

IV.

THE STRUCTURE AND SYSTEM OF BAVLI TRACTATE MAKKOT

Whether or not the Talmud of Babylonia is structured and guided by a program that we may call systematic forms the principal question addressed by an academic commentary. For if the document exhibits structure and sets forth a system, then it is accessible to questions of rationality. We may ask about the statement that its framers or compilers wished to make by putting the document together as they did. But if we discern no structure and perceive no systematic inquiry or governing points of analysis, then all we find here is inert and miscellaneous information, facts but no propositions, arguments, viewpoints. Now the Talmud commonly finds itself represented as lacking organization and exhibiting a certain episodic and notional character. That view moreover characterizes the reading and representation of the document by learned and experienced scholars, who have devoted their entire lives to Talmud study and exegesis. It must follow that upon the advocate of the contrary view — the one implicit in the representation of the document for academic analysis — rests the burden of proof. I set forth the allegation that the Talmud exhibits a structure and follows a system and therefore exhibits a commonly-intelligible rationality. The claim to write an academic commentary explicitly states that proposition. For the tractate before us, I have therefore to adduce evidence and argument.

I maintain that through the normal procedures of reasoned analysis we may discern in the tractate a well-crafted structure. I hold that the structure made manifest, we may further identify the purpose and perspective, the governing system of thought and argument, of those who collected and arranged the tractate's composites and put them together in the way in which we now have them. By "structure" I mean, how is a document organized? and by "system," what do the compilers of the document propose to accomplish in producing this complete, organized piece of writing? The answers to both questions derive from a simple outline of the tractate as a whole, underscoring the types of compositions and composites of which it is comprised. Such an outline tells us what is principal and what subordinate, and how each unit — composition formed into composites, composites formed into a complete statement — holds together and also fits with other units, fore and aft. The purpose of the outline then is to identify the character of each component of the whole, and to specify its purpose or statement. The former information permits us to describe the document's structure, the latter, its system.

While the idea of simply outlining a Talmud-tractate beginning to end may seem obvious, I have never made such an outline before, nor has anyone else.* Yet, as we shall now see, the character of the outline dictates all further analytical initiatives. Specifically, when we follow the layout of the whole, we readily see the principles of organization that govern.

These same guidelines on organizing discourse point also to the character of what is organized: complete units of thought, with a beginning, middle, and end, often made up of smaller, equally complete units of thought. The former we know as composites, the latter as compositions.

*I have provided complete outlines for the Mishnah and for the Tosefta in relationship to the Mishnah, and, not always in outline form, for the Midrash-compilations of late antiquity as well. In the work of others I have not found complete structural descriptions, similar to mine, except on an episodic basis, e.g., Joseph Heinemann's introduction to one parashah of *Leviticus Rabbah*, cf. *Journal of the American Academy of Religion*

Identifying and classifying the components of the tractate — the composites, the compositions of which they are made up — we see clearly how the document coheres: the plan and program worked out from beginning to end. When we define that plan and program, we identify the facts of a pattern that permit us to say in a specific and concrete way precisely what the compilers of the tractate intended to accomplish. The structure realizes the system, the program of analysis and thought that takes the form of the presentation we have before us. From what people do, meaning, the way in which they formulate their ideas and organized them into cogent statements, we discern what they proposed to do, meaning, the intellectual goals that they set for themselves.

These goals — the received document they wished to examine, the questions that they brought to that document — realized in the layout and construction of their writing, dictate the points of uniformity and persistence that throughout come to the surface. How people lay out their ideas guides us into what they wished to find out and set forth in their writing, and that constitutes the system that defined the work they set out to accomplish. We move from how people speak to the system that the mode of discourse means to express, in the theory that modes of speech or writing convey modes of thought and inquiry.

We move from the act of thought and its written result backward to the theory of thinking, the matter of intention that provokes reflection and produces a system of inquiry. That statement does not mean to imply I begin with the premise of order, which sustains the thesis of a prior system that defines the order. To the contrary, the possibility of forming a coherent outline out of the data we have examined defines the first test of whether or not the document exhibits a structure and realizes a system. So everything depends upon the possibility of outlining the writing, from which all else flows. If we can see the order and demonstrate that the allegation of order rests on ample evidence, then we may proceed to describe the structure that gives expression to the order, and the system that the structure sustains.

The present work undertakes the exegesis of exegesis, for the Talmud of Babylonia, like its counterpart in the Land of Israel, is laid out as a commentary to the Mishnah. That obvious fact defined the character of my academic commentary, since we have already faced the reality that our Bavli-tractate is something other than a commentary, though it surely encompasses one. The problems that captured my attention derived from the deeper question of how people make connections and draw conclusions. To ask about how people make connections means that we identify a problem — otherwise we should not have to ask — and what precipitated the problem here has been how a composition or a composite fits into its context, when the context is defined by the tasks of Mishnah-

commentary, and the composition or composite clearly does not comment on the Mishnah-passage that is subjected to comment.

The experience of analyzing the document with the question of cogency and coherence in mind therefore yields a simple recognition. Viewed whole, the tractate contains no gibberish but only completed units of thought, sentences formed into intelligible thought and self-contained in that we require no further information to understand those sentences, beginning to end. The tractate organizes these statements as commentary to the Mishnah. But large tracts of the writing do not comment on the Mishnah in the way in which other, still larger tracts do. Then how the former fit together with the latter frames the single most urgent question of structure and system that I can identify.

Since we have already examined enormous composites that find their cogency in an other than exegetical program, alongside composites that hold together by appeal to a common, prior, coherent statement — the Mishnah-sentences at hand — what justifies my insistence that an outline of the document, resting on the premise that we deal with a Mishnah-commentary, govern all further description? To begin with, the very possibility of outlining Babylonian Talmud tractate Makkot derives from the simple fact that the framers have given to their document the form of a commentary to the Mishnah. It is in the structure of the Mishnah-tractate that they locate everything together that they wished to compile. We know that is the fact because the Mishnah-tractate defines the order of topics and the sequence of problems.

Relationships to the Mishnah are readily discerned; a paragraph stands at the head of a unit of thought; even without the full citation of the paragraph, we should find our way back to the Mishnah because at the head of numerous compositions, laid out in sequence one to the next, clauses of the Mishnah-paragraph are cited in so many words or alluded to in an unmistakable way. So without printing the entire Mishnah-paragraph at the head, we should know that the received code formed the fundamental structure because so many compositions cite and gloss sentences of the Mishnah-paragraph and are set forth in sequence dictated by the order of sentences of said Mishnah-paragraph. Internal evidence alone suffices, then, to demonstrate that the structure of the tractate rests upon the Mishnah-tractate cited and discussed here. Not only so, but the sentences of the Mishnah-paragraphs of our tractate are discussed in no other place in the entire Talmud of Babylonia in the sequence and systematic exegetical framework in which they are set forth here; elsewhere we may find bits or pieces, but only here, the entirety of the tractate.

That statement requires one qualification, and that further leads us to the analytical task of our outline. While the entire Mishnah-tractate of Makkot is cited in the Talmud, the framers of the Talmud by no means find themselves required to say something about every word, every sentence, every paragraph. On the contrary, they discuss only what they choose to discuss, and glide without comment by large stretches of the tractate. A process of selectivity, which requires description and analysis, has told the compilers of the Talmud's composites and the authors of its compositions* what demands attention, and what does not. Our outline has therefore to signal not only what passage of the Mishnah-tractate is discussed, but also what is not discussed, and we require a general theory to explain the principles of selection ("making connections, drawing conclusions" meaning, to begin with, making selections). For that purpose, in the outline, I reproduce the entirety of a Mishnah-paragraph that stands at the head of a Talmudic composite, and I underscore those sentences that are addressed, so highlighting also those that are not.

*This statement requires refinement. I do not know that all available compositions have been reproduced, and that the work of authors of compositions of Mishnah-exegesis intended for a talmud is fully exposed in the document as we have it. That is not only something we cannot demonstrate — we do not have compositions that were not used, only the ones that were — but something that we must regard as unlikely on the face of matters. All we may say is positive: the character of the compositions that address Mishnah-exegesis tells us about the concerns of the writers of those compositions, but we cannot claim to outline all of their concerns, on the one side, or to explain why they chose not to work on other Mishnah-sentences besides the ones treated here. But as to the program of the compositors, that is another matter: from the choices that they made (out of a corpus we cannot begin to imagine or invent for ourselves) we may describe with great accuracy the kinds of materials they wished to include and the shape and structure they set forth out of those materials. We know what they did, and that permits us to investigate why they did what they did. What we cannot know is what they did not do, or why they chose not to do what they did not do. People familiar with the character of speculation and criticism in Talmudic studies will understand why I have to spell out these rather commonplace observations. I lay out an argument based on evidence, not on the silences of evidence, or on the absence of evidence — that alone.

It follows that the same evidence that justifies identifying the Mishnah-tractate as the structure (therefore also the foundation of the system) of the Talmud-tractate before us also presents puzzles for considerable reflection. The exegesis of Mishnah-exegesis is only one of these. Another concerns the purpose of introducing into the document enormous compositions and composites that clearly hold together around a shared topic or proposition, e.g., my appendix on one theme or another, my elaborate footnote providing information that is not required but merely useful, and the like. My earlier characterization of composites as appendices and footnotes signalled the fact that the framers of the document chose a not-entirely satisfactory way of setting out the materials they wished to include here, for large components of the tractate do not contribute to Mishnah-exegesis in any way at all. If these intrusions of other-than-exegetical compositions were proportionately modest, or of topical composites negligible in size, we might dismiss them as appendages, not structural components that bear much of the weight of the edifice as a whole. Indeed, the language that I chose for identifying and defining these composites — footnotes, appendices, and the like — bore the implication that what is not Mishnah-commentary also is extrinsic to the Talmud's structure and system.

