthermore, contrary to the view held by Philo and Josephus, Greek and Ptolemaic law regarded poisoning parallel to murder in case of fatality, but not the mere possession of poisonous drugs or the causing of incurable illness by them.[49] Weyl [50] and Goodenough,[51] therefore, state that the common source for Philo's and Josephus' laws of poisoning is the Roman republican law, the "Lex Cornelia de sicariis." Professor Goodenough writes:

That such is the case here is made clear from the form in which it is quoted by Philo, for directly contrary to Roman practice he recommends that the punishment take the form of lynching. Court process is specifically ruled out and lynching is called for imperiously. While

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the instigator of murder is also punishable by death, though the actual murder was carried out by an agent (Ḳid. 42a).

[46] See Heinemann, *Philons Bildung*, p. 387.

[47] *Ant.*, 4, 8, 34.

[48] Goodenough, *Jewish Courts in Egypt*, p. 106.

[49] *Ibid.*; see also Lipsius, *Das attische Recht*, pp. 607–08.

[50] *Die jüdischen Strafgesetze bei Flavius Josephus*, pp. 65–66.

[51] *Jewish Courts in Egypt*, p. 107; see also the full Latin text of the Lex Cornelia quoted by Dr. Goodenough. I agree with him that Josephus did not take the idea from Philo.

the law itself then is Roman, the action he recommends is the only form of action the Jews could have taken under Roman rule. A clearer case could not be found of actual Jewish practice under the Romans. The Jews preferred taking a poisoner out and stoning him at once to turning him over to Roman officers, yet the defense of their doing so was entirely in terms of Roman law.[52]

I can understand Goodenough's view that lynching may have been a common practice among the Jews for crimes outside jurisdiction of the Roman courts, but if the Roman courts treated poisoning as a capital crime I cannot see any reason for Philo's ruling out a court process, whether Jewish or Roman, in favor of lynching, a primitive form of punishment. I also doubt whether the Romans would have permitted such action, if a court hearing was required for such a capital crime. Furthermore, it is still not clear whether the penalty for poisoning in the Roman period in Egypt was Greek or Roman in inspiration.[53] It seems to me beyond doubt that if the law in Egypt treated poisoning under the same category as murder, Philo would not have recommended lynching for such a crime.

Moreover, it is to be noticed that Philo speaks, not of one who has already committed murder by poison, but of one who contemplates such an act and is caught before his intention could be carried out. Hence, in order to understand this, we must ascertain the penalty for criminal intent in Jewish law.

The only instance in biblical law of definite punishment for intention is that of witnesses whose testimony is later found to be false, and who, therefore, are made to suffer the penalty they sought for their neighbor. The Mishnah, however, reveals disagreement between the Pharisees and Sadducees concerning the biblical meaning of "and ye do unto him as he had purposed to do unto his brother." [54] According to the Sadducees, the witnesses were executed only when they caused actual death. The Pharisees, however, maintained that false witnesses could be punished in a capital case, even if their guilt was exposed in time to save the court from ex-

[52] *Ibid.*, pp. 107 ff.
[53] See R. Taubenschlag, *Das Strafrecht im Rechte des Papyri* (1916), p. 80.
[54] Deut. XIX. 19.

ecuting the intended victim. If the judges, however, had not yet pronounced the sentence when the witness was proved false, then he could not be punished for his wicked intention.[55] The Pharisaic view is also held by Josephus.[56] It is to be remembered, however, that even among the Pharisees, who were stricter than the Sadducees in this particular law, the witnesses were put to death, not for their intent to kill in itself but for the false testimony to which it led.[57] According to Ritter,[58] Philo's statement that a person who intended murder had to suffer the death penalty is based upon the Pharisaic interpretation of Deut. XIX. 19, but this is not true, for Pharisees applied the law only to false witnesses. This biblical and Pharisaic law, therefore, has nothing in common with the particular passage in Philo.

Elsewhere Philo does indeed suggest that he considers criminal intention a capital offense: "If anyone threatens the life of another with a sword, even though he does not actually kill him, he must be held guilty of murder in intention, though the fulfilment has not kept pace with the purpose." [59] Here Philo does not, of course, demand the death penalty for murderous intention. He merely says that such a man is *morally* guilty of murder, a view found also in rabbinic literature. In Mishnath R. Eliezer we find a parallel to Philo's

[55] Mak. 1, 6; see also Moore, *Judaism*, II, 186.

[56] *Ant.*, 4, 8, 15, "But if anyone be believed to have borne false witness, let him, if convicted, suffer the same penalty which he, against whom he bore witness, would have suffered." Josephus agrees with the Pharisees that even if the guilt were exposed in time to save the court from executing the intended victim, the false witnesses would suffer the punishment they intended to bring. But whether he agrees with the Pharisees that in case the victim was executed the false witnesses would no longer suffer any punishment we cannot conclude from the passage quoted. The view held by the Pharisees and Josephus is found even in the Apocrypha, such as the story of Susanna (see Geiger, *Urschrift*, p. 140).

[57] There is logical reason for the Pharisaic provision which sounds indeed very paradoxical. If confutation of testimony were accepted after the execution of the convict, capital cases would never come to an end, and many persons would fall victim to it. The Pharisees, therefore, set a limit to the biblical law and applied it only to the period between the conviction and confutation; the penalty is, however, not merely for intention, but for false testimony.

[58] *Philo und die Halacha*, pp. 22–27.

[59] *Spec. Leg.*, III, 86.

words, where we read that if one throws a sword at somebody with the intention of killing him, even though he does not succeed, the law regards him as a murderer.[60] But no rabbinic scholar would take this passage as evidence that a murderer in intention only, though morally guilty of murder, is put to death by court. The same may be said about the passage in Philo.

In view of the fact that none of the sources discussed help to explain fully the passages in Philo and Josephus which deal with murder by poison, I shall endeavor to clarify these and many other passages by the same authors, which present similar difficulties, on different legal principles. I shall also try to settle the complicated historical problem of the Hellenistic-Jewish attitude toward lynching, maintained by many scholars to be favorable toward such crude punishment.

[60] It is rather striking to see the verbal agreement between the passage in Philo and the one in Mishnath R. Eliezer (ed. Enelow, 1933, p. 163):

מחשבה שיש עמה מעשה הרי הוא כמעשה כיצד נטל את כלי זינו ויצא ולא השיג חבירו זו מחשבה שיש עמה מעשה מעלין עליו כאלו הרגו.

Ἐάν τις ἐπανατείνηται ξίφος, ὥστ' ἀποκτεῖναι, καὶ ἂν μὴ ἀνέλῃ, ἔνοχος ἔστω προαιρέσει γεγονὼς ἀνδροφόνος, εἰ καὶ μὴ τὸ τέλος τῇ γνώμῃ συνέδραμε.

I am certain that no rabbinic scholar would ever interpret this passage to imply that a man guilty only of intent to murder would be given the penalty for murder itself. In the Responsa of R. Meir ben Baruch of Rothenberg (quoted in Shohet, *Jewish Courts in the Middle Ages*, p. 20) we find a parallel discussion concerning the penalty for a man who threatens to break another's head with the knife he holds, but who is prevented from the action itself: "It is true he committed a foul deed, and that nowadays we have no authority to render judgment involving fines, or concerning personal injuries; but every community is guided by its own code of ordinances; and if there is a proviso among the ordinances of that particular community to punish the guilty in such cases, the culprit is to be punished in strict conformity with the communal regulation." The same authority says that in his city such offenses are punished by stripes. It is quite possible that in Philo's time the Jewish Courts in Egypt, like those in the Middle Ages, inflicted a corporal penalty for such offenses, but we have no reason to believe that it was capital punishment. The Romans were the only legislators who imposed so severe a penalty for intent. *Legum Collatio* quotes Paulus: "Qui hominem occidit, aliquando absoluitur et qui non occidit, ut homicida damnatur: consilium enim uniuscuiusque, non factum puniendum est. ideoque si cum uellet occidere, casu aliquo perpetrare non potuit, ut homicida punitur: et is, qui casu teli hominem imprudenter ferierit, absoluitur" (M. Hyamson, ed., 1913, p. 60). Since Philo makes no reference to any penalty, it is highly improbable that he follows the Roman law which we have just quoted. (See also *Andocides* I. 94: *τὸν βουλεύσαντα ἐν τῷ αὐτῷ ἐνέχεσθαι καὶ τὸν τῇ χειρὶ ἐργασάμενον.*)

In Exod. XXII. 1–3, we read:

If a man steal an ox or a sheep, and kill it, or sell it; he shall pay five oxen for an ox, and four sheep for a sheep. If a thief be found breaking in, and be smitten so that he dieth, there shall be no blood guiltiness for him. If the sun be arisen upon him, there shall be blood guiltiness for him.

The Bible does not prescribe capital punishment for theft. An exception is made, however, in case the thief breaks into the house, although the reason for this is not given. Philo tries to explain as follows:

If anyone being insanely carried away by a desire for the property of others attempts to steal it, and being able easily to carry it off breaks into the house at night, using the darkness as a veil to conceal his action, if he be caught in the act before the sun arises, he may be slain by the master of the house in the breaches, having accomplished the lesser object which he proposed to himself, namely, theft, but having been hindered by someone from accomplishing the greater crime which might have followed, namely, murder; since he was prepared with iron housebreaking tools which he bore, and other arms to defend himself from any attack.[61]

According to Philo, the thief may be killed not for his intention to steal, but because he might have intended to kill the owner of the house, and it is important to prevent the crime. The same view is expressed in the Mishnah: "The house breaker is condemned in view of what he might do afterwards." [62] Furthermore, the Tannaim based upon this

[61] *Spec. Leg.*, IV, 7.

[62] Philo's explanation of the biblical law suggests a Jewish rather than a Roman character. In *Legum Collatio* VII. 2–4 we find the following comparison between the Roman and biblical law of theft: "With regard to the ordinance of the Twelve Tables that a thief, coming at night, be in any case killed, but if he come by day, only if he venture to defend himself with a weapon, know, ye jurists, that Moses had previously so ordained." (See Hyamson, ed., p. 93.) Afterward, Mosaic law is quoted. It is evident that a thief at night might be killed regardless of his possession of weapons. According to Roman law, theft at night is a capital offense in itself. Philo, however, emphasizes that even at night the thief may be killed only when he is a potential murderer. We shall see that his words have their source in Jewish law. Some other laws in Philo with regard to theft appear, indeed, Roman in character, but are really Jewish in principle. Though he adheres strictly to the biblical law with regard to theft, still he says that one who covetously desires to take away the property of others by force is an enemy of society (*κοινὸς πόλεως ἐχθρός Decal.*, 135). The Romans also made a dis-

law their view that if a person intends doing something which may endanger the life of a human being, he may be killed by anyone in order to prevent his criminal action.[63] Killing a person to prevent his committing certain heinous crimes was looked upon as a form of social self-defense and therefore permitted.[64] According to the Halakah, a person who endangers the life of his fellow men deserves immediate extermination. Any person is allowed to kill the pursuer after another's life in order to save the life of the one pursued.[65] The pursuer is a murderer in intention only, like the house breaker at night, but he may be killed by any individual to prevent the fulfillment of his criminal intention. In other words, he may be killed not because criminal intention is punishable by death, but for the sake of saving the life of the person endangered. In the same light we may understand the statement in Philo that anyone who intends murder by poison and is caught in the act may be killed before a sentence by the court, as a form of self-defense against an enemy of society:

So just as the mere sight of vipers and scorpions and all venomous creatures even before they sting or wound or attack us at all leads us to kill them without delay as a precaution against injury necessitated by their inherited viciousness, in the same way it is right to punish human beings who though they have received a nature mellowed through the possession of the rational soul, whence springs the sense of fellowship, have been so changed by their habits of life that they show the savageness of ferocious wild beasts and find their only source of pleasure and profit in injuring all whom they can.[66]

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tinction between theft and robbery. They instituted greater punishment for robbery because the robber was considered an enemy of society and could be punished either by death or lynching (see Roby, *Roman Private Law*, II, 216). Goodenough is correct in his view that the distinction which Philo makes between a more and less serious type of stealing is Roman in character (*Jewish Courts in Egypt*, p. 149), yet I am inclined to think that the absence of direct reference by Philo to the penalty for robbery indicates that the Jewish Courts in Egypt, like the Palestinian courts (B. Ḳ. 67b), instituted no punishment except restitution of the thing stolen. Dr. Goodenough attributes Philo's silence on this point to the fact that the Roman courts always determined penalties in such cases.

[63] Sanh. 8, 6; see Tosefta Sanh. 11, 9 and Jer. Tal. 26c אפילו חוץ למחתרת אין לו דמים.

[64] See Mekilta Mishpatim (22, 2–4); Sanh. 73b; Tosefta Sanh. 11, 9.

[65] Sanh. 8, 7.

[66] *Spec. Leg.*, III, 103.

It must be emphasized, however, that though both Philo and the Halakah call for direct action, without the court process, against a person of criminal intentions caught in the act, neither of them for a moment allows anyone to take the law into his own hands after a crime has been committed. Due process of law must then be observed.

In connection with the law of murder by poison Philo goes one step further in saying that not only those persons who compound deadly poisons must be killed, but also those who compound drugs which cause long and incurable illnesses, for death is often a lesser evil than disease. This has its basis in the Halakah, according to which a person who kills one afflicted with a fatal organic disease is freed from any punishment, for a man with an incurable disease leading to death is treated like one already dead.[67] The same reasoning led Philo to consider as a murderer a person who causes an incurable disease by poison.

Philo expounds other laws which hardly can be explained unless we apply to them the same principle. One of these relates to apostasy, which, according to biblical law, is a capital offense punishable by death. Philo says:

> If any of the nation fall away from honoring the One, they ought to be punished with the most extreme penalties for having deserted the most fundamental organization of piety and holiness, for choosing darkness before the most brilliant light, and for blinding the sharp-seeing powers of the intellect. So then it is fittingly enjoined upon all who have zeal for virtue that they should immediately and out of hand execute the penalties, taking the culprits to no court, to no council, indeed to no ruler of any kind. On the contrary, they ought to give vent to their constant disposition to hate evil and love God by exercising it in bringing punishment upon these impious ones.[68]

Goodenough, in accord with his thesis that the laws discussed by Philo are based upon actual usage, takes this passage as historical evidence that, under the Romans, Jews put their own murderous criminals to death without the sanction of a judicial sentence. Thus, in cases where the Jews could not expect the approval of the Romans to execute a sentence of death, they took the law into their own hands. He writes:

[67] Sanh. 78b.

[68] *Spec. Leg.*, I, 54–55.

It would be difficult to find the lynching spirit better compressed into a single paragraph in any literature, while the specific mention that the case is not to be referred to the Roman governor gives the whole a most realistic ring. To justify this as the Jewish law, Philo does not quote the Old Testament legislation for apostates, which, as Heinemann points out, provided a regular legal process, but quotes only the case of Phineas as precedent.[69]

Though Juster himself believes that we have no evidence of the matters in which the Jewish courts in Alexandria possessed jurisdiction, and abandons the theory of separating practical laws from merely theoretical problems discussed by Philo, nonetheless he thinks that, as many passages in the New Testament indicate, lynching was a common custom among the Jews.[70] Goodenough goes even further in saying that lynching was practiced among the Alexandrian Jews in case of adultery, injuring parents, false oaths, and killing slaves.[71] He is forced to make such a statement because the Romans would certainly not have sanctioned the death penalty for such crimes. Heinemann is strongly of the opinion, however, that Jewish law, as far as we can judge from rabbinic literature, does not approve of lynching and that every punishment required a trial and judicial sentence, though we may be certain that single instances of mob violence occurred from time to time.[72] Thus, Heinemann believes that Philo's view with regard to apostates has no parallel in Palestinian literature. G. Allon endeavors to show that the earlier Palestinian Halakah did not require a trial for apostates.[73] Similar rabbinic sources are also referred to by Heinemann.

Regardless of whether Philo's attitude towards apostates is based upon Palestinian traditions, the fact that he opposed lynching, even in cases where there was undeniable evidence of a capital crime, may be seen from his interpretation of the biblical narrative of the wood-gatherer on the Sabbath:

[69] *Jewish Courts in Egypt*, p. 34.

[70] J. Juster, *Les Juifs dans l'empire romain* (1914), II, 158.

[71] *Jewish Courts in Egypt*, pp. 76–78, 108, 121, 148, 253.

[72] See Heinemann's careful analysis of this problem in *Philons Bildung*, pp. 223–27. He disagrees, however, with Goodenough that Philo's discussion implies a favorable attitude toward lynching.

[73] "Le-Ḥeḳer ha-Halakah be-Philon," *Tarbiz*, VI (1934–35), 30–37.

And being very indignant they were about to put him to death, but reasoning with themselves they restrained the violence of their wrath, that they might not appear, as they were only private persons, to chastise anyone rather than the magistrates and that, too, without a trial, though the transgression was manifest and undeniable.[74]

It is rather interesting to note that the biblical phrase, "and the congregation of Israel stones him," appeared to Philo to express a lynching spirit, and therefore he says that witnesses who detected the crime stoned him.[75] All this shows that he was certainly not in favor of lynching and would not have approved or encouraged it. Furthermore, even if we should agree that the Romans took no punitive measures against a single instance of lynching, it is hardly probable that they would have sanctioned "laws" of lynching. Moreover, one may doubt whether Philo encouraged the actual practice of lynching. I am under the impression that he is not here discussing practical law. Bentwich may be correct in saying, "this passage is written in the form of exhortation." [76] The question, however, is of a different nature. In this case we have a Jewish Philo, for no one can properly say that he is endeavoring here to reconcile Judaism with his Greek and Roman surroundings in Alexandria. The question is, to what extent does Philo the Jew agree with his contemporary Palestinian Jews? Under what circumstances did the Pharisees approve of capital punishment without trial?

According to Mishnaic law, no penalty could be executed without the sentence of the court. The actual condemnation of a person to death always was by trial,[77] as it is in modern days. The following exception is made, however, in the Mishnah:

These may be delivered from transgression at the cost of their lives: he that pursues after his fellow to kill him, or after a male, or after

[74] *Vita M.*, II, 214. See also the same reference by Heinemann, *Philons Bildung*, p. 225.

[75] *Spec. Leg.*, II, 250–51.

[76] "Philo as Jurist," *Jewish Quarterly Review*, XXI (1931), 154.

[77] See Mak. 12a; Sifre Num. 161. Josephus (*Ant.*, 14, 9, 33) says that Herod was reproached by the Sanhedrin for having executed certain men without the regular court procedure, for Jewish law does not permit the killing of a criminal before actual conviction to death by this body.

a girl that is betrothed; but he that pursues after a beast, or that profanes the Sabbath, or that commits idolatry — they must not be delivered from transgression at the cost of their lives.[78]

Heathenism, sexual immorality, and homicide are the three things to which a Jew must not yield even at the cost of his life.[79] The problem, as stated in the Mishnah, is whether a third person, in order to forestall the trangression, is allowed to kill the potential offender. The Mishnah draws a line of distinction between heathenism and the other two crimes. Although an individual forced to worship idols ought to let himself be killed rather than transgress, a third person is not authorized to kill him to prevent this transgression. The sinner may be condemned to death after he has worshiped the idol, but the layman has no right to execute him. In cases of homicide and sexual immorality, any Israelite, without waiting for the decision of the court, may kill one who contemplates or is in the act of committing such sins.

Why the Mishnah makes a distinction between heathenism and the other two can hardly be explained. In the Tosefta we find a different view expressed by a contemporary of Josephus: "Eleazar ben Zadok says, if one worships idols he may be delivered from the transgression at the cost of his life."[80] This is the earliest Tannaitic statement that we have with regard to apostates. If the apostate is caught in the act he may be put to death, without a trial and judicial sen-

[78] Sanh. 8, 9.

[79] Sanh. 74a.

[80] Tosefta Sanh. 11. In the Mishnah we find the phrase, "he who pursues after a betrothed woman" (הרודף אחר נערה המאורסה). The Talmud Sanh. 73a and b take the statement in the Mishnah literally and therefore claims that only in such a case can the offender be delivered from the transgression at the cost of his life in order to prevent the insult upon the prospective wife (שלא בא אלא לפוגמה). In the Tosefta Sanh. 11, 11, however, it is stated that if one is about to indulge in any of the prohibited relations classified in the Bible as a capital offense he may be delivered from the transgression by the cost of his life (אחד נערה המאורסה ואחד כל עריות שבתורה מצילין אותו בנפשו). In Jer. Tal. Sanh. 26c all capital trangressions are included, except in the case of intended intercourse with a woman whose marriage the law has not sanctioned (אלמנה לכהן גדול אין מצילין אותו בנפשו). The distinction which the Babylonian Talmud makes between a betrothed woman and a woman after her nuptials is not found in Jer. Tal. I follow the sources of the Tosefta and Jer. Tal. and apply the Tannaitic principles to a married woman, as well as to a betrothed.

tence, by those who detected him. This may have been the undisputed Palestinian law during the existence of the Temple, but it must be carefully distinguished from mob violence and lynching. Once a man committed idolatry the court alone had a right to condemn the culprit to death, but when one intended to commit it or was in the act of committing it, everyone's duty was to kill the apostate to prevent the action, for such a person ought to give up his own life rather than transgress. In other words, a distinction is to be made between (1) lynching a man for a crime, however grave, which he has already committed, but for which he has not yet been convicted, and (2) killing a person to prevent him from committing certain heinous crimes. The former is lynching in the proper sense of the term and is not permitted. The latter is looked upon as a form of social self-defense and is therefore allowed. Thus, the Mishnaic report that a zealot had killed a man who lived with an Aramean woman [81] was interpreted in Talmudic literature to refer to a case in which death had been dealt to a potential sinner. Anyone who killed an offender after actual accomplishment of the simple act, however, might be executed for murder.[82] The main principle is that to lynch a man because he has committed a crime, regardless of its nature, was forbidden, but to kill him because he plans to commit an offense or because he is captured while committing one of the three most immoral transgressions previously enumerated is a moral duty. The immoral action is to be prevented even at the cost of the offender's life.

When we examine Philo's works carefully we find that, as in the case of murder by poison, they probably do not refer to men who have committed idolatry, but to apostates who worship idols. Philo says that in such cases the apostates may be killed, not for their former actions, but in order to prevent repetition of transgressions. The earlier Tannaitic Halakah and Philo are therefore in agreement on this matter. I believe, however, that neither Philo nor the Pharisees dealt in this case with practical law, but merely tried to emphasize the seriousness of the moral offense of idolatry.

[81] Sanh. 9, 7.
[82] Sanh. 82a.

The only reference to an actual case in Palestine of what is generally called lynching is the instance of Stephen, related in Acts. It may be doubted whether Stephen really blasphemed the name of God, even according to the Pharisaic conception of blasphemy, but even if Acts is correct, this particular case really has nothing to do with lynching. It is interesting to note that Philo gives two different interpretations of the phrase "and the congregation of Israel stoned him," mentioned in the Bible twice, first in connection with the wood-gatherer and then in connection with the blasphemer. In the first case Philo does not take the phrase literally, interpreting it to refer only to those who witnessed the transgression. But of the blasphemer Philo says:

> And God commanded him to be stoned, considering, as I imagine, the punishment of stoning to be an appropriate one for a man who had a stony and hardened heart, and wishing at the same time that all his fellow-countrymen should share in inflicting it on him, as he knew that they were very indignant and eager to slay him; and the only punishment which so many myriads of men could possibly join in was that which was inflicted by throwing stones.[88]

While for both the violation of the Sabbath and the worship of idols the punishment was death by stoning, Philo still makes a distinction between the execution of a man guilty of one and the execution of a man guilty of the other. For offense against the Sabbath the witnesses themselves performed the execution, a view which was also held by the Rabbis. For idolatry, however, any Israelite could participate in the execution. In either case, the stoning was not an act of lynching, but a legal execution, following a trial by law.

If Philo's interpretation has historical value, then the account in Acts was not an act of lynching but rather a legal execution after the manner described by Philo in the case of blasphemy. Stephen was tried in court and, having been found guilty of blasphemy, was legally executed by stoning in which the entire people participated. Even if Acts is not correct in saying that Stephen had blasphemed and was stoned, there is no reason to doubt that in such manner

[88] *Vita M.*, II, 202.

blasphemers were executed after a trial and conviction. When, however, a person committed any other capital offense, the public could witness the execution, though no one was allowed to lay hands on the criminal except the witnesses to the crime. The fact that neither the Bible nor the Tannaitic Halakah provides for an official executioner is significant. Under such circumstances mob violence could easily have occurred, but mob violence at an execution ordered by the court must be distinguished from lynching, which is an act performed by the mob without any trial and conviction.

In Philo's discussion of adultery similar problems arise. In many passages he speaks about it as a capital crime, as, for example:

> In such a case who would not kill? For while in other matters nations differ widely in their customs, in this alone do all people everywhere agree, in that they reckon adulterers worthy of ten thousand deaths, and without allowing detected adulterers a trial they hand them over to them that caught them.[84]

The Roman law considered adultery an offense which could be brought to trial to the provincial magistrates, but Greek and Roman law authorized the husband to kill the adulterer if he was caught in the act. Goodenough says that Philo refers here to the Greek and Roman law. He even holds that according to Philo if there was indisputable evidence of adultery the husband might hunt out the adulterer and kill him, though it may be doubted whether the Romans would have tolerated such action.[85] Such an interpretation presents many difficulties. In the first place, Philo does not here mention the husband at all. The words may refer to any witness of the act, but if Philo authorized the witness to kill the adulterer without trial he certainly did not have in mind practical Roman law, which would not have permitted such action. Furthermore, he definitely opposed any punishment by the husband without trial even where positive evidence and testimony existed. He says, for example, that though Joseph's master did not doubt the truth of his wife's testimony and the evidence of the garment, nonetheless he had no right to

[84] *Jos.* 44.
[85] *Jewish Courts in Egypt*, pp. 78–80.

arrest the young man without a trial and hearing in court.[86] Philo's statement, "The law has pronounced all acts of adultery, if detected or proved by undeniable evidence, liable to the punishment of death," [87] does not imply, contrary to Goodenough's view, that the husband has the right to kill the adulterer without trial. Philo merely says that under such circumstances the woman is liable to punishment by death, but undoubtedly through the regular procedure of the court. On the other hand, if Roman law did not consider adultery a capital offense, then Philo is speaking here, not of practical law at all, but rather of the Old Testament and biblical legislation.

It seems to me, however, that though he refers to a law to which "all people agree," nevertheless he is speaking in Jewish, not in Greek and Roman, terms. Philo says that all people consider adultery a capital offense, in certain circumstances not calling for a trial. This is true, but there is a distinction between Jewish and Roman law in this case. Jewish law does not distinguish between husband and stranger. Adultery is, like any other offense, punishable only by court. If, however, somebody discovers that one is about to commit adultery or is in the act of committing it, that person may kill the adulterer in order to prevent such immoral conduct. If witnesses testify that one has committed adultery, neither the husband nor anyone else has the right to lay hands on the offender. The matter is then entirely in the hands of the court. Thus, the statement of Philo that the adulterer may be killed without a trial by those who caught him in the act and his statement that the husband has no right to punish the adulterer after the act has been committed are both in agreement with Palestinian law.

From the ethical point of view there is a fundamental distinction between the Roman and the Jewish approach to this law. According to the former, the adulterer may be killed without a trial as a matter of revenge, and therefore the law authorizes only the husband to kill the offender. Jewish law, on the other hand, rules that if the offender is caught in the

[86] *Jos.*, 52.
[87] *Spec. Leg.*, III, 52.

act he may be killed by those who caught him in order to prevent immoral conduct. Philo himself sides with the Jewish law. It is highly improbable, however, that the Romans would have ignored Jewish practice of such laws in Alexandria.

Thus, it would seem that Philo shows an acquaintance with both Palestinian and Roman law, but the principles he uses reflect the former rather than the latter. Philo is not here applying Roman principles to the Jewish law, but Jewish principles to the Roman law.

3. Negligence

In Exod. xxi. 33–34, we read: "And if a man shall open a pit or if a man shall dig a pit and not cover it, and an ox or an ass fall therein, the owner of the pit shall make it good, he shall give money unto the owner of them, and the dead beast shall be his." The Bible speaks only about domestic animals; nothing is said about the responsibilities of the man who dug the pit if a human being should fall into it and suffer injury or death. Discussing this biblical law, Philo says:

> It is a common practice with some people to dig deep holes in the ground either when they are opening veins of spring water or making receptacles for the rain water. Then after widening the tunnels out of sight, instead of walling the mouths in or covering them up with a lid as they should, through some fatal carelessness or mental aberration they leave them gaping as a death-trap. If, then, some person walking along does not notice them in time but steps on a void and falls down and is killed, anyone who wishes may bring an indictment on behalf of the dead man against the makers of the pit, and the court must assess what punishment they must suffer or what compensation they must pay. . . . Of the same family as the above is the offense committed by those who in building their houses leave their roofs flat instead of ringing them in with parapets to prevent anyone being precipitated unawares over the edge. Instead they are to the best of their ability murderers, even if no one is killed by the force of the fall.[88]

First, it is to be noticed that Philo combines the two laws concerning wells and battlements which are given separately in the Bible. Josephus does the same.[89] It has been suggested

[88] *Spec. Leg.*, III, 148–49.

[89] *Ant.*, 4, 8, 37.

that Josephus is following the lead of Philo,[90] but this is open to doubt. Both Josephus and Philo seem to have had a common aim, readily explainable, in combining these two laws. The passage in Exodus does not prohibit opening or digging a pit. It merely provides for payment of damages if the pit is left open and injury to animals occurs. In Deut. xxii. 8 the law prohibits leaving the roof of a house unguarded. In Tannaitic Halakah this passage was interpreted as a prohibition against omitting battlements, as well as against leaving pits uncovered.[91] Philo and Josephus both speak of the penalties following injuries caused by an uncovered pit, as well as of the prohibition against leaving the pit uncovered. Such a prohibition is based on Deut. xxii. 8, and therefore they combine these two laws to show that the guiding principle in both laws is the same.

Furthermore, Philo states that the law of Exod. xxi. 33 does apply to injury to human beings. Students of his work, therefore, point out that he does not agree with the Halakah, which definitely states that if a man falls into a pit and dies, the owner of the pit is not guilty of death.[92]

It may be doubted, however, whether there really is such a disagreement. Philo himself does not say that the owner of the pit shall be put to death as a murderer, but only that the judge has to decide what penalty must be paid (*ὅ τι χρὴ παθεῖν ἢ ἀποτῖσαι*). In connection with a beast who killed a man, on the other hand, Philo says if its owner knew that the beast was dangerous and still did not confine it, he should be put to death (*προσαναιρείσθω*).[93] According to Philo, the relatives of the man who fell into the pit may demand damages

[90] See Ritter, *Philo und die Halacha*, p. 52.

[91] See Sifre on Deut. 229.

[92] See Heinemann, *Philons Bildung*, p. 408; Goodenough, in his *Jewish Courts in Egypt*, p. 192, makes the following statement: "Halakik tradition specifically says that the process cannot be extended to apply to human beings at all, since but one of the two passages provides for action, and that only in the case of animals. This is an excellent instance of exegetical Halacha which has no sense of practical jurisprudence, as contrasted with Philo's clear background of actual court procedure." We shall attempt to show that the rabbinic view that the owner of the pit cannot be punished for manslaughter if a person falls into the pit is logical in principle, but this does not imply that he is free from all punishment.

[93] *Spec. Leg.*, III, 145.

only. The Tosefta says that although the owner cannot be prosecuted for murder, if one is injured by falling into the pit, the man who dug it must pay damages.[94] This shows the Tannaitic Halakah was understood to mean, not lack of responsibility of the owner for injury to a human being, but impossibility of his punishment by death as a murderer. As for the damages which the owner of the pit had to pay to the relatives of the man killed, they were the same as those which the owner of a beast had to pay for a human being killed by his beast. Consequently, since Philo does not say that the owner of the pit was put to death if a man was killed by falling into the pit, but only that he had to pay a fine, there is no disagreement between Philo and the Halakah.

In addition to this problem, as applied to human beings, Philo refers in the same passage to the biblical law of injuries caused to a beast: "But if a beast falls in and perishes, then they who dug the pit shall pay its value to its owner as if it were still alive, and they shall have the dead body for themselves." [95] This statement shows that Philo understands the biblical phrase, "and the dead beast shall be his" (Exod. xxi. 34), to refer to the digger of the pit, who must return to the owner of the beast full value of a living beast. The dead animal cannot be regarded as a part payment. Ritter [96] points out that Philo's view is contrary to Halakah. According to the Halakah, if a beast was killed by another beast or by a pit, the person through whose agency the accident occurred had to pay only the difference between a living and a dead animal, for the dead body belonged to the original owner. This is the rabbinic interpretation of the biblical phrase, "and the dead body shall be his." The same rule is applied in the Talmud also to theft and robbery, that is, in case the stolen thing was damaged, the thief does not have to return a similar vessel of equal value. He may return the damaged vessel to its owner and pay only the difference.[97]

[94] Tosefta B. Ḳ. 4, 14; Tal. B. Ḳ. 53a and b. The same view is also held by Maimonides, *Mishneh Torah*, "Hilkot Nizḳe Mamon," 12, 15; Tosafot B. Ḳ. 3a.

[95] *Spec. Leg.*, III, 146–48.

[96] *Philo und die Halacha*, pp. 50–51.

[97] B. Ḳ. 10a and b; 11a.

The rabbinic attitude towards the thief, the robber, and the one who commits damages is more lenient than that of Philo. There is no doubt, however, that the literal meaning of the verse, "He shall give money unto the owner thereof and the dead beast shall be his," is as Philo interprets it. The question then becomes: What is the reason for the disagreement between the Rabbis and Philo? The answer to it may be found in the disagreement between the schools of Shammai and Hillel. The Shammaites, who usually took a stricter and more conservative attitude towards Jewish law, held that if a man stole a beam and used it in the erection of a mansion, he must pull down the whole house and return the original beam to the owner, since the thief possesses no ownership of the thing stolen. The Hillelites refused to consider all the legal technicalities and said that the owner may claim only the value of the beam. They were anxious to see the injured satisfied, but endeavored to make the restitution as easy as possible for the sinner. Although they found no precedent in Jewish law for their view, they felt that such an enactment was necessary for the sake of the repenters (תקנת השבים).[98] The Hillelites may have taken such a lenient attitude towards robbers and thieves because in their time the Sanhedrin had no longer the legal right to prosecute criminals, and in order to prevent such cases from coming to the Roman courts, they made it as easy as possible for the thief or robber to return the valued article to the owner. We may say confidently that the *takkanah* was inaugurated in Palestine not earlier than 70 C.E.[99]

The more lenient attitude of the Hillelites prevailed, and influenced many other laws. On this principle the later Halakah was shaped and extended. Under it the robber and the trespasser were permitted to return the damaged article and pay the difference, instead of returning another article of the same kind or its full value. Philo's stricter view, therefore, that the dead body belongs to the digger of the pit and that he must repay the full value, "as if it [the animal] were still alive," is in agreement with the Shammaites and was

[98] Tosefta B. K. 10, 5.

[99] See A. Büchler, *Studies in Sin and Atonement* (1928), pp. 384–88.

most likely the accepted Palestinian Halakah during his lifetime.

Philo's tendency to apply stricter penalties to trespassers than those found in Tannaitic and Talmudic literature is also reflected in other laws.[100] He writes, for instance: "If a shepherd or keeper of goats or a herdsman or the driver of flocks lets his cattle graze or pasture in the field of another, and spares not the fruits and the trees, he shall give an equal piece of land of equal produce." [101] The principle of this law is the same as that which we have discussed above. According to the Halakah, if a beast damages someone's property, the owner of the beast may either pay for the loss or give in return a piece of property of his own. This had to be his best property, but the Halakah does not burden the owner of the beast with the necessity of buying an equal piece of land.[102] The Rabbis demanded compensation for the loss resulting from the trespass, but not the restoration of the article or property equivalent to the one damaged. If we keep in mind, however, that, according to the Shammaites, where a robbery or theft occurred the original article had to be returned, then in cases involving damages the only way to make amends was by returning a piece of land as good as the original. This view is actually expressed by Philo.[103]

[100] *Philo und die Halacha*, p. 60.

[101] *Spec. Leg.*, IV, 23.

[102] See Giṭ. 5, 1; B. Ḳ. 7a.

[103] The biblical phrase in Exod. XXII. 4, "of the best of his vineyard shall he make restitution," was differently interpreted by R. Akiba and R. Ishmael. The former said that the one who caused the loss must make restitution with the best of his property (מדמזיק שיימינן); the latter said that "the best of his vineyard" means that the damage is appraised by the best property of the one who suffered the damages (Giṭ. 48b; B. Ḳ. 58b; compare with Jer. Tal. Giṭ. 46c). The Vulgate understands this passage in the same light as R. Akiba: *quidquid optimum habuerit in agro suo . . . pro damni aestimatione restituet.* The LXX, however, while following the view held by R. Akiba, makes a distinction between complete destruction of the estate and partial damages. The restitution with the "best of his vineyard" applies only if he damaged the whole field or vineyard, but not for casual damages: *ἀποτίσει ἐκ τοῦ ἀγροῦ αὐτοῦ κατὰ τὸ γένημα αὐτοῦ. ἐὰν δὲ πάντα τὸν ἀγρὸν καταβοσκήσῃ, τὰ βέλτιστα τοῦ ἀγροῦ αὐτοῦ ἀποτίσει.*

It is to be noticed that in the passage in Philo which we have quoted it is not stated that the one who caused the damages must pay with the best of his property. Philo undoubtedly follows the LXX. The distinction which

In this passage Philo reveals another agreement with Palestinian law. The biblical law deals only with the responsibility of the owner to pay damages for his beast's injury to someone's property, but nothing is said concerning the responsibility of the shepherd who neglected to watch the offending animal. According to the Tannaitic Halakah, the shepherd himself replaces the owner and is held responsible for damages. The Tosefta goes on to say that if the shepherd is a slave the one who suffered the damages can receive his compensation only when the slave is set free,[104] that is, when the slave shall have opportunity to earn money for repayment, but the owner is no longer liable. Philo, likewise, makes the shepherd responsible for the damages. If, however, he means by *βοσκήσῃ* that the shepherd actually drives the beast into the field of another, then the matter is unrelated to the responsibilities of a negligent shepherd. It corresponds, instead, exactly to the Talmudic law that if a person intentionally puts somebody's beast on another's sheaves he must pay damages as if he had caused the damage with his own hands.[105]

The discussion in Philo as to the penalty the owner of movable property suffers if by his negligence his property is the cause of death to someone deserves special investigation. It is true that there can be found very few points of agreement in such laws between Philo and the Tannaitic Halakah. Nonetheless, if we bear in mind the various disagreements and discussions in Tannaitic literature concerning them, we may better understand Philo's point of view.

The law of Exod. xxi. 28–30 deals with a beast which has killed a man:

If the ox was wont to gore in time past and warning hath been given to its owner, and he hath not kept it in, but it hath killed a man or a

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the LXX makes may be based upon a Palestinian source. R. Simeon says that the law requires that damages must be restored with the best property in order to discourage such action (Git. 49b; Jer. Tal. Git. 46c מפני מה אמרו הנזקנין שמין לחן בעידית כדי שיאמר אדם למה אני גוזל ולמחר בד יורדין לנכסו ונוטלין שדה נאה שלו).

Since the law which requires that compensation of damages be paid out of the best land is only a precaution for the general good, the LXX applies this law only when one causes a heavy loss, but not for minor damages.

[104] Tosefta B. Ḳ. 1, 20. [105] B. Ḳ. 56b.

woman; the ox shall be stoned and its owner shall be put to death. If there be laid on him a ransom then he shall give for the redemption of his life whatsoever is laid upon him.

In connection with this law Philo makes the following comment:

But if the owner of the beast knew that it was a savage and ferocious animal and did not confine it, nor shut it up and take care of it, or if he had heard from others that it was not quiet and still allowed it to feed at liberty, he shall be liable to prosecution as guilty of the man's death. And then the animal shall be put to death also, or else he shall pay a ransom and a price for his safety (ἢ λύτρα καὶ σῶστρα κατατιθέσθω).[106]

Philo seems to be of the opinion that if the owner of the beast was not put to death he must pay a double fine, one as a ransom and the other as a price for his safety. Since the Bible mentions only the ransom which he had to pay for the redemption of his life, the question may be raised: What are the sources on which Philo based his statement? Let us now examine the Tannaitic discussions of this law.

In the Mekilta there is a disagreement between R. Ishmael and R. Akiba in the interpretation of the verse, "then he shall give for the redemption of his life whatsoever is laid upon him." According to R. Akiba, the phrase "for the redemption of his life" (פדיון נפשו) refers to the man who was killed, which means that the owner of the beast make full compensation for the value of the man who was killed, whereas, according to R. Ishmael, it refers to the owner of the beast, that is to say, the owner of the beast must pay what he

[106] *Spec. Leg.*, III, 144. See Ritter, *Philo und die Halacha*, p. 50; Heinemann, *Philons Bildung*, p. 402. With reference to this passage in Philo, Goodenough makes the following statement: "To make these provisions workable several changes were made. In place of the relatives of the deceased having the right to decide whether the beast's owner was to pay them damages or to be executed, Philo specifies that the case is to go to court where it is for the judge to decide whether the case called for a fine or a capital penalty. Further the amount of fine is to be decided by the court, not, as is implied in the biblical provision, by the relative" (*Jewish Courts in Egypt*, p. 126). I doubt whether Philo really made any changes in the biblical text, for the Bible is silent as to whether the case is decided by the court or relative. He follows the rabbinic tradition, however, which also understood the biblical phrase, "there be laid on him a ransom," to refer to the court, not the relatives (Mekilta Mishpatim 21, 29 בבית דין).

himself is worth as a ransom.[107] Geiger [108] points out that the disagreement between R. Akiba and R. Ishmael lies not only in the interpretation of this particular phrase; it represents two different approaches to the law as a whole. In the Mishnah the biblical law that the owner of the beast is also to be put to death is not taken literally. It says: " 'The ox shall be stoned and the owner be put to death' means as for the death of its owner a court of twenty-four is needed, so also for the stoning of the ox." [109] The Hebrew term גם is taken not in the sense of "also" but in the sense of "as," which would imply that the ox is executed by the same mode of punishment as its owner. According to R. Eliezer, however, no judgment is necessary for a beast which has killed a man, but everyone who hastens to kill the beast is rewarded.[110] Whether R. Eliezer takes the biblical phrase, "and the owner shall be put to death," literally is not indicated in the Mishnah.

Other Tannaitic scholars take this phrase to mean that the owner of the beast can be executed, not by the court, but by the hands of God.[111] Frankel [112] sees this interpretation reflected also in the words of the LXX, which uses the future indicative instead of the imperative — "let him be put to death." Geiger, however, maintains that these different interpretations belong to the later Halakah; the earlier Halakah, he thinks, took the biblical law literally and considered the owner of the beast worthy of being punished by death. R. Ishmael, who says that the ransom had to be paid according to the value of the owner of the beast, represents this earlier Halakah: the owner of the beast is guilty of death, and the ransom which he must pay in order to redeem his life is according to his own value. R. Akiba represents the later Halakah: the owner of the beast was not put to death, and the ransom he had to pay was the value of the man who was killed. Geiger's statement that the earlier Halakah took literally the biblical law requiring the owner's death needs proof; [113] nevertheless, his argument as a whole is very logical.

[107] Mekilta Mishpatim 10.
[108] *Urschrift*, p. 448.
[109] Sanh. 1, 1.
[110] *Ibid.*
[111] Mekilta Mishpatim 10.
[112] *Einfluss*, p. 94.
[113] With reference to Geiger's and Frankel's theories see Ritter, *Philo und*

Philo himself says that the owner of the beast is liable to prosecution as being guilty of the death. There is no doubt that he takes the biblical law literally in believing that the man who did not confine his savage animal deserves to be put to death.

Now we can understand Philo's statement that in case the owner of the beast is not put to death, he has to pay a double fine, one as an atonement and the other as a ransom for his life (*σῶστρα*). Philo takes the biblical phrase, "for the redemption of his soul," to refer to the owner of the beast, since he is guilty of death and must pay his value as a ransom for his life. At the same time he must also pay, as an atonement, the value of the man killed, for even according to R. Akiba, who does not consider the owner guilty of death, there is the moral responsibility to make retribution to the full value of the victim's life. In other words, the payment as an atonement for the value of the man who was killed and the payment as a ransom for his own life have nothing to

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die Halacha, pp. 134 ff. In this chapter I have discussed the laws in Philo only with regard to intentional murder but not with regard to unintentional murder. I shall make reference only to some interpretations of Philo about *φόνος ἀκούσιος* which are Midrashic in character. In *Quaes. in Gen.*, I, 77, Philo asks why Cain was not put to death for the homicide which he committed and answers: "These premises being laid down, he who first committed a sin, as if he had been really always ignorant of evil is chastised more simply, but the second offender, because he had the first for an example, so that there cannot possibly be any excuse made for him, is guilty of voluntary crime." Philo considers Cain one who committed a *φόνος ἀκούσιος* because he had done it in ignorance, but the second offender, because he had the first for an example, committed an intentional crime. The same interpretation is found in the Midrash (לא כדינו של רוצחים דינו שלקין; קין הרג, ולא היה לו ממי ללמוד. Gen. Rabah on this point). More interesting is another interpretation of Philo which has its parallel in Midrash. He writes: "What does Cain mean when he says, 'Everyone who shall find me will kill me,' when there was scarcely another human being in the world except his parents? It may be that he said this, because he was apprehensive of injury from beasts and reptiles, for nature has brought forth these animals with the express object of their being instruments of vengeance on the wicked" (*Quaes. in Gen.*, I, 74). The Midrash also relates that when Cain killed Abel the beasts came to God to demand the life of Cain, but God prohibited them because Cain killed Abel without knowing the serious offense of homicide (נכנסו בהמה חיה ועוף לתבוע דמו של הבל). Philo and the Rabbis are equally of the opinion that the beasts were created for the purpose of seeking revenge on those who committed murder.

do with each other. Thus Philo's requirement of a double fine may be right even from the Halakic point of view.

The subject of penology led Philo also to comment on the two biblical instances in which a beast is punished by death. One involves an animal with which a man or a woman has had a sexual connection, and the other deals with a beast which has killed a man. Philo asks why the animal should be killed if a man has sinfully misused it and answers that the Bible prescribed the death penalty for the beast for two reasons: first, because it was subservient to such iniquities; second, in order to prevent its bringing forth or begetting a monstrosity.[114] A striking parallel to the first reason is found in the Mishnah: "If the human being has sinned, wherein lies the sin of the beast? Since by means of it an offense has happened to a human being, scripture says, 'let it be stoned.' "[115]

Furthermore, according to Philo, such a beast is unfit to do work, for he says: "And those who care little for seemliness would never use such animals as those for any purpose of life, but reject and abominate them, loathing their very sight, thinking that whatever they touch would become impure and polluted."[116] In this Philo agrees entirely with a Mishnaic law. According to the Halakah, if a beast has committed anything for which it is punished by death, it becomes *ipso facto* outlawed for purposes of slaughter or food, and may not even be used, while alive, in any profitable way.[117]

[114] *Spec. Leg.*, III, 50. Very interesting is Philo's discussion in *Quaes. in Gen.*, II, 9, on why God commanded, during the time of the flood, that the animals shall be killed. He writes: "Why does he say all things which existed upon earth shall be consumed; for what sin can the beast commit?" He answers: "Animals were originally made, not for their own sake, as it has been said by philosophers, but in order to do service to mankind, and for their use and glory; therefore, it is very reasonable that when those beings are destroyed for the sake of whom they had their existence, they also should be deprived of life." The same answer Saadia gave to Hiwi al Balkhi, "All of them were created for man's glory and they were of one disposition with him, therefore were they drawn after him unto destruction and desolation." (I. Davidson, ed., *Saadia's Polemic against Hiwi al Balkhi* (1915), p. 52.)

[115] Sanh. 7, 6.

[116] *Spec. Leg.*, III, 50.

[117] Mekilta Mishpatim 10.

If a beast has killed a man, Philo says, it must be stoned, for its flesh may not be either offered in sacrifice by the priests nor eaten by men. It is not consistent with the law of God, he argues, that man should use for food the flesh of an animal which has slain a man. The Bible stipulates only that the ox shall be stoned and its flesh shall not be eaten, but no prohibition of bringing such an ox for a sacrifice is given.

Ritter [118] points out as a parallel to Philo's view the Mishnaic Halakah that if a person consecrates to the Temple a beast which has killed a man, the consecration is invalid.[119] The comparison is entirely irrelevant, for Philo speaks here about offering the beast as a sacrifice on the altar, whereas the Mishnah speaks about dedicating the beast to the Temple. Ritter was apparently not aware of the fact that consecration to the Temple (הקדש) does not always mean a sacrifice (קרבן). Furthermore, the Mishnah makes the following distinction: If an ox has been sentenced to be stoned, and its owner consecrates it to the Temple, it is not consecrated. If, however, he consecrates it before the sentence is uttered, the consecration is valid. According to this Mishnah, even if we are certain that the ox killed a man, but the judges have not yet pronounced the sentence, the consecration is valid. Philo does not know of this distinction. Another Mishnah states that although a man can consecrate to the Temple a beast which killed a man, provided the judges have not yet pronounced the sentence, such an animal cannot be offered as a sacrifice,[120] because no beast which has killed a human being is acceptable as a sacrifice to God. This is exactly the law to which Philo refers here.

4. The Foetus — Its Legal Status in Society

In Exod. xxi. 22–23 we read,

> And if men strive together and hurt a woman with child, so that her fruit depart, and yet no harm follow, he shall be surely fined according as the woman's husband shall lay upon him; and he shall pay as the

[118] *Philo und die Halacha*, p. 49.
[119] B. Ḳ. 4, 8.
[120] Zeb. 8, 1.

judges determine. But if any harm follow, then thou shalt give life for life.

According to this biblical passage, if a man hurts a pregnant woman and causes the death of the child, he must pay a fine, but if harm follows to the woman, then he must suffer "life for life." With regard to this law Philo says,

But if any one has a contest with a woman who is pregnant and strikes her a blow on her belly, and she miscarries, if the child which was conceived within her is still unfashioned and unformed, he shall be punished by a fine (ζημιούσθω), both for the assault which he committed, and also because he has prevented nature, which was fashioning the most excellent of all creatures, a human being, from bringing it into existence. But if the child which was conceived has assumed a distinct shape in all its parts, having received all its proper connective and disconnective qualities, he shall die (θνησκέτω); for such a creature as that is a man who is . . . like a statue lying in a sculptor's workshop, requiring nothing more than to be released and sent into the world.[121]

Let us analyze Philo's words: first, he makes a distinction between killing a foetus which was not formed and one which had already assumed a distinctive shape in all its parts. If a person kills a foetus which is not yet entirely developed, he must pay a fine for two reasons: (a) for the assault which he committed; (b) for preventing nature from bringing a human being into the world. Whether the assailant has to pay two separate fines or only one, Philo does not say, nor does he say to whom it belongs. The Bible, however, states specifically that the fine belongs to the husband of the woman. Moreover if a person kills a formed foetus, the killer of the unborn child has the status of a murderer and is punished by death. The formed foetus is regarded as a living creature (ζῷον), and a person who prevents its coming into the world is considered a murderer.

Students have pointed out that he contradicts himself on the status of the developed foetus as a living creature. In another passage he says:

And those people who have investigated the secrets of natural philosophy say that those children which are still within the belly . . . are part of their mother. But when the children are brought forth and

[121] *Spec. Leg.*, III, 106–09.

are separated from that which is produced with them, and are set free and placed by themselves, they then become real living creatures.[122]

Here Philo regards the child as a living creature only when it comes into the world. Furthermore, his statement that if a person kills a formed foetus he is punished by death is said by some scholars to have no support in either Greek law or Tannaitic Halakah.[123] According to both the Tannaitic and the Stoic tradition, the foetus is simply a part of its mother during the entire time it remains in the womb. It has been suggested, therefore, that Philo's statement reflects a law which was practiced only in the Jewish courts of Egypt.[124] The fact, however, that the LXX translates Exod. XXI. 22–23 as Philo does shows that this law not only was practiced in the local Jewish communities in Egypt, but was also known in Palestine. The translation of the LXX reads thus:

If men . . . hurt a woman with child so that her unformed fruit depart (*μὴ ἐξεικονισμένον*) he shall pay a fine . . . ; but if the foetus was formed already (*ἐὰν δὲ ἐξεικονισμένον*) then he shall pay a life for a life.[125]

[122] *Spec. Leg.*, III, 117. Philo's statement in the same passage that whoever kills a child regardless of age is a murderer, for the law's condemnation of the crime has reference not to age, but to his membership in the human race (*μὴ ἐπὶ ταῖς ἡλικίαις ἀλλ' ἐπὶ τῷ γένει παρασπονδουμένῳ δυσχεραίνοντος*), is the undisputed law of the Mishnah. In Nidd. 5, 3 we read: "A boy one day old . . . can inherit property and bequeath it; he that kills him is culpable; and he counts as a חתן שלם to his father and his mother and to all his kinsfolk."

[123] See Ritter, *Philo und die Halacha*, pp. 34–39; Goodenough, *Jewish Courts in Egypt*, pp. 112 ff.; Heinemann, *Philons Bildung*, pp. 390–91. In Greek law abortion was not considered an offense in itself and therefore no *γραφὴ ἀμβλώσεως*. If, however, the foetus was in such an advanced stage as to be recognized as a *ζῷον*, an action for murder, *δίκη φόνου*, could be brought by the husband (Lipsius, *Das attische Recht*, pp. 608–09). Plato maintained that the foetus is a living being because it moves about in the womb and draws nourishment to itself (Plutarch, *De Placitis Philosophorum* v. 15, *Πλάτων ζῷον τὸ ἔμβρυον· καὶ γὰρ κινεῖσθαι ἐν τῇ γαστρὶ καὶ τρέφεσθαι*). At Rome, Romulus allowed a husband to divorce his wife if she committed abortion, but it was not considered a capital crime. (See Plutarch, *Rom.* 22; Mommsen, *Römische Strafrecht*, pp. 636–37; see also V. Aptowitzer, "Observation on the Criminal Law of the Jews," *Jewish Quarterly Review*, XV (1924–25), 55 ff.; Driver and Miles, *Assyrian Laws*, p. 115, n. 5.)

[124] Goodenough, *Jewish Courts in Egypt*, p. 112.

[125] A view similar to that of Philo and the LXX is found in pre-biblical law. The laws of abortion in the Assyrian Code, are quite the same in

As a matter of fact, however, Philo's interpretation of this passage has its background in Tannaitic Halakah. To begin with, it is not true, as scholars generally hold, that the Rabbis agreed with the Greek philosophers in regarding the unborn child as only a part of its mother. According to R. Jose, Shemaiah and Abtalion agreed that a child in its mother's womb inherited its father's possessions, and that if a priest's daughter married an Israelite who died leaving her pregnant, her servants might not eat the *terumah*, for these already belonged to the unborn child, who had the status of an Israelite, though his mother was a priestess.[126] All this shows that although in some respects the Rabbis considered the unborn child, because of its dependence on her for nourishment, a part of its mother, nevertheless it had the legal status of a human being by itself. On the same ground, the passage of Philo which says that the unborn child is a part of the

principle as that found in Philo. In the former the following appears: "If a man strike a woman and cause her to drop what is in her (miscarriage), according to that which is in her, he shall make restitution for life. And if the husband of that woman have no son, his wife they struck, and that which was in her she dropped, according to that which was in her they shall kill the one who smote (her). If that which was in her was small they shall make restitution with life" (translated by Luckenbill in J. M. P. Smith's *History of Hebrew Law*, 1931, p. 235). See also M. Jastrow, "An Assyrian Law Code," *Journal of the American Oriental Society*, XLI (1921), p. 47, n. 38. This is the only pre-biblical code which treats a foetus as a human being. It also makes a distinction between a developed foetus and one in its early stages. With the exception of the distinction made between a woman who has other children and one who has not, the Assyrian law of abortion is in principle the same as that of Philo and the LXX. Since the Assyrian law considers abortion a crime committed only against the immediate family, it takes into account the existence of other children, while Philo and the LXX, considering murder a crime against the human race, regard abortion as more than a family matter. It is, however, hard to determine whether or not an Assyrian law of 1500 B.C.E. could have left an influence on the Alexandrian Jews of the first Century C.E.

[126] Yeb. 67a. There are many other rabbinic references which imply that the foetus is treated as a separate individual. The Jer. Tal. states that if a master strikes out the eye of his slave girl who is pregnant she goes out free, but the foetus remains a slave, for the foetus is not treated as a part of the mother (B. K. 5a). R. Johanan says for the same reason one can sanctify a foetus in its mother's womb (Tem. 77a). According to some scholars, the "majority" hold that the foetus is not a part of his mother (Tem. 30b). Consequently, the common view that the Rabbis and the Stoics were of the same opinion with regard to the foetus is not correct. (See also B. B. 142a and b; Jer. Tal. 16d; Yeb. 5c.)

mother is not to be considered a contradiction to the passage in which he maintains that the formed foetus is treated like a living creature.

As to the other question, whether there is a basis in Tannaitic Halakah for Philo's view that a man who kills a developed foetus is a murderer and is punished by death, we may say that we have no direct parallel. Similar cases are discussed, however, which may be considered as a background to Philo's view. We find, for instance, a law in the Mishnah that if a pregnant woman is sentenced to be executed, the execution must not be put off until the child is born. This law, however, is applied only to a child in its unformed state. When the child is entirely formed, and the mother is already seated on her travailing chair, then the unborn child is treated like a human being, though it has not come into the world yet, and the execution must be put off until the child is born.[127] The Mishnaic phrase, "seated on the travailing chair" (המשבר), we may take to mean that the foetus is already formed and about to be born. It corresponds virtually, therefore, to Philo's words, "when the foetus

[127] 'Arak. 1, 4. The Talmud in 'Arak. 7a also says that when the child is ready for birth it is treated like a separate being (גופא אחרינא). A different view from that of the Mishnah is taken by the Tosefta in 'Arak. 1, 4. First, instead of the Mishnaic phrase, ישבה על המשבר, the Tosefta has הוציא עובר את ידו, which shows that according to the Tosefta even if the foetus is in full shape the execution is not postponed until actual birth takes place. The difference between the Tosefta and the Mishnah is not merely in phrasing the law, but also in the approach to the law. More striking even is the additional part of the Tosefta שאלו ילדה היה ולדותיה נסקלין. According to the Mishnah and the Talmud, if the child is already in full shape, the execution is put off until it is born so that the foetus, at that time treated as a separate individual, shall not suffer the penalty of death together with its mother. If the child is born before the execution, the child certainly suffers no penalty. The Tosefta, however, states that even if the foetus is born it suffers the penalty of death equally with its mother. I doubt whether a parallel to the view expressed in the Tosefta can be found either in any Jewish or non-Jewish writing. I believe that the Tannaitic statement in the Tosefta is a view which was held by one individual and is not in agreement with Jewish standard law. It may be that the text originally read נפטרין instead of נסקלין. Prof. L. Ginzberg has suggested the reading שאילו פרה היו ולדותיה נסקלין. This would be in agreement with the Halakah (see Sanh. 80a). The same authority also accurately remarked that if the Tosefta deals with the children of the convicted woman the term would be נהרגין, not נסקלין. This suggestion is very plausible, and the text as it stands is corrupt.

has assumed a distinct shape in all its parts, having received all its proper connective and disconnective qualities."

This Mishnaic law is also reflected in another passage in Philo:

> It appears to me that some lawyers have also promulgated the law about condemned women which commands that pregnant women, if they have committed any offense worthy of death, shall nevertheless not be executed until they have brought forth, in order that the creatures in their womb may not be slain with them when they are put to death.[128]

Here he does not make the distinction which he draws in connection with a man who kills a foetus. He is stating generally that the execution of pregnant women (*φυλάττεσθαι μέχρις ἂν ἀποτέκωσιν*) must be postponed in order to save the life of their unborn children. It may be, however, that since Philo had already expressed his opinion that the foetus is to be treated like a human being only at the stage when it is entirely formed, he did not consider it necessary to restate this

[128] *Virt.*, 139. Mangey (*Philonis Judaei Opera Omnia*, II, 398, note k) remarks that Philo makes reference here to Roman law, according to which, "praegnantis mulieris consumendae damnatae poena differtur quoad pariat." (See also Z. Frankel in *Monatsschrift*, 1859, p. 389.) Ritter accurately stated that Philo, by his own admission, also has in mind Jewish law (*Philo und die Halacha*, p. 109, n. 3). Since Ritter quotes only one part of the Mishnah, which says אין ממתינין לה עד שתלד, he regards it as contrary to the view held by Philo. But Ritter and the scholars who followed him misunderstood the Mishnah, which does not speak about a fully developed foetus. It deals with another problem altogether. The common view of scholars that the execution is put off because, according to the Mishnah, the foetus is a part of the mother is not correct. Even if, according to the Mishnah, a pregnant woman should commit a capital crime, her trial may be put off until the child is born, because the foetus belongs to the husband, whom the law would not deprive of his child because of his wife's capital offense. If, however, the trial was concluded, then the undeveloped foetus must also die with its mother because, according to rabbinic law, the execution must follow immediately after the conviction to avoid unnecessary suffering (עינוי הדין). This is also Maimonides' interpretation of the Mishnah (see *Mishneh Torah*, "Hilkot Sanhedrin" 12, 4, and also Tosafot 'Arak. 7a). The law of the Mishnah is not based upon cruelty to the foetus, but upon the Pharisaic endeavor to make the suffering of the criminal as light as possible. The terminology in this Mishnah, therefore, is האשה שיצא להרג. It is interesting to notice that in the Tosefta Nidd. 4, 17, R. Ishmael relates that Cleopatra executed pregnant slave-girls who were condemned to death. If this story has any historical value, the execution was certainly not in accordance with the best Roman tradition. It may also be that their pregnancy was found out after the execution.

distinction.[129] If this is the case, then he has in mind the Palestinian law that a pregnant woman cannot be executed at the time when she has to bear her child, because at this time the child is no longer a part of its mother, and in order to save the life of the child the execution must be put off. Probably, however, this interpretation is quite forced, and it may be more logical to assume, as pointed out by Mangey and Goodenough, that Philo here follows Roman practice.

Furthermore, according to the Halakah, if a pregnant woman dies before the formed child is born, any person may violate the Sabbath in order to save its life, for the unborn child has the status of a human being.[130] All this shows that a formed foetus, according to Tannaitic Halakah as well as to Philo, has the status of a human being. These Tannaitic sources, however, prove only that a formed foetus is treated like a human being and that its life must be saved, but it offers no light on whether a person who killed an unborn child would be regarded as a murderer punishable by death. Other Tannaitic sources, however, touch upon this problem. According to the Mishnah, if physicians say that the killing of the foetus may save the mother, who would die otherwise, it is lawful to kill the foetus.[131] According to Maimonides' explanation of this Mishnah, based on an Amoraic passage in the Talmud, the only reason for the permission to kill the child in order to save the mother is that the child has attacked the life of its mother, and according to Mishnaic law everyone is allowed to kill an aggressor in order to save the life of the one attacked.[132] Otherwise, the lives of the mother and child would be equivalent, and the mother might be allowed to die in order to save the life of the child. Now if the killing of a foetus would not be murder, the Mishnah

[129] Philo's statement that the law prohibits the offering of pregnant animals (*Virt.*, 138) we shall discuss in another place.

[130] 'Arak. 7b. It is interesting to notice that though the foetus was treated like a human being and every one might violate the Sabbath for his safety, still a child who was born prematurely was not considered a ζῷον (Tosefta Shab. 15, 5). This shows that the distinction which Philo makes between a formed and unformed foetus is in principle in agreement with the Halakah.

[131] Oholot 7, 6. See Sanh. 72b.

[132] *Mishneh Torah*, "Hilkot Roẓeaḥ" 1, 9.

would permit such an act to save the life of the mother under any circumstances.[133] Furthermore, according to R. Ishmael, the Hebrew term for "human being" (אדם) is also applied to a foetus. God's command to Noah and his sons in Gen. IX. 6 is interpreted as meaning, "Whoso sheddeth the blood of a human being [i.e., foetus] who is in a human being [i.e., mother], his blood shall be shed."[134] Hence R. Ishmael derives the principle that the sons of Noah, who killed a formed foetus, are guilty of death. R. Ishmael does not say whether the same law would be applied to an Israelite, but undoubtedly if killing a foetus were not considered murder, the sons of Noah would not be guilty of death. All the sources which we have discussed show that Philo's statement has its background in Tannaitic Halakah, although it is possible that the later Tannaitic Halakah was more lenient with a man who killed a foetus than with one who killed a child already born.

Josephus says with regard to this law:

He that kicks a woman with child so that she miscarries, let him pay a fine in money as the judges shall determine, as having diminished the population by the destruction of what was in her womb, and let money also be given the woman's husband by him.[135]

[133] The Mishnah in Oholot 7, 6 also says that if the greater part of the foetus came out it is not lawful to kill the foetus in order to save the life of its mother. In Jer. Tal. the following reason is given for the law: Since the child is partly born we assume that it will not die because of its mother's illness and, therefore, one may no longer be permitted to kill it in order to save the life of its mother (יצא רובו אין נוגעין בו חיישינן שלא ימות 'A. Zar. 40d). It seems that according to the Jer. Tal. the only reason that we may kill the foetus in order to save the mother is the assumption that the child, owing to the dangerous condition of its mother, will not be born alive. And as it is not part of the mother, it may be destroyed to save the mother. This is also the view held by Philo. See also Midrash Lekaḥ Ṭob, Mishpatim 22 (110).

[134] Sanh. 57b.

[135] *Ant.*, 4, 8, 33. In this passage Josephus does not consider abortion a capital offense. In *Cont. Ap.*, II, 30 (215), he writes: "The law orders all offsprings to be brought up and forbids women either to cause abortion or make away with the foetus; a woman convicted of this is considered a murderess, because she destroys a living creature, and destroys the race." Josephus speaks of abortion as a capital offense. Weyl understands his words to imply legal prosecution and punishment for abortion (*Die jüdischen Strafgesetze bei Flavius Josephus*, pp. 50–52). If Weyl's interpretation be correct, we see a definite contradiction between the *Ant.* and *Cont. Ap.* Aptowitzer believes that the passage in *Cont. Ap.* is only of "moral valuation" ("Observa-

Here the assailant has to give money to the woman's husband and also pay a separate fine for having diminished the population by killing the foetus. Josephus does not say to whom this extra fine is given. Goodenough is of the opinion that, according to Philo as well as to Josephus, the assailant has to pay two fines; one to the husband of the woman and another, possibly, to some charitable institution, because the assailant has prevented nature from bringing a human being into the world.[136] In the whole field of Tannaitic Halakah we have no evidence that such a fine was ever levied on a person. In the Bible also a fine is given by the assailant only to the person who has suffered an injury of some kind, not to a charitable institution. Josephus possibly based his statement that the assailant has to pay two fines upon Exod. xxi. 22, "He shall be surely fined according as the woman's husband shall lay upon him; and he shall pay as the judges shall determine." The husband fixes the amount of the fine, and the man also pays "as the judges shall determine." Modern commentators suggest נפילים for פלילים, thus making the passage mean that the assailant shall pay "for the untimely birth."[137] Josephus, however, understands it to mean "as the judges shall determine" and therefore infers that the Bible imposes two fines upon the person who causes the miscarriage, one paid to the husband of the woman and an additional one for diminishing the population, the amount of this extra fine being determined by the judges.[138] Philo also apparently finds the biblical phrase, "as the judges shall determine," strange, after the unconditional discretion just given to the husband, for he refers neither to the judges nor to the husband. But it may be doubted whether he agrees with Josephus that the assailant has to pay two fines.

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tion on the Criminal Law of the Jews," *Jewish Quarterly Review*, XV, 87, n. 117). Philo in the *Hypothetica* speaks of abortion as a capital offense without making the distinction between a developed foetus and a foetus not yet fully formed (*Fragmenta*, 580; Richter, VI, 180). (See my *Alexandrian Halakah in the Apologetic Literature of the First Century, C.E.*, 1936, pp. 13–15.)

[136] *Jewish Courts in Egypt*, p. 114. See also Heinemann, *Philons Bildung*, p. 391, n. 1.

[137] See S. R. Driver, *The Book of Exodus* (1929), p. 219.

[138] I have noticed that Weyl also interprets Josephus as I do (*Die jüdischen Strafgesetze bei Flavius Josephus*, pp. 57–62).

In *De Fuga* Philo refers also to Exod. xxi. 22–23, and although he there interprets the law in the same manner as in *De Specialibus Legibus*, the reading of the biblical text is somewhat different. The passage says:

> But that which is clear and distinctly visible is like one which is completely formed, and which is already fashioned in an artistic manner as to both its inward and its outward parts, and which has already received its suitable character. And with respect to those matters, the following law has been enacted with great beauty and propriety: "If while two men are fighting, one should strike a woman who is great with child, and her child should come from her before it is completely formed, he shall be punished by a fine, according to what the husband of the woman shall impose upon him, and he shall pay the fine deservedly. But if the child be fully formed, he shall pay life for life." [139]

Here Philo says that the fine belongs to the husband, while the phrase, "as the judges shall determine," he converts, as does the LXX, into μετὰ ἀξιώματος. If he based his interpretation of this law in *De Specialibus Legibus* upon the text which he discusses in *De Fuga*, there certainly is no reason to believe that he imposed two fines upon the man who causes the death of an unformed foetus, for the phrase, "as the judges determine," is absent in the LXX and in *De Fuga*. If Philo knew of no other biblical tradition except the text of the LXX, he had no justification for a double fine. The fact that this passage occurs alike in Philo and Josephus makes it highly probable that there must have been a tradition known to both of them which made the assailant pay a double fine. I cannot see how Goodenough takes it for granted that Jewish courts in Egypt, under the influence of Ptolemaic practice, made the assailant pay a fine to an "indemnity society" for the loss of one of its members. We have no references to such societies or to such fines.

Goodenough does seem correct, however, in saying that Josephus and Philo make the assailant liable to a double fine. But it is paid to the persons concerned, namely, husband and wife. In Tannaitic literature we find the statement that if one causes abortion he must pay two fines: one for diminishing the family by killing the foetus; the other for

[139] *Fuga*, 137.

causing pain, deterioration in value, medical attendance, loss of time, and mortification to the woman.[140] The former belongs to the husband, since he is the head of the family; the latter belongs to the wife who suffered the injuries. If, therefore, one causes a miscarriage to a woman who was divorced, the fine for killing the foetus belongs to her former husband, but not the fine for causing injuries to the woman. The rabbinic law is equivalent to that found in Philo and Josephus. Philo says that the money paid in damages is imposed for two reasons; one because of the ὕβρις that has been committed, which we may assume, as in the Halakah, belongs to the woman, and the other for diminishing the population, payable to the husband as the head of the family.[141]

[140] Tosefta B. Ḳ. 9, 20.

[141] Philo seems also to have known of a Greek tradition that casting away children is forbidden only when the child was already nourished by his parents, but at the time of birth the child is not called "a human being." In *Vita M.*, I, 11, Philo says: *τὸν μὴ φθάσαντα τροφῆς ἡμέρου μεταλαχεῖν οὐδ' ἄνθρωπον οἱ πολλοὶ νομίζουσιν.* The exposure of infants in the Greek and Roman world was considered neither a criminal offense nor immoral conduct. (See Goodenough, *Jewish Courts in Egypt*, pp. 115 ff.; Heinemann, *Philons Bildung*, pp. 393 ff.; I. H. Weiss, *Zur Geschichte der jüdischen Tradition*, 1894, II, pp. 22–24.) Bearing in mind the pagan attitude towards the casting away of infants by parents, he understands better a passage in *Spec. Leg.*, III, 110 ff. "He also adds another proposition of greater importance in which the exposure of infants is forbidden which became a habitual wickedness among other nations on account of their natural inhumanity" (*δ παρὰ πολλοῖς τῶν ἄλλων ἐθνῶν ἕνεκα τῆς φυσικῆς ἀπανθρωπίας χειρόηθες ἀσέβημα γέγονεν*). There is no doubt that upon this principle is based the Tannaitic Halakah that one must not employ a pagan midwife, because she is apt to kill the new-born child (Tosefta 'A. Zar. 3, 3).

CHAPTER VI

OATHS AND VOWS

1. Forms of Oaths

The third commandment, not to take God's name in vain, was understood by different Jewish sects in various ways. According to the Essenes, it was a prohibition not to swear by the name of God at all. They therefore condemned alike those who took oaths in the name of God and those who committed perjury.[1] Josephus tells us that this was a command not to swear by the name of God in insignificant matters.[2] The Mishnah, however, understood it as a prohibition against taking an oath contrary either to nature or to law, such as an oath to violate any of the biblical commandments or an oath that an object known to be a stone was gold. An oath of this sort was not binding and was called "an oath taken in vain" (שׁוא).[3] Nowhere in the Mishnah is it said that taking an oath by the name of God is a violation of the third commandment.

Philo's interpretation of this commandment apparently agrees with the view held by the Essenes, since he also understands it as an injunction not to swear by the name of God, "for the word of the virtuous, says the law, shall be his oath, firm, unchangeable, which cannot lie, founded steadfastly on truth."[4] But it must be observed that even in Tannaitic literature we have two standards, the Halakic and the Agadic (that is, the legal and the ethical), and though the Halakah mentions no laws prohibiting swearing by the name of God, the Agadah disapproves of the use of such an oath. The Midrash says, "A truthful oath can be sometimes called an oath in vain; if a person says to his friend, 'I take an oath to go to a certain place to eat and drink,' and he fulfills his

[1] *Bell. Jud.*, II, 8, 6. See also Ginzberg, *Eine unbekannte jüdische Sekte*, pp. 130–32.

[2] *Ant.*, 3, 5, 5.

[3] Sheb. 3, 8.

[4] *Spec. Leg.*, II, 1–2.

oath, it is still an oath in vain." [5] Furthermore, the Tosefta states that even when one is compelled to swear, as in case of a depositary, he is nonetheless guilty of wickedness, and those who stand by are bound to recite, "Depart I pray you from the tents of these wicked men." [6] All this shows that there is a difference between the legal and ethical points of view, and Philo may have followed the former.

That he really did not, however, consider taking an oath by the name of God equal to perjury, as the Essenes did, is shown by the fact that though he demanded the infliction of heavy punishment upon a perjured person, he did not mention any such penalty for swearing by the name of God. Nevertheless, he did not approve of it and suggested various other ways in which a person may take an oath if circumstances compel him to swear. He may invoke the health of his parents if they are alive, or their memory if they are dead, for a man's parents are the pattern of divinity. He may also invoke heaven and earth, since they never grow old but are eternal; or he may take an oath without pronouncing the name of God, saying merely, "By the . . . ." [7] The oaths which Philo mentions here have no parallel in the Bible but are known to have existed among the Jews in Palestine. The Midrash Tanḥuma renders Gen. xxxi. 53, "And Jacob swore by the fear of his father," as "by the life of his father," that is, by invoking his father's health as witness to his oath.[8] There is, however, a disagreement in Tannaitic Halakah as to whether an oath by heaven and earth is binding. According to the Mishnah, if a person takes an oath by heaven and earth, it is not valid.[9] A milder attitude, however, is

[5] Tanḥuma ed. Buber Maṭot 1.

[6] Tosefta Soṭ. 7, 4.

[7] *Spec. Leg.*, II, 4.

[8] Tanḥuma at the end of Wayyeṣe. In the same passage Philo says: "It is recorded in the law that one of the patriarchs of the race, and one of those most specially admired for his wisdom, as swearing by the fear of his father" (*ὀμνὺς κατὰ τοῦ φόβου τοῦ πατρός*). There is no doubt that Philo is here referring to Gen. xxxi. 53, but the passage reads (בפחד יצחק אביו). Professor Ginzberg (*Eine unbekannte jüdische Sekte*, pp. 130–32) has shown that the Midrash Tanḥuma interprets the verse in the same light as Philo does. See also Heinemann, *Philons Bildung*, pp. 6, 83.

[9] Sheb. 4, 15.

taken by the Midrash. The Midrash Rabbah on Cant. VIII. 4, "I adjure you O daughters of Jerusalem," asks, "By what has he given them the oath of adjuration? R. Eliezer says by heaven and earth." Jesus also seems to have felt that the invoking of heaven and earth in an oath was legally binding, "Swear not at all, neither by heaven, for it is the throne of God, nor by earth, for it is the footstool of his feet." [10]

Philo himself is not in favor of swearing by heaven and earth unless circumstances force one to take such an oath. This seems to be the view expressed in the New Testament. The Jews in Alexandria, as well as those in Galilee, apparently used to take oaths very often without giving a thought to the importance of the purposes, especially if the oaths were taken only by heaven and earth. Philo and the Midrash, who always spoke more from the moral than from the legal point of view, emphasized the fact that such oaths were also binding. Hence Philo held that a person should abstain from taking them unless circumstances forced him to do so.

Philo suggests that those who must swear should say "Yes, by" (*νὴ τόν*), without mentioning the name of God. The phrase "Yes, by" does not mean anything if we translate it into any other language, but the idea itself, that an oath does not need the utterance of the name of God if we fully understand by the expression used that He is being called on as witness, is entirely in agreement with the Tannaitic Halakah. The fundamental teaching of the Mishnah and Tosefta concerning the forms of oaths is that substitutes, as well as "handles" to oaths, are sufficient.[11] The name of God does not need to be expressed, and an oath may be taken in any language. If a man takes an oath, saying "By the name of ——," it is binding and is called an oath by the name of God.[12] According to the school of Shammai, even secondary substitutes, understood only by the man who utters the oath, are sufficient.[13] Furthermore, the reason for using these different

[10] Matt. V. 34 f.

[11] Ned. 1, 1. See also Professor Goodenough's references to such forms of oaths in Greek literature (*Jewish Courts in Egypt*, pp. 43–44).

[12] Tosefta Nazir 2, 1.

[13] Tosefta Nazir 2, 1.

substitutes, according to both the Talmud and Philo, was to avoid mentioning the name of God.[14]

Thus Philo considers an oath binding even without the name of God, but if a person violates such an oath, he invokes God as a witness to a statement which is not true. He says:

> But if anyone is compelled to swear by anything which the law does not forbid (ὃ μὴ νόμος ἀπείρηκε) let him exert himself to give effect to his oath. For what is better than to practise a lifelong veracity, and to have God as our witness thereof? For an oath is nothing else but the testimony of God invoked in a matter which is a subject of doubt, and to invoke God to witness a statement which is not true is the most impious of all things.[15]

Philo is speaking here of the oaths taken in the manner "which the law does not forbid," that is, the various ways of taking an oath which he has discussed before, but if a man violates such an oath, it is the same offense as violating an oath by the name of God. The same view is also found in the Mishnah. Throughout the Mishnah the term oath (שבועה) without the name of God is sufficient, but if a person violates such an oath he is punished for disobeying the commandment, "Thou shalt not swear by my name to falsehood." [16] According to Philo and the Mishnah, in whatever form a person takes an oath, it is understood that he takes God as witness to his oath, and if he violates such an oath, it is equivalent to swearing by the name of God to falsehood.

Though Philo is opposed to taking oaths in general, nevertheless he says that a person who always speaks the truth may be encouraged to take an oath, if circumstances compel him, "for what is better than to practise a lifelong veracity and to have God as our witness thereof?" Students of his

[14] Ned. 10a.

[15] *Spec. Leg.*, II, 7–10.

[16] Sheb. 3, 9–10. My whole argument that an oath in Tannaitic literature does not need the name of God is based upon numerous Mishnah which use the formula שבועה as a term for an oath. It is true, however, that some of the later rabbinic scholars are of the opinion that a person cannot be punished if he violates an oath which was not taken by the name of God (see Maimonides, *Mishneh Torah*, "Hilkat Shebuot," 11, 3–4). Oaths given to a bailee seem always to have been by the name of God.

works erroneously point out that this passage contradicts what he has said against swearing at all, but Philo is only following Palestinian traditions, which also disapproved the taking of oaths by ordinary individuals, but had no objection to them by one whose piety was indisputable. The Midrash Tanḥuma says:

"Thou shalt fear the Lord thy God; and Him shalt thou serve and by His name shalt thou swear" [Deut. VI. 13]. Moses said unto Israel, you should not think that I permitted you to swear by the name of God even concerning something which is true, but if you possess these virtues [that is, fearing God and serving Him] then you are allowed to swear by His name.[17]

According to Philo, perjury is a capital offense, and the perjured man may be punished either by God or by man. Of the latter case he says:

But the punishments which are inflicted by men are of various kinds, being death or stripes (*θάνατος ἢ πληγαί*); those who are braver and stricter in their piety inflict death on such offenders, but those who are of milder disposition scourge them with rods publicly in sight of all men, and to those who are not of slavish dispositions stripes are a punishment not inferior (in terror) to death.[18]

Though Philo refers here to two groups of people who differ in opinion about punishment for perjury, he himself seems to favor the stricter penalty — if one may judge by his references in other places, where he mentions only death as suitable.[19] This allusion to the two groups, however, shows that he was discussing not mere theoretical laws but actual usage.

Philo could not have based his own stern view on non-Jewish sources, for we know that according to Greek law the only form of perjury treated as a crime was the *ὅρκος βασιλικός*, which was an offense against the state, while the violation of an oath taken by the name of God was a religious matter with which the state did not concern itself. It is, however, striking that neither in Ptolemaic nor in Roman jurisprudence can we find any specific reference to the penalty

[17] Tanḥuma ed. Buber Wa'etḥanon.
[18] *Spec. Leg.*, II, 28–29.
[19] *Spec. Leg.*, I, 252, and II, 252–56.

of perjury even in case of ὅρκος βασιλικός.[20] It seems to be beyond doubt that the breaking of such an oath was not punished by death. Ritter, Goodenough, and Heinemann have failed to find a parallel in Jewish and non-Jewish literature to Philo's statement on the question.[21] According to the Mishnah, perjury was penalized by stripes, the standard treatment for violating any negative commandment.[22] Philo himself acknowledges them as one method. Because of this, scholars have generally concluded that he had no basis in ancient law for his advocacy of the death penalty. I shall try, however, to show that the background of Philo's view is biblical and Tannaitic Halakah.

Before explaining Philo's statement, I shall first analyze the different forms of oaths mentioned in the Bible. The original Hebrew term for oath is שבועה, but many biblical passages show that various Hebrew terms, whose primary meaning is curse, are also used in the Bible for oaths. In Num. v. 21 we read: "And the priest shall cause the woman to swear with an oath of cursing (בשבועת האלה)," and the same term, אלה, is also used for an oath in Gen. xxvi. 28. The term ארור (cursed) is also used for an oath in the Bible, as, for instance, in I Sam. xiv. 24, "Cursed be the man who shall

[20] See E. Seidl, *Der Eid im romisch-ägyptischen Provinzialrecht*, 1933, p. 129.