But that language served only for the occasion. In fact, the outline before us will show that the compositions are large and ambitious, the composites formidable and defining. Any description of the tractate's structure that dismisses as mere accretions or intrusions so large a proportion of the whole misleads. Any notion that "footnotes" and "appendices" impede exposition and disrupt thought, contribute extraneous information or form tacked-on appendages — any such notion begs the question: then why fill up so much space with such purposeless information? The right way is to ask whether the document's topical composites play a role in the re-presentation of the Mishnah-tractate by the compilers of the Talmud. We have therefore to test two hypotheses:

- [1] the topical composites ("appendices," "footnotes") do belong and serve the compilers' purpose, or
- [2] the topical composites do not participate in the re-presentation of the Mishnah-tractate by the Talmud and do not belong because they add nothing and change nothing.

The two hypotheses may be tested against the evidence framed in response to a single question: is this topical composite necessary? The answer to that question lies in our asking, what happens to the reading of the Mishnah-tractate in light of the topical composites that would not happen were we to read the same tractate without them? The outline that follows systematically raises that question, with results specified in due course. It suffices here to state the simple result of our reading of the tractate, start to finish: the question of structure, therefore also that of system, rests upon the position we identify for that massive component of the tractate that comprises not Mishnah-commentary but free-standing compositions and composites of compositions formed for a purpose other than Mishnah-commentary.

The principal rubrics are given in small caps. The outline takes as its principal rubrics two large-scale organizing principles.

The first is the divisions of the Mishnah-tractate to which the Talmud-tractate serves as a commentary. That simple fact validates the claim that the tractate exhibits a fully-articulated structure. But the outline must also underscore that the Mishnah-tractate provides both more and less than the paramount outline of the Talmud-tractate. It is more because sentences in the Mishnah-tractate are not analyzed at all. These untreated Mishnah-sentences are given in bold face lower case caps, like the rest of the Mishnah, but then are specified by underlining and enclosure in square brackets.

Second, it is less because the structure of the tractate accommodates large composites that address topics not defined by the Mishnah-tractate. That brings us to the second of the two large-scale modes of holding together both sustained analytical exercises and also large sets of compositions formed into cogent composites. These are treated also as major units and are indicated by Roman numerals, alongside the Mishnah-paragraphs themselves; they are also signified in small caps. But the principal rubrics that do not focus on Mishnah-commentary but on free-standing topics or propositions or problems are not given in boldface type. Consequently, for the purposes of a coherent outline we have to identify as autonomous entries in our outline those important composites that treat themes or topics not contributed by the Mishnah-tractate.

I. Mishnah-Tractate Makkot 1: 1A-G

A. HOW ARE WITNESSES TREATED [PUNISHED] AS PERJURERS?

1. Explanation of the somewhat odd wording of the Mishnah.
2. The source in Scripture for the Mishnah's rule.

B. [IF THEY HAD SAID,] "WE TESTIFY CONCERNING MR. SO-AND-SO, THAT HE IS THE SON OF A DIVORCÉE," OR, "... THE SON OF A WOMAN WHO HAS PERFORMED THE RITE OF REMOVING THE SHOE," [AND HAD BEEN PROVED PERJURERS], THEY DO NOT SAY, "LET THIS ONE BE DECLARED THE SON OF A DIVORCÉE," OR,"LET HIM BE DECLARED THE SON OF A WOMAN WHO HAS PERFORMED THE RITE OF REMOVING THE SHOE." BUT HE IS FLOGGED [ON ACCOUNT OF PERJURY] WITH FORTY STRIPES.

"WE TESTIFY CONCERNING MR. SO-AND-SO, THAT HE IS LIABLE TO EXILE," THEY DO NOT SAY, "LET THIS ONE GO INTO EXILE IN HIS STEAD." BUT HE IS FLOGGED WITH FORTY STRIPES.

1. The next Mishnah-clause is given a foundation in Scripture.
2. Tannaite complement to the topic at hand: They are not punished by being declared the son of a divorcée or the son of a woman who has performed the rite of removing the shoe if they have given false witness in such a matter [but are flogged]. They are not sent into exile to the cities of refuge. They are not required to pay ransom. They are not sold as slaves [if they accused someone of having stolen and the accused is to be sold into slavery to pay compensation for the theft]. They also are not made to pay statutory fines on the basis of their own admission of their guilt.
3. Amoraic complement: A conspiring perjurer has to pay in accord with his share.

II. Mishnah-Tractate Makkot 1: 1H-K

A. [If they had said,] “We testify concerning Mr. So-and-so, that he has divorced his wife and not paid off her marriage settlement,” — (and is it not so that whether it is today or tomorrow, he certainly is going to pay off her marriage settlement? —) they make an estimate of how much a man will be willing to pay [now] for the ownership of her marriage settlement, on the condition that, if she should be widowed or divorced, [he will take it over], but if she should die, her husband will inherit her [estate, including said marriage settlement].

1. Complement to the Mishnah: How is this assessment accomplished?

III. Mishnah-Tractate Makkot 1: 1L-N

[If they had said,] “We testify concerning Mr. So-and-so, that he owes his fellow a thousand zuz, on condition that he will pay him in thirty days,” and the accused says, “... in the next ten years,” they make an estimate of how much a man is willing to pay for the use of a thousand zuz, whether he pays them in thirty days or in ten years.

A. RULES ATTRIBUTED TO SAMUEL BY JUDAH, CONCERNING THE AFFECT OF LOANS UPON THE SABBATICAL YEAR

1. He who makes a loan to his fellow for ten years — the end of the Sabbatical Year remits the debt, and that is the case even though one may claim that at the time that the Sabbatical Year came to an end, the commandment ‘he shall not exact it of his neighbor’ (Deu. 15: 2) does not apply, for ultimately that commandment will take effect retroactively.”
2. He who says to his fellow, ‘...on the stipulation that the advent of the Seventh Year will not abrogate the debts’ — the Seventh Year nonetheless abrogates those debts.

B. THREE MISCELLANEOUS SAYINGS ATTRIBUTED TO RAB BY JUDAH

IV. Mishnah-Tractate Makkot 1: 2-3E

A. [IF THEY HAD SAID,] “WE TESTIFY CONCERNING MR. SO-AND-SO, THAT HE OWES HIS FELLOW TWO HUNDRED ZUZ,” AND THEY TURN OUT TO BE PERJURERS —

THEY ARE FLOGGED, AND THEY PAY UP, [AND THIS IS ON TWO DISTINCT COUNTS,] FOR THE COUNT WHICH BRINGS FLOGGING ON THEM IS NOT THE COUNT WHICH BRINGS ON THEM THE PENALTY OF RESTITUTION,” THE WORDS OF R. MEIR. AND SAGES SAY, “WHOEVER PAYS RESTITUTION IS NOT FLOGGED.”

1. Scriptural proof for the position of sages.

B. [IF THEY HAD SAID,] “WE TESTIFY CONCERNING MR. SO-AND-SO, THAT HE IS LIABLE TO RECEIVE FLOGGING IN THE MEASURE OF FORTY STRIPES,” AND THEY TURN OUT TO BE PERJURERS — “THEY ARE SMITTEN EIGHTY TIMES, ON THE COUNT OF, ‘YOU SHALL NOT BEAR FALSE WITNESS AGAINST YOUR NEIGHBOR’ (EXO. 20: 13), AND ON THE COUNT OF ‘YOU SHALL DO TO HIM AS HE HAD CONSPIRED TO DO’ (DEU. 19: 19),” THE WORDS OF R. MEIR.

AND SAGES SAY, “THEY ARE FLOGGED ONLY FORTY STRIPES.”

1. Scriptural proof for the position of sages: how do they deal with the proof-text adduced in evidence by Meir?

V. Mishnah-Tractate Makkot 1: 3E-H

A. THEY DIVIDE UP [AMONG THE PERJURERS] A PENALTY FOR MAKING RESTITUTION, BUT THEY DO NOT DIVIDE UP THE PENALTY OF FLOGGING. HOW SO? [IF] THEY GAVE TESTIMONY ABOUT SOMEONE THAT HE OWES HIS FELLOW TWO HUNDRED ZUZ, AND THEY TURNED OUT TO BE PERJURERS, THEY DIVIDE [THE TWO HUNDRED ZUZ] AMONG THEM [AND MAKE RESTITUTION OF THAT AMOUNT]. BUT IF THEY GAVE TESTIMONY ABOUT HIM THAT HE IS LIABLE TO RECEIVING FLOGGING IN THE MEASURE OF FORTY STRIPES, AND THEY TURNED OUT TO BE PERJURERS, EACH ONE IS FLOGGED FORTY TIMES.

1. Scriptural proof for the rule of the Mishnah.

VI. Mishnah-Tractate Makkot 1: 4-5

A. WITNESSES ARE DECLARED TO BE PERJURERS ONLY IF THEY [BY THEIR OWN TESTIMONY] INCRIMINATE THEMSELVES.

HOW SO? [IF] THEY SAID, “WE TESTIFY CONCERNING MR. SO-AND-SO, THAT HE KILLED SOMEONE,” [AND] THEY SAID TO THEM, “HOW CAN YOU GIVE ANY TESTIMONY, FOR LO, THIS ONE WHO IS SUPPOSED TO HAVE BEEN KILLED, OR THAT ONE WHO IS SUPPOSED TO HAVE KILLED, WAS WITH US ON THAT VERY DAY AND IN THAT VERY PLACE” — THEY ARE NOT DECLARED PERJURERS. BUT IF THEY SAID TO THEM, “HOW CAN YOU GIVE TESTIMONY, AND LO, YOU YOURSELVES WERE WITH US ON THAT VERY DAY IN THAT VERY PLACE” — LO, THESE ARE DECLARED PERJURERS, AND THEY ARE PUT TO DEATH ON THE BASIS OF THEIR OWN TESTIMONY [AGAINST THE THIRD PARTY].

1. The testimony of the perjurer must be such as to incriminate himself: how on the basis of Scripture do we know that fact?

i. Three examples of how the substance of the testimony is refuted by the perjurer himself.