[21] See Goodenough, *Jewish Courts in Egypt*, pp. 180 ff. The only reference he makes to perjury as a crime punished by court is the Ulpian law. He continues: "The two bits of evidence together establish a strong probability that the Romans in Egypt treated the ἀσέβεια of perjury against ὅρκος βασιλικός by scourging the offender" (p. 181). Goodenough fails, however, to show that the ὅρκος βασιλικός was considered a capital offense in ancient jurisprudence. I admit, however, that if Philo's discussion of perjury is based on non-Jewish sources, the material on the subject collected by Dr. Goodenough in pp. 41 ff., 176 ff., and 186 presents a logical argument. I disagree that the "lenient people" of Philo were Romans or Jews who imitated Romans. We are hardly in need of searching sources for the view of those who punished perjury by stripes, for the standard penalty for perjury in the Mishnah is stripes. Dr. Heinemann thinks, however, that the capital penalty for perjury has no basis in any law (*Philons Bildung*, p. 93). Thus Heinemann is of the opinion that the laws of perjury in Philo have no precedent in ancient law. (See also Ritter, *Philo und die Halacha*, p. 47.) The only single reference which has any bearing on the subject was made by Professor Ginzberg. The Midrash states that Nebuchadnezzar said to Zedikiah: בדין אלהיך חייב אתה להרוג (see *Eine unbekannte jüdische Sekte*, pp. 135–37; see also B. Revel, "'Onesh Shebu'at Sheḳer le-Da'at Philon we-ha-Rambam," *Ḥoreb*, 1935, pp. 1–5).

[22] Sheb. 3, 5.

eat bread" (ארור האיש), concerning which it is said later, in verse 26: "And the people did not eat anything for the people feared the oath" (כי ירא העם את השבועה).

These passages prove that the terms "oath" and "curse" were used synonymously. This may be because every oath taken to establish a doubtful fact or to fortify a promise was always followed by a curse. The same view is also expressed in Tannaitic literature.[23] Philo, too, says that a man to whom an oath is given because he is suspected of denying a deposit has to accept a curse upon himself.[24]

There is, however, another kind of oath mentioned in the Bible which has nothing to do with a curse. This is one taken, not for the establishment of a doubtful fact or for a promise to someone else (for the execution of an undertaking), but as a personal obligation in a matter not affecting others. This type of oath is dealt with in the law of Num. xxx. 2: "to swear by an oath to bind himself with a bond."

The oath followed by a curse was of a more serious nature, and for violating it the Tannaitic Halakah seems to indicate that the punishment was death.

R. Judah B. Bathyra says, In Lev. v. 1 it is written, "And if anyone sin in that he heareth the voice of adjuration (קול אלה), he being a witness, whether he hath seen or known, if he do not utter it, then he shall bear his iniquity"; and in Lev. v. 17 is written, "His iniquity he shall bear"; as there the punishment is death by the hand of God, so is it in this case.[25]

Lev. v. 1 deals with a man who took an oath to give information concerning something to which he was a witness and later violated his oath, or swore falsely. According to R. Judah b. Bathyra, his penalty is death by divine punishment.

Another Hebrew term mentioned in the Bible and under-

[23] Sifre on Num. xiv. (v. 21).

[24] *Spec. Leg.*, IV, 7.

[25] Tosefta Sheb. 3, 9–10. In Tannaitic literature the biblical verse of Lev. i. 1 refers to witnesses who refuse to bear testimony in cases where loss of money is involved. Under such circumstances the plaintiff can bind the witness by an oath not to withhold the testimony. Such an oath is of equal force as if the witness himself would swear not to withhold the evidence (עשו בו את המושבע בנשבע Sifra Wayyikra 12). If, however, he still refrains from giving testimony, according to R. Judah b. Bathyra, his penalty is divine punishment. I can see no other reason for such a severe penalty, except the violation of the oath.

stood in Tannaitic literature to have the significance of an oath is *ḥerem*, usually translated by "devoted" or "accursed." The punishment for violating this type of oath, according to Tannaitic scholars, is death. R. Akiba says:

The Ḥerem is as much as the oath, and an oath is as much as the Ḥerem; and everyone who violates the oath is as though he violated the Ḥerem. Know the power of the Ḥerem. Come and see from Joshua, the son of Nun, who put Jericho under the Ḥerem. Achan, son of Carmi, saw the Teraphim and he went and buried them in the midst of his tent. Joshua took Achan and his sons and his daughters and all that he had and brought them into the Valley of Achar. He stoned them and burned them.[26]

Josephus, however, claims that Achan was put to death because he stole the things which were consecrated to the Temple,[27] but capital punishment for such a theft has no basis in the Bible. According to the Mishnah, a person who steals any object belonging to the Temple is not liable to punishment; no one can steal anything from God, and wherever the object happens to be, it is in His possession.[28] This Mishnah seems to be, however, a later Tannaitic Halakah. Another Mishnah, which reflects an earlier Tannaitic Halakah, says that the zealous kill a man who steals from the Temple.[29]

Extra-Tannaitic and rabbinic sources also indicate that the punishment for perjury was death. The Targums, for instance, translate the Hebrew term for oath (שבועה) into the Aramaic term for oath (שבועתא) only when death is indicated as the punishment for violating it, as in I Kings II. 43, I Sam. XIV. 26, and Judg. XXI. 5.

The author of the Fragment of a Zadokite Work believes that a person must keep his oath even at the price of death:

As to what He said, "that which is gone out of thy lips thou shalt keep" to confirm, every oath of a bond by which a man will confirm upon

[26] Pirḳe de R. Eliezer, chap. 38 (English translation by G. Friedlander, 1916, pp. 294–97). See also Midrash Tanḥuma Yalamdanu Wayyesheb.

[27] *Ant.*, 5, 1. Philo also considers the theft of consecrated things a capital offense. In *Spec. Leg.*, III, 83, he says that under the capital offense of murder is also included Temple robbery. (See Heinemann, *Philons Bildung*, p. 38.) In the *Hypothetica* he says that for stealing sacred things the penalty is death (Eusebius, *Praep. Evang.* VIII, vii; in the C. E. Richter ed., VI, 179).

[28] B. Ḳ. 7, 4; Talmud 76a. [29] Sanh. 9, 6.

himself to perform a commandment of the Law till the price of death he shall not redeem it.[30]

These various sources indicate that there is nothing extraordinary in Philo's point of view regarding the death penalty for perjury, inasmuch as both biblical and post-biblical literature reflect the same attitude.

As we have already seen, Philo refers to the two groups who differ on the matter, "those who are of a braver and stricter disposition punish a perjured man by death, but those who are of a milder disposition punish a perjured man by stripes." He does not, however, say specifically whom he has in mind. We know that in his lifetime there were two distinctive Jewish sects in Palestine, the Sadducees and Pharisees, one of the controversies between whom concerned punishment. Josephus says that John Hyrcanus thought the Pharisees should punish Eliezer, the man who insulted him, by death:

and the Pharisees said that Eliezer deserved to be punished by stripes and bonds, but that it did not seem right to punish his taunt with death. And, indeed, the Pharisees are by nature lenient in punishments.[31]

Josephus calls the Sadducees men who are "very severe in judging offenders." [32] The Mishnah, which is a Pharisaic code, tells us that no person could be punished unless witnesses had warned him that his proposed act was a crime. The Pharisaic sect became so chary about inflicting capital punishment that a court which executed more than one person in seventy years was called "murderous." [33] We may say that for practical purposes the Pharisees in many instances abolished capital punishment and substituted stripes for it. The Sifre on Deut. xxv. 3 says: " 'Then thy brother should be dishonoured before thine eyes' teaches us that all who have incurred the punishment of being cut off, if they have received stripes, become exempt from the first punishment." [34] Philo, then, would seem to be reflecting the Pharisaic attitude when

[30] S. Schechter, *Documents of Jewish Sectaries*, I, 16, line 8. See also Ginzberg, *Eine unbekannte jüdische Sekte*, pp. 135–37.

[31] *Ant.*, 13, 10, 6.

[32] *Ant.*, 20, 9, 1.

[33] Sanh. 5, 1.

[34] Sifre on Deut. 285 (xxv. 3).

he says: "But those who are of milder disposition scourge them with rods publicly in the sight of all men . . . scourging them is a punishment not inferior in terror to death." [35] When he speaks of "those who are braver and stricter in their character" he most likely has the Sadducees in mind, for they were severe in punishing offenders.

It should also be noticed that although the Bible itself refers to stripes as a punishment, this is true only in connection with crimes against civil rights, as in Deut. xxv. 1–3, not with violations of religious laws such as perjury. The infliction of stripes as a penalty for violating any negative commandment is found only in Tannaitic literature; Philo also refers to it here.

The question, however, is why Philo and the Rabbis considered perjury a capital offense, when no such law about it is found in the Pentateuch. Furthermore, why does Philo say that if a person commits perjury he remains "unpurified forever"? [36] This makes perjury a more serious offense than violating any of the other commandments, because other offenses may be pardoned.

In order to understand why Philo is so severe in punishing a perjured man we must first learn what he considered the aim and purpose of taking an oath in general. In several passages he defines an oath as an appeal to God as witness in doubtful matters. Therefore, if a person commits perjury, according to Philo, he thereby also denies that God is a witness to human affairs and thus becomes an atheist; thus, a perjured man commits two grave sins at once. The same view is brought out in Midrash Tanḥuma. The Midrash says: "The one who violates an oath denies the existence of God and remains unpardoned forever," [37] which is parallel to Philo's statement that a perjured man remains unpardoned forever, and his implied view that by perjury a person becomes *ipso facto* an atheist.

A similar case to that of perjury is mentioned in Deut. xxi. 22, which deals, according to Tannaitic sources, with a

[35] *Spec. Leg.*, II, 28.
[36] *Ibid.*
[37] Tanḥuma ed. Buber. Maṭot 5.

man who curses the name of God, an offense for which the Bible prescribes the penalty of death. The reason for hanging a man who curses the name of God, as explained in Tannaitic Halakah, is his denial of the existence of God. R. Joshua says: "Just as hanging is prescribed as a posthumous penalty for one who was cursing God, because he denied the Root (כפר בעיקר), so in other cases is hanging prescribed for the one who denied the Root [i.e., God]." It is on the same ground that Philo considers a perjured man deserving of death, since, according to him, such a person denies the existence of God.[38]

In relation to Philo's statement that perjury is a capital offense there is another point to be considered. Philo takes the Hebrew term for cursing (קללה) to mean reviling. Thus, the biblical command, "He that curseth his father or mother shall surely be put to death," [39] is explained by him to mean: "He who uses abusive language to those to whom good words are owed as bounden duty, or in any other way does aught to dishonor his parents, let him die." [40] Since reviling one's parents is taken by Philo to be the same as cursing one's parents, perjury must of necessity be taken by him to mean the same as cursing God. It is for this reason, therefore, that Philo considers perjury a capital offense, a crime he includes under the law of cursing God given in Lev. xxiv. 14, where the penalty prescribed for it is death. Similarly, in Tannaitic literature, denying the existence of God is considered the greatest of offenses. R. Reuben explained to a philosopher in Tiberias that the most hated man was he who denied his Creator, and he illustrated it thus:

"Honour thy father and thy mother, thou shalt not kill, thou shalt not commit adultery, thou shalt not steal, thou shalt not bear false witness against thy neighbour, and thou shalt not covet," all these show that no man denies property without denying the Root, and no man proceeds to transgress the law unless he denies Him who commanded it.[41]

[38] Sifre on Deut. 221 (xxi. 22); Sanh. 45b; see also Büchler, *Studies in Sin and Atonement*, p. 105.

[39] Lev. xx. 9.

[40] *Spec. Leg.*, II, 248.

[41] Tosefta Sheb. 3, 8.

Philo brings out the same point by saying that a perjured man is an atheist who denies that God is a witness to human affairs, and "atheism is the beginning of all iniquities." [42]

It is for the same reason that Philo treats perjury and cursing parents together. He says, "But the lawgiver of our nation is not so foolish as, after putting to death men who are guilty of minor offenses, then to treat those who are guilty of heavier crimes with mildness, and the sacrilege involved in reviling or outraging parents is not so great as that committed by perjury against the sacred name of God." [43] This shows that, according to Philo, the punishment for dishonoring one's parents or God is death. The Pharisees, however, who were lenient in punishing offenders, imposed the punishment of death for cursing parents only if the curse were invoked in the name of God. No punishment was set for dishonoring parents. The Karaites, who represent more of a Sadducean tradition, disregard the Pharisaic view. Like Philo, the LXX, Matt. xv. 4, and Mark vii. 10 convert the biblical phrase, "he that curseth (מקלל) his father," into "he that speaks evil (*κακῶς εἴπῃ*) of his father." [44] It may be that all these represent an earlier tradition which considered speaking evil against parents, without cursing by the name of God, included under Lev. xx. 12.

Philo goes one step further in connection with punishment for perjury and says that a person who sees one violating an oath and does not inform against him or convict him, because he is influenced by friendship or respect or fear rather than by piety, is liable to the same punishment as the perjured man himself, for to range oneself on the side of the wrong-

[42] *Decal.*, 91. Philo is also of the opinion that uttering the name of God is a capital offense and punishable by death: *τολμήσειεν ἀκαίρως αὐτοῦ φθέγξασθαι τοὔνομα θάνατον ὑπομεινάτω τὴν δίκην* (*Vita M.*, II, 206). He seems to follow the LXX, which translates Lev. xxiv. 15 ונקב שם into *ὀνομάζων δὲ τὸ ὄνομα κυρίου θανάτῳ θανατούσθω*. The Targum also translates it the same way ודי פרש שמא דיי יתקטלא. According to rabbinic literature, no penalty is prescribed for uttering the name of God (Sanh. 56a). Heinemann accurately said (*Philons Bildung*, p. 20) that the statement in Pesiḳta de R. Kahana כל הפרש שמו של הקב"ה חייב מיתה has no legal significance.

[43] *Spec. Leg.*, II, 254.

[44] See Revel, "Karaite Halakah," *Jewish Quarterly Review* (1913), pp. 368–79.

doer is just the same as committing the wrong.[45] This explanation may be applied not only to perjury, but to one who sees his friend violating any other commandment. Philo, however, mentions the idea only in connection with perjury. This law has no basis in the Bible.

The same view, however, is expressed in Tannaitic Halakah. According to the Rabbis, if one sees a friend profaning the name of God and does not inform against him, he is committing the same iniquity as the offender. In the *Pirḳe de R. Eliezer*, in connection with R. Akiba, who states that a Ḥerem and an oath are the same, we read:

And everyone who violates an oath is as though he violated a Ḥerem. Everyone who knows the matter and does not declare it, the Ḥerem falls upon him and destroys his timber and his stones, as it is said, "and it shall enter into the house of him who swears falsely by my name and shall consume it with the timber thereof and the stones thereof" [Zech. v. 4]. Joshua took Achan, the son of Acri, and his sons and his daughters and all that he had, and brought them up into the Valley of Achar. And it is written, "The father shall not be put to death for the children, neither shall the children be put to death for the father" [Deut. xxiv. 16]. But because they were cognizant of the matter he stoned them and burned them. If there was burning, why was there stoning? But the stoning was because they knew of the matter and did not report, and burning because thirty-six righteous men died because of him.[46]

According to this Midrash, a person who does not inform against one who has violated an oath is to suffer the penalty of capital punishment and to be executed by stoning. The Midrash Tanḥuma also brings out virtually the same point in its interpretation of Lev. v. 1:

And if a person shall hear the voice of a curse [that is, cursing God] and shall be a witness to it, whether he hath seen or known, and shall not inform against this person, he shall share equally the iniquity of the man who profaned the name of God.[47]

Ritter, being unaware of this Midrashic interpretation, says that Philo's statement is based on a misunderstanding

[45] *Spec. Leg.*, II, 26. *διαφέρει γὰρ τοῦ ἀδικεῖν οὐδὲν τὸ συνεπιγράφεσθαι ἀδικοῦντι.*

[46] *Pirḳe de R. Eliezer*, chap. 38 (in Friedlander's translation, p. 276); Midrash Tanḥuma Yelamdanu Wayyesheb.

[47] Tanḥuma ed. Buber Wayyikra 5.

of Lev. v. 1.[48] Ritter also says that according to Mosaic law no one is obliged to inform against a man who violates a commandment,[49] but the quotation just given from the Midrash Tanḥuma shows he is mistaken. The parallel between the Tannaitic view and that held by Philo is obvious.

Though Philo thinks that a perjured man remains unpurified and unpardoned for the rest of his life and is liable to capital punishment if sentenced by stern judges, nevertheless he applies this law only to a man who does not confess his wickedness. When the perjured person, being convicted by his own conscience, becomes his own accuser, then he can no longer be punished by any penalty. On the one hand, Philo considers perjury as one of the greatest of crimes and as deserving the most severe punishment. On the other hand, he regards the free admission of perjury as a great moral act and achievement, by which a person deserves to gain his pardon.

In accordance with this principle, the law of Lev. v. 14–16, which reads:

> And the Lord spoke unto Moses, saying, if anyone sin and commit a trespass against the Lord, and deal falsely with his neighbour in a matter of deposit, or of pledge, or of robbery, or have oppressed his neighbour, or have found that which was lost, and deal falsely therein and swear to lie, then it shall be, if he hath sinned and is guilty, that he shall restore it in full, and he shall add the fifth part more thereto

is explained by Philo as follows:

> And after having put forth these and similar enactments with reference to sins committed unintentionally, he proceeds to lay down rules respecting intentional offenses. If anyone, says the law, shall speak falsely concerning a partnership or about a deposit, and being suspected and having an oath proposed to him shall swear, and, when he has escaped all convictions at the hands of his accusers, shall himself become his own accuser (*αὐτὸς ἑαυτοῦ κατήγορος*), being convicted by his own conscience residing within, and shall reproach himself for the things which he has denied, and for which he had sworn falsely, and shall come and openly confess the sin which he has committed, and implore pardon; then pardon shall be given to such a man, who shows

[48] *Philo und die Halacha*, pp. 47, 48; see also Heinemann, *Philons Bildung*, p. 94.

[49] *Ibid.*, n. 1.

the truth of his repentance not by promises but by work, by restoring the deposit which he has received, paying also an additional fifth of the value as an atonement for the evil which he has done. After this let him go to the temple, to implore remission of the sins which he has committed, taking with him an irreproachable mediator, namely that conviction of the soul which delivered him from his incurable calamity, curing him of the disease which would cause death. And it orders that he should sacrifice a ram, as in the case of a man who has offended in respect of the holy things; for the law speaks of an unintentional offense in the matter of holy things as of equal importance with an intentional sin in respect of men, if we may not indeed say that this is also holy, since an oath is added to it.[50]

In the Bible itself it is not said that the law deals with a voluntary confession, but this interpretation is found in the Mishnah: "If he confesses voluntarily, then he must return the deposit with an additional fifth and a trespass offering." [51] In later Tannaitic Halakah there is an argument, however, as to whether a person who deliberately swears falsely and confesses afterwards is to be punished by stripes.[52] As a rule, the atoning sacrifice was always brought in connection with a sin committed unwittingly, as in Lev. v. 15, "though he know it not," but when a person committed a sin wittingly he was always punished. Philo and most of the Tannaitic scholars are of the opinion that perjury was considered an exceptional case, for which a trespass offering was permitted to be brought even in case of a deliberate sin, provided the offender confessed his sin and made restitution with the additional fifth.

Another parallel to Philo's view that a perjured man who confessed his sin and made restitution was exempt from the penalty of death is found in the Fragment of a Zadokite Work: "And if he swears and transgresses he is guilty, and shall confess, and shall return, and shall not bear death." [53] This is, undoubtedly, a reference to Lev. v. 20. The view of the Zadokites that the confession of a perjured man saved him from death corresponds exactly to Philo's view.

Not only does Philo regard perjury as an exceptional case,

[50] *Spec. Leg.*, I, 234–37.
[51] B. K. 9, 6; see Ritter, *Philo und die Halacha*, p. 45, n. 3.
[52] Sheb. 37a; see Büchler, *Studies in Sin and Atonement*, p. 400, n. 3.
[53] Schechter, *Documents of Jewish Sectaries*, I, 5, line 1.

for which the bringing of a trespass offering instead of punishment is allowed even in case of deliberate sin, but he also holds that this offering must be brought for unintentional offenses against holy things, though not for an offense against men. He says in the same passage that an unintentional offense against God, such as perjury, is as serious a sin as an intentional sin against men, such as denying a deposit. Hence, only in event of denying a deposit intentionally does one need to bring a trespass offering. The same view is expressed in Tannaitic sources. The Mishnah says that if one denies a deposit unintentionally, he ought not to bring a trespass offering,[54] but if he utters the oath unwittingly, he has to bring a trespass offering. This is the law when one makes use of holy things unintentionally.[55]

Josephus also understands this particular passage of Lev. v. 20 to deal with a man against whom no witnesses testify to perjury, but who becomes his own accuser. "The sinner," says Josephus, "who is conscious of sin but has none to convict him of it (*μηδένα ἔχων τὸν ἐξελέγχοντα*) sacrifices a ram." [56] Josephus is not speaking directly of perjury. He means only self-accusation of guilt. He may have based his idea upon the Hebrew term, מעל, which is usually translated as "commit a trespass," but which means, etymologically, "to cover, to veil." This would have the meaning of hiding sin that nobody else knows about except the one committing it.[57]

[54] Sheb. 5, 1.

[55] *Ibid.*

[56] *Ant.*, 3, 9, 3.

[57] Besides this reference to confession in the case of perjury, Philo also defines the meaning of confession and repentance in another place. "If men feel shame throughout their whole soul, and change their ways, reproaching themselves for their errors, and openly avowing and confessing (*ἐξαγορεύσαντες δὲ καὶ ὁμολογήσαντες*) all the sins that they have committed against themselves with purified souls and minds" (*Exsecrat.*, 163). Philo does not consider repentance sufficient for forgiveness of sins. Repentance must be followed by an open confession, which seems to imply confessing one's sins in public. As to the question whether a silent confession before God was sufficient, we have no direct evidence in the Bible. In the Jer. Tal., we find the following statement: "Why have the authorities instituted that the prayer (of the eighteen Benedictions) should be recited silently? So that the sinners may not be reproached, as the law has for the same reason assigned the same place for slaughtering both the sin offering and burned offering" (Soṭ. 32b). As far as we can judge from rabbinic literature, public confession was not

In conclusion, it should always be remembered that Philo considers a perjured man defiled and impure (*μένειν ἀεὶ δυσκαθάρτους*).[58] These terms are not used by him in the sense of levitical impurity, for which certain ablutions and other acts of purification are prescribed. He uses them in the same moral sense as when the prophets speak of defiling the land by murder and idolatry.

2. Antisocial Oaths

Though we have seen that Philo considered the violation of an oath a great offense and even favored the penalty of death for perjury, nevertheless he enumerates various kinds of oaths taken for an antisocial purpose which are not binding and which a person may violate. As with other oaths, he strongly opposes these, but, once taken, he advises disregarding them and urges resort to prayers and sacrifices.

The most lawful vows [he writes] are those which are offered in acknowledgment of an abundance of blessings either present or expected; but if any vows are made for contrary objects, it is not holy to support them. For there are some men who swear to commit theft, or sacrilege, or adultery, or rape, or to inflict wounds or murder, or any similar act of wickedness, and who perform them without delay, making an excuse that they must keep their oaths, as if it were not better to do no iniquity than to perform such an oath as that. The national law and ordinances of every people are established for the sake of justice

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required of the sinner. Ginzberg refers, however, to a Midrash which says that the sinner used to confess his sin before the priest when he offered a sacrifice (*Eine unbekannte jüdische Sekte*, p. 59). Even if we assume that the Midrash conveys to us a historical fact I doubt whether public confession was in common usage among the Palestinian Jews. (See Büchler, *Studies in Sin and Atonement*, pp. 416 ff.) In later Jewish theology public confession is unknown in doctrine and practice. Besides the passage in Philo quoted above, we also read in the *Didache* 4, 11, "Confess thy sins in the congregation, and proceed not to thy prayer with bad conscience." It is highly probable that the Palestinian Jews, who confessed their sins at the time they offered the sacrifice of atonement, deemed a silent confession before God, in such a solemn place as the Temple, sufficient for remission of sins. The Hellenistic Jews, who were far removed from the Temple and could not offer sacrifices for remission of sins, required a public confession. The reference in the New Testament to the confession of sin before John the Baptist may merely be a reflection of the Essenes' doctrine that no one must keep secrets from another. In such a society public confession before the head of the sect might have been in common usage.

[58] *Spec. Leg.*, II, 27.

and of every virtue, and what else are laws and ordinances, but the sacred words of nature (*νόμοι δὲ καὶ θεσμοὶ τί ἕτερον ἢ φύσεως ἱεροὶ λόγοι*) which have an authority and power in themselves, so that they differ in no respect from oaths? [59]

According to Philo, then, if one takes an oath to violate a previous law, it is the same as if one had taken an oath to break a former oath. Philo, however, limits himself to ethical laws, not saying whether the same principle would be applied to religious laws. His interpretation that laws and ordinances of people are oaths in themselves would show that he makes no distinction between ethical and religious laws.

When we turn to the Mishnah, we learn that his view agrees with that of the Tannaitic Halakah. "A person," says the Mishnah, "cannot take an oath to violate any of the commandments," [60] and the same reason is given as in Philo, namely, that the laws in themselves are oaths. The Mishnah, however, deals only with religious law, for example, to take an oath not to sit in the Sukkah during the Feast of Tabernacles, or not to put on phylacteries, but it mentions nothing about ethical law, such as Philo refers to. It may be that the Mishnah did not consider it necessary to do so. The Boraita does refer to the case mentioned by Philo: "What is considered an oath of doing evil to somebody else, which a person is not allowed to fulfill? If a person takes an oath to inflict wounds on somebody or split his head." [61] Philo's view in this respect agrees entirely with the Tannaitic Halakah.

There is, however, one point in which Philo has his own tradition, agreeing neither with the Bible nor with the Halakah. He does not seem to make any distinction in the use of the two biblical terms, "vow" (נדר), and "oath" (שבועה). They are synonymous to him. Only one kind of vow seems to him different from oath, namely, "vows of consecration," which he describes as "the most lawful vows." [62] When he mentions the invalidity of an oath to violate the law, he uses the terms "oath" and "vow" as identical. According to the Mishnah, on the other hand, while a man cannot take an oath to violate any commandment, he can

[59] *Spec. Leg.*, II, 12–13.
[60] Ned. 2, 2.
[61] B. Ḳ. 91b.
[62] *Spec. Leg.*, II, 12.

make a vow to violate a ritual commandment. Thus, for instance, by means of a vow he can make the Sukkah forbidden upon himself during the Feast of Booths. The difference between these two terms is that an "oath" is understood in Tannaitic literature as a personal obligation (איסור גברא) which a person cannot make contrary to law, whereas the term "vow" is understood as a consecration of an object (איסור חפצא).[63] Philo, however, does not know of this distinction. From the point of view of practical law there is no difference between Philo and the Halakah, for the distinction made in the Mishnah is applied only to ritual law, while the antisocial oaths and vows which Philo enumerates are not binding even according to the Tannaitic Halakah.

The distinction made in the Mishnah between vows and oaths is also reflected in the words of Josephus. Endeavoring to show that Jewish customs and laws were well known among the Gentiles, Josephus says:

> This is apparent from a passage in the work of Theophrastus on Laws, where he says that the laws of the Tyrians prohibit the swearing by foreign oaths, in enumerating which he includes among others the oath called "Corban" (*καὶ τὸν καλούμενον ὅρκον κορβάν*). Now, this oath will be found in no other nation except the Jews.[64]

Some students of Josephus understand the phrase, "the oath called Corban," to mean a vow to bring a sacrifice. This would imply that Josephus was not acquainted with Greek law; otherwise, he would not say that "this oath will be found in no other nation except the Jews." We know that the Greeks also used to make oaths to bring sacrifices to the Temple, and there is nothing typically Jewish about it.

It is quite clear, however, that Josephus has been entirely misunderstood and that this passage shows rather his knowledge of Tannaitic Halakah than his ignorance of Greek law. According to Mishnaic law, if a person takes any of his possessions and says, "Let it be upon me a Corban," he is not allowed to make use of this particular object, as one is not permitted to make use of anything which he offers as a sacrifice to the Temple.[65] In other words, a person not only can bind

[63] Ned. 1b. [64] *Cont. Ap.*, I, 167. [65] Ned. 1, 4.

himself to refrain from using something, but can also deny himself something as if it were a consecrated object. According to Tannaitic literature, if a person makes such a vow and violates it later, he ought to bring a trespass offering, as a person has to bring a trespass offering for making use of things consecrated to the Temple.[66] In Mishnaic literature the term "consecration" is always associated with the term "vow." Speaking to Gentiles who did not know the difference between vows and oaths, Josephus merely says, ". . . This oath will be found in no other nation except the Jews." The Greeks knew of oaths to bind a person to do or not to do something, and they also knew of oaths to bring a "Corban" to the Temple, but the idea that a person can make any object of his possession a Corban and forbidden to himself is entirely Jewish.[67] That a vow of Corban did not mean in ancient Israel a sacrifice to the Temple, but a vow of self-denial, is also reflected in the words of Jesus.[68]

Philo speaks of two kinds of antisocial oaths: one active, which we have discussed before; the other passive, which is of a less serious character, such as refraining from bestowing benefits upon somebody by prohibitive oath. Philo, for example, says that some persons who wish to give force to the savagery of their natural dispositions often swear that they will not give any assistance to such a man or receive anything from him as long as he lives. Or they swear they would not admit this man or that to sit at the same table with them or to come under the same roof with them. He therefore recommends them to seek to propitiate the mercy of God by prayers and sacrifices, so that they may find some cure for the disease of their souls which no man is competent to heal.[69]

Philo regards such passive oaths as not binding, for they could not be taken with reason and deliberate purpose, but only in anger and hatred. In another passage he brings out this point even more clearly by saying that a person must ratify his lawful oaths, "especially if neither wild anger (ὀργαὶ

[66] Ned. 35a.
[67] See also Isaac Halevy, *Dorot ha-Rishonim*, I3 (1923), pp. 314 ff.
[68] Mark, VII. 11.
[69] *Spec. Leg.*, II, 16.

ἀτίθασοι) nor frenzied love (λελυττηκότες ἔρωτες), nor unrestrained appetites agitate his mind (διάνοιαν ἐκμήνωσιν) so that he does not know what is said or done" (ὡς ἀγνοῆσαι τὰ λεγόμενα καὶ πραττόμενα).[70] If the oath has been taken legally and with sober reason, however, then it must be fulfilled.

Turning to the Palestinian attitude toward antisocial oaths, we find that though the Mishnah itself does not deny the validity of such oaths, R. Meir says:

> We give him an opening to regret such oaths by saying, "If you had known that by such an oath you violated the commandments not to seek revenge, and not to be mindful of the injury done to you by your neighbor, and to love your neighbor as you love yourself, would you have taken such an oath?" [71]

According to R. Meir, if the judge really sees that the man regrets having taken such an oath, it is no longer binding.

A parallel to Philo's view, that an angry person may violate an oath he took not to let somebody into his house, is found in the Tosefta:

> The generation of the wilderness have no share in the future world, for God has sworn in his anger not to let them in into his place. R. Eliezer says, since God has sworn in his anger not to let them in there, the oath is not binding.[72]

It is quite evident from this Tosefta that if a person should take an oath in anger not to let anyone enter his house, he would not be bound to fulfill his oath. The position of the Tosefta is exactly the same as Philo's.

Philo's view that a real oath, which a person ought to fulfill, is one taken, not when love, anger, or appetite agitates the mind, but by sober reason and with deliberate purpose, is the law of the earlier Tannaitic Halakah that later caused much discussion in both Tannaitic and Amoraic literature. "There are four sorts of vows," says the Mishnah, "which the scholars declared as not binding; vows uttered while bargaining, vows made dependent on a mere exaggeration, vows made by error, and compulsory vows," [73] that is,

[70] *Spec. Leg.*, II, 9.
[71] Ned. 9, 3.
[72] Tosefta Sanh. 13, 10.
[73] Ned. 3, 1.

made only by people who were agitated and not under cool reason. The person taking the vow, both these authorities insist, must be completely aware of what he is doing and why.

After describing the wickedness of men who take antisocial oaths, Philo severely criticizes those who keep their oaths even after the death of their enemies: "And sometimes [he says], even after the death of their enemies, they keep up their irreconcilable enmity, not allowing their friends to give the customary honors even to their dead bodies." [74] This view may be understood better when we realize that according to the Tannaitic Halakah, if a person makes a vow not to assist his friend, and his friend dies, he may buy for him all the things necessary for the customary funeral honors given.[75]

Though the cited passages in Tannaitic literature bear out Philo's denial that passive antisocial oaths and oaths taken in anger are binding, it is a fact that the whole tractate of Nedarim deals with such vows in an opposite way. We must, therefore, investigate non-rabbinic as well as rabbinic sources dealing with this same problem.

In Mark VII. 9–13 we read [76] Jesus' words to the Pharisees:

> And he said unto them, Full well do ye reject the commandment of God, that ye may keep your tradition. For Moses said, Honor thy father and thy mother; and he that speaketh evil of father or mother, let him die the death; but ye say, If a man shall say to his father or his mother, that wherewith thou mightest have been profited by me is Corban, that is to say, given to God, ye no longer suffer him to do aught for his father or mother; making void the word of God by your tradition, which ye have delivered; and many such like ye do.

Jesus' fundamental criticism of the Pharisees is that by means of their legal traditions they nullify the law. As to the question of how the Pharisees make void the word of God, we may suppose that it was done either by permitting one to take a vow which involved the violation of the law, or

[74] *Spec. Leg.*, II, 16.

[75] Tosefta Ned. 9, 7.

[76] A part of this discussion was published in the *Journal of Biblical Literature* (1936), pp. 227–38.

by saying that any vow whatsoever, once taken, must be fulfilled,[77] thus allowing a man to evade the law by considering a vow binding even if it necessitates the violation of the law. The phrase οὐκέτι ἀφίετε αὐτόν in Mark and the similar phrase οὐ μὴ τιμήσει in Matthew suggest that the Pharisees insisted upon the fulfillment of the vow, and Jesus demanded that the vow be broken. It must be admitted, however, that we cannot draw definite conclusions from the New Testament passages as to what exactly Jesus' criticism was. From Mishnaic literature we learn that the Pharisees not only disapproved of such vows, but also gave those who made them an opportunity to retract. Chwolsohn [78] and Wünsche [79] believe that the Pharisaic view expressed in the Mishnah is a direct contradiction of the view attributed to the Pharisees by Jesus. Klausner takes the same position but tries to solve the difficulty as follows:

> There are three possible explanations of the difference: the rule in the time of Jesus may have been otherwise, or Jesus may have been bringing an unjustifiable charge against the Pharisees, or else the authors of the Gospels had heard something about the rules concerning vows among the contemporary Tannaim, and confused permission with prohibition.[80]

The implication of Klausner's explanation is that the Mishnaic and New Testament records cannot be reconciled.

Büchler, who is of the opinion that Jesus criticized the priests and not the Pharisees, says that the term Corban used in Mark does not mean prohibiting one's profit as Corban, but giving away to the Temple the money with which one supports his parents. He says that the priests approved and possibly encouraged such vows for their own benefit, and Jesus strongly criticized them for "making void the word of God." [81] But the term Corban in Tannaitic literature is usually employed to signify either some property prohibited

[77] See H. Strack and P. Billerbeck, *Kommentar zum N.T. aus Talmud und Midrash* (1922), I, on Matt. xv. 5.

[78] D. Chwolson, *Das letzte Passamahl Christi* (1908), p. 95.

[79] Wünsche, *Neue Beiträge*, p. 13.

[80] J. Klausner, *Jesus of Nazareth* (1925), p. 306.

[81] A. Büchler, *Die Priester und der Cultus im letzten Jahrzehnt des jerusalemischen Tempels* (1895), p. 93.

one or some animal offered upon the altar. For donating something to the Temple the term קדש is usually used. In all probability, therefore, Jesus is referring to a person's taking a vow that his parents shall derive no benefit from him. Furthermore, Büchler's interpretation would imply that the word φαρισαῖοι is not used here in its literal meaning, or that it does not belong in the text, either of which would require *evidence* to make it plausible.

Kaufmann says that the word φαρισαῖοι should be taken literally in this passage, and that Jesus criticized the Pharisees for their opinion that a person might make a vow to violate any commandment, though he could not take an oath for such a purpose. In other words, Jesus criticized the Pharisees for the technical distinction they made between vows and oaths.[82] This interpretation can hardly be accepted. To be sure, it is still doubtful whether Jesus means vows or oaths. The Greek in both Gospels reads ὃ ἐάν, "whatever." The Peshitto in both places and the Sinaitic Syriac in Mark render this by (דְ). The (אן) of the Sinaitic Syriac in Matthew suggests that the Greek manuscript which the translator used read ἐάν without the ὅ. This may go back to an original Aramaic אן. According to this reading, Jesus' words were "Corban if thou shalt profit by me," using the term Corban as an oath equivalent to the words, "I swear by the gift which is upon the altar that thou shalt not be profited by me." In the Bible the formula of an oath is also followed by אם, which corresponds to the Greek ἐάν and the Syriac אן (Gen. XXI. 23; I Sam. XX. 3; II Sam. III. 9; I Kings I. 51). If the words of Jesus were really as rendered by the Syriac, they referred not to vows, but to oaths, and Jesus' charges against the Pharisees would be again unjustifiable, since the Pharisees admitted that oaths cannot be taken to violate a commandment. Kaufmann's statement, therefore, has no solid foundation.

J. Mann says: "It is nowhere mentioned in the Bible that a man can prohibit another person by means of a vow from deriving any benefit from anything which belongs to the

[82] E. Kaufmann, *Golah We-Naker* (1929), pp. 351–52. See S. Zeitlin, "The Pharisees and the Gospels," *Essays and Studies in Memory of Linda R. Miller* (1938), pp. 267 ff.

former," [83] and therefore Jesus protested against the Pharisees who considered such vows binding. The story of the tribes of Israel who took an oath prohibiting the marriage of their daughters to the Benjamites shows, however, that in biblical times a vow depriving another person of a certain benefit was considered valid, and that the violation of such an oath was forbidden. There is no reason to believe that such oaths and vows were not considered valid during the biblical period in Palestine.

In order to understand Jesus' words we must first see the difference between the earlier and later Halakah with regard to vows and oaths. By "earlier Halakah" I do not refer to biblical customs, but to post-biblical law in the pre-Pharisaic period. In the Mishnah we read the following statement: "The rules concerning dissolving of vows fly about in the air and there is nothing upon which they can stand." [84] From this Mishnah we also learn that according to Pharisaic teaching, vows may be dissolved under certain circumstances, but, as explicitly stated in many other Mishnahs, only a judge can dissolve them. Even he can do so only by suggesting reasons which, if known at the time, would have deterred the person from making the vow. The sole right of the judge in this matter is not, however, mentioned in the Bible. The Fragment of a Zadokite Work, which contains more or less Sadducean ideas, says definitely that if a man takes an oath, he must keep it even at the price of death,[85] an indication that this sect did not acknowledge any method of retraction.

What the attitude of the earlier Halakah was towards dissolving vows is not evident in rabbinic literature. We may consider, however, Josephus' and Philo's view. In connection with the oath which the Israelites made not to give their daughters in marriage, Josephus says:

> And whereas they had before the war taken an oath that no one should give his daughter as a wife to a Benjamite, some advised them to have

[83] "Oaths and Vows in the Synoptic Gospels," *American Journal of Theology*, XXI (1917), 260–74; see also J. H. Hart, "Corban," *Jewish Quarterly Review*, XIX (1906–07), 615–59.

[84] Mishnah Ḥag. 1, 8.

[85] Schechter, *Documents of Jewish Sectaries*, I, 15, line 5.

no regard for what they had done, because the oaths were not taken advisedly and judiciously, but in passion, and thought they would not offend God if they were able to save a whole tribe from perishing, and perjury was not dreadful and injurious when it was done out of necessity but only when it was done of wicked intention.[86]

This remark of Josephus, that there was a disagreement in the γερουσία as to whether the violation of an oath taken in passion for an antisocial purpose would be an offense to God and therefore perjury has no biblical counterpart. He undoubtedly has in mind conflict in the Sanhedrin of his time about a person's right to violate such an oath, though he does not specify the source. All his statement tells us is that in Palestine itself not all scholars were of the same opinion with regard to antisocial oaths.

According to Philo, as has already been made clear, a person must fulfill an oath he takes under any circumstances or suffer death for violation. An exception to this rule is made, however, in the case of an antisocial oath, which is not binding. A person may violate such an oath but must ask God for forgiveness.[87] If Philo "and the some who advised them" (to which Josephus refers) represent an earlier Palestinian Halakah, then the Pharisaic reform was stricter in some cases and milder in other cases than the earlier Halakah. Antisocial oaths or vows in the earlier Halakah were not considered binding, whereas the Pharisees said that even such oaths could not be automatically dissolved. According to the Pharisaic view, if a person vowed that his friend should not profit by him, he would have to fulfill the vow, unless he came to the judge and proved that if he had known the result of it, he would never have made it. Here the Pharisaic law is the stricter of the two. But with regard to general vows the Pharisaic Halakah is milder than the earlier law. According to the earlier Halakah, vows which are not antisocial cannot be dissolved at all, whereas the Pharisees give the judge

[86] *Ant.*, 5, 2, 12: οἱ μὲν ὀλιγωρεῖν συνεβούλευον τῶν ὀμωμοσμένων ὡς ὑπ' ὀργῆς ὀμόσαντες οὐ γνώμῃ καὶ κρίσει, τῷ δὲ θεῷ μηδὲν ἐναντίον ποιήσειν. . . . τάς τε ἐπιορκίας οὐχ ὅταν ὑπὸ ἀνάγκης γένωνται χαλεπὰς εἶναι καὶ ἐπισφαλεῖς ἀλλ' ὅταν ἐν κακουργίᾳ τολμηθῶσι, τῆς δὲ γερουσίας πρὸς τὸ τῆς ἐπιορκίας ὄνομα σχετλιασάσης. . . .

[87] See *Spec. Leg.*, II, 7–14.

the right to dissolve them if good reasons are provided by the man who took the vow.

It seems to me, however, that though we have seen a great difference of opinion between Philo and the Pharisees with regard to vows and oaths, it is in the writing of Philo only that we can trace the origin of the Mishnaic law that vows, under certain circumstances, can be dissolved by a judge.

In the *Hypothetica* Philo again makes reference to the law that vows must be fulfilled, but he adds a bit of Jewish law which has no origin in Mishnaic literature: "Release from a promise or vow (καὶ ἔκλυσις δὲ ἐπιφημισθέντων) can only be in the most perfect way when the high priest discharges him from it (μεγίστη τοῦ ἱερέως ἀποφήσαντος); for he is the person to receive it in due subordination to God." [88] It may be that Philo has here preserved for us a pre-Mishnaic tradition, antedating the time when the Pharisees, who always endeavored to take away the judicial rights from the priesthood, introduced the innovation that a judge or court could dissolve vows instead of the high priest. The assumption that prior to the Pharisaic innovation the power to dissolve vows was vested in the High Priest may be supported also by the story of one of the earliest disagreements between the Pharisees and the priesthood, when Alexander Jannaeus was forced to abandon the Pharisaic party and side with the Sadducees.

In the Jerusalem Talmud the following incident is told of the conflict between Alexander Jannaeus, who was both King and High Priest, and Simon ben Sheṭaḥ, who was the leader of the Pharisees. Three hundred Nazarites came to Jerusalem to offer their sacrifices at the time when the vow of their term of Nazarite was about to expire. Unfortunately, however, they were poor and could not afford the expenses of buying the sacrifices required for fulfilling the final rites of a Nazarite. Through the influence of Simon ben Sheṭaḥ, Alexander Jannaeus paid for the sacrifices of a hundred and fifty men, while Simon ben Sheṭaḥ himself dissolved the vows of the other hundred and fifty, making it unnecessary for them to bring an offering. When Alexander Jannaeus

[88] Eusebius, *Praep. Evang.*, VIII, vii (in the Richter ed., VI, 180).

was informed of this action he became so enraged against Simon ben Shetaḥ that the latter had to flee in order to save himself from the King's anger.[89] The historicity of this story has never been doubted.[90] Leszynsky says, "In dieser Anekdote spiegelt sich ein Stuck dieser Kämpfe der Parteien lebendig wider." [91] Why was Alexander Jannaeus so angry? The Talmud says it was because Simon ben Shetaḥ had promised to pay a half of the expense, but instead of paying he dissolved the vow of the Nazarites. Modern scholars explain it on the grounds that the law of dissolving vows was a Pharisaic innovation which Alexander Jannaeus opposed.[92] It is highly improbable, however, that his opposition should have caused such a complete breach as to make Simon ben Shetaḥ fear for his life.

It seems to me that the story related in the Talmud has been misunderstood. The law of dissolving vows was not a Pharisaic innovation. It had already existed before the time of this sect and was vested, as we have seen, in the High Priest. As Alexander Jannaeus was both King and High Priest, the right to dissolve vows belonged to him. But we know that the Pharisees questioned the qualifications of some of the Maccabean rulers to serve as high priests. Consequently, when Simon ben Shetaḥ dissolved the vow of the Nazarites, Alexander Jannaeus regarded the act as an insinuation of his unfitness to be the head of the priesthood. It is no wonder, then, that the Midrash reveals Simon ben Shetaḥ's fear of death at the hands of the outraged priest,[93] and it may have been this incident that ultimately led the Pharisees to deprive the High Priest of the power to dissolve vows and to confer it upon the court and judges.

In summary, our discussion seems to result in the conclusions that (a) in Old Testament times, antisocial oaths and vows could not be dissolved under any circumstances (the tribes of Israel therefore considered indissoluble their oaths

[89] Jer. Tal. Nazir 45b; Bek. 11b.

[90] See Halevy, *Dorot ha-Rishonim*, I3, pp. 496–500.

[91] *Die Sadduzäer* (1912), p. 48.

[92] *Ibid.*, p. 49; J. Mann, "Oaths and Vows in the Synoptic Gospels," *American Journal of Theology*, XXI (1917), 272.

[93] Gen. Rabbah 91, 3.

not to give their daughters to the Benjamites); (b) in later times, as Philo and Josephus tell us, a certain group in Palestine considered such oaths not binding; (c) according to Philo, the High Priest could dissolve any kind of vow and oath; and finally (d), as a result of the controversy between Simon ben Shetaḥ and Alexander Jannaeus, the Pharisees said that all vows and oaths could be dissolved by a judge if good reasons were given but that antisocial oaths were otherwise binding.

As to the opinion of the Sadducees toward antisocial oaths, we have no direct evidence either from Tannaitic literature or from Josephus. If the Fragment of a Zadokite Work represents the principles of this sect, we may be assured that they protested against such vows and oaths but still considered them binding. The author of the Zadokite Work says that whoever prohibits his possession on somebody walks in the footsteps of the Gentiles, but he does not say that a person may violate such an oath.[94]

Jesus, like Philo and the group of the Senate which Josephus mentions, is in favor of the Halakah which maintains that antisocial oaths or vows are not binding at all and need not be dissolved. He therefore criticizes the Pharisees for their opposite view and charges them with making void the work of God by the tradition which they have delivered, because they have arrogated to themselves the authority over antisocial vows and prohibited the violation of them except with their permission.

There are some other passages in the New Testament with regard to vows and oaths that scholars have not been able to reconcile with Tannaitic literature, and the common solution to the problem is that Jesus brought unjust accusation against the Pharisees or that the writers of the Gospels misunderstood his words. In Matt. XXIII. 16–22, we read:

Woe unto you, ye blind guides, that say, Whosoever shall swear by the temple, it is nothing; but whosoever shall swear by the gold of the temple he is a debtor. Ye fools and blind: for which is greater, the gold, or the temple that hath sanctified the gold? He therefore that sweareth by the altar, sweareth by it, and by all things thereon. And

[94] See Ginzberg, *Eine unbekannte jüdische Sekte*, pp. 54–56.

he that sweareth by the temple, sweareth by it, and by him that dwelleth therein.

A direct contradiction of Jesus' charge against the Pharisees is found in the Mishnah, which says that if a person makes a vow with the declaration "like the temple, like the altar, like Jerusalem," the vow is valid and the thing becomes as holy as a sacrifice.[95] This Mishnah shows that the Pharisees agreed with Jesus that the Temple, altar, and Jerusalem may also be used as terms for vows. In order to understand this New Testament passage we must call attention to a certain principle of the Mishnaic Halakah. According to the Mishnah, a person may make a thing consecrated or prohibited only when he vows by something which has itself become sacred or prohibited through a vow, as, for example, "Let this object be like Corban," in which case the Corban is also a thing made prohibited or sacred by a vow. If he vowed by something which is forbidden or consecrated by law, such a vow is not binding.[96] According to this rule, then, a vow made in the name of the Temple, the altar, or Jerusalem ought not, strictly speaking, to be binding, since these things were not consecrated by a vow but were automatically sacred by the law. The reason that the Pharisees considered such vows binding, however, is that they interpreted the words of the person who uttered the vow to mean, not "by the altar," but "by the things offered upon it," just as Jesus said, "He that therefore sweareth by the altar sweareth by it, and by all things thereon."

The Pharisees interpreted the formula of the vow in the manner described because the Jews in Judah and Jerusalem associated the Temple, the altar, and Jerusalem itself with the sacrifices offered there. The Mishnah, therefore, often makes a distinction between the forms of vow in Judah and Galilee. The Galilean Jews, who very seldom brought their offerings to the Temple, did not associate the forms of vows with the offerings brought on the altar or to the Temple. Thus, if a Galilean says, "Let it be like terumah," the vow is not binding, because we do not assume that he means by

[95] Ned. 2, 6.
[96] Ned. 2, 1; 14a.

such a formula the *terumah* which one consecrates by word of mouth to the Temple.[97] It is on the same ground that Rab Judah, who often records laws as then applied to the Galileans, says that if one should say "Jerusalem" the vow is not binding, for we do not necessarily interpret his words to mean like the offering brought to be sacrificed in Jerusalem.[98] It seems to me beyond doubt that the Pharisees considered such expressions as "like the temple, like Jerusalem, and like an altar" as formulas of vows only in Judah, whereas in Galilee such expressions were not so considered. Hence the criticism of Jesus.

3. Oaths in the Place of Evidence

Before Philo discusses the nature of the oaths required of a man who denied having received a deposit, he first explains the gravity of the crime of denying something given in trust. Such a denial is a double perjury, first, in the withholding of a deposit entrusted to one's care; second, in the repudiation of the testimony of an unerring and infallible witness — God. Deposits, unlike loans, are always given privately, since neither person desires any other witness to the transaction than God, who witnesses all human affairs. Hence, by denying a deposit one denies that God is a witness to human action.[99] Students have pointed out the striking similarity between the view of Philo and that of R. Akiba, who understands the biblical statement to mean that if a man denies a deposit "he commits a trespass against the Lord." [100]

[97] Ned. 2, 4.

[98] Ned. 1, 4.

[99] *Spec. Leg.*, IV, 30.

[100] See Ritter, *Philo und die Halacha*, p. 62; Büchler, *Studies in Sin and Atonement*, pp. 108–09. The passage of R. Akiba in Sifra Wayyiḳra (v. 21) agrees verbatim with one in Philo. R. Akiba's statement runs as follows: "What is the inner meaning of the verse, commit a trespass against God? For the creditor or debtor, or a transactor of any business does so by a written contract and witnesses. Thus when one of the parties denies, he denies against the witnesses and contract. But he who deposits something with his friend does not wish that any living soul should know about it, but the Third party alone who is present between them (God) and when the depositor denies the deposit, he denies the Third party between them" (i.e., God who alone witnesses the act).

Philo then turns to the law of Exod. xxii. 6–7:

And if a man deliver unto his neighbour money or stuff to keep, and it be stolen out of the man's house, if the thief be found he shall pay double. If the thief be not found, then the master of the house shall come near unto God to see whether he have not put his hand unto his neighbour's goods.

He does not quote this biblical passage literally but adds a number of interpretations to it. He says:

And if they [the thieves] are not taken, then the man who received the deposit shall go of his own accord before the divine tribunal, and stretching out his hand to heaven shall swear by his own life that he had no desire to appropriate what had been deposited with him.[101]

The Bible does not say exactly that the man who took in trust a deposit of inanimate things must take an oath when he says that the deposit was stolen. The biblical phrase, "and the master of the house shall come near unto God," may have different meanings. It may mean that he should go to the sanctuary either to state his claims or to let the priest investigate the matter by an oracle. Philo, however, understands the term used here to refer not to God or to the sanctuary but to the judges. The Greek word δικαστήριον he uses apparently corresponds to the Hebrew phrase בית דין (court of justice). Josephus also understands the biblical phrase in the same way. "But if," says Josephus, "without any act of treachery, the depositary loses the deposit, let him come before the seven judges and swear by God." [102] Here the depositary takes the oath before seven judges, the number which, according to Josephus, constitutes a court. This is also the accepted interpretation in Tannaitic literature. The Mekilta explains Exod. xxii. 6–7 in the same way. Though the term God is used in the Bible, the Rabbis in many places did not take it literally, including judges under it as well. The Targums translate "to God" by "before the judges" (לקדם דינא). In the same manner the Mekilta interprets verse 27, "thou shalt not curse God," by "thou shalt not curse the judges." [103]

[101] *Spec. Leg.*, IV, 34.
[102] *Ant.*, 4, 8, 38.
[103] Mekilta Mishpatim 15 (Weiss ed.).

Philo emphasizes the fact that the depositary cannot be forced to take the oath but must come by his own desire to the divine tribunal (προσίτω γνώμῃ ἑκουσίῳ) to take it. Similarly, according to Tannaitic Halakah, the depositary cannot be forced to swear, but if he does not want to take an oath he has to repay the deposit to its owner.[104] Philo must have had in mind the same thing, for otherwise it is difficult to understand the expression, "by his own desire."

The oath required of a man who denies a deposit seems to Philo of a form different from that taken by a man to support a personal undertaking. According to Philo, a depositary has to stretch out his hands to heaven and swear by his own life, literally by the destruction of his life (ἐξωλείας). Philo does not say that the oath must be by the name of God or any equivalent thereof; it consists only of taking a certain curse upon oneself. Josephus, on the other hand, says definitely that the oath has to be by the name of God.[105] It should be observed, however, that according neither to the Bible nor to the Midrash is stretching out the hand to heaven a form of oath requiring the name of God or a substitute. In Gen. XIV. 23 we read: "And Abram said unto the King of Sodom, I have lifted up my hand unto the Lord that I will not take a thread or a shoe latchet from you." The Bible does not indicate that any act other than stretching out the hand to heaven was necessary to give the oath validity. The Midrash also says that lifting up the hand to God is a form of oath.[106] Since Philo himself is opposed to swearing by the name of God in general, he substitutes this gesture for an oath. The Midrash also says that Abram took an oath by lifting up his hand to heaven, in order not to swear by the name of God. Evidently Philo adheres to the rabbinic view.[107]

[104] Tosefta Soṭ. 7, 4; Mekilta Mishpatim 16 (Weiss ed.). See also Weiss note on this passage.

[105] *Ant.*, 4, 8, 38.

[106] Tanḥuma ed. Buber Lek Leka.

[107] Although Midrashic references show that stretching out the hand to God is a form of oath, it may be still doubted whether the Tannaitic Halakah would so consider the gesture for a bailee. Such an oath as described by Philo was introduced in the Gaonic period. The Gaon R. Zadok abolished the proper oath, which was accompanied by the laying of hands on the scroll of the law, and as a substitute curses were pronounced against the

According to Philo, the depositary who says that the object given to him in trust had been lost or stolen must take an oath that he had no intention of appropriating it (*μήτε τι μέρος τῆς παρακαταθήκης νοσφίσασθαι*).[108] Josephus says that the depositary must swear that he made no use even of the smallest portion of it. If, however, he made use of the least part thereof, and he happened to lose the remainder accidentally, he is sentenced to restore all that he received in trust. Josephus writes:

> But if, without any act of treachery, the depositary lose the deposit, let him come before the seven judges and swear by God (*ὀμνύτω τὸν θεόν*) that nothing had been lost through his own intention or malice, and that he had not made use of any part for himself (*οὐδὲ χρησαμένου τινὶ μέρει αὐτῆς*) and so let him depart exempt from blame. But, if he has used even the smallest portion of the object entrusted (*χρησάμενος δὲ κἂν ἐλαχίστῳ μέρει*) and happens to have lost the remainder (*ἂν ἀπολέσας τύχῃ τὰ λοιπά*) he shall be condemned to restore all that he received (*πάντα ἃ ἔλαβεν ἀποδοῦναι κατεγνώσθω*).[109]

The Bible states "that the depositary must swear whether he had not put his hand into his neighbour's goods," but in Mishnaic literature the meaning of this biblical phrase was interpreted differently by the schools of Shammai and Hillel. According to the school of Shammai, if the depositary only contemplated appropriating the deposit, even if it was lost or stolen later in a manner for which he could not be blamed, he had to restore all that he received in trust. According to the school of Hillel, one could not be judicially compelled to restore a deposit which had been lost or stolen merely because he had intended stealing it. This school therefore makes the following distinction: If the depositary has bent down the cask which was stored with him and has taken a quarter of a log of wine therefrom, and thereafter

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man suspected of giving false evidence. The reason for the abolition seems to be the people's improper understanding of the seriousness of perjury. (See J. Mann, "The Responsa of the Babylonian Geonim as a Source of Jewish History," *Jewish Quarterly Review*, 1920, X, 345–46.) Philo also complains in many passages that people are not aware of the seriousness of taking oaths. It may be that in Alexandria during his time curses were substituted for oaths, as was the case in the Gaonic period in Babylonia.

[108] *Spec. Leg.*, IV, 34–35.

[109] *Ant.*, 4, 8, 38.

the cask has been broken (accidentally), he must pay only for the quarter which he actually took, but if he picks up the cask and takes a quarter of a log of wine therefrom and thereafter it is broken (accidentally), he must pay for the entire value of the cask. In other words, the depositary is considered responsible for the whole only if he has made use of a part and performed an act by which he showed that his intention was to appropriate the whole, though for mere intention to steal a person cannot be made responsible.[110]

The disagreement between the schools of Shammai and Hillel is reflected also in the words of Philo and Josephus. Philo says that the depositary had to take an oath that he had no intention of appropriating the deposit before it was lost, which shows that Philo regarded the intention of appropriating a deposit as obligating the depositary to restore its value to its owner even if it was lost later. This also agrees with his general philosophy that the intention to commit a crime differs in no respect from its actual perpetration. In connection with murder he says: "If anyone aims a blow with a sword at anyone, with the intention of killing him, and does not kill him, he will be still guilty of murder, since he is a murderer in his intention, though the end did not keep pace with his wish." [111] Josephus, however, says that the intention of the depositary to appropriate the deposit makes him liable only when he has already made use of a small portion thereof and it has been lost later. When Josephus says that if the depositary made use of the smallest portion of the deposit he is compelled to restore all that he received, he probably limits the judgment to instances where the depositary intended to steal the entire deposit. This is the view held by the school of Hillel.

In this matter, therefore, Philo agrees with the followers of Shammai, whereas Josephus follows the school of Hillel.

Philo also makes reference to the fact that the depositary must take three oaths when he says that the deposit was stolen or lost: first, the oath discussed above, namely, that he had no desire of appropriating what was deposited with

[110] B. M. 3, 12.
[111] *Spec. Leg.*, III, 86.

him; second, that he did not give it up voluntarily to some other person (*μήτε ἑτέρῳ κοινοπραγῆσαι*); third, that he was not making a false statement of theft which had never taken place (*μήτε ὅλως συνεπιψεύσασθαι κλοπὴν οὐ γενομένην*.[112] Scholars have pointed out that Philo in this instance does not follow the literal text of the Bible, which stipulates only that the depositary must take an oath that he did not put his hand to his neighbor's goods. Nor does Josephus follow the Bible closely. According to him, the depositary must take two oaths: first, that the deposit had not been lost voluntarily or with wicked intention; second, that he had made no use of any part thereof.[113] Clearly, neither Philo nor Josephus bases his ideas upon the biblical text but has in mind the laws of deposits as recorded by the traditional law.

According to the Talmudic law, the deposit-holder must take three oaths: first, that he did not neglect to watch the trust; second, that he put no hand to the trust; third, that it was no longer in his possession.[114] From the Mekilta it seems quite clear that, in case the thief was not found, the owner of the deposit could make the depositary take oath that he had not voluntarily sold his deposit to somebody else.[115] The second oath mentioned by Josephus and the Talmud corresponds exactly to the first oath mentioned by Philo. The third oath of the Talmud corresponds to the third oath given by Philo, while the second oath of Philo corresponds to the oath mentioned in the Mekilta. In this particular law Ritter misunderstood Philo as well as the Halakah.[116]

There is another point in Philo which ought to be mentioned. According to him, a person who bears false witness commits many crimes: (1) he corrupts the most sacred possession among men, which is truth; (2) he shares thereby in the guilt of the guilty party; (3) by presenting false testimony he may cause the judges to render an unjust and illegal decision, since they must rely on the testimony of the witnesses; (4) he is guilty of a sacrilegious act (*ἀσέβεια*) because he makes

[112] *Spec. Leg.*, IV, 34, 35.
[113] *Ant.*, 4, 8, 38.
[114] B. Ḳ. 107b.
[115] Mekilta Mishpatim 15 (Weiss ed.).
[116] *Philo und die Halacha*, p. 66 and n. 1.

the judge violate his oath of office. It is not customary for a judge to make a decision without being under oath to give true judgment.[117]

In Philo's description of the serious offense of bearing false witness two specific laws are revealed. First, that no oath is required from the witness before he gives his testimony; and second, that the judge has to take an oath before he decides the case. Philo's view that the words of the witness are sufficient for his credibility is entirely in agreement with Tannaitic Halakah, for neither the Bible nor the Mishnah imposes on the witness any oath to confirm his testimony.[118] The mere prohibition against bearing false witness was considered by the Bible and the Tannaitic legislators as sufficient to induce people to state the truth. Furthermore, later rabbinic scholars believed that the witness who does not tell the truth without an oath may testify to falsehood even with an oath.[119] Philo himself also says in another place that the man who swears is *ipso facto* suspected of lacking credibility. His view, however, that the judge has to take an oath before he decides a case is entirely unknown in biblical and post-biblical literature. The Mishnah says only that before the High Priest enters the Temple on the Day of Atonement he has to swear that he will perform his duties according to the law,[120] but we have no evidence apart from Philo that an oath was ever required of a judge that he would decide the case according to the law.[121]

One other significant passage in Philo deals with oaths in

[117] *Decal.*, 138–41.

[118] See S. Mendelsohn, *The Criminal Jurisprudence of the Ancient Hebrews* (1891), pp. 79, 276. In Roman courts witnesses were sworn (see Roby, *Roman Private Law*, p. 408).

[119] Tosfat Ḳid. 43b.

[120] Yoma i, 5.

[121] I feel convinced that Goodenough is correct in saying that the fourth argument of Philo is spoken in Greco-Roman terms: "This argument would appeal to Romans, for while it was a custom common to both Greek and Roman law to swear judges, it is the Roman Cicero who tells of a custom of his ancestors that litigants bear the oath of the judge in mind and ask nothing which is not in accord with it" (*Jewish Courts in Egypt*, p. 178 and n. 71). If Jewish judges were sworn in Alexandria it is the only such case in Jewish history, and I doubt whether it was practiced. Philo speaks here only of the ἔθος, but not of Jewish law.

trials. In biblical law, as in ancient and modern law, oaths were given as a means of ascertaining the truth of a disputed matter. There is, however, one point about oaths which is peculiar to biblical law. The various oaths which are referred to in the Bible are all administered as a means of clearing the defendant of any accusation. Thus, oaths given to depositaries who say that they were unable to return the deposit through no fault of their own are for the purpose of clearing them of any responsibilities. The Bible never suggests that oaths were ever administered to the plaintiff as evidence that his accusation was not false. In such a case the biblical law required two witnesses. I think that we may take it as a historical fact that in biblical times oaths were used in order to free one from any obligation or accusation, but not to establish a claim.

It is interesting on this basis to see Philo's comment on the biblical command against lying and swearing falsely in God's name. After quoting Lev. XIX. 11–12, he says:

> These injunctions are given with great beauty and very instructively; for the thief being convicted by his own conscience denies and speaks falsely, fearing the punishment which would come upon his confession. And he who denies an accusation seeks to fix it upon another person, bringing a false accusation against him, and imagines devices to make his false accusation appear probable; and every false accuser is at once a perjured man, thinking but little of piety. For when just evidence (ἔλεγχοι) is lacking, men have recourse to what is called the inartificial mode of proof (ἄτεχνον πίστιν), that is, the proof of oaths, thinking that by the invocation of God he shall produce belief among those who hear him.[122]

It is immaterial whether or not his phraseology is based upon Aristotle's *Rhetoric*,[123] but it is most significant that Philo makes reference to oaths which the accuser takes as a means of proving that his accusation was not false. Thus, in a case where evidence was lacking the plaintiff could substantiate his claim by an oath. This is a bit of jurisprudence which has no origin in the Bible, nor were such oaths in existence in biblical times. According to the Bible only witnesses could substantiate the claim of the accuser. There is no doubt,

[122] *Spec. Leg.*, IV, 40.

[123] See Goodenough, *Jewish Courts in Egypt*, pp. 185 ff.

however, that the passage in Philo is not a mere "exegetical whimsicality," but is rather based upon the procedure of the Jewish courts in Egypt.

Fortunately enough, we have direct bearing on this problem in Tannaitic literature. The Mishnah states: "All they that take oaths which are enjoined in the law take them that they need not make restitution; but the following take an oath that they may recover their due; the hireling and he that has been robbed." [124] It seems that at an early period the Rabbis made an innovation, namely, that if one accused somebody of theft or if the employee charged his employer with not paying his wages, the accuser was permitted to prove his claim by an oath. I believe that the Alexandrian Jewish courts also administered oaths to the accuser under such circumstances. If my interpretation be correct, then the whole passage in Philo shows a continuity in thought. First, dealing with the biblical function of oaths, it speaks of a thief who tries to clear himself of an accusation by an oath, and then, dealing with the rabbinical innovation as to the function of oaths, it speaks of one who tries to establish an accusation by an oath. In this, then, we see that Philo was acquainted with a post-biblical legal innovation, as is recorded in the Mishnah. It is highly probable, however, that both Philo and the Rabbis may have taken over this form of oaths from the Romans.

[124] Sheb. 7, 1.

CHAPTER VII

THE JUDICIARY

PHILO wrote two treatises on the functions of a judge and on laws of evidence and court procedure in general. A part of these he devoted to philosophical speculations about the function and nature of a judge, and the other part to the rules and legal regulations to which a judge must adhere. The important aspect for the present discussion is his legal doctrines. An analysis of his treatment of judges and the creation of magistrates may throw much light on the nature of the Jewish courts in Palestine and Alexandria, a subject upon which we have much information, but our sources are so conflicting that we are still in the dark about the authority, function, and procedure of the ancient Jewish courts.

To quote Philo:

> In the first place the law bids the judge "not to admit idle hearing." And what does that mean? My good man, it is saying, keep your ears clean; and they will be clean if they are constantly being washed by a stream of excellent words, and if they never admit long speeches, idle, and worthy of rejection. . . . And a second conclusion harmonious with the first is also clearly to be deduced from the command not to admit idle hearing: it means he who heeds hearsay evidence is paying heed idly and unintelligently. . . . Wherefore some of the Greek lawgivers who copied from the most holy tablets of Moses seem to have made an excellent regulation in forbidding hearsay witness, for it is right to accept as reliable what some one has seen, but what some one has heard is by no means certain.[1]

Philo is referring here to Exod. XXIII. 1, "Thou shalt not utter a false report," translated by the LXX, "Thou shalt not receive idle words." Hence he takes the command of *οὐ παραδέξῃ ἀκοὴν ματαίαν* to mean that the judge may not listen to the idle speeches of the plaintiff in court.[2] A similar interpretation is found in the Tannaitic literature. The Rabbis understood

[1] *Spec. Leg.*, IV, 59–61.

[2] See also the similar translation of the Targum Onkelos. לא תקבל שמע דשקר.

the passage as an injunction for a judge not to listen to the complaints of one contestant before the other appears in court. In rabbinic terminology this prohibition is called לשון הרע, that is, listening to an evil report, for every accuser or accused is bound to speak evil against the other person. The judge is allowed to listen to the arguments only when both litigants are present.[3] Following the LXX, however, which translates שוא by *ἀκοὴν ματαίαν*, Philo understands it as a command that a judge must not be guided in his decision by the idle speeches and arguments of the parties who come to court.

The second conclusion drawn by Philo is in agreement not only with the Greek law to which he himself refers, but also with the basic principles of the Jewish law of evidence. The Mishnah states that in capital cases the witness was admonished as follows: "Perhaps you testify what is but a supposition or hearsay or what another witness said."[4] The same procedure was applied even in civil cases.[5] Although Philo says that Greek lawgivers have also forbidden hearsay evidence, nonetheless Jewish law was much stricter than Greek and Roman law. The Greeks and Romans only discouraged hearsay evidence, while Jews refused to consider such evidence. At Athens hearsay evidence was accepted by the court in case the person from whom the rumor had come died and so could not himself appear as a witness.[6] In the Roman treatise on pleading, where the duty of a witness is expounded, we find him instructed to set forth what he knows and what *he has heard*.[7] We have also an interesting episode of cross-examining a witness by Lucius Crassus. Silus testified against Crassus' client, Piso, by alleging "what he said that he heard about him." "It is possible, Silus, that the man from whom you heard this spoke under the influence of anger." Silus assented. "It is possible, too, that you did not understand him rightly." He nodded emphatically, and so

[3] Mekilta Mishpatim (23, 1); Sanh. 7b; Pes. 118a.

[4] Sanh. 4, 5.

[5] Sanh. 3, 6.

[6] See Lipsius, *Das attische Recht*, p. 886; Goodenough, *Jewish Courts in Egypt*, p. 194.

[7] Cicero, *Ad Herennium* IV. 35, 47.

gave himself away. "Possibly, likewise, you never heard at all." This unexpected question overwhelmed the witness to such an extent that he burst out into laughter.[8] This amusing incident shows that the Romans did not reject hearsay evidence but required cross-examination.

Philo continues to enumerate other laws which a judge must obey:

> The second precept for the judge is that he take no gifts: for "gifts," says the Law, "blind seeing eyes and pervert justice," and prevent the mind from traveling straight ahead on the smooth road. For to accept gifts to assist in an act of injustice is the conduct of a thoroughly depraved person, and to do so even for assisting justice is the sort of thing that people do who are half wicked.[9]

Ritter has pointed out that Philo's statement that a judge is forbidden to take a gift even for a just decision is in agreement with Jewish tradition.[10] The Rabbis laid down the norm that no fee may be taken even for pronouncing the just just and the guilty guilty. In case of acceptance the decision is considered invalid.[11]

The third injunction for the judge, in Philo's opinion, is that

> He investigate the facts rather than the litigants, and attempt by all means to keep his mind from forming impressions of the contestants. What knowledge he may have [of the contestants] as his relatives (οἰκείων), friends, fellow citizens, or as strangers, enemies, or as foreigners, this he must ignore and forget, that neither friendliness nor hatred may overcast his will to justice.[12]

The principle of this statement, namely, that the judge must pay attention not to the litigants but to the contestants of the case is in agreement with Jewish law, although it may be doubted whether the Rabbis ever permitted one to act as judge in case a contestant was a relative or intimate friend or enemy. The unanimous opinion of the Mishnah is that no kinsman of the suitor is eligible to act as judge.[13] The Talmud

[8] Cicero, *De Oratore*, II. 70, 285.
[9] *Spec. Leg.*, IV, 62.
[10] *Philo und die Halacha*, pp. 103–04.
[11] Sifre Deut. 144; Ket. 105a.
[12] *Spec. Leg.*, IV, 70.
[13] Sanh. 3, 1–4.

agrees with Philo that one may not judge if one of the suitors is his friend or his enemy since neither friendliness nor hatred may influence the decision of the judge.[14] The Mishnah even defines a friend or an enemy: "By friend is meant a groomman, and by an enemy is meant anyone who has not spoken with him for three days on account of enmity." [15] The assumption in the passage quoted from Philo that one may act as judge, even where the litigants are relatives, friends, or enemies, would thus seem at variance with these rabbinic passages. Ritter [16] thinks, however, that he has found a passage in Sifre that agrees with Philo. On Deut. XVI. 19, "Thou shalt not wrest judgment, thou shalt not respect persons," the Sifre comments: "Thou shalt not say this man is pleasant; that man is my relative." [17] But this does not mean that one may judge in a case involving a relative. It is rather a prohibition against anyone's trying to influence the decision of the judge by claiming kinship with him (איש פלוני קרובי).[18]

Philo also wrote a special treatise on the appointment of magistrates (*κατάστασις ἀρχόντων*). Since the Greek term *ἄρχων* may apply to a king, ruler, chief, or magistrate, we may regard Philo's work on *κατάστασις ἀρχόντων* as applying to all who hold a judicial or an administrative position. It is true that he quotes many biblical laws dealing with the appointment of a king, but, like the Rabbis, he regards the biblical law as applicable in many instances not only to that office, but also to the office of a judge or any other political ruler. Philo begins his treatise with a criticism against the system of establishing magistrates among non-Jews and continues with a lengthy discussion of the administrative and judicial system of the Jews. It is, therefore, essential to have a preliminary idea of the difference between the Jewish and Greek judicial systems in order to understand Philo's attitude toward the appointment of magistrates. In ancient Greece the power of the courts was vested in the hands of the ordinary citizens of Athens. Every year six thousand people, six hun-

[14] Ket. 105b.
[15] Sanh. 3, 5.
[16] *Philo und die Halacha*, p. 104, n. 3.
[17] Sifre Deut. 144.
[18] See Weiss's note on this point.

dred of each phyle, were chosen by lot. They were divided into ten sections of five hundred each, so that a thousand remained as a reserve for filling vacancies. The sections, like the places of sitting, were called *dikasteria.* The court in which each had to sit for the day was again assigned by lot, so that the contestants could not know in advance who would be hearing their case. Instead of deciding cases or inflicting punishment by their own authority, the magistrates were now constrained to submit each particular case to the judgment of one of the popular *dikasteries.*[19] This democratic form of judiciary avoided the danger that the letter rather than the spirit of the law might prevail. The popular *dikasteries* also abolished the aristocratic oligarchy of the magistrates and the Council of the Areopagus, but, like other reforms, this system of court procedure also produced many vices. The courts were filled with uneducated old men of the lower classes who had no legal form whatever to serve as a standard of judgment. Many persons, unfit for any other work, but attracted by the payment, were eager to sit in the *dikasteries.*[20] In short, a whole judicial system dependent on the casting of lots, without any consideration of the education and legal knowledge of those who were to sit in court, could hardly have had the sympathy of the cultured class. Philo begins his treatise with a criticism of this method of selection of judges:

> Some people introduced the idea that magistracies appoint their officers by lot, a thing which is not profitable to the masses, for a lot shows good fortune but not virtue. Many unworthy people have often obtained office by such means, and a good man of supreme authority would reject them even to be reckoned among his subordinates. Even those people who are considered rulers of a smaller capacity, those who are called masters, do not admit everyone to be their servants, whether born in the house or bought with money, but they will only take those who are obedient. . . . Physicians do not obtain their employment by lot, but because their experience is approved.[21]

He sees no difference between a physician who heals the sick, a pilot who steers the vessel, and a judge or ruler who super-

[19] G. Grote, *History of Greece* (1851), V, 378 ff.
[20] See G. W. Botsford, *Hellenic History* (1922), pp. 251 ff.
[21] *Spec. Leg.*, IV, 151–54.

vises the private and sacred affairs of men. All of them must gain their position by experience and knowledge. Hence he finds great praise for Moses, "who makes no mention of any authority being assigned by lot" (κληρωτῆς μὲν ἀρχῆς οὐδὲ μέμνηται).[22]

This passage reveals Philo's knowledge of Greek and Jewish sources, for the selection of judges and officers by the lot is an unknown procedure in Jewish literature. Certain Jewish traditions, it is true, do suggest that the lot was sometimes used for appointing officers to the Sanhedrin. On Num. xi. 24, "and he gathered seventy men of the elders of the people," the Sifre comments that when Moses was about to appoint the Sanhedrin of seventy, he gathered six men of every tribe in Israel so that each should be equally represented, but since God commanded that the Sanhedrin be only of seventy elders, Moses made a *takkanah*. He took seventy-two tablets. On seventy he inscribed the name "elder," and two he left blank. He then put them all in an urn of drawing lots (κάλπη = קלפי) and told each elder to draw his tablet. To each who drew a tablet with the name "elder" Moses said, "God has sanctified you," and if one drew a blank Moses said to him, "It is from heaven."[23] Thus, according to Tannaitic tradition, the members of the first Sanhedrin were appointed by lot.

There is no doubt, however, that among the Jews the nomination of candidates for the Sanhedrin or any other high position was never done by the mere casting of a lot. Positive prerequisites were set up for any man who wished to become a member of the Jewish courts. Men were not eligible to become members of the Sanhedrin unless they had served as judges in their local communities and in the two magistracies in Jerusalem. There were many other requirements. They had to be ordained and famous for their scholarship. It is highly probable, however, that even among Jews the casting of lots was used when two men of equal distinction and qualification were candidates for the same position. Moses nominated seventy-two men as qualified for the Sanhedrin,

[22] *Spec. Leg.*, IV, 157.
[23] Sifre Num. 95; Sanh. 17a.

but since only seventy were required he used the lot as a means of determining who should be appointed. In another place Philo himself finds no fault with the appointment of judges by lot. He opposes it as the only means of determination.

Discussing Deut. XVII. 15, he writes:

. . . Moses says, "thou shalt not appoint a foreigner to be a ruler over thee, but one of thy own brethren," by which he implies that the appointment shall be a voluntary choice and an unimpeachable scrutiny of a ruler whom the whole multitude with one accord shall choose. . . . And Moses gives two reasons, on account of which it is not proper for a foreigner to be elected to authority: first, that he may not amass a quantity of silver, and gold, and flocks, and raise great and iniquitous riches for himself of the poverty of those who are subjected to him; second, that he may not . . . make the nation quit their country and so compel them to emigrate and wander about to and fro in interminable wandering. . . . For Moses was aware beforehand, as was natural, that one of the same race (*τὸν ὁμόφυλον*) and a relation (*συγγενῆ*) who shares in the most sublime relationship, — and that relationship is one citizenship (*πολιτεία μία*) and the same law (*νόμος ὁ αὐτός*) and one God (*εἷς θεός*), — would never offend in any manner similar to those which I mentioned. Instead of causing the inhabitants to quit their homes he would even afford a safe return to such as were dispersed in foreign lands.[24]

It is difficult to determine whether Philo is referring to a king or to any other person in high authority. He does not translate the Hebrew term מלך by *βασιλεύς*, but by the general term *ἄρχων*, which may also apply to a chief magistrate. In this point he follows the LXX.[25] It is possible, however, that

[24] *Spec. Leg.*, IV, 157–9. Professor Goodenough has written me on the following important point: "I think there is more here than you point out, namely the danger that Romans appoint *apostate* Jews, like Philo's nephew, who by his favor with the Romans, might well have begun with such a post in Alexandria, as he was later sent to Jerusalem."

[25] *Spec. Leg.*, IV, 158–59. In the Masoretic text of Deut. XVII. 15–16, the reading is as follows: "Thou mayest not put a foreigner over thee, who is not thy brother. Only he shall not multiply horses to himself, nor cause the people to return to Egypt." According to this reading the prohibition refers to the king appointed from among his brethren. According to Philo, however, verse 16 is merely an explanation of why a foreigner may not become a ruler in Israel (*ἵνα μὴ πλῆθος θρεμμάτων συναγάγῃ*). Dr. Heinemann is correct in saying that we have no rabbinic tradition to support Philo's interpretation and that he must have based his interpretation on the LXX, which translates רק, meaning "but," by the Greek term *διότι*, which has often the meaning of "for the reason that." Hence, according to the LXX and Philo, verse 16 is an explanation of verse 15 (see *Philons Bildung*, p. 190).

there is a Tannaitic tradition behind this translation. According to the Halakah, the prohibition against appointing a foreigner to the kingship applies also to any administrative or judicial position.[26] Any ἄρχων must be a Jew by race or born of parents who accepted the Jewish faith. This rabbinic principle is also in agreement with Philo's general philosophy:

> For what the king of a city is, that also is the first man in a village, and a master of a house, and a physician among the sick, and a general in his camp . . . any one who has the power to make things better or worse.[27]

He goes further in explaining the phrase קרב אחיך (ἐκ ἀδελφῶν σου). A man cannot be qualified for an administrative position unless he has the following virtues in common with the people he is to govern. First, he must be a ὁμόφυλος; [28] second, he must belong to the same state; third, he must practice the same law and believe in one God. In this passage the term *homophylon* does not mean a coreligionist, but one of the same race, for Philo includes under the term συγγενῆ religious affiliation. He did not consider the belief in monotheism the only element that makes one a member of the Jewish faith. In order to become a member of the Jewish faith one must also observe the same law. This would indicate a distinction between a coreligionist and a kinsman. An ἄρχων must be both a blood relative and an observer of the same religion so that he may protect the people of the

[26] Midrash Tannaim Deut. xvii. 14. אין לי אלא מלך מנין לרבות שוטרים וגבאי צדקה ומופרי דיינין ומכה ברצועה ת"ל מקרב אחיך תשים עליך מלך כל שתשימהו לא יהיה אלא מן הברורים שבאחים (see also Sifre Deut. 157; Yeb. 45a; Jer. Tal. Ḳid. 66a).

[27] *Spec. Leg.*, IV, 186.

[28] See S. Zeitlin, *The Jews: Race, Nation, or Religion?* (1936), pp. 21–28. On page 28 Professor Zeitlin refers to Philo's "using the words τὸν ὁμόφυλον καὶ συγγενῆ which mean the Jewish king must be one of the Jewish religion and related by blood, that is, of the same people and the same religion." He takes the term συγγενῆ here to mean related by blood and ὁμόφυλον a coreligionist. Although I agree with him that ὁμόφυλος is frequently used for a coreligionist, nonetheless in this passage Philo seems to employ συγγενῆ for a coreligionist and ὁμόφυλος for one related by blood. Philo himself explains what he means by συγγενῆ. He says that by it he means ἀνωτάτω συγγένειά ἐστι πολιτεία μία καὶ νόμος ὁ αὐτὸς καὶ εἷς θεός. He definitely states that by "relative" he means one who shares in the religion of the Jew.

land he is governing and help the Diaspora Jews return to their original homes. The whole passage seems to imply that Philo regards a proselyte of the first generation ineligible as a magistrate in Israel.

The same view is held in Tannaitic literature.[29] No proselyte had the legal right to hold a judicial or administrative office, unless his mother was born a Jewess, in which case the child is even racially considered a Jew.[30] The Mishnah says that as Agrippa read the law on the Feast of Tabernacles his eyes flowed with tears when he reached the verse, "Thou mayest not put a foreigner over thee who is not thy brother," while the sages consoled him by saying, "Our brother art thou." Other Rabbis, however, bitterly opposed the flattery of those who called Agrippa brother and legally fit to hold the office of a king.[31] Agrippa was only a descendant of the Idumaeans but according to tradition his mother was a Jewess, and he was qualified to be a ruler in Israel. Yet some Tannaitic scholars objected to the comforting words of the sages.

In Philo's opinion, according to biblical law, one of the chief duties of the man entrusted with the highest authority is to appoint judges. It is open to doubt whether by *μεγίστης ἀρχῆς ἀξιωθέντι* [32] Philo has in mind the king or anyone who happens to be the head of the state. The men who are appointed as judges must excel in prudence (*φρονήσει*), in ability (*δυνάμει*), in justice (*δικαιοσύνῃ*) and in piety (*θεοσεβείᾳ*).[33] Hence, according to him, judges are appointed to their offices by the king or by the head of the state. The question is, however, whether this view accords with Palestinian traditions.