B. [IF] OTHERS CAME AND GAVE FALSE TESTIMONY AGAINST THEM, AND STILL OTHERS CAME AND GAVE FALSE TESTIMONY AGAINST THEM, EVEN A HUNDRED — ALL OF THEM ARE PUT TO DEATH.

R. JUDAH SAYS, “THIS IS A CONSPIRACY, [TO CONFUSE THE JUDGES], AND THE ONLY ONES TO BE PUT TO DEATH ARE THOSE OF THE FIRST GROUP ALONE.”

1. Challenge to the position of Judah: If **this is a conspiracy**, then even the first set of witnesses also should not be subject to the law.

i. Case that illustrates the problem of how one unreliable set of witnesses may discredit the case of the person who produced them, even though the same party produces reliable ones as well.

VII. Mishnah-Tractate Makkot 1: 6

A. PERJURED WITNESSES [IN A CAPITAL CASE] ARE PUT TO DEATH ONLY AT THE CONCLUSION OF THE TRIAL.

1. Tannaite complement to the Mishnah is set forth. This takes up the paradox that if the witnesses shown to have been perjured have not killed, they are put to death, if they have killed, they are not put to death

B. NOW LO, THE SADDUCEES SAY, “ONLY WHEN THE ACCUSED HAS ACTUALLY BEEN PUT TO DEATH, SINCE IT IS SAID, ‘A LIFE FOR A LIFE’ (DEU. 19:21).” SAGES SAID TO THEM, “AND HAS IT NOT ALSO BEEN SAID, ‘AND YOU WILL DO TO HIM AS HE HAD PLANNED TO DO TO HIS FELLOW’ (DEU. 19:19)? AND LO, HIS FELLOW IS STILL ALIVE! IF SO, WHY HAS IT BEEN SAID, ‘A LIFE FOR A LIFE’? FOR ONE MIGHT SUPPOSE THAT FROM THAT VERY MOMENT AT WHICH [THE JUDGES] HAVE RECEIVED THEIR TESTIMONY [WHICH IS PROVED TO BE PERJURY], THEY SHOULD BE PUT TO DEATH. SCRIPTURE SAYS, ‘A LIFE FOR A LIFE’ — LO, THEY ARE PUT TO DEATH ONLY AT THE CONCLUSION OF THE TRIAL.”

1. Tannaite complement to the Mishnah: a concrete case that intersects with the rule before us.

VIII. Mishnah-Tractate Makkot 1: 7-8

“AT THE MOUTH OF TWO WITNESSES OR THREE WITNESSES SHALL HE THAT IS TO DIE BE PUT TO DEATH” (DEU. 17: 6). IF THE TESTIMONY IS CONFIRMED WITH TWO WITNESSES, WHY HAS THE SCRIPTURE SPECIFIED THREE? BUT: [THE PURPOSE IS] TO DRAW AN ANALOGY BETWEEN THREE AND TWO.

A. JUST AS THREE WITNESSES PROVE TWO WITNESSES TO BE FALSE, ALSO TWO WITNESSES MAY PROVE THREE WITNESSES TO BE FALSE.

1. Clarification of the rule of the Mishnah: this applies where the testimony was not disjoined. That rule on the power of two witnesses to prove a hundred to be perjurers] applies in particular to a case in which all of them testified without significant spells of interruption between one and the next [so that we treat the entire testimony as unified.

B. AND HOW DO WE KNOW THAT [TWO WITNESSES MAY PROVE FALSE] EVEN A HUNDRED? SCRIPTURE SAYS, “WITNESSES.” R. SIMEON SAYS, “JUST AS TWO” ARE PUT TO DEATH ONLY IF BOTH OF THEM ARE PROVED TO BE PERJURERS, ALSO THREE WITNESSES ARE PUT TO DEATH ONLY IF ALL THREE OF THEM ARE PROVED TO BE PERJURERS. AND HOW DO WE KNOW THAT THIS APPLIES EVEN TO A HUNDRED? SCRIPTURE SAYS, ‘WITNESSES.’”

R. AQIBA SAYS, “THE MENTION OF THE THIRD [WITNESS] IS ONLY TO IMPOSE UPON HIM A STRICT RULE AND TO TREAT THE RULE CONCERNING HIM AS THE SAME AS THAT APPLYING TO THE OTHER TWO.

AND IF SCRIPTURE HAS IMPOSED A PUNISHMENT ON SOMEONE WHO GETS INVOLVED WITH THOSE WHO COMMIT A TRANSGRESSION, PRECISELY EQUIVALENT TO THAT WHICH IS IMPOSED ON THOSE WHO THEMSELVES COMMIT THE TRANSGRESSION, HOW MUCH THE MORE SO WILL [HEAVEN] PAY A JUST REWARD TO THE ONE WHO GETS INVOLVED WITH THOSE WHO DO A RELIGIOUS DUTY, PRECISELY EQUIVALENT TO THAT WHICH IS PAID TO THOSE WHO THEMSELVES ACTUALLY DO THE RELIGIOUS DUTY.

JUST AS, IN THE CASE OF TWO [WITNESSES], IF ONE OF THEM TURNS OUT TO BE A RELATIVE OR OTHERWISE INVALID, THE TESTIMONY OF BOTH OF THEM IS NULL, SO IN THE CASE OF THREE, [IF] ONE OF THEM TURNS OUT TO BE A RELATIVE OR OTHERWISE INVALID, THE TESTIMONY OF ALL THREE OF THEM IS NULL. HOW DO WE KNOW THAT THE SAME RULE APPLIES EVEN IN THE CASE OF A HUNDRED? SCRIPTURE SAYS, ‘WITNESSES:’”

1. An anomaly in the law of the Mishnah is examined.

C. SAID R. YOSÉ, “UNDER WHAT CIRCUMSTANCES? IN THE CASE OF TRIALS FOR CAPITAL CRIMES.

“BUT IN THE CASE OF TRIALS IN PROPERTY LITIGATIONS, THE TESTIMONY MAY BE CONFIRMED WITH THE REMAINING [VALID WITNESSES].” RABBI SAYS, “ALL THE SAME IS THE RULE GOVERNING PROPERTY CASES AND CAPITAL CASES.” THIS IS THE RULE WHEN [BOTH WITNESSES] WARNED THE TRANSGRESSOR:

1. The rule of the Mishnah is qualified.

D. BUT IF THEY HAD NOT JOINED IN WARNING THE TRANSGRESSOR, WHAT SHOULD TWO BROTHERS DO WHO SAW SOMEONE COMMIT HOMICIDE?

1. The decided law is spelled out.

IX. Mishnah-Tractate Makkot 1: 9

A. [IF] TWO SAW THE INCIDENT FROM ONE WINDOW, AND TWO SAW IT FROM ANOTHER WINDOW, AND ONE WARNS [THE TRANSGRESSOR] IN THE MIDDLE, WHEN PART OF ONE GROUP SEE PART OF ANOTHER, LO, THESE CONSTITUTE [DISJOINED WITNESSES NONETHELESS FORM] A SINGLE BODY OF TESTIMONY [SUBJECT TO THE RULES GIVEN ABOVE]. BUT IF NOT, LO, THESE CONSTITUTE TWO DISTINCT BODIES OF TESTIMONY. THEREFORE, IF ONE OF THEM TURNS OUT TO BE PERJURED, [THE TRANSGRESSOR] AND THOSE TWO WITNESSES ARE PUT TO DEATH, BUT THE OTHER GROUP OF WITNESSES IS EXEMPT.

1. How on the basis of Scripture do we know that disjointed testimony is invalid?
2. Further rulings on the proposition concerning the invalidity of disjointed testimony.

B. R. YOSÉ SAYS, “UNDER NO CIRCUMSTANCES IS ONE PUT TO DEATH UNLESS BOTH WITNESSES AGAINST HIM HAVE GIVEN WARNING TO HIM, AS IT IS SAID, ‘AT THE TESTIMONY OF TWO WITNESSES’ (DEU. 17: 6).”

1. Clarification of the identity of the Yosé behind the present ruling.

C. ANOTHER MATTER: “AT THE MOUTH OF TWO WITNESSES” [DIRECTLY] — THAT A SANHEDRIN SHOULD NOT LISTEN TO THE TESTIMONY THROUGH THE INTERVENTION OF A TRANSLATOR.

1. A case illustrating the application of the Mishnah’s rule.

D. A MISCELLANEOUS ITEM CONCERNING A CASE IN WHICH THE WITNESSES ARE RELATED TO ONE WHO HAD GIVEN A SURETY FOR A LOAN, BUT R. PAPPA CONSIDERED VALIDATING THEIR EVIDENCE, SINCE THEY WERE NOT RELATED TO EITHER THE DEBTOR OR THE CREDITOR.

X. Mishnah-Tractate Makkot 1: 10

A. HE WHOSE TRIAL ENDED AND WHO FLED AND WAS BROUGHT BACK BEFORE THE SAME COURT — THEY DO NOT REVERSE THE JUDGMENT CONCERNING HIM [AND RETRY HIM].

IN ANY SITUATION IN WHICH TWO GET UP AND SAY, “WE TESTIFY CONCERNING MR. SO-AND-SO THAT HIS TRIAL ENDED IN THE COURT OF SUCH-AND-SUCH, WITH MR. SO-AND-SO AND MR. SO-AND-SO AS THE WITNESSES AGAINST HIM,” LO, THIS ONE IS PUT TO DEATH.

1. Harmonization of conflicting implications of the Mishnah’s statements.

B. [TRIAL BEFORE] A SANHEDRIN APPLIES BOTH IN THE LAND AND ABROAD.

1. Scriptural source for the Mishnah’s rule.

C. A SANHEDRIN WHICH IMPOSES THE DEATH PENALTY ONCE IN SEVEN YEARS IS CALLED MURDEROUS. R. ELEAZAR B. AZARIAH SAYS, “ONCE IN SEVENTY YEARS.”