According to Tannaitic traditions, the first Sanhedrin was appointed by Moses, who selected judges even before he was

[29] Midrash Tannaim Deut. XVII. 14. אין מעמידין מלך מקהל גרים אפילו אחר כמה דורות אין לי אלא מלך (see also Yeb. 45a).

[30] Soṭ. 7, 8; Sifre Deut. 157.

[31] Midrash Tannaim Deut. XVI. 14; Soṭ. 41b.

[32] *Spec. Leg.*, IV, 170.

[33] In Tannaitic sources similar virtues to those mentioned by Philo are required from a member of the Sanhedrin. The Tosefta Ḥag. 2, 9 enumerates the following qualities: (1) wisdom, (2) modesty, (3) piety, (4) well liked among his fellow men. The terms חכם וירא חטא correspond to Philo's *φρονήσει* and *θεοσεβείᾳ*.

commanded by God to do so.[34] The kings of the house of David both acted as judges[35] and appointed them. On the verse in II Chron. XVII. 1, "And Jehoshaphat his son reigned in his stead, and strengthened himself," the Rabbis comment that Jehoshaphat strengthened himself and appointed judges.[36] Since the days of Alexander Jannaeus the kings had lost all their rights over the judiciary,[37] and to this period belongs the statement in the Mishnah: "The king can neither judge nor be judged." [38] We have no rabbinic sources which may throw light on the problem of who appointed judges to the Sanhedrin during that period. A statement in Tannaitic literature says that only those who had filled the three offices, namely, of a local judge and a judge in the two magistracies in Jerusalem, could be qualified to become members of the Great Sanhedrin.[39] The Mishnah also states that before the Sanhedrin sat three rows of disciples, and if a new member was needed they appointed him from the first row.[40] These statements throw light on the necessary qualifications for membership but not on the appointing power. It is only natural to assume that the *nasi*, that is, the president of the Sanhedrin, exercised a great influence in the appointment of ordained judges to the higher and lower courts.

It is, therefore, highly improbable that during Philo's days the head of the state in Palestine exercised any such authority, unless by "worthy of the highest authority" Philo refers neither to the king nor to the political head of the state, but to the head of the Sanhedrin, whose opinion must have been of great weight. Historically, however, Philo is correct in saying that the duty of the king or of the head of the state is to appoint judges. We have seen that according to tradition both Moses and the kings of the house of David

[34] See Jer. Tal. Sanh. 19a.

[35] Midrash Tanḥuma on Deut. XVII. 14; Sanh. 14b. ושפטיך זה מלך.

[36] *Ibid.* שנתחזק ומינה את הדיינין. See also II Chron. XIX. 8: "Moreover in Jerusalem did Jehoshaphat set of the Levites and priests, and of the heads of the fathers' houses of Israel for the judgment of the Lord and for controversies."

[37] Sanh. 19a.

[38] Sanh. 2, 1.

[39] Tosefta Ḥag. 2, 9.

[40] Sanh. 4, 4.

were active in the judiciary and also in the appointment of judges. Philo illustrates his argument by the story of Moses and Jethro:

Since of the things which would come to his attention [of the ruler] some are greater things of greater importance and some others of less importance, he will commit those which are unimportant to his lieutenants, while he himself would by necessity become the most accurate examiner of the weightier matters. But the things which one is supposed to look upon as greater matters are not, as some persons think, those in which persons of great reputation disagree with other persons of great reputation, or rich men with rich men, or leaders with leaders (ἡγεμόνες πρὸς ἡγεμόνας); but, on the contrary, where there are powerful men on one side and private individuals, men of no wealth or dignity or reputation on the other side, men whose sole hope of escaping intolerable evils lies with the judge himself. And we can find clear instances of both kinds in the sacred law which are worthy of our imitation. At one time, Moses alone decided all cases of legal controversies, laboring from morning till night. But when his father-in-law came and saw with what weight of business Moses was overwhelmed, since all who had disputes were always coming to him, he gave Moses excellent advice, namely, to choose successors that they might judge the less important matters and that he might have only the more important matters to decide. . . . And Moses, being convinced by Jethro's arguments, chose men of the highest reputation and appointed them as his lieutenants and judges, but commanded them to refer the more important cases to him.[41]

This passage is of importance not only because Philo, like the Rabbis, deduces from Exod. XVIII. 25 that Moses appointed judges, but because he refers to those who interpreted the phrase in Exod. XVIII. 22, "every great matter they shall bring unto thee," as applying to questions concerning men of reputation or princes. Philo agrees neither with this interpretation nor with the principle that disputes between men of reputation must be decided by the chief magistrate. The view of "some people" is also held by various Tannaitic scholars, who took the phrase to mean that affairs of important men were brought to Moses, the chief magistrate (דברים של בני אדם גדולים).[42] To Philo, however, the main duty of the chief magistrate is to protect the poor against the rich.

[41] *Spec. Leg.*, IV, 171–74.
[42] Sanh. 15a; Mekilta Mishpatim (Exod. XVIII. 22).

Philo also shows his acquaintance with Tannaitic traditions in his description of the highest Jewish court in Palestine. First, he states that the ἄρχων or δικαστής must try to imitate God in giving just and righteous decisions, but if the matter before judgment is too complicated for the judge to give a decision, he must send the case to a higher court:

> Let no judge be ashamed to confess that he is ignorant of that of which he is ignorant. . . . When, therefore, the case looks to him obscure by reason of the perplexed and unintelligible nature of the circumstances which throw uncertainty and darkness around it, he ought to decline giving a decision and send the matter before judges who will understand it more accurately. And who can these judges be but the priests (ἱερεῖς), and the ruler and governor of the priests (ὁ τῶν ἱερέων ἔξαρχος καὶ ἡγεμών)?[43]

This passage of Philo is undoubtedly based on Deut. XVII. 8–9, which reads:

> If there arise a matter too hard for thee in judgment, between blood and blood, between plea and plea, and between stroke and stroke, even matters of controversy within thy gates; then shalt thou arise, and get thee up unto the place which the Lord thy God shall choose, and thou shalt come unto the priests the Levites, and unto the judge that shall be in those days; and thou shalt inquire, and they shall declare unto thee the sentence of judgment.

According to Tannaitic literature, the law of Deuteronomy applies to the Great Sanhedrin which sat in the Chamber of Hewn Stone, namely, that if the lower courts had no traditions upon which to decide matters "between blood and blood, between plea and plea" the cases went before the highest court.[44] This judicial system of lower and higher courts was also known to Philo, as we have seen from the passage quoted. He exaggerates, however, by saying that the whole court consisted of priests. The Mishnah says that the Sanhedrin consisted of priests, Levites, and Israelites that may give their daughters to priestly stock.[45] There is no doubt, however, that most of the members were of priestly families. It may also be that Philo follows the literal text of the Bible, which says, "and thou shalt come unto the priests

[43] *Spec. Leg.*, IV, 191.
[44] Sanh. 11, 2; Tosefta Ḥag. 2, 9.
[45] Sanh. 4, 2.

and Levites." The striking point in the whole passage of Philo is that he characterizes the Sanhedrin as consisting of a dual leadership: one of the ἔξαρχος, which corresponds to the Hebrew term נשיא; the other, the leader of the Sanhedrin, whom he calls ἡγεμών. As stated in another place, the phrase ὁ τῶν ἱερέων ἔξαρχος does not correspond to the technical term of ἀρχιερεύς,[46] which is used in Josephus and Philo for the High Priest.

A similar tradition is also found in Tannaitic sources. The Mishnah states that two persons were at the head of the Great Sanhedrin in Jerusalem. One was called the *nasi* and the other the *ab bet din*.[47] The former was the president of the court, and the latter seems to have served as the vice-president. The *nasi* and *ab bet din* are usually designated as the "pair" (זוגות). The Mishnah even gives the names of those "pairs" who were at the head of the highest court.[48] Some of them lived in the second century B.C.E. The same system of dual leadership continued in the rabbinic academies even after the destruction of the Temple. It is highly probable that when Philo says that the highest court was headed by an ἔξαρχος and ἡγεμών, Greek terms which correspond to the Hebrew terms of *nasi* and *ab bet din*, he accurately describes the dual form of leadership of the Great Sanhedrin in Jerusalem.

[46] Pp. 85–86. [47] Ḥag. 2, 2. [48] Pe'ah 2, 6.

CHAPTER VIII

THE CALENDAR

1. The Sabbath, Sabbatical Year, and Jubilee

Philo enumerates ten Jewish festivals. The first he calls the Festival of Every Day.[1] It is fruitless to look either in Jewish or Greek literature for its origin. He cannot mean that every day of the week is a festival in the technical sense of the term. He does wish to define in a general way what constitutes a festival according to the Jewish religion, and this may therefore be considered as an introduction to his subsequent description of the various Jewish festivals. This procedure seemed to him necessary to prepare the minds of his non-Jewish readers, who thought of a festival merely as a day of merry making, to understand how the Sabbath, a day of study and contemplation and the exercise of justice,[2] and the Day of Atonement, a day of fasting, could be called festivals. A man, he says, who lives a blameless life and follows nature and her ordinances is enjoying perfect tranquillity and the spirit of festivity. Hence, to the wise and virtuous person every day is a festival. Contrasting this Jewish conception of the joy of a festival with that of the pagans, he says:

> How can a man who is full of the most evil counsels, who lives with folly, have any genuine joy? A man who is in every respect unfortunate and miserable; in his tongue, and his belly, and all other members of his body. He uses the tongue for the utterance of things which ought to be secret and buried in silence; the belly he fills with abundance of strong wine and immoderate quantities of food; the rest of his members he uses for the indulgence of unlawful desires and illicit connections, not only seeking to violate the marriage bed of others, but lusting unnaturally, and seeking to deface the natural character of men and change it into a womanlike appearance.[3]

[1] *Spec. Leg.*, II, 41. Philo himself admits ἀκούσας θαυμάσαι τις ἂν ἴσως. Dr. Goodenough has suggested to me that Philo may have "manufactured" a tenth festival in order to make up the important number 10.

[2] *Spec. Leg.*, II, 62–64; *Fragmenta*, 630–31.

[3] *Spec. Leg.*, II, 50. Philo enumerates three elements by which vices are committed at pagan festivals: γλῶτταν, γαστέρα, γεννητικά.

From another passage in Philo we learn that such vices were usually committed at the pagan festivals.[4]

Philo treats the Sabbath as the second festival. There is one fundamental difference between Palestinian and Alexandrian Jews with reference to this day. The Palestinian Jews considered the Sabbath a special gift bestowed only upon them,[5] signifying the covenant between God and Israel. This view is echoed in the Book of Jubilees: "The Creator of all things blessed it but did not sanctify all peoples and nations to keep the Sabbath thereon, but Israel alone; them alone he permitted to eat and drink and to keep the Sabbath thereon on the earth." [6] The Sabbath is pictured in rabbinic literature as a bride to Israel, and hence, when a pagan observes the Sabbath, it is equivalent to adultery.[7] One of the Rabbis even went to the extreme of saying that a pagan who observes the Sabbath is guilty of death.[8] This of course should not be taken literally. It shows only that the Rabbis considered the Sabbath deeply rooted in Jewish life and Judaism. It is never included among the seven commandments that must be universally fulfilled.

The Alexandrian Jews had a different conception of the Sabbath. Treitel has accurately remarked that in Philo the day appears as a universal proclamation, and Philo himself takes pride in the fact that it is observed even among some of the heathen.[9] In *Vita Mosis*, when he endeavors to show the divine origin of Mosaic law, he says:

> There is something surely still more valuable — even this: not only Jews but almost every other people, particularly those which take more account of virtue, have so far grown in holiness as to value and honor our laws. . . . They attract and win the attention of all, of barbarians, of Greeks, . . . of Europe and Asia, of the whole inhabited world from end to end. For who has not shown his high respect for that sacred seventh day, by giving rest and relaxation from labor to himself and his

[4] *Cher.*, 89–92. The passage in *Spec. Leg.*, II, 41–54, is almost a repetition of that in *Cher.*, 87–98.

[5] Shab. 11b.

[6] Book of Jubilees II. 31.

[7] Bereshit Rabbah, chapter 11.

[8] Sanh. 58b.

[9] *Philonische Studien* (1915), pp. 14–25. See also R. Marcus, *The Law in the Apocrypha* (1927), p. 82.

neighbors, freemen and slaves alike, and beyond these to his beasts? . . . Again, who does not show awe and reverence for the fast, as it is called, which is kept more strictly and solemnly than the "holy month" of the Greeks? [10]

Philo goes on to compare the Jewish and pagan conception of a holiday. The Sabbath and the Day of Atonement he chose as evidence that Jewish law has a universal value. This apologetic passage of Philo is found verbatim in *Contra Apionem*. Josephus, like Philo, endeavors to show that while pagan laws are kept by some and rejected by others, the law of Moses remains ἀθάνατος.[11] It would take too much space to quote in full the passages in both authorities, but they are so much alike that their common origin cannot be doubted. One passage in Josephus dealing with the Sabbath and Day of Atonement will suffice:

It will be found that throughout the whole of that period not merely have our laws stood the test of our own use, but they have to an ever increasing extent excited the emulation of the world at large. . . . The masses have long since shown a keen desire to adopt our religious observances; and there is not one city, Greek or barbarian, nor a single nation, to which our custom of abstaining from work on the seventh day has not spread, and where the fasts and the lighting of lamps and many of our prohibitions in the matter of food are not observed.[12]

Josephus also claims for apologetic purposes that the Sabbath and the Day of Atonement are universally accepted.[13] Hence, in Philo and Josephus, contrary to Palestinian sources, the Sabbath is treated as a universal proclamation.

There is, however, much material in Philo concerning the Sabbath which may be considered specifically Tannaitic; in fact, his discussion of the Sabbath is very similar to that in Tannaitic literature. In Num. xv. 32–35 we read:

And while the children of Israel were in the wilderness, they found a man gathering sticks upon the Sabbath day. And they that found him gathering sticks brought him unto Moses and Aaron and unto all the congregation. And they put him in ward, because it had not been declared what should be done unto him. And the Lord said unto Moses:

[10] *Vita M.*, II, 17–23.
[11] *Cont. Ap.*, II, 38 (277).
[12] *Cont. Ap.*, II, 39 (280–83).
[13] *Ibid.*

"The man shall surely be put to death: all the congregation shall stone him with stones without the camp."

The Bible merely says that the man was gathering wood; it does not explain how he thus violated the Sabbath.

Philo refers to this biblical passage in a few places and adds a number of interpretations which are found verbatim in the Sifre. In one passage he says,

In that ancient migration which took place when the people of Israel left Egypt, when the seventh day arrived, all those myriads of men which I have described above rested in their tents in perfect tranquillity, but one man, who was not of those who are looked upon with disregard (*οὐχὶ τῶν ἠμελημένων*) or of the lower classes, gave little regard to the commandments and having mocked at the overseers (*χλευάσας τοὺς φυλάττοντας*) went forth to pick up sticks, but in reality to display his transgression of the law (*ἔργῳ δ' εἰς παρανομίας ἐπίδειξιν*). And he indeed returned, bearing with him a faggot in his arm, but the men who remained in their tents, although inflamed with anger and exasperated by his conduct, nevertheless did not at once proceed to very harsh measures against him, on account of the holy reverence due to the day, but they led him before the ruler of the people, and made known his impious action, and he committed him to prison. When the command had been given to put him to death, the ruler turned over the man to be killed by those who had seen him at first.[14]

The Bible does not mention the name of the man who gathered the sticks, nor does it say to what group he belonged, while Philo seems to refer to a tradition that he was not of the lower classes nor despised by the people. A similar tradition is given by R. Akiba, according to whom the gatherer of the sticks was Zelophehad.[15] He seems to have based his statement on Num. xxvii. 3: "Our father died in the wilderness, and he was not in the company of them that gathered

[14] *Spec. Leg.*, II (250–51).

[15] Sifre Num. 132 (xxvii. 3). It is true that Philo considers Zelophehad a righteous man, "a man of high character and distinguished tribe" (*Vita M.*, II, 234), but I merely want to bring out that a similar tradition to that of Philo was also known in Palestine. Philo, like R. Akiba, endeavors to explain the biblical phrase, "but he died of his own sin," and therefore puts into the mouth of the girl the following words: "Our father died, they said, but not in any rising in which, as it fell out, multitudes perished, but following contentedly the quiet life of an ordinary citizen, and surely it is not to be accounted as a sin that he had no male children." Colson accurately states on this passage that Philo is trying to interpret the phrase, "but he died of his own sin"; see also how the phrase is translated by the LXX.

themselves against the Lord in the company of Korah, but he died of his 'own sin.' " R. Akiba takes the Hebrew expression "he died of his own sin" not to mean that he died of a natural death, but that he died in the wilderness for violating the Sabbath. Zelophehad did not belong to the lower classes, for he left an inheritance, nor was he despised by the people, for he did not belong to the revolting party.

Philo says that the gatherer of sticks ridiculed the overseers. He does not explain, however, what he means by φυλάττοντας. Nothing of this is mentioned in the Bible. According to Tannaitic tradition, Moses appointed overseers in the camp to prevent violations of the Sabbath. These men also warned the gatherer of sticks not to commit the sin, but he paid no attention to their warnings and defiantly violated the Sabbath.[16] This is probably what Philo means by saying, "and he ridiculed the overseers."

The reason that no harsh measures were taken by the men who saw him violating the Sabbath, says Philo, was their reverence for the Sabbath. In another place he is even more explicit, saying,

> Seeing a most unholy spectacle, a man gathering sticks for fuel, and hardly able to control themselves they were minded to slay him. Reflection, however, caused them to restrain the fierceness of their anger. They did not wish to make it appear that they who were but private citizens took upon themselves the ruler's duty of punishment, and that too without a trial (καὶ ταῦτ' ἄκριτον), however clear was the offense in

[16] Sifre Num. 113 (xv. 32). The term τοὺς φυλάττοντας in Philo corresponds to the term שומרים used in the Sifre. The agreement between Philo and Sifre is very significant, not merely from the exegetical point of view, but also from the point of view of the Halakah. According to the Tannaitic Halakah, no criminal can be punished by death unless the accused had been warned by the witnesses that he was about to commit a capital crime. If the man rejected the warning and committed the crime it was considered as self-evident that he had done it intentionally and was fully aware of the crime and its consequences. In rabbinic terminology this principle is called התראה. Until now it has been thought that this principle was entirely unknown to Philo. I think this is a mistake. The principle of התראה is deduced from Num. xv. 32. Moses appointed guards to warn everyone of the crime of transgressing the Sabbath. The offender rejected their warning and had gone right on with the preparation of the criminal act. We have shown that the same interpretation is given by Philo, who actually tells us of his knowledge that the witnesses must first give warning of the seriousness of the crime.

other ways, or that the pollution of bloodshed, however justly deserved, should profane the sacredness of the day.[17]

This explanation indicates that Philo was acquainted with the Tannaitic Halakah that a man who committed a capital offense might not be executed on the day of the Sabbath,[18] and the passage as a whole clearly shows his opposition to lynching.

When Philo relates the story of the gatherer of wood, he interprets the biblical verse, "And they put him in ward because it had not been declared what should be done to him," as follows:

And Moses being at a loss as to what should be done to the man, for he knew that he had committed a crime worthy of death, but did not know what was the most suitable manner for the punishment to be inflicted upon him. . . .[19]

According to Philo, the question was not whether he was worthy of death, but by what kind of death he should be executed. This is also the Tannaitic interpretation. The Sifre on Numbers says:

Because it had not been declared what should be done to him. But does it not say, "all those who profane the Sabbath shall surely die"? [Exod. xxxi. 14.] The meaning is: Moses did not know by what manner of death the offender should die.[20]

In the Bible we read that God commanded that the execution should be carried out by the entire congregation, "All the congregation shall stone him with stones without the camp." Philo, however, says that the witnesses who saw him violating the Sabbath stoned him.[21] In this respect he also

[17] *Vita M.*, II, 214.

[18] Mekilta Wayyaḳhel I; Sanh. 35a. According to Tannaitic law, not only may the execution not be carried out on the Sabbath, but not even a trial of a case of capital punishment can be inaugurated on the eve of the Sabbath, because the Rabbis considered the interval between the time of the condemnatory sentence and its execution very painful. Since they were anxious to save the convict all unnecessary pain, they decreed that the execution should follow close upon the verdict (Sanh. 35a); see also Mendelsohn, *The Criminal Jurisprudence of the Ancient Hebrews*, pp. 112–13, nn. 250–59.

[19] *Vita M.*, II, 217.

[20] Sifre Num. 113 (xv. 32).

[21] *Spec. Leg.*, II, 251.

agrees with Tannaitic Halakah, which did not accept this verse in its literal sense, but declared that the congregation only witnessed the stoning, which was performed by the witnesses.[22] Philo, like the Rabbis, seems to have based his interpretation on Deut. XVII. 7: "The hand of the witnesses shall be first upon him to put him to death." On the same ground Talmudic jurisprudence provides for no official executioners. The witnesses to the crime prosecute the criminal and execute him. The public is allowed to witness the execution but may not lay hands on the criminal.

Finally, Philo raises the question as to how the man violated the Sabbath by gathering sticks and gives two explanations. In one passage he says,

> And, therefore, in my opinion it was not allowed to kindle a fire on the seventh day for the reason which I have already mentioned, so likewise it was not lawful to collect any fuel for a fire.[23]

In another passage he says,

> and wood is the material of fire, so that if a man is picking up wood, he is committing a crime which is akin to and nearly connected with burning a fire, doubling his transgression partly in the mere act of collecting in defiance of the commandment to rest from work, and partly in that what he was collecting was the material for fire, which is the basis of the arts.[24]

The main principle of Philo's argument is that anything which a person is not allowed to use on the Sabbath he may not collect or move from its place. If the law, therefore, forbids making a fire on the Sabbath, it implies that one should not collect the material which is used for making one.

The Tannaitic Halakah gives a different reason for the death penalty. It says that the wood-gatherer transgressed the Sabbath by the *melakah* (work) of plucking.[25] Philo's departure from the Tannaitic interpretation is of small importance, since the early Amoraic scholars likewise rejected the Tannaitic interpretation.[26] It is important, however, to

[22] Sifre Num. 113 (XV. 32).

[23] *Spec. Leg.*, II, 251.

[24] *Vita M.*, II, 220: *ὅτι καὶ τοιαῦτα συνεκόμιζεν, ἃ πυρός ἐστιν ὕλη, τῆς τῶν τεχνῶν ἀρχῆς.*

[25] Sifre Num. 113 (XV. 32).

[26] Shab. 96b.

determine whether the principle of Philo's argument has its background in Tannaitic Halakah.

The Halakah does not allow one to handle or to move from its place any object which he is forbidden to use on the Sabbath. This is not considered a biblical command, but only a rabbinical prohibition. In Philo's opinion, however, it is biblically prohibited. It would seem, however, that in pre-Talmudic times this prohibition was considered biblical even in Palestine. In the Talmud we find the following passage:

> In former days only three utensils were permitted to be handled on the Sabbath, and they were a knife to chop pressed dates, a skimmer, and a small table knife. Subsequently more were allowed . . . until finally any utensil was allowed with the exception of the wood-saw and the ploughshare.[27]

According to Talmudic tradition, the "former days" refers to the Period of Nehemiah, when stricter laws were made as a precaution, and most of the utensils were not allowed to be handled or moved, whereas in the Tannaitic period only those objects used solely for doing prohibited work were proscribed. From I Macc. II. 33–38 it seems that to handle an object used primarily for work was regarded at that time as subject to a biblical prohibition, for the zealous people who hid in the caves preferred to suffer death rather than to protect themselves by blocking up their hiding places with stones or throwing stones at the attackers. It was not until the Mishnaic period, when thirty-nine kinds of labor were classified as biblically forbidden, that the prohibition of handling things which a person may not use came to be re-

[27] Shab. 123b. See also Tosefta Shab. 14, 1. Striking is the difference between R. Jose and Philo. According to R. Jose, the prohibition to kindle a fire on the Sabbath is not considered a *melakah*, and if one kindles a light on the Sabbath he is not punished either by death inflicted by the court or extermination by God (Shab. 70a), whereas, according to Philo, to kindle a light on the Sabbath is the most serious offense because it is "the beginning and seed of all business of life" (*Spec. Leg.*, II, 65). Whether Philo agreed with the Pharisees that kindling lights for the Sabbath eve was permitted, or with the Sadducees, who forbade the use of fire on the Sabbath (see Geiger's *Nachgelassene Schriften* III, 287) is a matter open to doubt. Philo always speaks about the kindling of fire, but not about using fire, a fact which may suggest that he agrees with the Pharisees.

garded as being only of rabbinic origin. Hence, Philo's statement that the prohibition against making a fire on the Sabbath also includes collecting the material used for making the fire agrees with the earlier Halakahs.

We know of many other tasks which in Tannaitic Halakah are considered as only rabbinically prohibited, and which in the Book of Jubilees, reflecting in all probability an earlier Halakah, are considered as matters of biblical prohibition. We read, for example, in the Book of Jubilees:

> And every man who does any work thereon, or goes on a journey, or tills the farm, whether in his house or in any other place, and whoever lights a fire, or rides on a beast, or travels by ship on the sea — whoever fasts or makes war on the Sabbath, shall die.[28]

Riding on a horse on the Sabbath is considered in the later Halakah only a rabbinical prohibition; so also is traveling in a ship or fasting on the Sabbath. For such offenses the Rabbis did not condemn a man to death. Either the author of the Book of Jubilees did not know of any difference between things biblically prohibited and those rabbinically prohibited, or the earlier Tannaitic Halakah was stricter with laws concerning the Sabbath than the later.

Philo goes one step further in saying that not only is a person forbidden to do work or any kind of business connected with seeking a livelihood on the Sabbath, but he is also forbidden to think about such matters.[29] In the Mishnah the planning of work on the Sabbath for a weekday is considered a transgression of a rabbinic injunction.[30] In the

[28] Book of Jubilees L. 12. The Tal. Sanh. 46a relates that a man who rode on a horse on the Sabbath was once stoned by the court because the time required such a strict penalty even for the transgression of a minor offense. I doubt whether this story has any bearing on the statement in the Book of Jubilees that for riding on a beast the penalty is death (see Finkelstein, "The Book of Jubilees and the Halakah," *Harvard Theological Review*, 1923, XVI, 48–49). I also doubt whether the expression in the Book of Jubilees, "he shall die," is to be taken literally. It certainly does not imply death by court. It may correspond to the rabbinic expression חייב מיתה, which very often means that the person committed a great offense; see also Ḥag. 2, 2.

[29] *Vita M.*, II, 211: *διαφειμένους πάσης ἐπιπόνου καὶ καματηρᾶς φροντίδος.* Philo urges not only forgetting all weary and painful thought on the Sabbath, but also abstaining from the manual and mental arts. See Colson's note on this point.

[30] See Shab. 23, 3; Tal. Shab. 150a.

Book of Jubilees we read: "And whoever says on it that he will do something shall die." [31] This prohibition is based on Isaiah LVIII. 13: "If thou turn away thy foot because of the Sabbath, from pursuing thy business on my holy day, and honor it by not doing thy wonted ways, nor pursuing thy business, nor talking of it."

Philo's acquaintance with the laws of the Sabbath as they were understood by Mishnaic scholars is reflected also in another passage. After saying that the Sabbath is a day of rest not only for men but also for slaves and beasts, he adds:

> And extends also to every kind of tree and plants; for it is not permitted to cut any shoot or branch, or even a leaf, or to pluck any fruit whatsoever. All such are set at liberty on that day, and live as it were in freedom, under the general edict that proclaims that none should touch them.[32]

In Exod. xxxv. 2 there is only a general prohibition of "work," but the definition of it is not given. Under the heading "work" (*melakah*) the Mishnah enumerates thirty-nine principal species of prohibited acts. The chief prohibition of reaping includes not only harvesting grain, but also picking grapes, cutting clusters of dates, stripping off olives from the trees, and plucking figs. This is what Philo refers to when he says that it is not lawful to gather fruit on the Sabbath.

Among the other things which Philo enumerates as prohibited on the Sabbath are lighting a fire, doing agricultural work, carrying a burden, bringing a charge in court, sitting in judgment, asking back property, collecting debts, and engaging in other affairs allowed on the days which are not holy.[33] In the Pentateuch only agricultural labor and light-

[31] L. 8.

[32] *Vita M.*, II, 22.

[33] *Migr. Abr.*, 91. It is often stated that Philo does not know the distinction between a biblical and rabbinical prohibition. He always speaks about Jewish laws and customs as the revealed word of God. This passage, however, suggests that though he is not interested in distinguishing between customs fixed by man and biblical commands, he knew of the distinction. About the allegorists Philo says: "These men are taught by the sacred word to have thought for good repute, and to let go nothing that is part of the customs fixed by divinely empowered men, greater than those of our own time." Afterward he lists most of the Sabbatical prohibitions which are not

ing a fire are forbidden, while the other activities which Philo mentions have their background in the prophetic literature and Palestinian Halakah. From Amos we know that trading on the Sabbath was prohibited. In Nehem. x. 32 and XIII. 15–16 buying and selling on the Sabbath are condemned. In Tannaitic Halakah buying and selling are not included among the thirty-nine classes of biblically prohibited labor, and in themselves they are not prohibited by rabbinical law. Philo includes under the prohibition of buying and selling also the paying of debts on the Sabbath. A parallel to this law is found in the Zadokite sect: "On the day of the Sabbath no man shall utter a word foolishly; and surely none shall demand any debt of his neighbour, nor shall judge in the matters of property." [34]

Special consideration must be given the passage in Philo referring to the biblical law of Exod. xx. 10, which states that the Sabbath is a day of rest even for the manservant and maidservant. With regard to this law Philo says:

> Moses gave additional laws besides, thinking it right, not only that those who were free should abstain from all work on the seventh day, but also that their servants and handmaids should have a respite from their tasks, proclaiming a day of freedom to them also after every space of six days, in order to teach both classes this most admirable lesson; so that the masters should be accustomed to do some things with their own hands, not waiting for the services and ministrations of their servants, in order that if any unforeseen necessities come upon them, according to the changes which take place in human affairs, they might not, from being wholly unaccustomed to do anything for themselves, faint at what they had to do . . . and teaching the servants not to despair of better prospects, but having a relaxation every six days as a kind of spark and kindling of freedom, to look forward as a complete relaxation hereafter, if they continue faithful and attached to their masters.[35]

Although Philo is not speaking here of prohibited work, still his explanation suggests that he understood the scope of

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found in the Bible. He seems to have known that asking back property, acting as a judge, and the other things which he enumerates are not biblical prohibitions, but are Jewish customs established by men of former generations. He believes that they should nevertheless be observed with equal respect.

[34] Schechter, *Documents of Jewish Sectaries*, I, 10, lines 15–20.

[35] *Spec. Leg.*, II, 64.

work included in the biblical command "thou shalt not do any work" to differ from that included in the command "nor thy manservant and maidservant." A freeman, according to him, is forbidden only to do work prohibited on the Sabbath. A master, however, is not allowed to make his servant do any kind of work at all; the master must give the slave a day of freedom, and he must do the necessary unforbidden work himself. This view of Philo is entirely unknown in Tannaitic Halakah, according to which the servant is forbidden to do only the work prohibited on the Sabbath, but he may be asked by the master to do any other work that the latter himself is permitted to do. In the first century the Rabbis extended this prohibition not only to a servant who was sold to his master for a number of years, but also to a Gentile hired to do work on the Sabbath. The latter case was considered only rabbinically prohibited.[36] The Zadokites, however, seem to agree with Philo that the law of Exod. xx. 10 prohibits the master from demanding any work whatsoever on the Sabbath. The passage reads as follows:

> No man shall send the son of the stranger [Gentile] to do his affairs on the day of the Sabbath. No nurse shall bear the suckling child to go out and come in on the Sabbath. No man shall provoke his manservant or maidservant or his hireling on the day of the Sabbath.[37]

According to Tannaitic law, a mother may carry her child on the Sabbath but the Zadokites forbade the nurse to do so on the grounds that the Bible forbids the hiring of a Gentile to do prohibited work on the Sabbath. Hence, the law which commands that the servants should rest on the Sabbath refers even to work which the master is permitted to do. The prohibited work even a Gentile may not do for a Jew. Perhaps Philo interpreted the biblical law of Exod. xx. 10 in the same manner.

Philo treats the laws of the Sabbath, of the Sabbatical year, and of the Jubilee in one group, for he regards them all as coming with the sacred number seven. The law proclaims a

[36] Tosefta Shab. 14, 9, 12, 13, 14.
[37] Schechter, *op. cit.*, I, 10, 10–15.

day of freedom for servants and handmaids on the seventh day to teach the principles of equality. Similarly, the law proclaims the seventh year and the fiftieth year, seven times seven, as years of freedom to remind the people of the principles of humanity and equality. The law demands that the land lie fallow on the seventh year in order to show employers that if the soil, which has no feeling of pain or pleasure, needs a period of relaxation so much more do their servants.

In the Bible we find the laws of slavery discussed in three different places. Exod. xxi. 2 says: "If thou buy a Hebrew servant, six years he shall serve; and in the seventh he shall go out free." If, however, the slave declares that he loves his master and prefers to remain a slave, the master shall bore the ear of the slave with an awl and the slave shall serve him "forever," which means according to rabbinic literature, until the Jubilee.[38] In Lev. xxv. 39–40 we read:

> And if thy brother be waxen poor with thee thou shalt not make him to serve as a bondservant. As a hired servant and as a settler, he shall go with thee; he shall serve with thee until the year of the Jubilee.

This particular law makes no reference to the seventh year. One who sells himself out of necessity is set free only at the arrival of the Jubilee. The law in Deut. xv. 12 repeats the law of Exodus, but also adds (verses 13–14) another regulation:

> And when thou lettest him go free from thee, thou shalt not let him go empty; thou shalt furnish him liberally out of thy flock, and out of thy threshing floor, and out of thy winepress, of that wherewith the Lord thy God hath blessed thee thou shalt give unto him.

Some of the Tannaitic scholars were of the opinion that the law of Leviticus and the law in Exodus and Deuteronomy deal with two types of slaves. In ancient Israel either a man could sell himself as a slave or the court could sell him into slavery when he stole something and was not able to restore it.[39] Hence, the majority held that if a man sells himself willingly into slavery he could stipulate the period of his service. According to these sources, the laws of slavery found

[38] Mekilta Mishpatim (Exod. xxi. 6); Ḳid. 21b.
[39] Exod. xxv. 2.

in Exodus and Deuteronomy apply to a slave who was sold by court for theft. In the latter case, since he was sold without his consent, the law protected him. First, he could not be sold for a longer period than six years, even if his debt to his master were of a greater amount than the service he rendered during that period. Second, even if he should prefer to remain a slave, he must be set free at the arrival of the Jubilee. Third, when he is set free the master may not let the slave go with empty hands, but must give him a liberal share of his possession. If, however, a man sells himself into slavery, he is set free only at the arrival of the Jubilee. The distinction between these two types of slaves is very logical, for since a slave who sold himself was paid for his service, he could stipulate any length of time he pleased. The slave sold as a penalty for a wrong had to be protected by the law so that he might not suffer servitude for the rest of his life or be entirely unprovided for when he was set free.

R. Eliezer was, however, of the opinion that the laws of slavery in Exodus and Deuteronomy apply to both types of slaves. No Israelite, according to him, could sell himself for a longer period than six years.[40] He regarded the law of Deuteronomy and Exodus not merely as a protection for the slave, but as an ethical precept that no Israelite has the moral right to deny himself his own freedom for an unlimited period. This principle is echoed in the famous words of R. Johanan b. Zakkai [41] that the law requiring the piercing of the slave's ear if he prefers to remain in servitude is a symbol of reproach for his preference of slavery to freedom. The Jews are servants of God, but not servants of men.[42]

It is hardly possible to determine what the law was when slavery was actually in force. According to Tannaitic traditions, Hebrew slaves were not in existence during the Second Commonwealth. The laws of Hebrew slaves were in force only when the Jubilee was in existence.[43] But this does not necessarily prove that during the Second Common-

[40] Ḳid. 14b.
[41] Ḳid. 22b.
[42] See also a similar attitude taken by Philo in *Cont.*, 70.
[43] 'Arak. 29a; Ḳid. 69a.

wealth Jews did not sell themselves into slavery for a certain length of time. The fact is, however, that though we find many references in the Talmud to Jews who were the owners of foreign slaves, we find no reference to ownership of Hebrew slaves.

Philo also knew of the two classes of slaves, but, like R. Eliezer, he applies the laws of Exodus and Deuteronomy both to those who were sold by court for theft and to those who sold themselves willingly because of poverty. The laws concerning Hebrew slaves found in Philo are undoubtedly only theoretical, and it is therefore even more surprising to find his discussion of Hebrew slaves in agreement with the traditions found in Tannaitic sources.

Besides the agreement between Philo and R. Eliezer on that question, there are other important points on which Philo and Palestinian traditions are in accord. Philo goes on to say:

> The masters shall not behave to those whom they have bought with their money as if they were by nature slaves, but only hirelings, giving immunity and liberty at once, indeed, to those who can pay ransom for themselves, and at a subsequent period to the indigent, either when the seventh year from the beginning of their slavery arrives, or when the fiftieth year comes, even if a man happens to have fallen into slavery only the day before.[44]

He makes a distinction between the seventh year, which sets a slave free, and the Jubilee. A slave does not go out free on the Sabbatical year, but on the seventh year from the date when he became a slave, whereas in the Jubilee he is freed even if he has been a slave only one day.

Students of Philo have pointed out that his interpretation has its background in Tannaitic Halakah,[45] but none of them has tried to show the origin of the distinction which both Philo and the Halakah make. Philo's interpretation is not necessarily owing to his acquaintance with Tannaitic Halakah, but could easily have been derived from the Bible itself. If we assume that the seventh year on which the slave goes

[44] *Spec. Leg.*, II, 122.

[45] See Ritter, *Philo und die Halacha*, pp. 58 ff.; Heinemann, *Philons Bildung*, p. 340.

out free is to be identified with the Sabbatical year, then the biblical law which commands that the slaves should be emancipated on the year of Jubilee would become entirely irrelevant — the Jubilee always immediately follows the Sabbatical year, which already had freed all the slaves. Philo, therefore, says that the Jubilee sets free men who have fallen into slavery even one day previously, whereas the seventh year which sets the slave free starts from the beginning of his slavery. This explanation is also given in the Jerusalem Talmud for the origin of the Tannaitic Halakah.[46] At the same time, though it may be said that Philo's view and the Tannaitic Halakah were independently derived from the Bible, it is not unlikely that there was a more direct relationship between them.[47]

With regard to the thief who has been sold into slavery the Bible does not say whether or not he is freed in the seventh year.[48] According to Tannaitic literature, even if the services of six years does not amount to the value of the theft, the slave must be set free and cannot be sold again,[49] a reflection of which appears in the words of Philo. He says:

> And if he [the thief] is a poor man, and, consequently, unable to pay the penalty, let him be sold, that he who has been ill-treated may not be allowed to depart without any consolation. And, let no one accuse this ordinance of inhumanity; for the man who is sold is not left as a slave forever and ever, but within the space of seven years he is released by common proclamation, as I have shown in my treatise on the number seven.[50]

Josephus is silent on this question of the seventh year, but with regard to the Jubilee he says:

> And the fiftieth year is called by the Hebrews the year of Jubilee, wherein debtors are freed from their debts, and slaves are set at liberty, that is to say, those who are members of the race and having transgressed some requirements of the law have by it been punished by reduction to a servile condition, without being condemned to death.[51]

[46] Jer. Tal. Ḳid. 59a.

[47] Philo discusses the laws of the Jubilee and Sabbatical year separately. This is the only law where Philo combines both, probably an intentional procedure, for if the Sabbatical year sets the slaves free then there would not be the need of the Jubilee.

[48] See Exod. XXII. 2.

[49] Mekilta Mishpatim 13.

[50] *Spec. Leg.*, IV, 3.

[51] *Ant.*, 3, 12, 3.

In this passage he refers to two laws which have no background either in the Bible or in Tannaitic Halakah. First, his statement that the Jubilee is a year of remission of debts is contrary to the Halakah and has no support in the Bible. More in agreement with the Bible and the Halakah is Philo. who speaks of the Jubilee only as the year when slaves are set free, but not as a year in which debtors become free of their debts.[52] This unusual statement of Josephus has been pointed out by many scholars. Second, his statement that criminals were sold into slavery for crimes other than theft is also at variance with the Bible and the Halakah. The Bible says only that a thief is sold into slavery; it offers no evidence that there were other crimes punished this way. In Tannaitic Halakah it is stated definitely that while servitude is the punishment of a person duly convicted of theft and unable to make the prescribed restitution, false witnesses, who had intended to make a person pay money and for which they are sentenced according to biblical law to pay the same sum, may not be sold into slavery if they cannot pay the fine.[53] It seems that the Tannaitic Halakah understood the penalty of slavery for theft not as a restitution of the theft, but as a retaliation on the thief who wanted to enrich himself by the property of others; hence, the penalty of servitude is applied only to a thief. Philo seems also to be of the opinion that slavery is prescribed only for theft, "for it is fitting that a man should be deprived of his freedom, who for the sake of his most iniquitous gain has become a slave to guilt." [54] Furthermore, in case of theft, he uses the term πιπρασκέσθω, "let him be sold," whereas, in connection with slavery for debt, he does not say that the debtor is forced into slavery, but only that he has sold himself to pay the

[52] It deserves to be noticed, however, that in *Virt.*, 100, where Philo speaks of the Jubilee, he says that all the laws of the Sabbatical year are also applied to the Jubilee, except that for the Jubilee many new ordinances are added (ἐπιτελεῖται μὲν γὰρ ἃ καὶ τῷ ἑβδόμῳ προσείληφε δὲ ἔτι μείζονα). This passage rather suggests that he regarded the release from debts as applicable even to the Jubilee.

[53] Kid. 18a.

[54] *Spec. Leg.*, IV, 3.

debt.[55] Josephus, therefore, is alone in extending the penalty of slavery to crimes other than theft.[56]

It should be noticed, however, that in another passage Josephus himself speaks of the penalty of slavery as inflicted only in the case of theft. Criticizing Herod's innovation in selling criminals into slavery to foreign countries, Josephus says:

He made a law in no way like our original laws, which he enacted of himself, to sell housebreakers to be taken out of his kingdom, which punishment was not only grievous to be borne by the offenders, but contained in it an infringement of the custom of our forefathers. . . . For those laws ordained that the thief should restore fourfold, and if he had not so much, he should be sold, indeed, but not to foreigners, nor so as to be in perpetual slavery, for he had to be released after six years.[57]

But in this passage, too, there is a difference between Philo and Josephus. Philo says that if the thief is poor and cannot pay the value of the theft (*τό γε ἐπιτίμιον*),[58] he must be sold, whereas Josephus says that he is sold if he cannot pay threefold in addition to the value of the theft.[59] The Tannaitic Halakah on this point agrees with Philo.[60]

[55] In *Virt.*, 123, Philo speaks of men who sell themselves into slavery because of debts: "A period of six years for servitude is sufficient for those debtors who cannot repay the loans to the lender, or who for any other reason have become slaves, after having been free men." We have mentioned already that the *obligatio* in Jewish law always falls on the property (שעבוד קרקע), and Jewish law does not recognize the institution of slavery as a punishment for any form of bankruptcy.

[56] With reference to the law of setting a slave free after seven years of service we find a verbal agreement between Philo and R. Ishmael. Deut. xv. 14 commands that the master shall not let the slave go free empty, but he should give a share of his possessions. In *Spec. Leg.*, II, 81 ff., he makes the following comment on this law: "And, moreover, make him a present from your own property . . . so that he may not again through want fall into his previous calamity and become a slave (*μὴ πάλιν ὑπ' ἐνδείας εἰς τὴν ἀρχαίαν ἀτυχίαν ὑπαχθῇ δουλεύειν*), being compelled through want of his daily food to sell himself." The same explanation is given by Ishmael. אם יצא הוא ריקם מאצלך עכשיו הוא מסבב על הפתחים ונמכר פעם שניה (Midrash Tannaim on Deut. xv. 14).

[57] *Ant.*, 16, 1, 1; see also Sifre Deut. 118, which says that the court can sell one into slavery only to a Jewish master.

[58] *Spec. Leg.*, IV, 3.

[59] *τετραπλάσιον καταβαλεῖν τὸν κλέπτην, οὐκ ἔχοντα πιπράσκεσθαι* (*Ant.*, 16, 1, 1).

[60] Kid. 18a.

2. New Year and the Day of Atonement

Philo's discussion of the New Year festival is very brief and furnishes scarcely any information as to how the Alexandrian Jews observed the first day of Tishri. The Bible calls the festival a "sacred convocation which is signalized by the blast of the horn," but attached no great significance to the day. In rabbinic literature the first of Tishri is regarded as the beginning of the year, on which day judgment is annually pronounced on mankind. The world was created on Tishri.[61] The Mishnah states:

> At four times during the year is the world judged: at Passover through grain; at Pentecost through the fruit of the trees; on New Year's Day [the first of Tishri] "all that come into the world pass before him like sheep, as it is written, he that fashions the hearts of them all, that considers all their works"; on the feast of Tabernacles through rain.[62]

The first of Tishri is in the Talmud closely connected with the Day of Atonement, and the period from New Year to Atonement is called the Ten Penitential days.[63] Whether or not the Alexandrian Jews, like the Palestinian Jews, celebrated the first of Tishri, is difficult to ascertain. The general view of scholars that in Philo Tishri does not appear to be the beginning of the year is not correct. It is true, however, that in many passages of Philo the first of Nisan is designated as the beginning of the year. He says that the world was created and two of the biblical Patriarchs were born in Nisan which is the beginning of the year,[64] but he also speaks of Tishri as being the beginning of the year.[65] He is, how-

[61] R. Sh. 10b.

[62] R. Sh. 1, 2.

[63] Yoma 18b.

[64] *Quaes. in Gen.*, II, 31 and 45; *Quaes. in Ex.*, XII, 2 (ed. by J. R. Harris); *Vita M.*, II, 222.

[65] *Spec. Leg.*, I, 180. He says that the sacrifices brought during the feast of the "Sacred Moon" (*ἱερομηνίᾳ*) were in honor of the New Year (*ἐν ἀρχῇ τοῦ ἐνιαυτοῦ*). Josephus states in *Ant.*, 3, 10, 5 that Nisan is the beginning of the year (*Νισὰν παρ' ἡμῖν καλεῖται καὶ τοῦ ἔτους ἐστὶν ἀρχή*). His definition of the Jewish New Year in *Ant.*, 1, 3, 3 is in opposition to that of the various New Year days found in Tannaitic literature. He writes, "This catastrophe [the flood] took place in the six hundredth year of Noah's reign, in the second month which was called by the Macedonians Dius and by the Hebrews

ever, silent in reference to what is called New Year. It may be that he regards the year as divided into two seasons: one beginning with spring and the other with autumn. Hence, both Nisan and Tishri are the beginning of the year. It is, therefore, incorrect to assume that Philo was ignorant of the fact that the first of Tishri is a New Year in the Jewish calendar.

When Philo enumerates the Jewish festivals he makes the following statement about the first of Tishri: "Next comes the opening of the sacred month, when it is customary to sound the trumpet in the temple at the same time that sacrifices are brought there, and its name of 'trumpet feast' (*σαλπίγγων*) is derived from this." [66] This passage in Philo presents many difficulties. The biblical term תרועה in Lev. XXIII. 23 was understood in Tannaitic literature to mean the blast of horns, in contrast to the trumpet (חצוצרות). The Mishnah states: "The Shofars [horns] at the New Year were made from the horn of the wild goat, straight, with its mouthpiece overlaid with gold." [67] Hence, contrary to the view held by Philo, the New Year was not a "trumpet feast." According to the unanimous opinion of Tannaitic scholars, the instrument used at the New Year feast was not a trumpet but a horn (Shofar). It is highly probable, however, that Philo follows the LXX, which translates the Hebrew terms

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Morsuan [marḥeshwan], according to the arrangement of the calendar which they followed in Egypt. Moses, however, appointed Nisan, which is Xanthicus, as the first month for the festivals, because it was in this month that he brought the Hebrews out of Egypt. He also reckoned this month as the beginning of the year for all things pertaining to divine honor (*πρὸς ἁπάσας τὰς εἰς τὸ θεῖον τιμὰς ἦρχεν*), but the ancient order he preserved for selling and buying and for any other home affairs" (*πράσεις καὶ ὠνὰς καὶ τὴν ἄλλην διοίκησιν τὸν πρῶτον κόσμον διεφύλαξε*). His statement that Nisan is considered New Year with reference to divine worship is not in agreement with rabbinic sources, which set the first of Tishri as the beginning of the year for divine judgment and worship: again, his statement that Tishri is the beginning of the year for secular affairs is not in agreement with Tannaitic literature. The Tosefta says that, with reference to selling and buying, Nisan, not Tishri, is reckoned as the beginning of the year. Hence if one should sell or buy a house for "this year" the sale is valid until Nisan, because Nisan is set on the beginning of a new year for ordinary business transactions (Tosefta R. Sh. 1, 5).

[66] *Spec. Leg.*, II, 188.

[67] R. Sh. 3, 3.

of תרועה, חצוצרות, שופר by the Greek term σάλπιγξ, meaning "trumpet." The LXX, like Philo, calls the first of Tishri μνημόσυνον σαλπίγγων, and both ignore the Tannaitic insistence on the horn (κέρας) instead of the trumpet.

The Bible says that the first day of the seventh month shall be signalized by the blast of the horn or, as the Greek sources have it, the blast of the trumpet, but does not state whether the blast of the horn is a part of the Temple ceremonies or whether it is a personal obligation on every Jew. If we assume that the horn was used only in the Temple, then the question may be raised as to the significance of Tishri, since the Bible prescribes the blowing of a similar instrument such as the trumpet when the sacrifices are offered during the festivals: "Also in the day of your gladness, and your appointed seasons, and your new moons, ye shall blow with the trumpets over your burnt offerings and over the sacrifices of your peace offering." [68] According to Tannaitic sources, the trumpet was blown also at the daily sacrifices offered on the Sabbath.[69] The Mishnah gives a full account of the singing and of the blowing of the trumpets in the Temple at the daily sacrifices.[70] If the Hellenistic sources are correct in their statement that the trumpet, not the horn, was blown on New Year, then it is even more reasonable to assume that the trumpet on the New Year was blown not only in the Temple, where this instrument was used daily, but also in Jerusalem and the provinces. This view is also expressed in Mishnaic literature.[71] Philo, however, says that the first of Tishri is called the festival of σαλπίγγων because the trumpets were blown in the Temple at the offering of the sacrifice. His words suggest that this was only a Temple ceremony. It is also highly improbable that Philo confused Lev. xxiii. 23 with Num. x. 10, which says the trumpets are to be blown

[68] Num. x. 10.

[69] Sifre on Num. 76 (x. 10). Josephus in *Ant.*, 3, 13, 1, says that the trumpet was blown when the sacrifices were offered on the Sabbath and on the other days (λοιπαῖς ἡμέραις). I doubt whether he means "by the other days" the days of festivals. Possibly he is referring to the other days of the week, when the Tamid sacrifice was offered.

[70] M. Tamid 7, 3.

[71] R. Sh. 3, 7; 4. 1.

on the New Moon and festivals in general. He never refers to these occasions as calling for the sounding of trumpets.[72]

We may say almost with certainty, however, that had the horn been blown on New Year in the Alexandrian synagogues, Philo would have discussed it further and would not have spoken of it merely as a Temple ceremony. He knew that the first of Tishri was signalized by the blowing of the horn, or, as he mistakenly calls it, the blowing of the trumpet, but he seems never to have witnessed the ceremony on New Year in Alexandria. I disagree with Allon that the horn in ancient times was blown only in the Temple [73] for the reason I have given above, but I believe that the horn (Shofar) was not used among the Alexandrian Jews on the New Year festival. In the Mishnah [74] the blowing of the horn on the Jubilee and New Year is taken as a matter of course. "The year of the Jubilee is like the New Year in the blowing of the horn (Shofar) and in the Benediction.[75] The Sifra on the verse, "In the Day of Atonement you shall make a proclamation throughout all your land," [76] comments that only on the Day of Atonement of the Jubilee year is the horn (Shofar) blown throughout "your land" even if that day falls on a Sabbath; when New Year falls on this day the horn (Shofar) is not blown throughout the land, but only where there is a *beth din*.[77] The fact that the Tannaitic sources speak only

[72] It is open to doubt whether Büchler is correct in saying that the passage in Philo is based on the actual practice of the day, while the statement in the Mishnah that the horn was used on New Year in the Temple contradicts all that we know otherwise about the Temple service (*Types of Palestinian Jewish Piety*, 1922, pp. 233 ff.). As a rule the trumpet was used in the Temple on the festival days and daily sacrifices, but since the Bible prescribes definitely the Shofar for New Year, the Shofar was used in the Temple. The trumpets were also used, as stated in the Mishnah, for the New Year always fell on the New Moon.

[73] Le-Ḥeḳer ha-Halakah be-Philon," *Tarbiz*, VI (1934–35), 452 ff.

[74] R. Sh. 3, 5.

[75] The statement in R. Sh. 30a that on the Jubilee it is everyone's duty to blow the horn, but not on New Year's (ואין כל אחד ואחד חייב לתקוע) does not mean that the Shofar was blown only in the Temple, but that on New Year's the duty of every person is to listen to the blowing of the Shofar, as it is even today (R. Sh. 3, 7).

[76] Lev. xxv. 9.

[77] Sifra Behar 2 (xxv. 9). In Jer. Tal. R. Sh. 57b, the question is raised why we should not apply the בארצכם only to the Shofar of the Jubilee, while

of the obligation of blowing the horn in the Palestinian provinces and that various analogies are made between the horn on the Jubilee and New Year, suggests that the duty of blowing the Shofar applied only to Palestine.

In short, our theory is that the horn was used not only in the Temple, but also throughout Palestine, as was the custom on the Day of Atonement of the Jubilee year; but the Shofar was not used at any festival among the Alexandrian Jews. The duty of blowing the horn on New Year was not upon every person, but it was one's duty to listen to the sound of the horn, and we can easily imagine that the Jews must have flocked to the Temple gates in order to hear it, as the record in the Mishnah shows. The Mishnah in Tamid relates that even in Jericho the sound was heard from the Temple.[78] The use of the horn in the Temple could have taken place only during the New Year festival. Bearing in mind the fact that the horn was not blown in the Alexandrian synagogues, we can understand Philo's statement that the first of Tishri is called the festival of trumpets, because the trumpet was blown on that day at the Temple. Philo must have heard of the Jews gathering near the Temple in order to hear the sound of the horns or, as he calls it, the trumpets, and he therefore speaks about the festival of the trumpets as primarily connected with the Temple sacrifices.

Philo's description of the Day of Atonement shows that in Alexandria the day was spent in fasting and prayers, as it is even today in synagogues. The Bible merely says that "ye shall afflict your souls," but the nature of the affliction is not stated. It seems that the Jews always considered fasting so inseparably connected with affliction that the two became synonymous.[79] The Mishnah went even further, forbidding,

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the Shofar of the New Year should also be blown in Palestine and out of Palestine בארץ ובחוץ לארץ even on the Sabbath. This suggests that the application of the phrase in "your land" in the Sifra also to New Year was understood to mean Palestine proper. There is no doubt, however, that soon after the destruction of the Temple the custom of blowing the Shofar on New Year was practiced even among the Diaspora Jews. Thus, since it was blown at the sacrifices in the Temple as a part of the Temple ritual, the obligation of hearing the sound of the Shofar was applied only to Palestinian Jews.

[78] Tamid 3, 8.

[79] See Moore, *Judaism*, II, 55.

besides eating and drinking, bathing, anointing oneself, wearing shoes, and indulging in conjugal intercourse.[80] Philo calls the Day of Atonement the Feast of the Fast (*νηστεία*). He writes:

> And after the feast of Trumpets the solemnity of the fast is celebrated. . . . This Moses has called the greatest of all festivals, denominating it in his own language the Sabbath of Sabbaths, or, as the Greeks would say, a Week of Weeks, a holier than the holy. He gave this name for many reasons. First, because of the self-restraint which it entails; always and everywhere indeed he exhorted them to show this in all affairs of life, in controlling the tongue and the belly . . . , but on this occasion especially he bids them do honour to it by dedicating thereto a particular day. For when a person has once learned to be indifferent to meat and drink, those very necessary things, what can there be of things which are superfluous that he would find any difficulty in disregarding? Secondly, because the whole day is devoted to prayers and supplications, and men from morn to eve employ their entire leisure in nothing else but offering petitions of humble supplications by which they endeavor to propitiate God, and ask remission of their sins, voluntary and involuntary.[81]

Except for the fact that Philo gives a philosophic touch to the idea of fasting, the passage as a whole shows that the Alexandrian Jews spent the tenth of Tishri in fasting and prayers.

There is, however, one other explanation in the same passage in Philo with reference to the Day of Atonement which suggests that it was also an agricultural feast for the ingathering of the harvest. He goes on to say:

> Thirdly, because of the time at which this celebration is fixed to take place; for at this season all the fruits which the earth has produced during the whole year are gathered in. And therefore to proceed at once to devour what has been produced, Moses looked upon as an act of greediness; but to fast, and to abstain from touching food, he considered a mark of perfect piety which teaches the mind not to trust in what stands ready prepared before us as though it were the only source of health and life. . . . Therefore, those who, after the gathering of the harvest abstain from food, . . . almost declare in express words, "We have with joy received, and we shall cheerfully store up the bounteous gifts of nature; but we do not ascribe to any corruptible thing the cause of our own durable existence, but we attribute that to the Saviour,

[80] Yoma 8, 1.
[81] *Spec. Leg.*, II, 193 ff.

to the God who rules in the world, and who is able, either by means of these things or without them, to nourish and preserve us. At all events, behold he nourished our forefathers even in the desert for forty years."

This would make the Day of Atonement not merely a fast but also a high festival, a means of securing the propitiation and pardon of God, and an expression of joy because of the ingathering of the harvest. By fasting the people showed that they were not greedy for the food, but had faith that God could nourish them under any circumstances. In the same light we may understand the words of R. Simeon b. Gamaliel in the Mishnah,

there were no happier days for Israel than the fifteenth of Ab and the Day of Atonement, for on them the daughters of Jerusalem used to go forth in white raiments; and those were borrowed, that none should be abashed which had them not; (hence) all the raiments required immersion. And the daughters of Jerusalem went forth to dance in the vineyards. And what did they say? The handsome girls said, set your eyes on beauty, for a woman is only for beauty; the well-born said, set your eyes on the family, for a woman is only for children; the ill-favoured said, Take your choice for piety's sake.[82]

This statement in the Mishnah puzzled scholars, for such performances were hardly in accordance with the nature of the day, the most solemn in the Jewish calendar. When we combine, however, the passage in Philo with the Mishnah we can easily understand how the festival spirit described in the Mishnah could have taken place in the Day of Atonement. As fasting was a symbol of faith in God rather than in the harvest, so the custom of borrowing raiment from one another was a symbol that the daughters of those who prospered in their harvest should not by their expensive garments humiliate the women of the lower classes.

The most interesting point in Philo's description of the festivals is that he considers most of them of an agricultural origin. Even the blowing of the trumpet he connects with the harvest season:

On this account it is that the law has given this festival the name of a warlike instrument in order to show the proper gratitude to God as

[82] Ta'an. 4, 8; Ta'an. 31a.

the giver of peace, who has abolished all seditions in the cities, and in all parts of the universe, and has produced plenty and prosperity, not allowing a single spark which could tend to the destruction of the crops to be kindled into flame.[83]

The Bible calls the festival of Sukkoth a festival of ingathering but assigns as the reason for Israelites' spending the festival in booths "that your generation may know that I made the children of Israel dwell in booths when I brought them out of the land of Egypt." Philo refers to the biblical explanation, but also adds something of his own:

And indeed the people are commanded to pass the whole period of the feast in tents, because there is no longer any need for remaining in the open air, laboring at the cultivation of the land, since there is nothing left in the land but all . . . is stored up in the barn, on account of the injuries which otherwise might be likely to visit it from the burning of the sun or the violence of the rain.[84]

A parallel statement is found in Josephus:

On the fifteenth of the same month (Tishri), at which the turning-point to the winter season is now reached, Moses bids each family to fix up tents, apprehensive of the cold and as a protection against the year's inclemency.[85]

In Philo and Josephus the Feast of Booths is rather secularized, but no parallel to their words is to be found in rabbinic literature.

Among the Jewish festivals Philo enumerates is that specified in Lev. XXIII. 15, which commands the Feast of Weeks to be counted "from the morrow after the day of rest," when the sheaf offering is brought. The Sadducees held that the sheaf offering was brought on the day after the Sabbath falling within the festival week. Consequently, Pentecost falls on the seventh Sunday after Passover.[86] The Pharisees maintained, on the other hand, that the Feast of Weeks always falls on the fiftieth day after the first day of Passover, and that "after the day of rest" applies to the second day of Passover. This is also Philo's view: "But within the feast there is another

[83] *Spec. Leg.*, II, 190.
[84] *Spec. Leg.*, II, 204.
[85] *Ant.*, 3, 10, 4.
[86] See Men. 10, 3; Tal. 65a; Tosefta R. Sh. 1, 15.

festival following directly after the first day. This is called the sheaf festival . . . from this day the fiftieth day is reckoned." [87]

Furthermore, describing the festival of the "Sheaf," he says: "The sheaf thus offered is barley, showing that the use of the inferior grains is not open to censure." [88] The same opinion is also expressed by Josephus,[89] but there is no mention in the Bible that the sheaf was offered of barley. This view is, however, commonly expressed in Midrashic literature.[90] Philo says also that the sheaf is offered only from the grains which were produced in Palestine,[91] for the law in Lev. XXIII. 10 states "when ye are come into the land which I give unto you, and shall reap the harvest thereof, then ye shall bring the sheaf of the first-fruits of your harvest unto the priest." The Rabbis have also deduced this principle from the biblical verse quoted by Philo.[92]

[87] *Spec. Leg.*, II, 162, 176; Ritter, *Philo und die Halacha*, p. 114; see also the LXX on Lev. XXIII. 15.

[88] *Spec. Leg.*, II, 175.

[89] *Ant.*, 3, 10, 5.

[90] Pesiḳta Rabbati 9. [91] Som., II, 75. [92] Men. 83b.

CHAPTER IX

THE FAMILY

1. Marriage and Divorce

When one studies the passages in *De Specialibus Legibus* and other treatises which deal with marriage, one is under the impression that to Philo the institution of marriage was only a means of perpetuating the human race and that marital relations between husband and wife were permitted only for this purpose. The biblical prohibition of marital relations during the period of the woman's menstruation Philo explains on this basis, since at such a time the hope of procreation is hardly to be cherished.[1] In another place he says:

> And because, with the view to the persistence of the human race, you were endowed with generative organs, do not run after rapes and adulteries and other unhallowed forms of intercourse, but only those which are the lawful means of propagating the human race.[2]

Moses, he says, participated in no sexual pleasures "save for the lawful begetting of children." [3]

Though this is the main purpose of marriage in Tannaitic Halakah also, the Rabbis, unlike Philo, nevertheless considered even those sexual relations not seeking procreation a marital obligation. This they derived from Exod. xxi. 10, "Her food, her raiment and her conjugal rights shall not be diminished." The Shammaites said that if a husband vowed not to have sexual intercourse with his wife she may consent for two weeks, but if the vow extends to a longer period, she may demand a divorce. The Hillelites said that one week is sufficient.[4] This shows that in Tannaitic Halakah marital relations were considered a biblical command, even if they were not necessarily for the sake of begetting children.

[1] *Spec. Leg.*, III, 35 ff.
[2] *Det.*, 102.
[3] *Vita M.*, I, 28.
[4] Ket. 71; Tosefta Ket. 8, 3; see also Shab. 118b; Jer. Tal. Ycb. 1b.

Philo's conception of marriage is rather similar to that held by the Essenes, of whom Josephus says:

> They think that those who decline to marry cut off the chief function of life, the propagation of the race, and, what is more, that, were all to adopt the same view, the whole race would very quickly die out. They have no intercourse with them during pregnancy thus showing that their motive in marriage is not self-indulgence but the procreation of children.[5]

Less rigid and more in agreement with Palestinian sources is Philo's attitude toward marriage in *Quaestiones et Solutiones in Genesim*.[6]

Students of Philo disagree as to whether his conception of marriage is based on Jewish or non-Jewish sources. Ritter[7] claimed that Philo is in accord with the Tannaitic Halakah, while Heinemann, who believed that Philo knew little about the Oral Law, held that his view is contrary to the Halakah and is based on non-Jewish sources.[8] I shall try to show that even if his general speculations about the ideal purposes of marriage were influenced by other sources, his discussions of the legal aspect of it are in agreement with the Palestinian Halakah. Philo writes:

> Many men, therefore, who marry virgins in ignorance of how they will turn out regarding their prolificness, and later refuse to dismiss them,

[5] *Bell. Jud.*, II, 161.

[6] In *Quaes. in Gen.*, III, 21, Philo makes the following comment on Abraham's relation with his servant Hagar: "His connection with his concubine was only a connection of the body for the sake of propagating children, but his union with his wife was that of two souls joined together in harmony by heavenly affection." In *ibid.*, I, 26, he speaks of the woman as the symbol of the house, for no home is perfect without a woman. In *ibid.*, I, 27, he says that the relation of a wife to her husband is the same as the relation of a daughter to her parents. This concept was well known in the Roman world (see Gaius III. 3: *sua heres est quia filiae loco est*) and is by no means foreign to the Semitic world. In Jer. III. 4 the terms "father" and "friend of my youth" are used as synonyms (see also Robertson Smith, *Kinship and Marriage in Early Arabia*, 1903, pp. 117–18). The Talmud also says that the wife, like the children, has to honor her husband (Kid. 31a). In the same passage Philo says: "For the husband receives the wife from the parents, as a deposit which is entrusted to him, and the woman receives her husband from the law." A parallel to Philo's words is found in the book of Tobit X. 12: *καὶ ἰδοὺ παρατίθεμαί σοι τὴν θυγατέρα μου ἐν παρακαταθήκῃ.*

[7] *Philo und die Halacha*, p. 68.

[8] *Philons Bildung*, pp. 261 ff.

when prolonged childlessness shows them to be barren, deserve our pardon. Familiarity, that most constraining influence, is too strong for them, and they are unable to rid themselves of the charm of old affection imprinted on their souls by long companionship. But those who marry women who have been tested by other men and ascertained to be barren merely covet carnal enjoyment like so many boars and goats and deserve to be inscribed among the list of the impious men as enemies of God.[9]

In Tannaitic Halakah we find striking parallels to the view held by Philo. The Mishnah says that if a man marries a woman who after ten years of married life has not born a child, he shall not abstain from keeping the law to "be fruitful and multiply."[10] Heinemann says that Ritter made a mistake in holding that, according to the Halakah, the husband must divorce her. The Mishnah merely states that in such a case he may take another wife. According to Philo, however, he is not allowed to live with her. I disagree with Heinemann in his interpretation of the Mishnah. The Tosefta states the man must divorce his wife.[11] This is interpreted in the Talmud in two different ways. According to some, he is morally obliged to divorce; according to others, he is legally forced to divorce her.[12] Philo seems to be of the opinion that if many years have passed in childlessness, the husband cannot be forced to divorce his wife. By the words, "he may be pardoned," Philo means that there is a moral obligation to divorce the woman, but no measures can be taken against him if he fails to. Polygamy was legitimate among the Jews, but it was not a common practice, and neither Philo nor the Rabbis would advise a man whose wife is childless to take a second wife. They would prefer divorcing the barren woman to having two women in the same house.

The Halakah is, however, stricter in cases where a woman has been proved barren in a previous marriage. The second husband is forced to divorce her, and she loses her *ketubah*.[13] Some Rabbis even held that sexual relation with such a woman is prostitution.[14] They apply those laws, however, only

[9] *Spec. Leg.*, III, 36.
[10] Yeb. 6, 6.
[11] Tosefta Yeb. 8, 3.
[12] Ket. 77a.
[13] Yeb. 65a.
[14] Yeb. 61a.

to men who have not previously established a family. Those who have children from earlier marriages may espouse even sterile women. The Mishnah that enumerates the women to whom the law of the Ordeal of Bitter Water is not applied (because their marriage was not sanctioned by the law) includes one who is barren. R. Eliezer alone held that in case of sterility it is not considered a prohibited marriage, for the husband may still marry another woman and establish a family.[15] Philo also makes a distinction between marrying a woman who is found sterile after a number of years of married life and marrying a woman who is known to be barren. Men who marry definitely barren women are enemies of God, for they regard marriage as merely a means of gratifying their excessive lust and carnal desires.

As to the question of what constitutes fulfillment of family requirements, there is a difference of opinion in Tannaitic literature. According to the Shammaites, a man who fathers two male children has met his obligation.[16] Concerning the Hillelites there are two traditions in the Tosefta: according to one, even a single female child was deemed sufficient; according to the other, there must be at least one male and one female child.[17] In either case this school makes no difference between male and female children. Philo is silent on this point. Ritter erroneously states that according to the Rabbis a person fulfills the command to "be fruitful" if he has one male child; similarly, he sees in Philo's words, "unless, indeed, it is a crime that he was without male offspring," an indication that Philo has the same view.[18]

Philo's strong opposition to marriage as a means of satisfying personal desires leads him to discuss the biblical law of Lev. xv. 16–18, which required that husband and wife should bathe themselves in water after marital relations. He interprets the passage thus:

> And the law takes such exceeding pains to prevent any irregularity taking place with respect to marriage that even in the case of husband

[15] Sot. 4, 1.
[16] Yeb. 6, 7.
[17] Tosefta Yeb. 8, 3.
[18] *Philo und die Halacha*, p. 83, n. 1.

and wife who come together for legitimate embraces, in strict accordance with the laws of marriage, after they have arisen from their beds it does not allow them to touch anything (οὐ πρότερον ἑᾷ τινος ψαύειν) before they have had recourse to washing and ablutions, keeping them very far from adultery and from all accusations referring to adultery.[19]

Josephus remarks:

Even after the regular connection of man and wife, the law enjoins that they shall both wash themselves, for there is a defilement contracted thereby both of soul and body, as though they had traveled into another country.[20]

While Josephus and Philo agree that bathing was necessary in such a case, there is a fundamental difference between them as to the reason for it. According to Josephus, the ablutions were required because the legal marital relation was a defilement in itself. Philo thought they were required only in order to prevent any accusation of adultery and to keep the marriage ties sacred. Josephus' interpretation is entirely contrary to the rabbinic view. As far as I know, we do not find in the whole field of rabbinic literature an expression of the view that legal marital relations should be considered a defilement of the body and soul.[21] According to the Rabbis, bathing was prescribed after intercourse so that men should not be with their wives like the cock with the hen.[22] This is analogous to the reason given by Philo.

According to Tannaitic literature, before the required bathing after marital relations husband and wife were not allowed to touch food, but they could touch anything else in the household.[23] Philo, however, held a stricter view. According to him, they were not allowed to touch anything at all. It may be that he erroneously identified the biblical law with the Babylonian law. Herodotus says that when a Babylonian has connection with his wife they both sit at the burnt offering of incense and at dawn wash themselves, "but touch not even a vessel" before they have washed.[24]

[19] *Spec. Leg.*, III, 63.
[20] *Cont. Ap.*, II, 29.
[21] See the statement by R. Simeon, Sifra Meẓorah 3 (15, 16).
[22] Ber. 22a.
[23] See Zabim 5, 1.
[24] Herodotus, I, 178.

It should be noticed that while both Philo and Josephus consider bathing itself enough, the Bible definitely states that the mere washing with water is not deemed sufficient to render a person pure unless the sun had gone down thereafter. In another place, however, in his discussion of the purity of the priests, Philo follows the biblical law. He says:

> And if any priest do by any chance touch anything that is unclean, or if he should have impure dreams by night, as is very often the case, let him during that day touch nothing which has been consecrated; but let him wash himself the ensuing evening, and after that let him not be hindered from touching them.[25]

By "impure" dreams Philo most likely means a seminal emission, which has the same status in the Bible as intercourse. This shows that Philo considered bathing sufficient for an Israelite, the rule to wait until evening being applied only to a priest in connection with touching or eating consecrated things. The origin of this distinction, though not found in the Bible, may be traced to Pharisaic teachings according to which the necessity to wait until evening was prescribed only for a priest in connection with entering the Temple and eating of the sacrifices and the *terumah*. An Israelite who has taken a bath becomes *ipso facto* cleansed of his impurity and must participate in the affairs of his house and the community.[26] The Sadducees, however, seem to have been of the opinion that the bath became effective only at nightfall.[27] Thus, the Pharisees held that the red heifer which was not offered in the Temple might be sacrificed before nightfall by the High Priest who bathed from his impurity. He is called in Tannaitic terminology a טבול יום. The Sadducees strongly objected to this view. In their opinion one did not become purified by taking a bath unless one waited until sunset, regardless of whether or not the sacrifices were offered in the Temple.[28] The Sadducees apparently applied the phrase "till even" to all alike. No distinc-

[25] *Spec. Leg.*, I, 119.
[26] Mishnah Zabim 5, 12.
[27] Parah 3, 6.
[28] See Finkelstein, "The Pharisees," *Harvard Theological Review*, XXII (1929), 206 ff. See also S. Zeitlin, "Ha-Ẓeduḳim we-ha-Perushim," *Ḥoreb*, III (1937), pp. 71–73.

tion was made between an Israelite and a priest. Thus, Philo's view that an Israelite performs his duty by bathing, whereas the priest must not touch anything consecrated until sunset, is in agreement with the Pharisaic interpretation of this law.

Philo not only defines the Jewish conception of marriage and the manner in which people should live after marriage, but he also discusses the preliminary steps to be taken by a man who wishes to marry. He may act on his own initiative, but when he claims the hand of the woman he must ask the consent of her parents. Philo gives the following advice to one seeking marriage with a virgin:

> If indeed you have any legitimate feelings of love in your soul for the maiden go to her parents, if they are alive, and if they are not, go to her brothers or to her guardians (ἐπιτρόπους) or to any other persons who are in charge of her (ἄλλους κυρίους) and revealing to them your affection towards her, as a free born man should do, ask her in marriage, and implore them not to consider you unworthy. For no one of those who have the guardianship of the maiden entrusted to them could be so base as to oppose an earnest and deserving entreaty.[29]

He does not state definitely whether the consent of the parents is always necessary regardless of the woman's age. It is evident, however, that he is speaking here of a girl not yet fully mature. She would not otherwise be under the care of protectors and guardians. In this passage Philo does not regard marriage as a business transaction between the suitor and the girl's father, such as is described in the papyri of the fifth century:

> I come to your house that you might give me your daughter Miphtahiah in marriage. She is my wife and I am her husband from this day for ever. I have given you as the price of your daughter Miphtahiah (the sum of) five *shekels*, royal weight. It has been received by you, and your heart is content therewith.[30]

Philo demands only the approval of the parents, but he leaves the question of the marriage entirely in the hands of the suitor and the girl.

[29] *Spec. Leg.*, III, 65–71.

[30] A. E. Cowley, *Aramaic Papyri of the Fifth Century* (1923), p. 46, par. 3–6.

Although Philo's view that the father has the right to give his daughter in marriage is not explicitly mentioned in the biblical law, nevertheless, the phrase in Deut. xxii. 16, "My daughter have I given unto this man for a wife," would indicate that the father customarily exercised the privilege. The story of Rebecca and Eleazar shows that the mother and brothers also had the right to give a girl in marriage with her consent. In Gen. xxiv. 57–60 we read, "And they said, we will call the damsel and inquire *at* her mouth. And they asked, 'Wilt thou go with this man?' And she said, 'I will go.' And thereupon they sent away Rebecca, their sister." According to Fourth Ezra, it is the mother who takes a wife for her son.[31] Furthermore, the author of the Book of Jubilees says: "Any man who wishes in Israel to give his daughter or his sister to any man who is of the seed of the Gentiles he shall surely die," [32] which shows that even in post-biblical time this custom was still in existence.

According to the Halakah, the father has the right to give his daughter in marriage to anyone of his choice until she reaches her majority, which is, according to the Rabbis, the age of twelve years and six months. But this right does not descend after his death to the brothers or to the mother. By special legislation, however, the Rabbis ordained that the mother of a girl and her brothers might, with the consent of the girl, give her in marriage during her minority. But if, on reaching her majority, she refuses to live with her husband, she is automatically released from him.[33] Philo does not know of the distinction between the right of the father to give his daughter in marriage and the right of the brother to give his sister in marriage.

It is probable, however, that the Rabbis did not ordain the first part of the law, namely, that the mother and brothers could give a minor girl in marriage. It may have been the law or the custom in pre-Tannaitic times. But in order to protect the orphan girl from unsuitable marriages, the Rabbis instituted the law which considered such marriages valid only if

[31] IV Ezra ix. 47; see also Heinemann, *Philons Bildung*, pp. 302 ff.
[32] Book of Jubilees xxx. 7.
[33] Yeb. 13, 1 and 2.

the girl consented to live with her husband after she reached maturity. If, however, on reaching a mature age, she refused to live with her husband, she was automatically released from him. This part of the law was a rabbinic reform. That the earlier Halakah did not make any distinction between the right of the father and the right of the mother and brothers to give a minor girl in marriage is even indicated in Tannaitic Halakah. The followers of Shammai, who usually represent a more conservative and stricter Halakah, were of the opinion that the refusal of the orphan girl when she reaches majority is valid only before marriage proper.[34] This shows that the conservative Shammaites accepted the law that the mother and brother can give a minor girl in marriage, but refused to accept fully the rabbinic reform that the girl can annul the marriage when she reaches majority.

Although we may explain Philo's reference to the consent of the father and brothers in terms of biblical and rabbinic law, still his statement that the consent of the ἐπιτρόπους is necessary can hardly be explained in terms of Jewish law. The function of the *epitropos* in Tannaitic literature is merely that of a steward who takes care of property and is appointed by court for a minor who inherits property. Furthermore, in Tannaitic literature it was only the father or the brothers and mother, in case the father is dead, who could give a girl in marriage. In the Halakah we have no regulations about the status of those who take care of an orphan girl. It is quite possible, however, that Philo is not discussing here the legal rights of the parents over their daughter in case of marriage, with its implication that the marriage is invalid if the parents refuse to sanction it, but he is merely advising the suitor regarding the proper way of claiming the hand of a girl.

While Philo himself follows the older Halakah, by which the right of the father to give his daughter in marriage descends to his son, he nevertheless applies Exod. XXII. 15, 16 to the father only. According to this law, if a man seduced a virgin, the father may approve or disapprove of the seducer's

[34] *Ibid.*

desire to marry her and may retain possession of the dowry which the seducer must pay. In connection with this Philo adds:

> But if the damsel be an orphan and have no father, then let her be asked by the judges whether she is willing to take this man for her husband or not; and whether she agrees to do so or refuses, still let her have the dowry that the man would have agreed to give her while her father was yet alive.

This law of Philo is not mentioned in the Bible. Goodenough thinks that Philo is speaking here in terms of Greco-Egyptian law, according to which the woman had the right to act legally for herself.[35] Heinemann also thinks that the whole passage is based on Greek sources. The fact, however, that Philo, as shown above, speaks of the marriage of an orphan girl as arranged by her brother shows that he does not consider it to be the woman's right to act independently. His exception in the case of seduction has its basis in Mishnaic law, which states that in case of seduction or rape the orphan girl always acts for herself, and the dowry which the seducer has to pay belongs to her instead of to her brothers.[36] Thus, Philo's law is a mere reflection of the Palestinian Halakah.

If we turn now to the question of divorce for reasons other than sterility, we find that, according to biblical law, the husband has the right to divorce his wife. In Deut. xxiv. 1, we read: "When a man taketh a wife and marrieth her, then it cometh to pass if she find no favour in his eyes because he hath found some unseemly thing in her that he writeth her a bill of divorcement and giveth it in her hand and sendeth her out of his house," etc. The meaning of the biblical phrase, "unseemly thing" was differently interpreted by the schools of Shammai and Hillel, as recorded in the following Mishnah:

> The school of Shammai says no man may divorce his wife unless he has found in her some unseemly thing, for it is said (Deut. xxiv. 1), "because he hath found some unseemly thing in her" (ערות דבר); but the school of Hillel says even if she spoiled his food, because it says "unseemly thing" in anything.[37]

[35] *Jewish Courts in Egypt*, p. 72.
[36] Ket. 4, 1.
[37] Git. 9, 10.

When we examine the Mishnah closely, we see that the school of Shammai does not help clarify the meaning of the phrase. The later rabbinic scholars understood the Shammaites to mean that a man could not divorce his wife unless witnesses came and testified that she had committed adultery, while the Hillelites accepted any threat to the peace of the family, such as spoiling the husband's food, as enough ground for divorce.[38]

Discussing the law of Deut. XXIV. 1, Philo says:

> But if a woman, having been divorced from her husband under any pretense whatever (*καθ' ἣν ἂν τύχῃ πρόφασιν*) and having married another, has again become a widow, whether her second husband is alive or dead, still she must not return to her former husband.[39]

Students of Philo believe these words to indicate that a man may divorce his wife without any specific cause for "any pretense whatever," which is in accordance with the school of Hillel.[40]

It should be noticed, however, that Philo gives two reasons for not allowing a man to remarry his former wife after she has been married to another: first, she has violated her former marriage ties (*θεσμοὺς παραβᾶσα τοὺς ἀρχαίους*); second, she has chosen new allurements in the place of the old. If we say that, according to Philo, a man may divorce his wife for any cause whatever, then the question is, why does he hold that a divorced woman has violated her former marriage ties?

In another place where Philo speaks of a man's accusing his wife of adultery, he says:

> When those men who marry virgins in accordance with the law, — and who yet afterwards preserve no natural affection for their wives, — if they seek to procure a divorce, and not being able to find a pretext for a separation (*μηδεμίαν ἀπαλλαγῆς πρόφασιν ἀνευρίσκοντες*), come forward and accuse them, saying that, though they fancied that they had been marrying virgins, they found on the first occasion of having intercourse together, that they were not virgins; — when, I say, these men

[38] Giṭ. 90b; see also Jer. Tal. Soṭ. 16b.

[39] *Spec. Leg.*, III, 30.

[40] See Ritter, *Philo und die Halacha*, p. 70, n. 1; L. Blau, *Die jüdische Ehescheidung* (1910–11), I, 40; see, however, the discussion on this subject by Heinemann, *Philons Bildung*, pp. 315 ff.; Moore, *Judaism*, II, 122 ff.

make such charges, let all the elders be assembled to decide on such cases.[41]

This passage indicates that for a Jew to divorce his wife in Alexandria was not a very easy matter, and that the main cause for divorce was unchastity.

It can easily be shown, however, that the attitude of the school of Shammai and of Philo has been misunderstood by some scholars. First of all, it is not true that according to the school of Shammai unchastity was the only cause for divorce. The Mishnah attributes to this group the view that if a man vows not to cohabit sexually with his wife for two weeks, he is obliged to divorce her.[42] The actions of a wife which may give her husband the right to divorce her, in the opinion of the Shammaites, are stated more fully in a Boraita in the Jerusalem Talmud, according to which, if a woman goes out on the street with her hair or any part of her body uncovered, the husband may divorce her.[43] The School of Shammai thus takes the Hebrew terms *erwat dabar* in Deut. XXIV. 1, translated "some unseemly thing," in their literal sense to mean "some uncovered thing." Philo also says that if a woman keeps even her hair uncovered, it is a sign that she is not modest, and the woman who is suspected of adultery must take off her headdress, the symbol of modesty.[44] In other words, according to the Shammaites, not only actual adultery may be the cause of divorce, but anything that

[41] *Spec. Leg.*, III, 80.