1. Clarification of the wording of the Mishnah.

D. R. TARFON AND R. AQIBA SAY, “IF WE WERE ON A SANHEDRIN, NO ONE WOULD EVER BE PUT TO DEATH.” RABBAN SIMEON B. GAMALIEL SAYS, “SO THEY WOULD MULTIPLY THE NUMBER OF MURDERERS IN ISRAEL.”

1. So what would they actually do to accomplish their goal?

XI. Mishnah-Tractate Makkot 2: 1A-L

A. THESE ARE THE ONES WHO GO INTO EXILE: HE WHO KILLS SOMEONE ACCIDENTALLY. (1) [IF] HE WAS ROLLING [THE ROOF] WITH A ROLLER, AND IT FELL DOWN ON SOMEONE AND KILLED HIM, (2) [IF] HE WAS LETTING DOWN A JAR [FROM THE ROOF], AND IT FELL ON [A MAN] AND KILLED HIM, (3) [IF] ONE WAS CLIMBING DOWN A LADDER AND FELL DOWN ON SOMEONE AND KILLED HIM — LO,

THIS PERSON GOES INTO EXILE. BUT: (1) IF HE WAS PULLING UP A ROLLER, AND IT FELL ON [A MAN] AND KILLED HIM, (2) [IF] HE WAS DRAWING UP A JAR, AND THE ROPE BROKE, AND [THE JAR] FELL ON A MAN AND KILLED HIM, (3) [IF] HE WAS CLIMBING UP A LADDER AND FELL ON A MAN AND KILLED HIM, LO, THIS ONE DOES NOT GO INTO EXILE.

THIS IS THE GOVERNING PRINCIPLE: WHATEVER HAPPENS EN ROUTE DOWNWARD — THE PERSON GOES INTO EXILE. [AND WHATEVER HAPPENS] NOT EN ROUTE DOWNWARD — THE PERSON DOES NOT GO INTO EXILE.

1. The scriptural source for the distinction that is made in the governing principle.
2. The explanation of the distinction between manslaughter and murder and its scriptural foundations.
3. From exegesis we move on to analysis of the intersection of principles: “If someone was climbing up a ladder, and a rung gave way under him so he comes down and kills someone — what is the law?”

XII. Mishnah-Tractate Makkot 2: 1M-R

A. [IF] THE IRON FLEW FROM THE HEFT AND KILLED SOMEONE, RABBI SAYS, “HE DOES NOT GO INTO EXILE.” AND SAGES SAY, “HE GOES INTO EXILE.” [IF] IT FLEW FROM THE WOOD WHICH IS BEING SPLIT, RABBI SAYS, “HE GOES INTO EXILE.” AND SAGES SAY, “HE DOES NOT GO INTO EXILE.”

1. Tannaite expansion of the dispute of the Mishnah: scriptural support for Rabbi’s position.
2. The general exegetical issue that underlies the specific legal dispute of the Mishnah.

XIII. Mishnah-Tractate Makkot 2: 2

A. HE WHO THROWS A STONE INTO THE PUBLIC DOMAIN AND SO COMMITTED MANSLAUGHTER — LO, THIS ONE GOES INTO EXILE.

1. Why should he go into exile, when what he has done is done deliberately?

B. R. ELIEZER B. JACOB SAYS, “IF AFTER THE STONE LEFT THE MAN’S HAND, THE OTHER PARTY STUCK OUT HIS HEAD AND TOOK [THE STONE ON THE HEAD], LO, THIS ONE IS EXEMPT.”

1. Tannaite proof from Scripture for Eliezer b. Jacob’s opinion.
 - i. Challenge to this reading of the language of Scripture. Solution in the appeal to context to establish the sense of a word that bears several meanings.

C. [IF] HE THREW THE STONE INTO HIS OWN COURTYARD AND KILLED HIM, IF THE VICTIM HAD EVERY RIGHT TO GO INTO THERE, [THE OTHER PARTY] GOES INTO EXILE. AND IF NOT, HE DOES NOT GO INTO EXILE, AS IT IS SAID, “AS WHEN A MAN GOES INTO THE FOREST WITH HIS NEIGHBOR” (DEU. 19: 5) — JUST AS THE FOREST IS A DOMAIN IN WHICH BOTH THE VICTIM AND THE ONE WHO INFLICTED INJURY HAVE EVERY RIGHT TO ENTER, SO THE COURTYARD BELONGING TO THE

HOUSEHOLDER IS EXCLUDED [FROM REFERENCE], SINCE THE VICTIM HAD NO RIGHT TO GO THERE.

ABBA SAUL SAYS, “JUST AS CUTTING WOOD IS OPTIONAL, SO ARE EXCLUDED [FROM PUNISHMENT THOSE WHO DO THEIR DUTY, E.G.:] THE FATHER WHO HITS HIS SON, THE MASTER WHO STRIKES HIS DISCIPLE, AND THE COURT OFFICIAL [WHO COMMITTED HOMICIDE IN THE DOING OF THEIR DUTY].”

1. Why take for granted cutting wood is optional? Secondary discussion of the issue raised here.

XIV. Mishnah-Tractate Makkot 2: 3A-F

A. THE FATHER GOES INTO EXILE BECAUSE OF [THE DEATH OF] THE SON.

1. We immediately ask about the apparent contradiction between two Mishnah-sentences: But have you not just said, ..so are excluded [from punishment those who do their duty, e.g.:] the father who hits his son!

B. AND THE SON GOES INTO EXILE BECAUSE OF THE [THE DEATH OF] FATHER.

1. The apparent contradiction between this statement and an established Tannaite teaching is ironed out.

C. ALL GO INTO EXILE BECAUSE OF [THE DEATH OF] AN ISRAELITE. AND AN ISRAELITE GOES INTO EXILE ON THEIR ACCOUNT,

1. What class of persons is encompassed by the inclusive language, “all...”?

D. EXCEPT ON ACCOUNT OF [THE DEATH OF] A RESIDENT ALIEN. A RESIDENT ALIEN GOES INTO EXILE ONLY ON ACCOUNT OF [THE DEATH OF] ANOTHER RESIDENT ALIEN.

1. The apparent contradiction between the premise of this statement concerning the resident alien and the contradictory premise found in a statement of equivalent standing is worked out.

XV. Mishnah-Tractate Makkot 2: 3G-N

A. “A BLIND PERSON [GUILTY OF MANSLAUGHTER] DOES NOT GO INTO EXILE,” THE WORDS OF R. JUDAH. . R. MEIR SAYS, “HE GOES INTO EXILE.” ONE WHO BEARS ENMITY [FOR HIS VICTIM] DOES NOT GO INTO EXILE.

1. The dispute rests on differing readings of Scripture.

B. R. YOSÉ B. R. JUDAH SAYS, “ONE WHO BEARS ENMITY [FOR HIS VICTIM] IS PUT TO DEATH, FOR HE IS IN THE STATUS OF ONE WHO IS AN ATTESTED DANGER.”

1. On what basis do we assume he is an attested danger, without an act of admonition.

C. R. SIMEON SAYS, “THERE IS ONE WHO BEARS ENMITY [FOR THE VICTIM] WHO GOES INTO EXILE, AND THERE IS ONE WHO BEARS ENMITY WHO DOES NOT GO INTO EXILE. THIS IS THE GOVERNING PRINCIPLE : IN ANY CASE IN WHICH ONE HAS THE POWER TO SAY, ‘HE KILLED KNOWINGLY,’ HE DOES NOT GO INTO EXILE. AND IF

HE HAS THE POWER TO SAY, ‘HE DID NOT KILL KNOWINGLY,’ LO, THIS ONE GOES INTO EXILE.”

1. Tannaite amplification and analysis of Simeon’s principle; harmonization of two representations of his position.

XVI. Mishnah-Tractate Makkot 2: 4-6F

A. WHERE DO THEY GO INTO EXILE? TO THE CITIES OF REFUGE — TO THREE WHICH ARE IN TRANSJORDAN, AND TO THREE WHICH ARE IN THE LAND OF CANAAN, AS IT IS SAID, YOU SHALL SET ASIDE THREE CITIES BEYOND JORDAN AND THREE CITIES YOU SHALL SET ASIDE IN THE LAND OF CANAAN (NUM. 35:14).

BEFORE THE THREE IN THE LAND OF ISRAEL HAD BEEN SELECTED [JOS. 20: 7], THE THREE WHICH WERE ON THE OTHER SIDE OF THE JORDAN [ALSO] DID NOT AFFORD REFUGE, AS IT IS SAID, “THEY SHALL BE FOR YOU SIX CITIES OF REFUGE” — [THEY DO NOT AFFORD REFUGE] UNTIL ALL SIX OF THEM AFFORD REFUGE AT THE SAME TIME.

1. Presentation and analysis of Tosefta’s complement to the Mishnah’s statement.
 - i. Systematic analysis of the proof-texts introduced in the foregoing.
 - ii. Systematic analysis of Tosefta’s complement in its own terms.

B. THE RELATIONSHIPS OF DISCIPLES AND MASTERS IN RESPECT TO GOING INTO EXILE

- i. The master goes with the disciple who is sent into exile.
- ii. The disciples go with the master who is sent into exile.

C. *WHAT IS THE MEANING OF THE VERSE...?* A FORMAL COMPOSITE OF EXEGESES OF SCRIPTURE. STRESS THROUGHOUT IS ON THE PRIORITY OF TORAH-STUDY OVER WEALTH AND ALL WORLDLY REWARD; THE VALUE OF TORAH-STUDY WITH A MULTITUDE OF DISCIPLES.

D. AND [DIRECT] ROADS [WERE PREPARED] FROM ONE TO THE OTHER, AS IT IS SAID, “AND YOU SHALL PREPARE THE WAY AND DIVIDE THE BORDERS OF YOUR LAND” (DEU. 19: 3).