[42] Ket. 5, 5.

[43] Jer. Tal. Giṭ. 50d; see also Jer. Tal. Soṭ. 16b. Halevy (*Dorot ha-Rishonim* I3, 723 ff.) interprets the Mishnah in Giṭ. 1, 10 in the same light as I do. Many of his interpretations with reference to the attitude of the Shammaites towards divorce are rather too far-fetched, but I agree with him in the main point that even according to the Shammaites adultery was not the only cause of divorce.

[44] *Spec. Leg.*, III, 53 ff. The Mishnah in Ket. 7, 2 also says that if a woman appears in public with her head uncovered, the husband has enough ground for divorce, and she loses the ketubah. (See also the statement by R. Ishmael, Ket. 72a and b.) The biblical term פרועה was interpreted in Tannaitic literature to mean uncovered. We have seen that the same interpretation is given by Philo. It is interesting to note that the term ראשה פרועה appears in Mishnaic literature not only with reference to grounds for divorce. It seems that the ancient custom in Israel was to cover the head of the woman at the time of the wedding ceremony. The same custom also existed among the ancient Assyrians, as may be seen from the Assyrian laws.

shows immodesty and that indirectly leads to a suspicion of adultery.

Philo undoubtedly holds the same view. When he says that the husband may divorce his wife for any true reason whatever, he explains in the same passage that the woman has violated the marriage ties. By the use of the expression, "any pretext that he may obtain," Philo merely emphasizes the Shammaite point of view that actual adultery is not the only cause for divorce. The husband is, however, allowed to remarry the woman, since she did not actually commit adultery. This also solves the general question: why, according to the Shammaites, is a divorced woman who has not married anyone else allowed to remarry her former husband, since this same group is supposed to regard unchastity as the only cause of divorce? The answer is that such an attitude was never taken by the Shammaites.

In accordance with our interpretation, we may say that it is a common mistake to identify the attitude of Jesus toward divorce with that of the Shammaites. Matt. XIX. 4–9 relates that certain Pharisees asked Jesus whether it was right for a man to divorce his wife for whatever cause and Jesus answered:

> Have ye not read that he who made them from the beginning made them male and female, and said, For this cause shall a man leave his father and mother, and shall cleave to his wife; and the two shall be one flesh. What therefore God hath joined together, let not man put asunder. They say unto him, why then did Moses command to give a bill of divorcement, and put her away? He saith unto them, Moses for your hardness of heart suffered you to put away your wives: but from the beginning it hath not been so. And I say unto you, whosoever shall put away his wife, except for fornication, and shall marry another committeth adultery, and he that marrieth her when she is put away committeth adultery.

Note the two aspects — that only fornication justifies divorce and that, a divorce on other grounds being invalid, remarriage becomes adultery. Both are contrary to the Jewish laws of divorce even as interpreted by the Shammaites. Jesus, therefore, ignored entirely the passage of Deut. XXIV. 1 and based his reply upon the narrative of Gen. I. 27, together with II. 24, for if even Deut. XXIV. 1 should be interpreted according to

the Shammaites, this biblical passage is contrary to the view held by Jesus.

2. Prohibited Degrees of Marriage

In Deut. VII. 3–4 Israelites are forbidden to form marriage alliances with any members of the seven nations who have occupied Palestine in the pre-Israelitic period. Commenting upon this law Philo says:

> But also, he [Moses] says, do not enter into the partnership of marriage with a member of a foreign nation, lest some day conquered by the forces of opposing customs you surrender and stray unawares from the path that leads to piety and turn aside into a pathless wild. And though perhaps you yourself will hold your ground steadied from your earliest years by the admirable instructions instilled into you by your parents, with the holy laws always as their key-note, there is much to be feared for your sons and daughters. It may well be that they, enticed by spurious customs which they prefer to the genuine (δελεασθέντες νόθοις πρὸ γνησίων ἔθεσι), are likely to unlearn the honour due to the one God, and that is the first and the last stage of supreme misery.[45]

According to this, the restriction extends to all other people who do not subscribe to the Jewish religion. It has no basis in the Bible, but R. Simeon ben Yoḥai insists upon it for a reason similar to Philo's – that the Jews would learn foreign customs and worship idols if they married other non-Jews besides those of the seven nations.[46] The general opinion of the Tannaitic authorities is that intermarriage with Gentiles is not biblically prohibited. It is possible, however, that this Mishnaic interpretation belongs to a later Halakah. The Book of Jubilees, which may represent earlier Tannaitic Halakah, says: "Moses commanded the children of Israel and exhorted them not to give their daughters to the Gentiles." [47] This author does not make any distinction between the seven nations and Gentiles in general. The Mishnah also states that the zealous slay a man who cohabits with a Gentile woman.[48] By "zealous" it probably means the men who still

[45] *Spec. Leg.*, III, 29; see also a parallel passage in *Ant.*, 7. 7. 5.
[46] 'A. Zar. 36b; see Ritter, *Philo und die Halacha*, p. 71.
[47] Book of Jubilees XXX. 11.
[48] Sanh. 9, 6.

hold the stricter and older Halakah. The Mishnah itself refers indirectly to a disagreement among scholars as to whether intermarriages with Gentiles are prohibited, by saying: "Whoever translates 'Thou shalt not give thy seed to Molech' as 'Thou shalt not give of thy seed to co-habit with a Gentile woman,' bid him to be silent." [49] The Book of Jubilees, however, translates Lev. XVIII. 21 in this manner.[50] All this shows that though the Bible speaks only of the seven nations, the law of Deut. VII. 1–4 was applied in the early Tannaitic period to all nations, as it is by Philo.

It must be stated, however, that the disagreement in Tannaitic literature as to whether or not intermarriage between the Jews and Gentiles is biblically prohibited has nothing to do with the problem of the validity of such marriages. Even if we assume that intermarriages are not biblically forbidden and that one could not be punished for making such an alliance, it is the unanimous opinion of the Tannaitic Halakah that if an Israelite marries a Gentile woman or a slave girl the marriage is not valid.[51] In the Talmud various biblical passages are cited to prove that such a union is invalid and that the children are not considered Jews [52] and do not inherit their father's possessions.[53] Their status is even inferior to that of bastards. There is no doubt, however, that this Mishnaic law can be traced back to the days of Ezra, who commanded the Jews upon their return to Palestine to forsake their pagan wives "and such that are born of them." [54] The Jerusalem Talmud explicitly states that the Tannaitic Halakah which so regards offspring of mixed marriages was an innovation made by Ezra.[55]

Philo was aware of this view. He called the children born of intermarriages between a Jew and an Egyptian woman or between a Jew and a slave girl *νόθοι*,[56] a term in Greek law

[49] Meg. 4, 9.

[50] Book of Jubilees XXX. 10; see Charles's note on this passage.

[51] Ḳid. 11, 12.

[52] See Ḳid. 68b; Yeb. 17a, 22b, 46o; Tem. 29b.

[53] Yeb. 2, 4. [54] Ezra X. 3.

[55] Ḳid. 64d; see my "Religious Background of Paul," *Journal of Biblical Literature*, LIV (1935), 48 ff.

[56] *Leg. Alleg.*, II, 94; *Virt.*, 224; *Vita M.*, II, 193.

to designate children born either of foreign women or slave girls. As Heinemann points out, we have no equivalent for this term in rabbinic literature.[57] The biblical term *mamzer* was interpreted in Tannaitic literature to refer to a child born of illicit relations with a married woman or of incestuous alliances.[58] The fact, however, that Philo applies the term *νόθος* only to a child born of a slave girl or a Gentile woman, and not to the child of a concubine or any illegitimate relation, is very significant. The *νόθος* in Greek law, unlike the *mamzer* in Jewish law,[59] had neither claim of inheritance nor anything in common with the children born of legitimate marriage. The status of children born of Gentile women or slave girls, according to the Palestinian Halakah, was equiva-

[57] *Philons Bildung*, pp. 313–14.

[58] Yeb. 8, 9.

[59] In Philo we have no definite statement regarding the status of a bastard in relation to his father's family. The verse in Deut. XXIII. 3, "A bastard shall not enter into the assembly of the Lord," the Rabbis interpreted as a prohibition against marriage between bastards and legitimate children. The general opinion seems to have been that a bastard is counted as a member of his father's family. Thus the Mishnah Yeb. 2, 5, says, "If a man has any kind of son such a son renders the wife of his father from levirate marriage. He is culpable if he strikes or curses his father and he has the status as his son in every respect unless he was the son of a bondwoman or pagan woman." The Talmud interprets the phrase בן מכל מקום to refer to a bastard with rights of inheritance (Yeb. 22b; see also Sifre Deut. 215; Ḳid. 68a). In *Decal.*, 130, Philo states that children born of adultery are the most miserable creatures, for they belong neither to the family of the adulterer nor to the family of the adulteress (*μηδετέρῳ γένει προσνεμηθῆναι δυνάμενοι, μήτε τῷ τοῦ γήμαντος μήτε τῷ τοῦ μοιχοῦ*). If he means that the bastard does not even share in the inheritance of his father, then his point of view is contrary to that of the Halakah. It may be, however, that during his time even in Palestine a bastard did not share in the inheritance. The Tosefta Yeb. 3, 3 relates that R. Eliezer was asked whether a bastard has the duty to perform the *ḥaliza* ceremony in case his brother died childless. R. Eliezer answered that he is not certain whether a bastard has the right of inheritance (ממזר מהו לירש). The Tosefta says that R. Eliezer was also of the opinion that a bastard inherits, but he had no tradition from his masters to this effect. It may also be that the law in the first century C.E. was different. In Ben Sira the term *mamzer* is understood in the same light as in Tannaitic literature and is also called a *κληρονόμος*. In 23, 22 it says: *γυνὴ καταλιποῦσα τὸν ἄνδρα καὶ παριστῶσα κληρονόμον ἐξ ἀλλοτρίου . . . αὕτη εἰς ἐκκλησίαν ἐξαχθήσεται καὶ ἐπὶ τὰ τέκνα αὐτῆς ἐπισκοπὴ ἔσται.* This passage shows that Ben Sira understood Deut. XXIII. 3 to apply to a child born through the union with another man's wife and that such a child has the right to his father's inheritance.

lent to the *νόθοι* in Greek law.[60] Thus, when Philo uses the term *νόθος*, and not the biblical term *mamzer* of Deut. XXIII. 3, for such children, he seems to have used accurately a Greek term for Jewish law. It is because children born of mixed marriage are called by Philo *νόθοι* that he uses the expressions *νόθοις ἔθεσι* and *πρὸ γνησίων* in the passage quoted, in which he explains why intermarriages are prohibited. Indirectly he wishes to convey the idea that children of intermarriage are "illegitimate."

Philo's discussion of the type of woman a priest may not marry also reflects some Tannaitic principles. In Lev. XXI. 7 three types are forbidden: a harlot, a profaned woman, and a divorced woman. The Bible, however, does not explain what it means by a "profaned woman" or in what respect she differs from a harlot. In Tannaitic literature the Hebrew

[60] Heinemann, *Philons Bildung*, p. 314. In the Testament of Levi we find a criticism against intermarriages between Jews and Gentiles. The passage reads: "and the daughters of the Gentiles shall ye take to wife purifying them with an unlawful purification" (*καθαρίζοντες αὐτὰς καθαρισμῷ παρανόμῳ*). This passage has caused much comment among students. Professor Finkelstein says that the passage may refer to the right of purification, presumably baptism for Gentile women converted into Judaism, while Professor Zeitlin says that *καθαρίζοντες* refers to the purification after menses (see *Journal of Biblical Literature*, 1932, p. 231, n. 16; 1933, pp. 78–79, 203–11). My own impression is that this passage has been misunderstood. A parallel passage is found in the Pauline Epistles which I discussed in my article, "The Religious Background of Paul," *Journal of Biblical Literature*, LIV, 48 ff. In I Cor. VII. 12–14 Paul says that if a Christian is married to a pagan woman and she is contented to dwell with him, he is not allowed to leave her, because the unbelieving wife is sanctified in her husband (*ἡγίασται ἡ γυνὴ ἡ ἄπιστος ἐν τῷ ἀνδρί*). The main principle of Paul's argument is that the pagan woman became purified or sanctified by the virtue of her believing husband. In other words, the sanctity and purification of the husband extends to the wife. By marriage the husband purified the unbelieving wife. Paul applied this principle only in case such a union came into existence through the conversion of one partner, but his argument must have been the main defense of those who favored mixed marriages. The Testament of Levi bitterly disapproves of this principle: "The daughters of the Gentiles shall ye take to wife purifying them with an unlawful purification; and your union shall be like unto Sodom and Gomorrah." Dr. Finkelstein himself makes reference to the fact that the LXX translates the Hebrew phrase in Job I. 5, ויקדש אותם, "and he sanctified them," into *ἐκαθάριζεν αὐτούς*, "and he purified them," which shows that *ἁγιάζω* and *καθαρίζω* are used as synonyms. Paul also uses the term *ἀκάθαρτος* as the negative in the passage quoted above. Hence the passage in the Testament of Levi has to do neither with baptism nor with purification after the menses nor with betrothals.

term חללה is interpreted to mean, not a woman accused of misbehavior or bad conduct in general, but one born of parents who violated the marriage laws of the priesthood.[61] If, for instance, a priest has married a divorced woman, the child of this union is called a חללה and no priest is allowed to marry her. She was born of parents who profaned the priesthood. On the same grounds the Mishnah says that before marrying another priest's daughter every priest must investigate four generations of her family to be certain that none violated the laws of marriage prescribed for his kind. If he marries an Israelite's daughter he must investigate five generations on her side.[62] This Tannaitic view seems to be reflected also in Philo's words when he says:

> But since the priest is a man well before he is a priest, and must and should feel the instinct for mating, Moses arranged for him a marriage with a pure virgin and one who is born of pure parents and grandfathers and ancestors, highly distinguished for the excellence of their conduct and lineage.[63]

It is evident that Philo, like the Rabbis, interprets the term חללה to mean "profaned by birth." He actually expresses the Mishnaic law that the priest must be certain of her ancestry at least four generations back.

The Hebrew term *zonah* (harlot), as in the Tannaitic Halakah, was interpreted by many scholars in different ways. R. Eliezer says that if an unmarried woman had intercourse with a man but once she is classified as a prostitute and is forbidden to marry a priest, while R. Akiba says that a *zonah* is one who lives a promiscuous life, that is, a prostitute in its full sense. The majority are, however, of the opinion that the term is applied to a proselyte or to an emancipated slave, or to a Jewess who had intercourse within one of the prohibited degrees of marriage.[64] Other Tannaim interpret the term differently. Philo uses for the Hebrew term *zonah*, πόρνη,[65] an indication that he agrees with Rabbi Akiba.

In the same passage Philo says that the law forbids a priest

[61] Sifra Emor (Lev. xxi. 7).

[62] Ḳid. 4, 3. I follow the interpretation given by Tosafot on this Mishnah in Ḳid. 46a; see also Rashi on this point.

[63] *Spec. Leg.*, I, 101.

[64] Sifra Emor (xxi. 4); Talmud Yeb. 61a.

[65] *Spec. Leg.*, I, 102.

to marry a harlot but permits an Israelite to do so, provided she repents of her former actions. Josephus, however, claims that the prohibition applies to an Israelite as well. Nor can he marry a slave.[66] Josephus seems to link the biblical prohibition against the harlot as a priest's bride with the idea of an innkeeper, which may mean a woman suspected of harlotry.[67] The Scripture does not forbid a freeman's marrying a female slave or a harlot. It should be noticed, however, that the translator of Targum Onkelos seems to be familiar with the same tradition. The law of Deut. xxiii. 18, "There shall be no prostitute of the daughters of Israel, neither shall there be a Sodomite of the sons of Israel," was understood in the Targum as a prohibition against a freeman's or a freewoman's marrying a slave. According to Targum, the command, "there shall not be any prostitute," is also a prohibition against marrying one. It includes, as well, denial of the right to marry a slave, for prostitution must have been common among this class.[68]

Josephus explains as the reason for prohibiting an Israelite to marry a slave the fact that God will not receive the marriage sacrifices of one who has prostituted her body. This also shows that Josephus bases his view on Deut. xxiii. 18, explaining it on the words of verse 19, "Thou shalt not bring the hire of a harlot into the house of God." In this interpretation he disagrees with Tannaitic literature, according to which "the hire of a harlot" means that the money she receives for prostitution cannot be offered as a sacrifice to God.[69] Josephus regards the sacrifices of a harlot as inacceptable even if the money did not come through prostitution.

Philo cites Deut. xxiii. 19 as an explanation of the prohibition against a priest's marrying a harlot who repents of her past sins, but he interprets the passage differently. He says in the passage following that previously quoted:

> On which account it is wisely said in another passage that one may not bring the hire of a harlot into the Temple. And yet the money is not

[66] *Ant.*, 3, 12, 2. [67] *Ant.*, 4, 8, 23.

[68] See Pes. 112b; Giṭ. 13b; *Spec. Leg.*, III, 68. See also P. Churgin, *Targum Jonathan to the Prophets* (1927), p. 17.

[69] Mishnah Tem. 6, 2; Sifre on Deut. 127 (xxiii. 19).

in itself liable to any reproach, except by reason of the woman who received it and the action for which it was given to her. How then could one possibly admit those women to consort with the priests whose very money is looked on as profane and base, even though in regard to its material and stamp it may be good and lawful money?

Philo here follows strictly the Tannaitic Halakah, which permits the acceptance of sacrifices from a harlot, but prohibits her from bringing as sacrifices the money gained through prostitution.

Although, according to Philo, an Israelite may marry a harlot if she changes her way of life, her children he regards as bastards. The law of Deut. XXIII. 3 states that "a bastard (*mamzer*) shall not enter into the assembly of the Lord," but the Bible does not say which children are considered under the epithet. In the Mishnah the problem is discussed in full:

Who is accounted a bastard? The offspring from any union of a near kin which is forbidden in the negative commandments. So R. Akiba, Simeon of Teman says: The offspring of any union for which the partakers are liable to extirpation at the hands of heaven, and the law is according to his words. R. Joshua says: The offspring of any union for which the partakers are liable to death at the hands of court. R. Simeon b. Azzai said: I found a family register in Jerusalem and it was written, such a one is a bastard through a union with a married woman.[70]

The Mishnah as a whole shows how uncertain the Rabbis themselves were on this point. Questions of illegitimacy must have been raised in the pre-Mishnaic period, yet we find no standard law about it. The unanimous opinion of the Mishnah is, however, that a bastard is a child born of the union with a woman married to another man or of the union with a woman prohibited to the man because of kinship. A different view is taken by Philo. The term *mamzer* he understands to apply to a child born of a πόρνης.[71] According to him, any child born of a prostitute out of wedlock is a bastard, but not if one marries her after she has reformed.

It seems, however, that the statement expressed in the

[70] Yeb. 4, 13; see also Sifre Deut. 248 (XXIX. 3).

[71] *Spec. Leg.*, I, 324; see Heinemann, *Philons Bildung*, p. 175.

Mishnah and the view held by Philo belong to two different traditions. When he interprets the term *mamzer* to mean a child born of a πόρνης he follows the law of Alexandrian Jewry, which, from evidence in rabbinic literature, we know to have been stricter about this matter than the Palestinian Jews were. The Jerusalem Talmud states that R. Tanḥum b. Papa sent an inquiry to R. Jose about two affairs which took place in Alexandria; one dealt with an unmarried woman (אחד בפנוי) and the other with a married woman (באשת איש). The nature of the problem is not specified exactly, but R. Jose's response clearly indicates that the Alexandrian Jews considered a bastard a child born through a union with an unmarried woman or with a harlot. R. Tanhum's question in his letter to R. Jose was whether the Halakah held by the Alexandrian Jews was correct. With reference to a child born of a married woman, R. Jose answered, "let not a bastard enter the assembly of God." With reference to a child born of an unmarried woman he answered: "You invent laws from your heart." [72] As the Talmud relates afterward, R. Jose's answer was that the children born of unmarried women are not considered bastards.

Although the response belongs to a much later period than that of Philo, it shows that the Alexandrian Jews adhered to the tradition referred to by him, namely, that the children born of harlots were considered bastards. Thus, the Alexandrian Halakah was stricter than the Palestinian. Whether the view held by the Alexandrian Jews was an older Halakah is something which cannot be ascertained, since we are still in the dark about the interpretation of *mamzer* in the pre-Mishnaic period.

Philo also devoted much space to explaining the biblically prohibited degree of kinship in marriage. In Lev. XVIII. 18 we read: "And thou shalt not take a woman to her sister to be a rival to her, to uncover her nakedness, besides the other, in her life time." In connection with this law Philo says: "Again, he does not permit the same man to marry two sisters, either at the same time or at different times" (οὔτ' ἐν τῷ αὐτῷ, οὔτ' ἐν διαφέρουσι χρόνοις).[73]

[72] Jer. Tal. Ḳid. 64d.

[73] *Spec. Leg.*, III, 27.

The Bible merely forbids a man to marry his wife's sister, but Philo's statement that the law does not allow a man to marry two sisters, whether at the same time or at different times, has no parallel there. It should be noticed, however, that the question of legality, if a person marries two sisters at the same time, was brought up before the Palestinian sages during the lifetime of Philo. It was raised when the Sabbatical year was still in existence. The Mishnah reads as follows:

> If a person betrothes two sisters at the same time, the betrothal is void for each of them. It happened once that a man was gathering figs in a basket for five women, two of whom were sisters. The figs indeed belonged to the women, but they were the fruit of the Sabbatical year. The man said, All of you shall be betrothed unto me with this. One of the females went and accepted for all the others. The sages decided that the betrothal was void, as far as regarded the sisters.[74]

The mere fact that the Mishnah found it important to relate the whole story and that the decision of the sages caused much discussion among later Tannaitic scholars shows that the decision was considered of great significance. On the same ground we may say that Philo himself, when he states that Moses did not permit the same man to marry two sisters either at the same time or at different times, has in mind not the biblical law but the contemporary Tannaitic Halakah.

In connection with this law, Philo agrees in another point with the Tannaitic Halakah. The Zadokites, who used the interpretative rule of analogy, forbade a man to marry his niece, as a woman was forbidden to marry her uncle. On the same ground they also forbade a man, after his wife's death, to marry her sister, as he was not allowed to marry his brother's wife after his brother's death. They therefore interpreted Lev. XVIII. 18, "Thou shalt not take a wife to her sister . . . in her life time," not as a command against marrying a wife's sister while the wife is alive, since a man is not allowed to marry his wife's sister even after his wife's death, but as a command against polygamy in general.[75]

The Pharisees, however, understood the passage as a prohibition against marrying two sisters as long as one of them

[74] Kid. 2, 7.

[75] See Ginzberg, *Eine unbekannte jüdische Sekte*, p. 31.

is still alive, even though he has divorced the other.[76] Philo understands this law in the same way. He says:

Even if he has put away the one whom he previously married: for while she is living, whether she be co-habiting with him or whether she be put away, or if she be living as a widow, or if she be married to another man, still he does not consider it holy for her sister to enter upon the position of her who has been unfortunate.[77]

3. Marriage Contracts and Forms of Marriage

In Deut. xxii. 23–24 we read:

If there be a damsel that is a virgin betrothed unto a man, and a man find her in the city, and lie with her; then ye shall bring them both unto the gates of that city, and ye shall stone them with stones that they die, the damsel because she cried not, being in the city; and the man, because he hath humbled his neighbor's wife; so thou shalt cut away the evil from the midst of thee.

This passage shows that a betrothal in biblical times was a more solemn institution than an engagement in modern times.[78] From the time of the betrothal the girl became in every respect the legal wife of her husband. If she committed adultery she was punished by death, just as a married woman would be, though the manner of execution differed slightly.

In discussing this biblical law Philo says:

Some people regard the crime of *ὑπογάμιον* as being midway between deflowering a virgin (*φθορᾶς*) and adultery, when in the case of couples who have formally executed covenants (*ὁμολογίαι*) but have not yet completed the marriages (*μήπω τῶν γάμων ἐπιτελεσθέντων*) some other man, by craft or violence, comes into relations [with the woman]. But in my judgment this is a form of adultery. For when there is a public record made (*ἐγγράφεται*) in the name of the man and woman (*ἀνδρὸς ὄνομα καὶ γυναικός*) as well as of the other matters which relate to unions (*ἐπὶ συνόδοις*), the covenants (*ὁμολογίαι*) have the force of marriages (*γάμοις ἰσοδυναμοῦσιν*). Wherefore the law orders both to be stoned if with one and the same mind they agreed to commit the crime.[79]

Let us analyze this passage: Philo here refers to "some people" with whom he disagrees, some who consider unfaithfulness

[76] Yeb. 8b.

[77] *Spec. Leg.*, III, 27.

[78] See S. R. Driver, *International Critical Commentary on Deuteronomy* (1895), p. 257.

[79] *Spec. Leg.*, III, 72–74.

of a betrothed woman not equal to adultery, but an offense somewhere between it and seduction. Whether these people were Palestinian lawyers or Greek lawyers is not mentioned in the text. He also gives a thorough description of the legal procedure of the betrothal: first, a written agreement between the two parties; second, the registration of the name of the man and woman; third, an enumeration of all the other things which are related to their union.

The Bible says only that by the betrothal she becomes "his neighbor's wife," [80] but it gives no specific description of the ceremony itself. The only reference to a written contract made in the Pentateuch is to the bill of divorcement. In the Talmud, however, a whole tractate is dedicated to the legal procedure of the betrothal. The Mishnah says: "A woman is acquired by three means, by money, by writ, and by intercourse." [81] The rabbinic scholars understood this Mishnah to be by money, or by writ, or by intercourse, while the Karaites had a tradition that all three elements together constitute marriage.[82]

Heinemann claims that the description of the betrothal in Philo is not Jewish in principle, and he compares the passage in Philo with the Greek betrothal contract. Goodenough, who endeavors to explain Philo's law in Greco-Roman terms, does not doubt that Philo's description of the marriage agreement is based on Greco-Egyptian law, of which we have knowledge through papyri material. According to it, there were two kinds of marriage agreements. One was made under the covenant of marriage ὁμολογία γάμου or συγγραφὴ ὁμολογίας, by which the intention of marriage was

[80] Deut. XXIV. 1.

[81] Kid. 1, 1.

[82] *Gan 'Eden: Nashim* 6; see also L. M. Epstein, *Jewish Marriage Contract* (1927), p. 11. I disagree, however, with his theory that even according to the Mishnah the three elements together constitute marriage, and that the rabbinic interpretation either by money, a writ or intercourse is a later Halakah. The terms בכסף בשטר ובביאה should be translated in the same manner as בגט ובמיתת הבעל, which means either by a bill of divorce or by the death of the husband. It is true that in the book of Tobit the three elements together seem to constitute marriage (Tobit VII. 13–15, VIII. 1), but bearing in mind the fact that Tobias, the son of Tobit, married Sara in order to fulfill the obligation of agnate marriage, we see that the ceremony was a combination of the betrothal and nuptials.

declared, the sum of the dowry was set upon, and completion of marriage was guaranteed. After this ὁμολογία, the couple lived together (συνεῖναι). The woman was not considered, however, a γυνὴ γαμετή until the full marriage was completed. Only after consummation could she sue for desertion, nor did she have any right of inheritance if he died. The children of such marriages did not enjoy all the benefits of legitimate offspring. Goodenough thinks that the description given by Philo is equivalent to the description of the ὁμολογία found in the papyri. Thus, the τινες, who treated unchastity at the time of the preliminary marriage a less serious crime than adultery, were Greek lawyers.[83]

Professor Goodenough's view that the ὁμολογία of Philo is not the Jewish betrothal, but is the equivalent of the Greco-Egyptian preliminary marriage, and that marital relations started then is certainly not beyond question. Philo uses the same term in another place and still speaks of the woman as a virgin.[84] He says that the High Priest is not allowed to marry a woman whose betrothed died before the nuptials, though she is still a virgin. This would indicate that the marital relations in Alexandria did not start before the nuptials. In this passage Philo speaks of a woman betrothed διὰ τῶν ὁμολογιῶν. Furthermore, he applies the law of a man who charged his wife with unchastity,[85] after marriage proper, "when they first came together," [86] an indication that marital relations started after the nuptials. The term συνεῖναι of the papyri certainly is not equivalent to συνόδοις, used by Philo. The term ὁμολογία for betrothals is also found in Josephus,[87] and there is nothing strange in its use by Philo to mean a betrothed woman.[88] Moreover, it is hardly believable that

[83] *Jewish Courts in Egypt*, pp. 93 ff. Professor Goodenough's references and discussion of the various kinds of marriage contracts in Greco-Egyptian law are very significant, and though I may disagree with his interpretation of the passage in Philo, nevertheless I believe that no one interested in the field can ignore such important new sources as those to which he makes reference.

[84] *Spec. Leg.*, I, 107–08.

[85] Deut. XXII. 13–14.

[86] *Spec. Leg.*, III, 80.

[87] *Ant.*, 19, 9, 1: καθωμολόγηντο δ' ὑπὸ τοῦ πατρὸς πρὸς γάμον.

[88] After I wrote this chapter I found that A. Gulak ("Sheṭar Erusin we-

he would have approved of a marriage agreement which permitted marital relations that did not give the woman the full status of a married woman. Such a marriage contract is entirely foreign to Jewish jurisprudence and ethics. We shall therefore endeavor to explain the passage in Philo by comparing it with betrothal contracts found in Tannaitic literature.

The nature of the written marriage covenant prevalent in Egypt during the time of Philo differed from that in Palestine. The betrothal in Palestine represented legal marriage even though it was not consummated before the nuptials. By betrothal or *erusin* the bride became in every respect the wife of her husband. In Alexandria, however, the betrothal in itself was not a full marriage contract. The Tosefta states that it was a common custom in Egypt that women who had been betrothed to men were afterwards captured and married by other men. The sages of Palestine considered the children of such unions bastards, for the women were already legally married by the betrothal. Hillel the Elder, however, says that since the Alexandrian Jews inserted in the *ketubah* of the betrothal the clause, "when thou comest into my house thou shalt be my wife," the marriage did not become legal until after the nuptials. Consequently, if the woman in question became the wife of another man, she did not commit adultery, and the children of such a union were not bastards.[89]

This conclusively shows that the Palestinian scholars contemporary with Philo disagreed about the application of Deut. xxii. 24 to the betrothal contracts of Alexandria. It must, therefore, be to these men that Philo refers when he says, "Some people think that living with a betrothed woman is an offense somewhere between deflowering a virgin and

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Debarim ha-Niḳnim be-Amirah," *Tarbiz*, 1931–32, III, 361–76) criticizes Dr. Goodenough's theory on the same grounds as I do. He also claims that the term ὁμολογία was used not only for marriage contracts but for general deeds. ὁμολογία is likewise found in rabbinic literature (שטרי אומלוגין). The term καθωμολογημένη for one betrothed is found in Plutarch, *Pompeius* 47: Ἰουλίαν . . . Καιπίωνι καθωμολογημένην. See also many other interesting references which Gulak brings to our attention.

[89] Tosefta Ket. 4, 9.

adultery." He does not have in mind the biblical betrothal, but the betrothal of Alexandria, to which some Palestinian scholars deny legal value. Philo, however, argues that a written agreement made by two parties relating to their union has the force of marriage, and if a person captures such a woman and has a sexual connection with her, he really commits adultery.

The Greek phrase συνόδοις used in Philo and the term συνεῖναι in the papyri represent two different laws. When he says that all things concerning the union of man and woman are mentioned in the betrothal contract, Philo does not mean that the woman actually becomes the man's wife with whom he may live. His statement corresponds to that of the Tosefta which declares that in the Alexandrian marriage contract were inserted the words, "when thou comest into my house thou shalt be my wife." The term συνεῖναι, "they come together," means that at the time of the betrothal they are treated like husband and wife.[90]

That betrothed couples in the Jewish communities in Egypt abstained from marital relations before the nuptials is also reflected by a story in the Talmud. An Egyptian Jewish bride and bridegroom were captured, but they did not live together, because the *ketubah* of the nuptials was not made out.[91] It should be noticed, however, that in Palestine in the Mishnaic and pre-Mishnaic period the bride and bridegroom lived as husband and wife after the betrothal. The Mishnah says: "Women shall not be betrothed nor married (again) till after three months . . . whether they were divorced or widowed, married or only betrothed." [92] The reason for the delay is that in case offspring ensues it may be definitely known whether the child belongs to her first or her second husband. Evidently the marital relation began at the betrothal. R. Judah says: "Women who have already been

[90] As to the question whether the *Shetar Kiddushin* was originally identical with the *ketubah*, this passage indicates that originally they were one. This is not the place, however, to go into a discussion of the *ketubah* as possibly the oldest form of marriage contract, a subject upon which a great deal has been written.

[91] Git. 57a.

[92] Yeb. 4, 5.

married may be betrothed immediately, and the betrothed ones married, except in Judah, for there the intercourse of the bridegroom with his betrothed is less restricted." [93] The Tosefta tells us that in Judah marital relations preceded the nuptials, while in Galilee they followed marriage proper.[94]

The questions, however, may be raised: Why did the Jewish communities in Egypt insert the clause "when thou comest into my house thou shalt be my wife according to the law of Moses and Israel," and why were marital relations immediately after the betrothal forbidden there, while in Judah they were permitted? Furthermore, it may be asked, why were the Jews in Galilee more strict in such matters than those in Judah? When we examine the rabbinical literature closely, however, we find a historical explanation for these differences.

The Jerusalem Talmud says:

> In the former days they [the Gentiles] decreed religious persecution in Judah and they raped the daughters of Israel. They decreed that the local ruler should come upon her first [that is, upon the newly married woman]. They [the sages] therefore ordained that the husband should have marital relations with the betrothed while she was still at her father's house [before the nuptials].[95]

This form of persecution may belong to the pre-Maccabean period and most likely to the period of Antiochus IV (Epiphanes). It was then that the custom arose in Judah to begin marital relations at the time of the betrothal. The Mishnah which says "A woman is acquired by three means — by money, by writ, and by intercourse" belongs also to this period. In Judah, even after the persecution ceased, the betrothal continued to be regarded for a long time as a fully constituted marriage. In Galilee, where the population changed after the Maccabean period, the law that marital relations began at the betrothal was not accepted.

Tannaitic tradition that in Galilee marital relations did

[93] *Ibid.*

[94] Tosefta Ket. 1, 4.

[95] Jer. Tal. Ket. 25c. The passage quoted is given as an explanation of the Mishnah Ket. 1, 5, which says that marital relations in Judah started before the nuptials. This passage is usually understood to apply to the time of the Hadrian persecution in Palestine, an assumption open to doubt.

not begin before the nuptials is also reflected in the Gospels. In Matt. 1. 18 we read: "Now the birth of Jesus Christ was on this wise: When his mother Mary had been betrothed to Joseph, before they came together she was found with child of the Holy Spirit." The Greek phrase πρὶν ἢ συνελθεῖν αὐτούς may mean "before their coming together," that is, before the nuptials. Joseph did not suspect Mary of adultery, but he knew that in Galilee pregnancy before the nuptials might give rise to much criticism, although in Judah such a case would have been an ordinary matter. The Talmud tells us of women of prominent families in Judah who went under the nuptial canopy pregnant.[96] Therefore, when Mary had to bear her child, in order to avoid local criticism she "went into the hill country with haste, into a city of Judah."

In the same light we can understand the betrothal in Alexandria. The phrase "when thou comest into my house thou shalt be my wife" merely means that the bride becomes a real wife at the nuptials, for in Alexandria, where religious persecutions were not practiced, marital relations began at the time of the nuptials, as in Judah before 168 B.C.E. and in Galilee later. In course of time, however, the betrothal in Egypt lost its significance, since the bride did not really become the wife of the husband until the nuptial ceremony. Hillel the Elder, comparing the important part that the betrothal played in Palestine with its slight social value in Egypt, was inclined to think that in Egypt the child of a woman who had previously been betrothed to another man was not to be considered illegitimate. Philo, as we have seen, disagrees with this opinion and thinks that if an agreement is made by a man and a woman concerning marriage, and the woman violates the agreement by having intercourse with another man, she commits adultery and deserves to be put to death.

It is also quite possible that the Alexandrian Jews had another reason for inserting the sentence "when thou comest into my house thou shalt be my wife," one which may also be of historical significance. Long before the biblical period the question had already been raised whether or not a be-

[96] Jer. Tal. Ket. 25c.

trothal really constituted marriage. In the Code of Hammurabi we find the following statement:

If a man has betrothed a bride to his son and his son has not known her, but he himself lie in her bosom, he shall pay her one half money of silver, and shall make good to her whatever she brought from her father, and the man of her choice may take her.[97]

This passage shows that in the time of Hammurabi living with a betrothed woman in Babylon was virtually the same offense as seducing a virgin in Israel. Though the Talmud usually applies a stricter code for the commandments which the sons of Noah are obliged to observe, nevertheless the Rabbis were lenient in their attitude towards punishment in case a son of Noah had sexual intercourse with a betrothed woman. According to Talmudic literature, a betrothed woman who is a pagan has not the status of a married one.[98] It seems that this is not merely a rabbinic theory, but a law which the Rabbis saw practiced among the Gentiles. The same view is also expressed in the Hittite Code, which was written at a much later period than the Code of Hammurabi. In paragraph 27 we read:

If a daughter be betrothed to a man and another elope with her, and elope with the bride price, too, whatever the first man's (bride price was) then he (the other man) shall compensate him (the first man).

The Hittite Code shows that betrothal among the Hittites was not equivalent to marriage proper, and the bride could elope with another man and forsake the one to whom she was originally betrothed. In the Assyrian law code of the fifteenth century B.C.E., it is shown, however, that the Assyrians, like the Hebrews, considered a betrothal equivalent to marriage, and the code required that the betrothed woman should be faithful to her prospective husband. We read:

If a woman was betrothed (ta-ad-ua-at) to (her) husband who has been captured by an enemy, and she has not a father-in-law, for two years she must remain faithful to her husband (but) during these two years she may go and testify that she has not any support and that she is dependent on the palace.[99]

[97] 156.

[98] Sanh. 57b; Jer. Tal. Ḳid. 1, 1; Midrash Rabbah on Num. VIII.

[99] Paragraph 44. This is Jastrow's translation in "An Assyrian Law Code," *Journal of the American Oriental Society*, XLI (1921), 41–42.

This is the only bit of pre-biblical jurisprudence which demands faithfulness from a betrothed woman as if she had been actually married to her husband. It is fruitless to speculate whether the biblical law was merely an adaptation of the ancient Assyrian law or whether the Hebrews formulated their laws about betrothals independently. The Assyrian law did not prevail in the pagan world in post-biblical time. The Roman and the Greek law,[100] like the Hittite Code, did not consider a betrothal binding. Either the man or the woman could annul it. In this respect the Jews in Alexandria who lived in the pagan world undoubtedly followed many of the Roman and Greek customs, as well as the law of the Gentile world. Consequently, it was a common occurrence for a betrothed woman to elope with another man. In Jewish law, however, a betrothal is equivalent to marriage and to live with a betrothed woman is a capital offense. The problem could be solved only by abolishing the legal value of betrothal. Therefore the Alexandrian Jews inserted the sentence, "when thou comest into my house thou shalt be my wife."

What we have said will shed light also on another law in Philo. In connection with the High Priest, the law of Lev. XXI. 13–14 reads:

> And he shall take a wife in her virginity. A widow, or one divorced, or a profaned woman, or a harlot, these shall he not take; but a virgin of his own people shall he take to wife.

In discussing this law Philo says:

> Let the high priest, therefore, take a pure virgin to be his wife: I say a virgin, meaning not only one with whom no other man has ever been connected, but one with whom no other man has ever been named in reference to marriage (*μηδεὶς ἄλλος ἀνὴρ ὠνομάσθη διά τινων ὁμολογιῶν*) even though her body may be pure (*ἀγνεύῃ τὸ σῶμα*).[101]

This interpretation has no basis in the Bible, but it occurs in the Mishnah: "The high priest is not allowed to marry a woman whose betrothed died after the betrothal or mar-

[100] See the reference to Roman and Greek law given by Gulak in his article referred to in note 88.

[101] *Spec. Leg.*, I, 107–08.

riage proper."[102] It is highly probable that the origin of this prohibition was the Palestinian custom of beginning marital relations at the betrothal. Since the Bible says that the High Priest must take a wife in her virgin state, he was forbidden to marry a woman who had been betrothed to someone else. Philo bases this law on the same ground, but speaking to an Alexandrian Jewish community, where marital relations began after marriage proper, he held that the term παρθένος could not be applied to a betrothed woman even though she were pure in body.

It is to be noticed that the statement in the New Testament that Joseph wanted to "divorce" Mary (ἀπολῦσαι)[103] shows that although in Galilee, where a betrothal had virtually the same status as in Egypt, a divorce was necessary if one of the betrothed did not want the marriage to take place. The Targum on Deuteronomy uses the expression ויפטרנה, "set her free," for the Hebrew phrase ושלחה, "send her away from his house." The Gospels also translate the biblical phrase ושלחה by "set her free." The LXX, however, translates it literally by ἐξαποστελεῖ. The Targum and the Gospels probably were influenced by rabbinic law, according to which a divorce was necessary even after the betrothal, before the bride entered her husband's house. On the ground that a betrothal does not constitute marriage the earlier Karaites maintained that it could be annulled without a divorce, and the law of Deuteronomy was applied only after marriage proper.[104]

The view of the Shammaites is that an orphan girl given in betrothal by her brothers while she was a minor can refuse to live with the man when she reaches majority, and she then becomes automatically free; but if given in real marriage she has to have a divorce.[105] This may reflect an older, less strict tradition concerning the status of betrothal. Philo is silent on the matter.

[102] Yeb. 4, 4. See also Ritter, *Philo und die Halacha*, p. 72.

[103] Matt. 1. 19. The same term is used in the New Testament for divorce in general.

[104] See A. Harkavy, *Likḳuṭe Ḳadmoniyyot* (1903), II, p. 118. See also Revel, "Karaite Halakah," *Jewish Quarterly Review*, III (1912–13), 378–79.