1. Tannaite complement to the Mishnah-rule
 - i. A homily on the theme of God’s showing sinners the way invokes the theme of the cities of refuge.
2. We know continue the exegesis of verses that follow the verse cited in the Mishnah, Deu. 19:3.

E. AND THEY HAND OVER TO HIM TWO DISCIPLES OF SAGES, LEST [THE AVENGER OF THE BLOOD] SHOULD KILL HIM EN ROUTE. THEY WILL SPEAK TO [THE AVENGER OF THE BLOOD].

R. MEIR SAYS, “ALSO HE [THE MANSLAUGHTERER] MAY SPEAK TO [THE AVENGER OF THE BLOOD], AS IT IS SAID, ‘THIS IS THE WORD OF THE MANSLAYER’ (DEU. 19: 4).”

R. YOSÉ B. R. JUDAH SAYS, “TO BEGIN WITH, BOTH THE ONE WHO KILLS BY ACCIDENT AND THE ONE WHO KILLS MALICIOUSLY GO FIRST TO THE CITIES OF

REFUGE. THEN THE COURT SENDS AND BRINGS [THE MURDERER] BACK FROM THERE. HIM WHO IS FOUND GUILTY OF DEATH IN COURT THEY KILLED. AND HIM WHO IS NOT FOUND GUILTY OF DEATH THEY SET FREE. HIM WHO IS FOUND GUILTY OF A CRIME REQUIRING EXILE THEY RETURNED TO HIS PLACE, AS IT IS SAID, ‘AND THE COMMUNITY SHALL SEND HIM BACK TO HIS CITY OF REFUGE’ (NUM. 35: 25).”

1. Tannaite complement to the Mishnah-statement.

ii. Expansion of a component of the foregoing.

F. THE DEFINITION OF THE CITY THAT AFFORDS PROTECTION; CITIES THAT LACK ELDERS

1. A city the majority of the population of which is made up of murderers does not provide refuge

2. A city that has no elders may not serve as a city of refuge.

i. Other rules that apply to cities in general but do not apply to a city that has no elders.

G. HOW COME THE PASSAGE THAT DEALS WITH MURDERS IS STATED IN STRONG LANGUAGE OF REPEATED ACTS OF SPEECH

H. A MISCELLANEOUS ITEM: COMPOSITE FORMED AROUND DISPUTES IN WHICH JUDAH IS INVOLVED.

XVII. Mishnah-Tractate Makkot 2: 6G-I

A. ALL THE SAME ARE [THE DEATHS OF] THE HIGH PRIEST WHO IS ANOINTED WITH ANOINTING OIL, THE ONE WHO IS CONSECRATED BY BEING CLOTHED IN MANY GARMENTS, AND THE ONE WHO HAS PASSED FROM HIS ANOINTMENT AS HIGH PRIEST — THEY BRING BACK THE MURDERER [FROM THE CITY OF REFUGE, HIS TERM HAVING ENDED].

1. What is the source in Scripture for the rule at hand?

B. THEREFORE THE MOTHERS OF THE PRIESTS PROVIDE FOOD AND CLOTHING FOR THOSE [WHO ARE IN THE CITIES OF REFUGE,] SO THAT THEY WILL NOT PRAY THAT THEIR SONS WILL DIE.

1. So the operative consideration is that they may not say prayers of that kind. Then if they said such prayers, would the sons, the high priests, then die?

C. THE CURSE OF A SAGE, EVEN FOR NOTHING, COMES ABOUT. THE CASE OF AHITOPHEL. OTHER CASES OF SAGES’ CURSES.

D. R. JUDAH SAYS, “ALSO [ON THE OCCASION OF THE DEATH OF] A PRIEST ANOINTED FOR WAR DOES ONE BRING BACK THE MURDERER:”

1. Clarification of the statement of the Mishnah.

XVIII. Mishnah-Tractate Makkot 2: 6J-L, 2: 7A-N

A. [IF] AFTER ONE’S TRIAL HAS ENDED [WITH THE SENTENCE OF EXILE], A HIGH PRIEST DIED, LO, THIS ONE DOES NOT GO INTO EXILE:

1. What is the reasoning behind this ruling?

B. [IF] IT WAS BEFORE THE TRIAL HAD ENDED THAT THE HIGH PRIEST DIED AND ANOTHER WAS APPOINTED IN HIS STEAD, AND AFTERWARD HIS TRIAL CAME TO AN END, HE COMES BACK ONLY AT THE DEATH OF THE NEXT HIGH PRIEST:

1. What is the scriptural source of this rule?

2. Secondary problems in connection with this rule: If the high priest was not a valid one, e.g., If his trial had come to an end and the high priest turned out to be the son of a divorcée or of a woman who had performed the rite of removing the shoe

C. [IF] (1) ONE'S TRIAL ENDED AT A TIME AT WHICH THERE WAS NO HIGH PRIEST, (2) HE WHO KILLS A HIGH PRIEST, AND (3) A HIGH PRIEST WHO COMMITTED INVOLUNTARY MANSLAUGHTER — [NONE OF THESE] LEAVES THERE FOREVER. AND ONE DOES NOT LEAVE [THE CITY OF REFUGE] EITHER FOR GIVING TESTIMONY HAVING TO DO WITH A RELIGIOUS DUTY, OR TO GIVE TESTIMONY HAVING TO DO WITH PROPERTY, OR TO GIVE TESTIMONY HAVING TO DO WITH A CAPITAL CRIME. AND EVEN IF THE ISRAELITES NEED HIM AND EVEN IF HE IS A GENERAL OF THE ISRAELITE ARMY OF THE QUALITY OF JOAB B. ZERUIAH:

1. Amplification of the story of Joab

D. HE MAY NOT LEAVE THERE EVER, AS IT IS SAID, "WHITHER HE HAS FLED" (NUM. 35:25) — THERE WILL BE HIS DWELLING, THERE WILL BE HIS DEATH, THERE WILL BE HIS BURIAL:

1. Contradiction between the rule of the Mishnah and a verse of Scripture is harmonized.

E. JUST AS THE TOWN AFFORDS REFUGE, SO THE TERRITORY WITHIN THE EXTENDED, SABBATH LIMIT OF THE TOWN AFFORDS REFUGE.

1. Contradiction between the rule of the Mishnah and a verse of Scripture is harmonized.

F. A MANSLAYER WHO WENT BEYOND THE LIMIT, AND THE AVENGER OF THE BLOOD FOUND HIM — R. YOSÉ THE GALILEAN SAID, "IT IS A RELIGIOUS DUTY IN THE HAND OF THE AVENGER OF THE BLOOD [TO KILL THE MANSLAUGHTERER], AND IT IS AN OPTION AVAILABLE TO ANYONE ELSE [TO DO SO AS WELL]." R. AQIBA SAYS, "IT IS AN OPTION AVAILABLE TO THE AVENGER OF THE BLOOD, AND ANYONE ELSE BEARS NO LIABILITY [IF HE DOES SO]."

1. A scriptural basis for the dispute in the Mishnah is now supplied.

2. Other positions on the same issue and their relationship to the views given in the Mishnah.

3. How do I know that the same rule as the one given in the Mishnah applies even if he unintentionally went beyond the limit?

i. A father who accidentally killed a son — a surviving son serves as the avenger of blood for him: relationship of contradictory opinions to the positions of Yosé and Aqiba

XIX. Mishnah-Tractate Makkot 2: 7/O-Q

A. A TREE STANDING IN THE SABBATH LIMIT, WITH ITS BRANCHES EXTENDING OUTSIDE OF THE SABBATH LIMIT — OR STANDING OUTSIDE OF THE SABBATH LIMIT, WITH ITS BRANCHES EXTENDING WITHIN THE SABBATH LIMIT — EVERYTHING FOLLOWS THE LOCATION OF THE BRANCHES. [THE BOUNDARIES OF THE CITY OF REFUGE EXTEND TO THE OUTER LIMIT OF THE BRANCHES.]

1. Contradiction between the premise of the Mishnah's rule and that of one that intersects on the issue of the disposition of the interstitial matter at hand. In that case The location of the branches is null. In our rule by contrast the status of the root is determined by the branches' location.

XX. Mishnah-Tractate Makkot 2: 7R-S

A. [IF] ONE HAS COMMITTED MANSLAUGHTER IN THAT VERY TOWN HE GOES INTO EXILE FROM ONE NEIGHBORHOOD TO ANOTHER. AND A LEVITE GOES INTO EXILE FROM ONE TOWN TO ANOTHER.

1. The Talmud supplies a scriptural basis for the Mishnah's rule.

XXI. Mishnah-Tractate Makkot 2: 8

A. SIMILARLY: A MANSLAYER WHO WENT INTO EXILE INTO A CITY OF REFUGE, WHOM THE TOWNSFOLK WANTED TO HONOR, MUST SAY TO THEM, "I AM A MANSLAYER." [IF] THEY SAID TO HIM, "EVEN SO," HE MAY ACCEPT [THE HONOR] FROM THEM, AS IT IS SAID, "THIS IS THE WORD OF THE MANSLAYER" (DEU. 19: 4). "THEY PAY LEVITES A RENTAL," THE WORDS OF R. JUDAH. R. MEIR SAYS, "THEY DID NOT PAY THEM A RENTAL."

1. Scriptural basis for the dispute on the law.

B. "AND HE MAY RETURN TO THE OFFICE WHICH HE HAD HELD BEFORE," THE WORDS OF R. MEIR. R. JUDAH SAYS, "HE DID NOT RETURN TO THE OFFICE WHICH HE HAD HELD BEFORE."

1. Tannaite complement to the Mishnah-dispute: the scriptural foundation of the dispute in the Mishnah and the positions of all parties thereto.

XXII. Mishnah-Tractate Makkot 3: 1-2

A. THESE ARE THE ONES WHO ARE FLOGGED: HE WHO HAS SEXUAL RELATIONS WITH (1) HIS SISTER, (2) THE SISTER OF HIS FATHER, (3) THE SISTER OF HIS MOTHER, (4) THE SISTER OF HIS WIFE, (5) THE WIFE OF HIS BROTHER, (6) THE WIFE OF THE BROTHER OF HIS FATHER, (7) A MENSTRUATING WOMAN, (8) A WIDOW IN THE CASE OF A HIGH PRIEST, (9) A DIVORCÉE OR A WOMAN WHO HAS PERFORMED THE RITE OF REMOVING THE SHOE WITH AN ORDINARY PRIEST, (10) A MAMZER GIRL AND A (11) NETIN GIRL WITH AN ISRAELITE, (12) AN ISRAELITE GIRL WITH A NETIN OR WITH A MAMZER. AS TO A WIDOW AND A DIVORCÉE, [PRIESTS] ARE LIABLE IN HER CASE ON TWO COUNTS. IN THE CASE OF A DIVORCÉE

AND A WOMAN WHO HAS PERFORMED THE RITE OF REMOVING THE SHOE, [A PRIEST) IS LIABLE IN HER CASE ON ONLY ONE COUNT ALONE.

1. The catalogue goes over the list of those who are liable to the penalty of extirpation at the hands of Heaven but not the death penalty at the hands of the earthly court. These are also liable to a flogging. But those who are liable to the death penalty at the hands of the earthly court are not listed here; even though an admonition was given to them prior to their action that, if they did the deed, they would be subject to a flogging, they are not flogged. The premise therefore is that one penalty excludes the other. The Mishnah now wishes to know the basis for that premise as well as for the contrary view, that one may be both flogged and punished in some more severe way as well.

2. The Scriptural basis for the views at hand.

3. What is subject to dispute in the Mishnah is refined and clarified: the character of the admonition given prior to the act is what precipitates the problem.

i. Further analysis of the scriptural basis for the views at hand.

B. [ALSO SUBJECT TO FLOGGING ARE]: (1) AN UNCLEAN PERSON WHO ATE FOOD IN THE STATUS OF HOLY THINGS:

1. For the item at hand, where does Scripture set forth an admonition against doing a given deed, the penalty of which is made explicit? Two possible explanations and a systematic exposition thereof.

C. (2) HE WHO ENTERS THE TEMPLE UNCLEAN:

1. The operative principle here is that on account of violating any negative commandment that is preceded by a positive commandment people are flogged. That principle is discussed in its own terms, as a problem in Scripture-exegesis.

ii. Secondary discussion of the proof that has solved the problem of the primary analysis. This is broken off by D, and then resumed, as indicated. At issue here and below, iii. is the principle: For any negative commandment which encompasses an affirmative one to rise up and do something, one does not incur flagellation.

D. THE STATUS OF AN ADMONITION THAT IS SUBJECT TO DOUBT

iii. Resumption of the discussion on the issue of C.1.ii: the flogging depends on whether the offender has carried out or not carried out the act of remedy, or on whether he has nullified or not nullified the change of making a remedy.

E. (3) HE WHO EATS FORBIDDEN FAT, BLOOD, REMNANT OF A SACRIFICE LEFT OVERNIGHT, MEAT OF A SACRIFICE RENDERED INVALID BY THE IMPROPER INTENTION OF THE OFFICIATING PRIEST, OR UNCLEAN [SACRIFICIAL MEAT]; (4) HE WHO SLAUGHTERS AN ANIMAL AND OFFERS IT UP OUTSIDE OF THE TEMPLE; (5) HE WHO EATS LEAVEN ON PASSOVER; (6) AND HE WHO EATS OR WHO DOES AN ACT OF LABOR ON THE DAY OF ATONEMENT; (7) HE WHO PREPARES ANOINTING OIL LIKE THE ANOINTING OIL OF THE TEMPLE, (8) HE WHO PREPARES INCENSE LIKE THE INCENSE OF THE TEMPLE, OR (9) HE WHO ANOINTS HIMSELF WITH ANOINTING OIL;

(10) HE WHO EATS CARRION OR *TEREFAH* MEAT [THAT IS, MEAT FROM A BEAST THAT WAS DYING ON ITS OWN], FORBIDDEN THINGS, OR CREEPING THINGS.

1. Illustrations and extensions of the law of the Mishnah.

F. [IF] ONE ATE (1) FOOD FROM WHICH TITHES HAD NOT BEEN REMOVED AT ALL, (2) FIRST TITHE FROM WHICH HEAVE OFFERING HAD NOT BEEN REMOVED, (3) SECOND TITHE OR CONSECRATED FOOD WHICH HAD NOT BEEN REDEEMED, (HE IS LIABLE TO FLOGGING].

1. A number of distinct counts may be involved in the items on this list, and one may be liable also for eating produce liable to tithing in a case in which the great heave offering [2% for the priest] has been taken up but not the first tithe, first tithe but not second tithe, or even the tithe for the poor, and the like.

G. HOW MUCH FOOD WHICH HAD NOT BEEN TITHED AT ALL DOES ONE EAT SO AS TO BE LIABLE? R. SIMEON SAYS, “ANY AMOUNT AT ALL.” AND SAGES SAY, “AN OLIVE’S BULK.” SAID TO THEM R. SIMEON, “DO YOU NOT AGREE WITH ME IN THE CASE OF ONE WHO EATS AN ANT, HOWEVER SMALL, THAT HE IS LIABLE?” THEY SAID TO HIM, “IT IS BECAUSE THAT IS HOW IT HAS BEEN CREATED.” HE SAID TO THEM, “ALSO A SINGLE GRAIN OF WHEAT IS PRECISELY IN THE FORM IN WHICH IT HAS BEEN CREATED.”

1. What is subject to dispute here? Analysis of the premise of the dispute as regards processed food.

XXIII. Mishnah-Tractate Makkot 3: 3-4

A. [ALSO SUBJECT TO FLOGGING ARE]: (1) HE WHO EATS FIRST FRUITS OVER WHICH ONE HAS NOT MADE THE REQUIRED DECLARATION;

1. The authority behind the anonymous, decided law is Aqiba.

i. The passage is framed as it is to indicate that Aqiba takes the same position as does Simeon, and it is Simeon’s position that is spelled out in rich detail.

a. A priest who ate meat deriving from a sin offering or guilt offering prior to the sprinkling of the blood is flogged. As explained *ad loc*, the topic is introduced to amplify a detail of the position set forth in the preceding discussion.

b. As to the presentation of first fruits, the act of placing them before the altar is essential to the rite [and they may not be eaten before that act], but the act of the declaration is not essential to the rite.

2. If Aqiba endorses the Mishnah’s view, and if as is claimed, Yohanan maintains the same view (as he does if he concurs that Aqiba’s opinion is given anonymously, therefore authoritatively, in the Mishnah, then there is a contradiction in Yohanan’s opinions, which is ironed out.

3. when is the declaration to be made? With respect to first fruits, at what point does the obligation to present these particular pieces of fruit take effect [so that one would violate the law if one ate them without proper presentation]?

4. As to the presentation of first fruits, the act of placing them before the altar is essential to the rite [and they may not be eaten before that act], but the act of the declaration is not essential to the rite.

B. (2) MOST HOLY THINGS OUTSIDE THE TEMPLE VEILS, (3) LESSER HOLY THINGS OR SECOND TITHE OUTSIDE THE WALL [OF JERUSALEM].

HE WHO BREAKS THE BONE OF A PASSOVER OFFERING WHICH IS IN A STATE OF CLEANNESS — LO, THIS ONE IS FLOGGED WITH FORTY STRIPES. BUT HE WHO LEAVES OVER MEAT OF A CLEAN PASSOVER OFFERING OR WHO BREAKS THE BONE IN THE CASE OF AN UNCLEAN ONE IS NOT FLOGGED WITH FORTY STRIPES.

HE WHO REMOVES THE DAM WITH THE OFFSPRING — R. JUDAH SAYS, “HE IS FLOGGED, AND HE DOES NOT HAVE TO SEND THE DAM AWAY.” AND SAGES SAY, “HE SENDS THE DAM AWAY, AND HE IS NOT FLOGGED.” THIS IS THE GOVERNING PRINCIPLE, IN THE CASE OF ANY NEGATIVE COMMANDMENT WHICH INVOLVES DOING A POSITIVE DEED, ONE IS NOT LIABLE.

1. It appears that the Mishnah’s author repeats himself with regard to second tithe or consecrated food which had not been redeemed [M. 3:2H].

i. The latter part of the passage refers to second tithe in a condition of cultic cleanness and a man in a condition of cultic cleanness, who ate it outside of the wall; the former passage refers to second tithe in a condition of cultic uncleanness and a man in a condition of cultic cleanness, who ate it in Jerusalem.

a. Proof that eating second tithe in a state of uncleanness is culpable.

2. How soon are people liable for eating produce in the status of second tithe if they do so [outside of the wall of Jerusalem, that is, at what point is it no longer permitted to redeem the produce for money]? As soon as they were face to face with the interior wall.

XXIV. Mishnah-Tractate Makkot 3: 5

A. (1) HE WHO MAKES A BALDNESS ON HIS HEAD [DEU. 14:1]:

1. How a single action may produce multiple counts of liability and similar questions.

i. Clarification of the demonstration.

2. Topical exposition in more general terms.

B. (2) HE WHO ROUNDS THE CORNERS OF HIS HEAD:

1. Definition of the terms of the Mishnah-rule.

C. AND (3) MARS THE CORNERS OF HIS BEARD [LEV. 19:27]:

1. Definition of the terms of the Mishnah-rule.

D. (4) OR HE WHO MAKES A SINGLE CUTTING FOR THE DEAD [LEV. 19:28] IS LIABLE.

[IF] HE MADE A SINGLE CUTTING ON ACCOUNT OF FIVE DIFFERENT CORPSES, OR FIVE CUTTINGS ON ACCOUNT OF ONE CORPSE, HE IS LIABLE FOR EACH AND EVERY ONE OF THEM.