[105] Yeb. 13, 1.

The conclusion that betrothals in Alexandria did not constitute marriage may help to formulate a theory concerning Philo's silence on levirate marriage, even though he does refer to agnate marriage as if it were in Alexandrian usage.

According to the law of Deut. xxv. 5, if a man dies without children it is the duty of the brother to marry the widow in order that a child may be born to succeed in the name of the dead brother. In rabbinic literature the whole tractate of Yebamot is dedicated to the laws of levirate marriage. Philo does not mention this law at all. There is no doubt that if levirate marriages were still in practice in the Jewish community in Egypt, he would have referred to it.[106]

The biblical law also commands that if one dies leaving only daughters, they inherit the estate, but, to keep the estate intact, they must marry within their father's family: "And every daughter that possesseth an inheritance in any tribe of the children of Israel, shall be a wife unto one of the family of the tribe of her father." [107] The Bible does not indicate what law would be applied if she failed to do so. Does she retain her inheritance or does the nearest kin of the deceased become the heir?

It is striking to observe that, though a whole tractate in the Talmud is devoted to levirate marriages, we find no laws in rabbinic literature concerning agnate marriage. According to Tannaitic and Talmudic tradition, this was practiced only at the time when the land was divided according

[106] It is true that although Philo does not refer to levirate marriage, nevertheless, that he was acquainted with it can be seen from his reference to the story of Tamar (Gen. xxxviii. 8). Philo says: "And yet Tamar having married two wicked brothers in turn, one after another, first of all the one who was the husband of her virginity and lastly him who succeeded her by the law of ἐπιδικασία in case the first left no family" (*Virt.*, 222). The Bible does not say that Er died without children, but Philo makes this statement only to explain how Tamar was allowed to marry her deceased husband's brother, which is forbidden under the law of Leviticus. This passage shows conclusively that Philo knew of levirate marriage, and it is therefore more surprising that he ignored entirely the law of levirate marriage. The passage in *Ant.*, 13, 12, 1 which tells that Alexander Jannaeus married the wife of his brother Aristobulus, who died without children, also shows that levirate marriage was practiced in Palestine during the Second Commonwealth. (See also Mishnah Yeb. 6, 3.)

[107] Num. xxxviii. 10.

to tribes and families.[108] Some Rabbis even said that Moses merely "advised" the daughters of Zelophehad to marry within their father's family, but it was never considered a command.[109] The Tannaitic statement that agnate marriage was not considered obligatory was not, however, the accepted Halakah among the Diaspora Jews. The passages in Philo referring to it suggest that during his lifetime it was customary in Alexandria. He says that a daughter who inherits her father's property must marry one of the near relatives of her father's family (*συγγενεῖς*); lacking these, she must marry a member of the same ward and tribe (*δημόται καὶ φυλέται*) in order that the property assigned to her should not be alienated by intermarriage with other tribes.[110]

The book of Tobit also shows that agnate marriage was still practiced among the Diaspora Jews in the Second Commonwealth. Sara, the daughter of Raquel, was married to seven husbands, all of whom died during the night of the nuptials. Tobias, the son of Tobit, was a distant blood relative of Sara. The angel advised Tobias to marry Sara:

> For I know that Raquel cannot give her to another man according to the law of Moses, but he shall be guilty of death (*ὀφειλέσει θάνατον*) because the right of inheritance doth rather appertain to thee than any other.[111] (*σοὶ καθήκει λαβεῖν ἢ πάντα ἄνθρωπον.*)

It is the duty of Tobias to inherit her,[112] for he is the only near relative (*σὺ μόνος εἶ ἐκ τοῦ γένους αὐτῆς*).[113] This type of marriage can be classified only as agnate. The father would have no right to give his daughter in marriage to any one else. The woman is regarded as being reserved for the relative, and if the father should dispose of her elsewhere, he is deserving of death. But this type of marriage is hardly parallel to the agnate marriage found in the Bible, according to which the daughters who inherit the property have to marry within the tribe. The biblical law, however, does not imply that the

[108] Sifre Emor (Lev. XXII. 3).
[109] B. B. 120a.
[110] *Spec. Leg.*, II, 126; see also Heinemann, *Philons Bildung*. pp. 310–11.
[111] Tobit VI. 13.
[112] Tobit VI. 12.
[113] Tobit VI. 12.

near kin "inherits" the woman with the property. In the story of Tobit the woman passes in marriage with the inheritance. This resembles the account of Ruth insofar as the view prevails that whoever inherits the property inherits the woman. Sara is not considered even an heir to her father's estate. Furthermore, her father was still alive. Nor does the situation parallel that of the daughters of Zelophehad. It is, therefore, highly improbable that the book of Tobit was written as a protest against the Pharisees who abolished the institution of agnate marriage.[114] As far as we can judge from Josephus, it was never obligatory, though the daughters inherited the property only if they married within their father's tribe. He writes:

> If they intend to unite themselves to persons of their tribes, they carry the inheritance with them to their husbands (*μετὰ τοῦ κλήρου πρὸς αὐτοὺς ἀπιέναι*), but if they should be married to another tribe, the inheritance should remain in their father's tribe (*ἐν τῇ πατρῴᾳ φυλῇ καταλιπεῖν*).[115]

It is difficult to determine whether Josephus is referring to actual usage or to the biblical law. It shows, however, that agnate marriage was obligatory only when the woman wanted to inherit the estate, which must be preserved, but not that the nearest male relative inherits the woman with the property.

The only type of marriage similar, though not equivalent, to the marriage of Tobias and Sara can be found in Attic law and is called the marriage of the *ἐπιδικασία* or *ἐπίκληροι*. At Athens the law ordered that if one died leaving no sons or grandsons, but only a daughter, she passed in marriage with the inheritance. The first in line to have a claim on her hand was her father's brother or the uncle's son. Such marriage was considered obligatory. If, however, either failed to claim her hand, she could marry the nearest agnate, but in the absence of one she could marry within her father's *φυλή*. If she became an heiress after she was married to one not the first in line, her husband might be forced to give her up in favor of a man nearer to her in kinship. If this nearest kin were already married, he might be obliged to give up his wife

[114] See M. Rosemann, *Studien zum Buche Tobit* (1894), pp. 1–17.
[115] *Ant.*, 4, 7, 5.

in favor of the ἐπίκληρος. The marriage of the nearest agnate did not require any official betrothal (ἐγγύησις), but the establishing of the claim upon the woman's hand constituted marriage (ἐπιδικάζεσθαι).[116] The agnate had as much claim on the heiress' hand as he had on the property of one who died childless.

The duty of Tobias to marry Sara is equivalent to the duty of the near agnate to marry the ἐπίκληρος in Attic law. The notion expressed in the book of Tobit, however, that Sara's father was not only forbidden to give her to one outside his own kin, but held as a capital offender should he disobey, is colored with Jewish ideas of levirate marriage. According to biblical law, the woman reserved for a levir must not marry outside of the family. Similarly, Judah was conscious that he committed a sin when he sent Tamar back to her father's home and did not give her in marriage to his son Shelah.

Thus, we may say the book of Tobit shows that agnate marriage was practiced among the Diaspora Jews, though its forms may have been influenced by Attic and biblical laws.

Reviewing our sources, we arrive at the conclusion that among the Palestinian Jews only levirate marriage was practiced, whereas among the Hellenistic Jews agnate marriage was customary. In the whole field of Hellenistic literature we find no reference to levirate marriage. The abolition of agnate marriage by Palestinian Jews has been explained, but the question remains, why was not levirate marriage practiced among the Alexandrian Jews?

We may give two possible explanations: first, the Hellenistic Jews living in a Roman world, where adoption was a common practice, may have substituted it for levirate marriage. It is a historical fact that among people who believed that one could create between himself and another a relationship of father and son levirate marriage was not practiced. In Athens adoption was permissible only if the adopting father had no legitimate children.[117] By adoption one could perpetuate his family name and inheritance. But this would

[116] See Lipsius, *Das attische Recht*, pp. 349–51, 544–48, 573; see also Driver and Miles, *Assyrian Laws*, pp. 240–50.

[117] *Ibid.*, p. 510.

not explain how the Hellenistic Jews could have disregarded the biblical law that the levir must perform either levirate or *ḥalizah*, otherwise making it impossible for the woman to marry outside of the family. The question can be readily answered by another assumption.

Lev. xx. 21 prohibits the marriage with a brother's wife. The law makes no distinction between a deceased or living brother in this matter. Nor does it stipulate that it applies only where children survive the deceased brother. The law in Deuteronomy, however, considers it a duty to marry the widow of a brother who dies childless. The Rabbis simply assumed that Leviticus applied only in case the deceased brother left children. But this answer was not accepted by all the Jews. The Talmud relates that the Samaritans practiced levirate marriage only with a childless widow whose husband died after the betrothal. If her husband died after the marriage was consummated, such marriage was prohibited.[118] There is no doubt that by such an explanation the Samaritans endeavored to reconcile the law of Leviticus with the law of levirate marriage in Deuteronomy. The Rabbis could hardly have accepted such an explanation. According to Tannaitic literature, the prohibited degrees of kinship by marriage apply to a betrothed woman as well as to a woman after marriage proper. It is highly probable that the Samaritans were not alone in applying the law of levirate marriage only to a betrothed woman of a deceased brother. If we assume that the Alexandrian Jews were of the same opinion, levirate marriage could not have been practiced in Alexandria, since, as already shown, betrothals in Alexandria did not constitute marriage. Hence, if the woman was widowed before the nuptials took place, there was no legal necessity to perform the levirate obligation. If she was widowed after marriage proper and her husband died childless, the levir was forbidden to marry her. The result was that levirate marriage was not practiced at all. Agnate marriage, however, which did not involve marriage within the prohibited degrees, was practiced among the Alexandrian Jews.

[118] Ḳid. 76a.

CHAPTER X

SEXUAL MORALITY

1. Illicit Relations

No Jewish writer ever protested so much against sexual irregularities as Philo. If it had been in his power he would have punished all harlots by death as public menaces for having misused their natural functions.[1] Still, I doubt whether Ritter is correct in saying that the penalty of death for harlotry was the actual law in Alexandria.[2] I believe that all the passages in Philo which speak about harlotry as a capital offense are merely apologetic in character. In the Roman and Greek world prostitution was a legalized institution, and in order to show the high morality of Jewish law, Philo could find no better illustration than its decrees against adultery. In *De Josepho* Philo puts the following words in Joseph's mouth:

> We, the descendants of the Hebrews, are guided by special customs and laws of our own: Among other nations the youths are permitted, after they are fourteen years of age, to use harlots and strumpets, and women who make gain by their persons, without restraint. But among us a harlot is not allowed to live, but death is a punishment for any one who adopts such a way of life. Therefore, before our lawful marriage we know nothing of any connection with any other woman, but without ever having experienced any connection we approach our virgin bride, considering the end of our marriage not pleasure but the begetting of legitimate children.[3]

Philo seems to be primarily interested in showing the difference between the pagan and the Jewish conception of sexual immorality. It may also be that though the Jews in Alexandria spoke about prostitution as a capital offense by way of reaction against their environment, it is highly im-

[1] *Spec. Leg.*, III, 51.

[2] *Philo und die Halacha*, p. 93; see also Goodenough, *Jewish Courts in Egypt*, p. 88; Heinemann, *Philons Bildung*, p. 285.

[3] *Jos.*, 42–43.

probable that they interpreted Deut. XXIII. 18 as meaning that a harlot is to be punished by death. Furthermore, if that were the case it would be hard to explain Philo's statement that an Israelite is allowed to marry a harlot,[4] an even milder view than that expressed by Josephus.[5]

Philo does not call for a penalty by the court for prostitution. There is, however, another bit of Jewish jurisprudence with regard to sexual immorality which seems to have been the law in Alexandria. The whole paragraph sounds like a response to a question which Philo was asked – whether or not the crime of violence (*βία*) by illicit relation with an unmarried woman was considered adultery.

If any one forcibly dishonors a woman (*βιασάμενος αἰσχύνῃ*) widowed either by the death of her husband or by some sort of divorce, he has committed a lighter sin than adultery, about one half as serious (*ἥμισυ σχεδὸν ἐκείνου*) and so shall he be relieved of the death penalty. But since he has regarded the most base things as the most desirable, let him be indicted for forcible deprivation (*βίαν*), contumelious assault (*ὕβριν*), criminal lack of control (*ἀκολασίαν*) and impertinence (*θράσος*) and let the judge decide in his particular case whether he has to be punished in person or by a fine (*ὅ τι χρὴ παθεῖν ἢ ἀποτῖσαι*).[6]

There is no doubt that by the term *χήρα* Philo does apply this law only to a widow or a divorced woman. He uses it in opposition to the same law in case of a *παρθένος*. Hence, violence to an unmarried woman was not classed among the Alexandrian Jews as robbing a virgin of her virginity, or equivalent to adultery, but as a crime which the court could punish either by fine or by stripes. In rabbinic literature the biblical law that if one violates a virgin he must marry her was taken literally. Violence to a girl who had reached maturity or to a divorcée or widow did not obligate marriage. Philo also applies the biblical law only to a virgin. Hence, his statement about violence to an unmarried woman is without biblical precedent at all.

Ritter claims that the law discussed by Philo has no origin in the Halakah,[7] while Goodenough brings to our attention

[4] *Spec. Leg.*, I, 102.
[5] *Ant.*, 4, 4, 23.
[6] *Spec. Leg.*, III, 64.
[7] *Philo und die Halacha*, pp. 90–91.

the fact that "in Alexandria and the Greek law of Egypt in general there is no direct parallel to this law." [8] I agree with Goodenough that we are dealing here with a practical bit of jurisprudence of the Jewish courts in Alexandria. It is, however, my purpose to prove that although there is no direct parallel in rabbinic law to the law discussed by Philo, it may still be shown that Philo's law has its background in Palestinian Halakah. He touches upon two separate problems: first, whether the term adultery can be applied to sexual connections with an unmarried woman; second, what should be the penalty for violating a woman. Philo's opinion on the first problem is that while sexual intercourse with an unmarried woman is not adultery in the same degree as with a married woman, for which the punishment is death, it still is adultery of a certain kind, the penalty for which is stripes. As for the second problem, his opinion is that while violence done to a woman is punishable by a fine, the judge can substitute stripes but cannot order both penalties.

In Tannaitic literature the problem of the legal nature of sexual intercourse with an unmarried woman is fully discussed. According to R. Eliezer, if an unmarried woman has connection with a man who has no intention of marrying her, she becomes thereby an adulteress.[9] This is not, however, the accepted view in rabbinic literature. Still, even those who do not consider such a woman an adulteress stigmatize the relationship itself as a "connection of prostitution." In the Mishnah we read:

> R. Meir says, whoever giveth to a virgin less than two hundred dinars or to a widow less than a menah (for their respective ketubah), his intercourse with them is an intercourse of fornication.[10]

In the Talmud there is, furthermore, an accepted law that if a person marries a woman not according to the manner prescribed by the Rabbis, the authorities have the right to annul the marriage, and the marital relations are to be considered mere prostitution.[11] So also the Sifre on Deuteronomy

[8] *Jewish Courts in Egypt*, p. 90.
[9] Yeb. 61b.
[10] Kit. 5, 1.
[11] Ket. 3a.

seems to understand the biblical command, "And there shall not be a prostitute among the daughters of Israel," to refer to an unmarried woman who gives herself to a man. There is no doubt that it is upon these sources that Maimonides has based his statement that, according to the Halakah, if a person has a connection with an unmarried woman he commits adultery of a less serious kind and is to be punished by stripes.[12]

It is quite apparent that it is the Halakic tradition expressed by Philo. Similarly, when speaking of intercourse with a betrothed woman, he says that some consider it to be an offense lying between seduction and adultery.

We have shown before that Philo's reference is to the Palestinian authorities, who thought that a betrothal among the Alexandrian Jews had no legal validity and that having a connection with a betrothed woman was equal to having a connection with an unmarried woman. Furthermore, in the Jewish communities in Babylonia, where marital relations seem to have begun at the time of the nuptials, even if the betrothed himself lived with his bride he was punished by stripes.[13] The penalty of stripes could have been inflicted upon the betrothed only if it was the penalty for living with an unmarried woman. All this shows that there was a rabbinic Halakah behind Philo's statement that intercourse with an unmarried woman is to be regarded as adultery of a lesser kind.

Philo's other point, that the offender may be fined for offering violence to a widow, also has its background in Palestinian law. If a man ravishes a virgin the Bible prescribes a fine of fifty shekels to be paid to the father. The Mishnah, however, goes beyond this biblical law, ordering, besides the fine of fifty shekels, payment by the ravisher for the disgrace, deterioration in value, and bodily pain.[14]

Philo's awareness of this Mishnaic law seems probable from the fact that when he discusses such a situation he does not mention the fixed biblical fine of fifty shekels, but leaves

[12] *Mishneh Torah*, "Hilkot Ishshut" 1, 4.
[13] Ḳid. 12b.
[14] Ket. 3, 4.

the amount of the fine undetermined. That is to say, it is not that he was ignorant of the fixed sum, which is mentioned in the Hebrew text as well as in the LXX, but that he most likely had in mind also the additional fine of legal damages, which is really unlimited. The additional fine mentioned in the Mishnah would be applied to violence to a widow as well as to a virgin, since it has nothing to do with the prescribed biblical sum. It is inflicted for the general bodily damages that the seducer caused by his violence.[15] Violence to a widow was not punishable by both stripes and a fine, for an accepted Mishnaic law stipulates that if a person commits two offenses simultaneously, he receives the severer punishment only.[16] Philo, however, leaves this matter to the judge to decide.

I believe the law just discussed was also known to Josephus, and if my interpretation is correct, one of his most difficult passages assumes a new light. In *Contra Apionem* Josephus makes a comparison between Roman and Jewish law, endeavoring to show the superior morality and strictness of the latter:

> I omit to speak concerning punishments, and how many ways of escaping them the greatest part of legislators have afforded malefactors by accepting fines in cases of adultery, marriage in case of corrupting a woman (*ἐπὶ φθορᾶς δὲ καὶ γάμους*).[17]

This passage suggests that Jewish law is stricter against corruption of an unmarried woman. On this point Whiston notes the striking disagreement between the *Antiquities* and *Contra Apionem*. In the *Antiquities* Josephus says, "He that corrupts a virgin that is not yet betrothed shall marry her himself."[18] Hence, the Jewish law is actually the same as the law of the heathen lawyers to whom Josephus refers in *Contra Apionem*, and his criticism against them is entirely unjust. More striking is Josephus' view in another passage in *Contra Apionem*, where he says that for violating an un-

[15] About this problem see Ket. 32; Jer. Tal. Ter. 44c.
[16] Mak. 1, 2.
[17] *Cont. Ap.*, II, 38 (276).
[18] *Ant.*, 4, 8, 23.

married woman (ἂν βιάσηται κόρην) the penalty is death.[19] Some of the translators of Josephus try to amend the text by changing γάμους into γάμων, which would mean that for adultery the heathen lawgivers allowed compensation in money. They also say that by κόρην Josephus means a betrothed woman. There is no need to insist that these emendations are merely an attempt to make these two striking passages in Josephus harmonize, but they are hardly plausible in any case.

It seems to me that the two passages in *Contra Apionem* were misinterpreted. It should be noticed that there is a slight difference between them and the one in the *Antiquities*. In the latter Josephus speaks strictly about a παρθένος, while in the former he speaks about unmarried women in general. In *Contra Apionem* he uses the term κόρην for raping an unmarried woman. He could easily have spoken of the crime as a capital offense. Philo also regards raping an unmarried woman as one of the greatest crimes. The language is even more rigid and forceful than in his discussion of raping a virgin. This law in *Contra Apionem*, however, does not contradict that in the *Antiquities*. The former is an additional piece of legislation of the Alexandrian courts, whereas the latter is merely a repetition of the biblical law.

2. Antenuptial Unchastity

The law of Deut. xxii. 13–21 deals with the problem of a man's accusation of his wife's antenuptial unchastity. To ascertain the truth of the charge, the law demands that when such a case comes before the court, the father of the girl should produce the evidence of her virginity, in this case displaying the garments. If blood is found thereon, then it is self-evident that the husband's accusation is false, "and he shall be chastised by the elders and also pay a fine of a hundred shekels to the father of the girl." If, however, the charge is sustained, then the girl shall be stoned.

If the biblical law is taken literally it implies that the garments of the girl are sufficient evidence to prove the falsehood of the husband's accusation. Furthermore, if the father of the girl fails to produce evidence of her virginity at the time

[19] *Cont. Ap.*, II, 30 (215).

of the nuptials, the husband's accusation without any other proof or testimony is sufficient to condemn her to death. If that is the case, then we are dealing here with a bit of jurisprudence which can hardly be conceived by an ethical jurist. How can we penalize the girl by death, only upon the failure of the father to produce the blood-stained garments, without other affirmative evidence of her guilt? Furthermore, how is it possible to ascertain that the girl committed adultery before the nuptials, though after betrothal to her husband? She might have lived with a man while she was free, which is not considered adultery according to biblical law. Nor is there any logic in punishing a girl by death because her husband married her in the belief that she was a virgin.

The arguments enumerated against taking the biblical law literally were undoubtedly those motivating the Pharisees in their refusal so to interpret it. Thus, according to the Tannaitic Halakah, the girl may be punished by death only if witnesses testify that she committed adultery after the betrothal. If she had sexual relations before the betrothal she is free from any penalty.[20] R. Eliezer b. Jacob seems to take the biblical phrase "and then shall spread the garment" literally, that is, if the husband brings the charge but his wife's garments disprove it, the husband is punished for his false accusation.[21] But R. Eliezer does not say whether the girl is punished by death on negative evidence. It seems to me beyond doubt that even according to R. Eliezer she is not, if witnesses do not prove her guilt after marriage proper or after betrothal. He is intent on literal interpretation of the law with respect to the penalty of the husband in case of positive disproof by the garments. To punish the girl, however, we need the testimony of witnesses that she committed adultery after her betrothal. The later rabbinic sources, such as Maimonides, have accepted R. Eliezer's view and applied it only with reference to the husband.[22] So do both Talmuds.[23] The statement in the *Scholion* to Megilat

[20] Ket. 46a; Midrash Tannaim Deut. XXII. 17–20.
[21] *Ibid.*
[22] Maimonides, *Mishneh Torah*, "Hilkot Na'arah Betulah" 3, 6.
[23] See Jer. Tal. Ker. 28c.

Taanit that the Sadducees interpreted the phrases literally,[24] if it has any historical value, may mean either that they shared the view later held by R. Eliezer, or that they interpreted the whole law literally. This would mean that if the father of the girl fails to provide sufficient evidence to contradict the accusation of the husband, the girl is punished by stoning.[25] In discussing this law Josephus ignores entirely the biblical reference to the garments, but requires the husband to support his accusation by evidence. If the court finds it sufficient to uphold his accusation, the girl is punished by death: "If a man having betrothed a bride in the belief that she is a virgin, find out that she is not, let him bring suit and make his own accusation, relying upon what evidence he may have to prove it." [26] In short, Josephus, like the Rabbis, placed the burden of proof on the husband, but there is a decided difference between Josephus and Tannaitic Halakah in the approach to this law. According to the Halakah, the law deals with a case of a man's accusation against his wife of antenuptial unchastity. According to Josephus, the law deals with a case of a man's betrothal to a woman he supposes a virgin but who he later claims was not. If he produces sufficient evidence to prove the truth of his charges, then the woman should be stoned "for not having kept chaste guard over her virginity up to her lawful marriage." The Halakah provides no penalty for the girl if her husband married her in the belief that she was a virgin and found out that she was not. Such a case does not constitute deception or misrepresentation justifying annulment of the marriage.

Bearing in mind the different definitions of the law of

[24] Scholion to Mishnah 4.

[25] With reference to the question of agreement between the Sadducees and R. Eliezer, see I. H. Weiss, *Dor Dor we-Dorshaw*, I, 117, and Halevy, *Dorot ha-Rishonim*, I3, 415 ff. I agree with Halevy in his interpretation of the view held by R. Eliezer, but I cannot see on what ground he assumes with certainty that the Sadducees sentenced the girl to death by the failure of her father to produce the stained garments. The passage in the *scholion* does not imply such an interpretation.

[26] *Ant.*, 4, 8, 23; (*εἴ τις ὡς παρθένον μνηστευσάμενος ἔπειτα μὴ τοιαύτην εὕροι, δίκην λαχὼν αὐτὸς μὲν κατηγορείτω*). See also Weyl, *Die jüdischen Strafgesetze bei Flavius Josephus*, pp. 87 ff.

Deuteronomy, I shall endeavor to investigate Philo's interpretation of the same law. He writes:

When men enter the nuptials in accordance with the law (*οἱ ἀγόμενοι νόμῳ*) and have sacrificed on the occasion of celebrating their marriage feast, but yet afterwards preserve no natural affection for their wives and insult and treat these gentlewomen as if they were courtesans; if they seek to procure a divorce, but finding no pretext for such a separation, resort to false accusations and through lack of any clear ground of impeachment shift their charges to things which cannot be made certain (*πρὸς τὰ ἀφανῆ τρέπωσι τὰς αἰτίας*) and come forward and accuse them, saying that they thought that they married virgins, but found on the first occasion of their having intercourse together, that they were not so (*ἐν ταῖς πρώταις ὁμιλίαις ἐφώρασαν*), then the whole body of elders assembles to decide on this case, and the parents will appear to plead the case in which they are all endangered. For the danger affects not only the daughters whose bodily chastity is impugned, but also their overseers against whom the charge is brought, not only because they have not watched them till the important period of their marriage (*τῆς ἀκμῆς καιρὸν οὐ παρετήρησαν*) but also because they have given in marriage as virgins those who have been defiled by others, deceiving and imposing upon those who have taken them as wives (*ὡς παρθένους τὰς ὑφ' ἑτέρων ἐφθαρμένας ἐνεγύησαν ἀπατῶντες καὶ φενακίζοντες τοὺς λαμβάνοντας*). If they appear to have justice on their side, let the judges impose a fine on those who have invented these false accusations, and let them also sentence those who have assaulted them to corporal punishment.[27]

This passage reflects Philo's acquaintance with some oral tradition. First, he interprets the Hebrew phrase "chastise him" as *διὰ πληγῶν εἰς σώματα*, which means that the accuser is punished by stripes. He could not have based this interpretation on the LXX, for the biblical phrase, "and they shall chastise him," is translated there by *παιδεύσουσιν αὐτόν*. The Tannaitic Halakah also understands by the phrase that the court punishes him by stripes.[28] Furthermore, whenever he speaks of an offense punishable by stripes or a fine — in which case the judge decides — Philo never allows both punishments for one offense. The false accusation of a man against his wife's unchastity is the only case for which Philo demands a double penalty. According to the Halakah, as well,

[27] *Spec. Leg.*, III, 79 ff.
[28] Ket. 45b.

a judge cannot impose two punishments for one offense. The law of unchastity is considered an exceptional case.[29]

Again, Philo's reference to ἡ γερουσία πᾶσα, in case the husband accuses his wife of unchastity, is also in agreement with the Halakah, which requires a court of twenty-three,[30] the usual number of judges in capital cases. Ritter has shown many other minor agreements between Philo and the Halakah.[31]

When, however, we carefully analyze the passage as a whole, we can easily see that Philo follows neither the literal text of the Bible nor the oral tradition. The most striking aspect of the whole passage is that he speaks only about the penalties for the husband if he loses his suit, but omits any reference to the penalty for the girl if he wins. Furthermore, Philo says nothing about the garments of the girl. He speaks only of a hearing of both sides by the γερουσία. Ritter refers to the fact that the Halakah also disregards the biblical requirement that the father should produce the garments as evidence. He has forgotten, however, that the Halakah requires other evidence, such as testimony of witnesses, while Philo is discussing an accusation not followed by any evidence and lacking "any clear ground of impeachment." Unlike Josephus, Philo understands the law as referring to after marriage proper (οἱ ἀγόμενοι νόμῳ); this implies that the main accusation is of adultery before the consummation of the marriage. When he mentions the parents of the girl, he says that they are also in danger of being condemned for misrepresentation, for they have betrothed as virgins girls already defiled by others.[32] Combining the two paragraphs in Philo

[29] Mishnah Mak. 1, 4; Tal. Ket. 32b. The same principle is also found in Greek law. Goodenough refers to Demosthenes, who in *Adv. Leptin.*, 155 quotes a Greek law which specifically prohibits the assigning of a double penalty for the same offense (see *Jewish Courts in Egypt*, p. 168 and n. 74). The fact that Philo requires a double penalty conclusively shows that he is dependent on Jewish tradition.

[30] Sanh. 1, 1.

[31] See Ritter, *Philo und die Halacha*, pp. 77 ff.

[32] Heinemann (*Philons Bildung*, p. 289) takes it for granted that Philo considers the main accusation of the husband that he betrothed her believing her a virgin and found out his mistake afterward. Hence Philo disagrees with the Halakah. The fact that he speaks of οἱ ἀγόμενοι shows that he interprets the law with reference to antenuptial unchastity.

we can see that he is discussing a man who claims after the nuptials that he found no virginity. Hence, the accusation is aimed against the girl and her parents. If she committed adultery between the betrothal and nuptials, then she committed a capital crime. If, however, she lived with a man before she was betrothed, then her parents were guilty of misrepresentation.[33] There is no reason, however, to think that Philo demanded the death penalty for the girl betrothed as a virgin but later found not to be. Under such circumstances he might have punished the parents with a fine for misrepresentation and deception and allowed the husband the right to divorce her, but she would not suffer the penalty of stoning.

We may say almost with certainty that Philo is not interested in discussing the biblical law of antenuptial unchastity and the penalty to be inflicted upon the girl. He is emphasizing the penalty of the husband for bringing an accusation against his wife without having any evidence to support his claim. Nor is he concerned with the theoretical interpretation of the Bible so much as with a practical law of the Alexandrian Jewish courts dealing with husbands who bring false accusations against their wives in order to get rid of them. If the court, after hearing both sides, is convinced that the husband is lying, it imposes a penalty of stripes for spreading an evil name against a daughter of Israel. The question is, however, whether the view held by Philo has any origin in ancient Palestinian law.

The Talmud relates that one of the reasons for the final breach between John Hyrcanus and the Pharisees was that a certain Pharisee, jealous of him, because he was holding the offices of both King and High Priest, brought an evil report that his mother was taken captive during the Maccabean period. This would render Hyrcanus unfit to hold the office of the High Priest. When the matter was investigated, no

[33] Even according to the Halakah, if one marries a woman in the belief that she is a virgin only to find himself deceived at the nuptials, it is considered a מקח טעות, unless she defends herself by claiming she was raped after the betrothal (Ket. 1, 4). The Mishnah does not state, however, whether such misrepresentation is sufficient ground to annul the marriage. According to the Talmudic interpretation of the Mishnah, the marriage is valid but her *ketubah* is reduced to a hundred *dinars* (Ket. 11b, 12a).

ground was found for such an accusation. Then a certain Sadducee, anxious to see the final breach between the Pharisees and John Hyrcanus, asked the King: "Should the penal law of bringing a false accusation against an average man, and against a King and High Priest be alike?" [34] The Talmud does not define the penalty for bringing a false accusation, nor does it say what penalty was inflicted on the bearer of such a charge against John Hyrcanus. Weiss accurately stated that a part of the story is missing.[35] Fortunately, Josephus, who also relates the story, says "the Pharisees made answer that he deserved stripes and bonds, but that it did not seem right to punish reproaches with death." [36] The Sadducees were displeased, however, that the standard penalty of stripes should be applied to one who insults a King. When we combine the story in the Talmud with the statement of Josephus, we may deduce a number of principles in Jewish law: (1) the biblical penalty of stripes for a false accusation of unchastity brought by the husband against his wife was the standard penalty for any other false accusation; [37] (2) the Sadducees also interpreted the biblical phrase, "and they shall chastise him," to mean corporal punishment, but demanded a heavier penalty if the accusation were directed against a King or a High Priest. Bearing these facts in mind, we may understand the Tannaitic Halakah that if one called his neighbor "bastard" he was punished by stripes, a result derived from the same principle.[38]

The conclusion drawn from my argument is that both Pharisees and Sadducees believed that if one spread an evil name against another without supporting evidence, and if the charge were decided by court to be without basis, the false accuser is punished by stripes. This law was undoubtedly based on Deut. XXII. 13.

To emphasize the point made, I must repeat that Philo, in his discussion of the law of antenuptial unchastity, was not

[34] Kid. 66a.

[35] *Dor Dor we-Dorshaw*, I, 133, n. 1.

[36] *Ant.*, 13, 10, 6.

[37] See also R. Judah's view in Ket. 45b with reference to false accusations.

[38] Kid. 28a; see also the interesting discussion about the penalties for spreading an evil name against somebody in the Tosefta 'Arak. 2, 10–12.

interested in interpreting the law of Deut. xxii. 13, nor has the passage anything to do with the accusation of a husband of antenuptial unchastity supported by evidence which may lead to the death of the girl for adultery. Thus, he ignored the whole biblical procedure and failed to make reference to the penalty which befalls the girl if her parents cannot prove that the husband's accusation is false. Philo is here merely discussing the case of a husband who, tired of his wife, brings a false accusation of adultery before the nuptials, so that he may divorce her without any difficulty. If the husband fails, however, to produce any evidence to support his claim, the court asks the girl and her parents to refute his testimony, and if the court believes that his accusation is entirely groundless, then he is punished by stripes for spreading an evil name. We have seen before that the Sadducees, as well as the Pharisees, were of the opinion that one who brings a false accusation is punished by stripes. The same view is held by Philo, but he says that in such a case the husband must pay a fine in addition; for, involved in the false accusation were both the girl and the parents. Philo does not refer, however, to the fixed biblical fine. It may be that for reproaches brought against an individual the penalty was stripes and imprisonment, as stated in Josephus, but for reproaches against a wife the penalty was stripes and the biblical fine mentioned in Deut. xxii. 13.

It is to be noticed that though Philo allows the double penalty for the husband who falsely reproaches his wife, he has no basis for it in the Bible. This conclusively shows that he is not interpreting the biblical text, but is referring to the procedure of the Alexandrian courts. He writes:

> and let them also pronounce what to those men will be the most unpleasant thing, a confirmation of their marriages if their wives will endure to live with them, for the law permits them at their choice either to remain with them or abandon them (*ὁ νόμος θελούσαις καὶ μένειν καὶ ἀπαλλάττεσθαι*).[39]

The Bible says merely that the husband has not the legal right to divorce the wife whom he charged with antenuptial

[39] *Spec. Leg.*, III, 82.

unchastity, but nothing is said about the liberty of the woman to cohabit with her husband or leave him.

This statement of Philo may be interpreted in three different ways: (a) she may forsake her husband and marry another man without any need even of a divorce; (b) she may divorce her husband; or (c) she may force her husband to divorce her against his will. With regard to the first interpretation, there are in the Bible the following instances permitting a woman to forsake her husband: first, when a man gives his servant as a wife to his son, who denies her food, raiment, and marital satisfaction, the Bible says, "then she shall go out free"; [40] second, when a man marries a captive and afterward is no longer attracted toward her, the Bible also says, "then shalt thou let her go whither she will." [41] But in neither of these instances is it stated whether a divorce is necessary. According to Tannaitic literature, they require a divorce.[42]

With regard to the second interpretation of Philo, the Aramaic papyrus of the fifth century B.C.E. would seem to provide for the possibility of a woman's divorcing her husband. It reads as follows:

> To to-morrow or another day if Miphtahiah should stand up in the congregation and say: "I divorce Ashor my husband," the price of divorce [shall be] on her head.[43]

The papyrus, however, is interpreted by many scholars as meaning, not that the woman has the power to divorce her husband, but rather that she can come into the congregation and express the demand for a divorce in these words.[44] Philo himself does not state in any place that a woman may demand a divorce.[45]

[40] Exod. XXI. 11.

[41] Deut. XXII. 14.

[42] Mekilta Mishpatim 3; Sifre Deut. XXII. 1.

[43] Cowley, *Aramaic Papyri of the Fifth Century, B.C.*, p. 46, verse 22.

[44] See Epstein, *Jewish Marriage Contract*, p. 202.

[45] The only other reference we have to a woman's forsaking her husband is in Josephus, *Ant.*, 4, 8, 23, according to Reinach's emendation: "nor let him marry one that has left her former husband" (*μηδὲ λιποῦσαν τὸν πρότερον αὐτῆς ἄνδρα*). The original text has *λυπῶν*, literally "grieving" her husband, but this hardly makes any sense (see Thackeray's note at this place in his

Since neither the first nor the second interpretation of the Philonic statement is fully acceptable, we are forced to accept the third, namely, that the wife may demand a divorce. For this we have the support of the Mishnah, which describes the circumstances enabling a woman to demand a divorce in former days, that is to say, about the period of Philo's lifetime. The Mishnah reads as follows:

> In former days, it was said that three women were granted divorces with the payment of the ketubah: She who said to her husband, "to thee I am unclean," she who said, "heaven is between me and thee," and she who said, "I am taken away from the Jews." [46]

The meaning of "to thee I am unclean" caused much argument among the later Tannaitic and Amoraic scholars. It can be stated with certainty that it could not mean adultery, for in that case the law would not have been changed later in the Mishnaic period. This early law referred to in the Mishnah may be understood in the light of the law which Philo mentions here, namely, that if a man falsely charged his wife with unchastity, she had the right to demand a divorce, for the reason, as the Mishnah states it, "to thee I am unclean." Thus, by the phrase the "law permits her" Philo has in mind, not the Bible, but possibly the law as it was practiced during his time in Palestine.

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translation of Josephus). This passage has little bearing on our subject, since Josephus says that one is not allowed to marry such women. It may be that he has in mind a certain group who considered the marriage dissolved if one partner refuses to continue living with another. I doubt, however, whether such a group ever existed among the Palestinian Jews. See, however, Epstein's interpretation of the papyri quoted above.

[46] Ned. 11, 12.

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Abbreviations and full titles of the works of Philo and other sources cited appear below:

PHILO'S WORKS

Abr. = De Abrahamo
Ad Gaium = Legatio ad Gaium
Aet. Mun. = De Aeternitate Mundi
De Agricultura
Cher. = De Cherubim
Conf. = De Confusione Linguarum
Cong. Erud. = De Congressu Eruditionis Gratia
Cont. = De Vita Contemplativa
De Gigantibus
De Providentia
De Sobrietate
Decal. = De Decalogo
Det. = Quod Deterius Potiori Insidiari soleat
Ebr. = De Ebrietate
Exsecrat. = De Exsecrationibus
Flac. = In Flaccum
Fuga = De Fuga et Inventione
Heres = Quis Rerum Divinarum Heres
Immut. = Quod Deus Sit Immutabilis
Jos. = De Josepho
Leg. Alleg. = Legum Allegoriae
Mig. Abr. = De Migratione Abrahami
Mut. Nom. = De Mutatione Nominum
Opificio = De Opificio Mundi
Plant. = De Plantatione

Post. C. = De Posteritate Caini
Praem. = De Praemiis et Poenis
Prob. Liber = Quod Omnis Probus Liber Sit
Quaes. in Ex. = Quaestiones et Solutiones in Exodum
Quaes. in Gen. = Quaestiones et Solutiones in Genesim
Som. = De Somniis
Spec. Leg. = De Specialibus Legibus
Virt. = De Virtutibus
Vita M. = De Vita Mosis

JOSEPHUS

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Abbreviations and full titles appear below:

Ant. = Antiquitates Judaicae
Cont. Ap. = Contra Apionem
Bell. Jud. = Bellum Judaicum
Vita

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Abbreviations and full titles of the tractates of the Talmud used appear below:

'A. Zar. = 'Abodah Zarah
Ab. = Abot
'Arak. = 'Arakin
B. B. = Baba Batra
B. Ḳ. = Baba Ḳamma
B. M. = Baba Meẓi'a
Bek. = Bekorot
Ber. = Berakot
Beẓ. = Beẓah
Bikk. = Bikkurim
Demai
Eduy. = Eduyot
'Erub. = 'Erubin
Giṭ. = Giṭṭin
Ḥag. = Ḥagigah
Ḥallah
Hor. = Horayot
Ḥull. = Ḥullin
Ker. = Keritot
Ket. = Ketubot
Ḳid. = Ḳiddushin
Kilayim
M. Ḳaṭ. = Mo'ed Ḳaṭan
M. Sh. = Ma'aser Sheni
Ma'as. = Ma'aserot
Mak. = Makkot
Meg. = Megillah
Men. = Menaḥot
Naz. = Nazir
Ned. = Nedarim
Nidd. = Niddah
Parah
Pe'ah
Pes. = Pesaḥim
R. Sh. = Rosh ha-Shanah
Sanh. = Sanhedrin
Shab. = Shabbat
Sheb. = Shebu'ot
Sheḳ. = Sheḳalim
Soṭ. = Soṭah
Suk. = Sukkah
Ta'an. = Ta'anit
Tam. = Tamid
Tem. = Temurah
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PHILO

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PUBLISHER'S NOTE

As probably the first systematic attempt to give a comprehensive account of how biblical law was interpreted in the first century of the Christian era, this volume will be of much interest to biblical students, Hellenists, philosophers, and students of the history of law. Dr. Belkin rejects the common tendency of scholars to draw a sharp line of distinction between Palestinian Judaism and Hellenistic Judaism, and the theory that they belong to two separate forms of culture. He shows the great interdependence of thought which existed between the Palestinian and the Alexandrian Jewish communities and demonstrates that the Oral Law, formulated by the Pharisees, deeply influenced the social and religious life of the Hellenistic Jews. He further shows that though normative Judaism was the creation of the Palestinian Jews, its concepts and doctrines were also known and accepted by the Alexandrian Jews. The first part of his book deals with the ritual and religious laws, the second with civil and criminal law. Needless to say, the book will illuminate many obscure passages in Philo, Josephus, the Apocrypha, and the New Testament.

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