1. Tannaite clarification of the circumstances in which the rule is invoked, excluding certain inappropriate cases.
2. How a single action may produce multiple counts of liability and similar questions.

E. FOR [CUTTING OFF THE HAIR OF] THE HEAD, HE IS LIABLE ON TWO COUNTS, ONE FOR EACH SIDE OF THE HEAD.

1. Clarification of the Mishnah's statement.

F. FOR CUTTING OFF THE BEARD, HE IS LIABLE ON TWO COUNTS FOR ONE SIDE, TWO COUNTS FOR THE OTHER SIDE, AND ONE COUNT FOR THE LOWER PART.

1. Clarification of the Mishnah's statement.

G. R. ELIEZER SAYS, "IF HE REMOVED ALL OF IT AT ONCE, HE IS LIABLE ONLY ON ONE COUNT."

1. Clarification of the Mishnah's statement.

H. AND HE IS LIABLE ONLY IF HE WILL REMOVE IT WITH A RAZOR.

1. Tannaite complement: Might one suppose that he is liable even if he shaved it off with scissors?

I. R. ELIEZER SAYS, "EVEN IF HE REMOVED IT WITH PINCERS OR WITH AN ADZE, HE IS LIABLE:"

1. The basis in analogical reasoning for this position.

XXV. Mishnah-Tractate Makkot 3: 6

A. HE WHO TATTOOS HIS SKIN — [IF] HE MADE A MARK BUT DID NOT TATTOO IT IN, TATTOOED IT IN BUT DID NOT MAKE A MARK, HE IS NOT LIABLE — UNLESS HE MAKES A MARK AND TATTOOS WITH INK OR WITH EYE PAINT OR WITH ANYTHING THAT MAKES A PERMANENT MARK.

R. SIMEON B. JUDAH SAYS IN THE NAME OF R. SIMEON, "HE IS LIABLE ONLY IF HE WILL WRITE THE NAME [OF A GOD], AS IT IS WRITTEN, 'NOR WILL YOU TATTOO ANY MARKS ON YOU, I AM THE LORD'(LEV. 19:28)."

1. Mishnah-clarification: For writing what sort of name of god is one liable?
 - i. Clarification of the attributive used in the foregoing.

XXVI. Mishnah-Tractate Makkot 3: 7-9

A. A NAZIRITE WHO WAS DRINKING WINE ALL DAY LONG IS LIABLE ON ONLY ONE COUNT,[IF] THEY SAID TO HIM, "DON'T DRINK, DON'T DRINK!" YET HE CONTINUED TO DRINK, HE IS LIABLE ON EACH COUNT. [IF A NAZIRITE] WAS CONTRACTING CORPSE UNCLEANNESS ALL DAY LONG, HE IS LIABLE ON ONLY ONE COUNT. [IF] THEY SAID TO HIM, "DO NOT CONTRACT CORPSE UNCLEANNESS! DO NOT

CONTRACT CORPSE UNCLEANNESS!” YET HE CONTINUED TO CONTRACT CORPSE UNCLEANNESS, HE IS LIABLE ON EACH COUNT. [IF] HE WAS SHAVING HIMSELF ALL DAY LONG, HE IS LIABLE ON ONLY ONE COUNT. [IF] THEY SAID TO HIM, “DON’T SHAVE! DON’T SHAVE!” YET HE CONTINUED TO SHAVE, HE IS LIABLE ON EACH COUNT. IF SOMEONE WAS WEARING A GARMENT OF DIVERSE KINDS [LEV. 19: 19, DEU. 22: 11] ALL DAY LONG, HE IS LIABLE ON ONLY ONE COUNT.

[IF] THEY SAID TO HIM, “DON’T PUT IT ON! DON’T PUT IT ON!” YET HE TOOK IT OFF AND THEN PUT IT ON, HE IS LIABLE ON EACH COUNT.

1. It does not have to be actually taking it off and putting it on, taking it off and putting it on, but even if he put his hand in and out of the sleeve [the multiple liabilities are incurred]

B. THERE IS ONE WHO PLOUGHS A SINGLE FURROW AND IS LIABLE ON EIGHT COUNTS OF VIOLATING A NEGATIVE COMMANDMENT: [SPECIFICALLY, IT IS] HE WHO (1) PLOUGHS WITH AN OX AND AN ASS [DEU. 22:10], WHICH ARE [2, 3] BOTH HOLY THINGS, IN THE CASE OF (4) [PLOUGHING] MIXED SEEDS IN A VINEYARD [DEU. 22: 9], (5) IN THE SEVENTH YEAR [LEV. 25:41, (6) ON A FESTIVAL [LEV. 23: 7) AND WHO WAS BOTH A (7) PRIEST [LEV. 21:1] AND (8) A NAZIRITE [NUM. 6:6] [PLOUGHING] IN A GRAVEYARD.

HANANIAH B. HAKHINAI SAYS, “ALSO: HE IS [PLOUGHING WHILE] WEARING A GARMENT OF DIVERSE KINDS” [LEV. 19: 19, DEU. 22: 11]. THEY SAID TO HIM, “THIS IS NOT WITHIN THE SAME CLASS.” HE SAID TO THEM, “ALSO THE NAZIR [B8] IS NOT WITHIN THE SAME CLASS [AS THE OTHER TRANSGRESSIONS].”

1. In a gathering people voted and decided: he who covers mixed seeds with dirt is liable to a flogging. Refinement of the Mishnah-rule.

- i. Aqiba is the authority behind the anonymous rule, and his opinion is not normative. Identification of which ruling of Aqiba is pertinent.

- a. Systematic test of the premises of Aqiba’s position.

XXVII. Mishnah-Tractate Makkot 3: 10-11C

A. HOW MANY TIMES DO THEY FLOG HIM? FORTY STRIPES LESS ONE, AS IT IS SAID, “BY NUMBER, FORTY” (DEU. 25: 2,3) — A NUMBER NEAR [BUT LESS THAN] FORTY.

1. What is the scriptural basis for this definition?

B. R. JUDAH SAYS, “HE IS FLOGGED A FULL FORTY TIMES.” AND WHERE DOES THE ADDITIONAL ONE FALL? BETWEEN THE SHOULDERS.

1. What is the scriptural basis for this ruling?

C. THEY MAKE AN ESTIMATE OF HIS CAPACITY TO TAKE THE FLOGGING [WITHOUT BEING IRREPARABLY INJURED OR KILLED] ONLY BY A NUMBER DIVISIBLE BY THREE.

[IF] THEY ESTIMATED HIM AS ABLE TO TAKE FORTY, [IF] HE THEN RECEIVED PART OF THE FLOGGING, AND THEY SAID THAT HE CANNOT TAKE ALL FORTY, HE IS EXEMPT.

[IF] THEY ESTIMATED HIM AS ABLE TO TAKE EIGHTEEN, [AND] ONCE HE HAS RECEIVED THE FLOGGING [OF EIGHTEEN], THEY SAID THAT HE CAN TAKE ALL FORTY, HE [STILL] IS EXEMPT FROM THE REST.

1. So it follows that, if he has been flogged at all, then that rule applies, but if he has not been flogged at all, that rule does not apply: challenge to the premise of the Mishnah-rule.

XXVIII. Mishnah-Tractate Makkot 3: 11D-F

A. [IF] HE COMMITTED A TRANSGRESSION ON WHICH HE IS LIABLE ON TWO COUNTS OF VIOLATING NEGATIVE COMMANDMENTS, AND THEY MAKE A SINGLE ESTIMATE [OF WHAT HE CAN TAKE, COVERING BOTH SETS], HE IS FLOGGED AND EXEMPT [FROM THE OTHER]. AND IF NOT, HE IS FLOGGED AND ALLOWED TO HEAL, AND THEN GOES AND IS FLOGGED AGAIN.

1. Tannaite conflict and the harmonization of apparent contradiction.

XXIX. Mishnah-Tractate Makkot 3: 12-14

A. HOW DO THEY FLOG HIM? ONE TIES HIS TWO HANDS ON EITHER SIDE OF A PILLAR, AND THE MINISTER OF THE COMMUNITY GRABS HIS CLOTHING — IF IT IS TORN, IT IS TORN, AND IF IT IS RIPPED TO PIECES, IT IS RIPPED TO PIECES — UNTIL HE BARES HIS CHEST.

1. Scripture basis for the rule of the Mishnah.

B. A STONE IS SET DOWN BEHIND HIM, ON WHICH THE MINISTER OF THE COMMUNITY STANDS.

AND A STRAP OF COWHIDE IS IN HIS HAND,

1. Scripture basis for the rule of the Mishnah.

- i. Proofs through the same exegetical principle of various other propositions.

C. DOUBLED AND REDOUBLED, WITH TWO STRAPS THAT RISE AND FALL [FASTENED] TO IT.

1. Tannaite clarification of the rule.

D. ITS HANDLE IS A HANDBREADTH LONG AND A HANDBREADTH WIDE, AND ITS END MUST REACH TO HIS BELLY BUTTON.

1. Clarification of the statement of the Mishnah.

E. AND HE HITS HIM WITH A THIRD OF THE STRIPES IN FRONT AND TWO-THIRDS BEHIND.

1. Proof in Scripture for this proposition.

F. AND HE DOES NOT HIT [THE VICTIM] WHILE HE IS EITHER STANDING OR SITTING, BUT BENDING LOW, AS IT IS SAID, “AND THE JUDGE WILL CAUSE HIM TO LIE DOWN” (DEU. 25: 2).

1. How on the basis of Scripture do we know that the lash is folded?

G. AND HE WHO HITS HIM HITS WITH ONE HAND, WITH ALL HIS MIGHT.

1. They appoint in charge of the flogging only those who lack physical power but exhibit abundant knowledge.

H. AND A READER READS: “IF YOU WILL NOT OBSERVE TO DO ... THE LORD WILL HAVE YOUR STRIPES PRONOUNCED, AND THE STRIPES OF YOUR SEED” (DEU. 28:58FF.) (AND HE GOES BACK TO THE BEGINNING OF THE PASSAGE). “AND YOU WILL OBSERVE THE WORDS OF THIS COVENANT” (DEU. 29: 9), AND HE FINISHES WITH, “BUT HE IS FULL OF COMPASSION AND FORGAVE THEIR INIQUITY” (PSA. 78:38), AND HE GOES BACK TO THE BEGINNING OF THE PASSAGE.

1. Tannaite clarification of the rule.
2. Amplification of the pertinent Scriptural statement.

I. AND IF THE VICTIM DIES UNDER THE HAND OF THE ONE WHO DOES THE FLOGGING, THE LATTER IS EXEMPT FROM PUNISHMENT [BUT IF] HE ADDED EVEN A SINGLE STRIPE AND THE VICTIM DIED, LO, THIS ONE GOES INTO EXILE ON HIS ACCOUNT.

IF THE VICTIM DIRTIED HIMSELF, WHETHER WITH EXCREMENT OR URINE, HE IS EXEMPT [FROM FURTHER BLOWS]. R. JUDAH SAYS, “IN THE CASE OF MAN, WITH EXCREMENT; AND IN THE CASE OF A WOMAN, WITH URINE.”

1. Tannaite clarification of the rule.

XXX. Mishnah-Tractate Makkot 3: 15-16

A. “ALL THOSE WHO ARE LIABLE TO EXTIRPATION WHO HAVE BEEN FLOGGED ARE EXEMPT FROM THEIR LIABILITY TO EXTIRPATION, AS IT IS SAID, ‘AND YOUR BROTHER SEEM VILE TO YOU’(DEU. 25: 3) — ONCE HE HAS BEEN FLOGGED, LO, HE IS TANTAMOUNT TO YOUR BROTHER,” THE WORDS OF R. HANANIAH B. GAMALIEL.

SAID R. HANANIAH B. GAMALIEL, “NOW IF ONE WHO DOES A SINGLE TRANSGRESSION — [HEAVEN] TAKES HIS SOUL ON THAT ACCOUNT, HE WHO PERFORMS A SINGLE RELIGIOUS DUTY — HOW MUCH THE MORE SO THAT HIS SOUL WILL BE SAVED FOR [HANDED OVER TO] HIM ON THAT ACCOUNT!”

R. SIMEON SAYS, “FROM ITS OWN PASSAGE WE MAY LEARN THAT SAME PROPOSITION, FOR IT IS WRITTEN, ‘EVEN THE SOULS THAT DO THEM SHALL BE CUT OFF’ (LEV. 18: 29); AND IT IS SAID, ‘WHICH IF A MAN DO HE SHALL LIVE BY THEM’ (LEV. 18: 4). LO, WHOEVER SITS AND DOES NO TRANSGRESSION — THEY GIVE HIM A REWARD LIKE THAT WHICH GOES TO ONE WHO [GOES AND] DOES A RELIGIOUS DUTY.”

R. SIMEON B. RABBI SAYS, “LO, IT SAYS, ‘ONLY BE SURE THAT YOU DO NOT EAT THE BLOOD, FOR THE BLOOD IS THE LIFE’ (DEU. 12: 23). NOW IF FOR KEEPING AWAY FROM EATING BLOOD, WHICH THE SOUL OF MAN DESPISES — HE WHO KEEPS AWAY FROM IT RECEIVES A REWARD, ROBBERY AND FORNICATION, WHICH THE SOUL OF A MAN DESIRES AND AFTER WHICH HE LUSTS — HE WHO KEEPS AWAY FROM THEM HOW MUCH THE MORE WILL ATTAIN MERIT — FOR HIM, AND FOR HIS DESCENDANTS, AND FOR THE DESCENDANTS OF HIS DESCENDANTS, TO THE END OF ALL GENERATIONS!”

1. What is at stake in the dispute is spelled out.

i. Amplification of a detail in the foregoing: Three rulings were made by the earthly court, and the court on high concurred with what they had done,' ask the same question — how we now receive Heavenly messages.

B. R. HANANIAH B. AQASHIA SAYS, “THE HOLY ONE, BLESSED BE HE, WANTED TO GIVE MERIT TO ISRAEL. THEREFORE HE GAVE THEM ABUNDANT TORAH AND NUMEROUS COMMANDMENTS, AS IT IS SAID, ‘IT PLEASED THE LORD FOR HIS RIGHTEOUSNESS’ SAKE TO MAGNIFY THE TORAH AND GIVE HONOR TO IT (ISA. 42:21).”

1. Exposition of the number of the commandments.

C. THE SAGE AND THE PROPHET: ISRAEL IN HISTORY.

Points of Structure

1. DOES BABYLONIAN TALMUD-TRACTATE MAKKOT FOLLOW A COHERENT OUTLINE GOVERNED BY A CONSISTENT RULES?

The outline given above serves for nearly the whole of the tractate. That is to say, if we start with the principles of a topical outline, with the conception that a topic-sentence governs what is to be said in the sequence of paragraphs that follow, then with the paragraphs laid out as secondary expositions and expansions of the topic or proposition, with a new topic-sentence signalling a new set of expositions and expansions relevant to that, and so on down, we can outline nearly every line of the tractate. The Mishnah's statements serve as the topic sentences in the outline I have worked out. The secondary expositions, bearing capital letters as their marks, then form a succession of close and logically-sequential expositions of the topic-sentences that the Mishnah has provided and the Talmud's framers have selected. These are the exceptions: III.A, B, IX D, XVI B, C, XVI F, G, H, XXII D, XXX C. It follows that Bavli-tractate Makkot does follow a coherent outline, and we may inductively define the rules that govern throughout.

2. WHAT ARE THE SALIENT TRAITS OF ITS STRUCTURE?

The of a Talmud-composite had in hand completed compositions deriving from an indeterminate past. What he then did was to follow a simple outline. He laid out the Mishnah-tractate, making a decision on which passages of the tractate he wished to expound. I have no clear theory of the criteria that instructed him on the matter, because a theory on why given paragraphs of the Mishnah were not treated must await the examination of a much larger sample than the three tractates (Moed Qatan, Keritot, Makkot) that at this moment are in hand. In any event we cannot show that the framer picked and chose among a large corpus of available Mishnah-comments; we cannot show that he included everything to which he had access; we cannot show that he made up pretty much everything he had to say; and we cannot show that he limited himself to the utilization of received materials. What we cannot show, we do not know. So the first salient trait of the structure of the tractate is, the formulation of a systematic exegesis for (parts of) tractate Makkot.

A fixed order of exposition governed: [1] the scriptural foundations of, or links to, rules of the Mishnah; [2] the explanation of words or phrases in the Mishnah; [3] the introduction of Tannaite complements to the Mishnah, meaning, compositions (or even composites) bearing the marks of origin among the official, Tannaite memorizers.* Afterward, so far as exegesis of a given Mishnah-sentence or paragraph was underway, [4] theoretical problems would be introduced, refinements of the law, interstitial cases in which two principles intersected and produced unclarity, and the like. That order is not a matter of hypothesis, so far as this tractate is concerned, it is demonstrated beyond doubt, beginning to end. That is, if all four types of material are set forth in the exposition of a given Mishnah-sentence or paragraph, the specified order governs. The third or fourth types will appear first in order only when the first and second types are not introduced at all. That seems to me ample evidence that a well-defined structural program governed. Other components of the program, e.g., cases, tangential discussions, not to mention the free-

standing composites that in no way bear upon Mishnah-exegesis, all are organized in a logical way as well, but have to be dealt with in their own terms.

We do not know when the Tannaite component of the corpus was formulated for transmission, whether in writing or orally (and the document time and again insists on the transmission through the memory of professional memorizers). That all compositions and composites bearing the signal of Tannaite authority originated in the period prior to the closure of the Mishnah is demonstrably impossible, and the Bavli contains ample evidence that throughout the period of the composition of its principal parts, Tannaite work was going on.

3. WHAT IS THE RATIONALITY OF THE STRUCTURE?

The rationality of Bavli-tractate Makkot may be defined very simply. The framers of the tractate undertook to examine and analyze Mishnah-tractate Makkot so as to clarify its contents, on the one side, and to show the logical coherence and cogency of the diverse rules of the tractate, on the other. The principles of cogency were two. First, the discrete rules of the Mishnah relate to the received, written Torah of Sinai, and they gain cogency not because they spin out a single logical proposition, or even because they work out in an orderly way the components of a topic and explain each component in its place. Rather, they gain cogency because all of the discrete statements derive from a single, prior source, which is, the written Torah. The first principle of rationality then concerns the coherence of discrete and free-standing statements, e.g., this Mishnah-paragraph, that Mishnah-rule, and coherence is imposed by a common derivation in the Torah. The first principle of cogency therefore is formal.

But a second principle of cogency plays an equally important role, and that concerns the substance of matters. The Mishnah-rules cohere not only because all of them derive from the same prior source, but because each of them takes up its position in the exposition of a topic. The orderly presentation of the tractate, line by line, defines a rationality that insists upon the principle that subjects themselves exhibit an inner logic; hold together by reason of the fit of the parts thereof. That accounts for the principle of organization that lays out the tractate as a commentary to the Mishnah, itself a topical formulation of the law, rather than as a commentary to those passages of Scripture to which the Mishnah-rules relate. That that alternative rationality of structure can have governed hardly can be doubted, since we do have systematic expositions of topics in accord with their appearance in Scripture, not the Mishnah, in Mekhilta, Sifra, and the two Sifrés.

It follows that two principles of cogency intersect, the scriptural and the topical, and the topical takes pride of place. That is the meaning of the Bavli's presentation of its ideas in the form of a commentary to the Mishnah.

4. WHERE ARE THE POINTS OF IRRATIONALITY IN THE STRUCTURE?

If rationality derives from the interplay of form and substance, as just now spelled out, then rationality defines, also, its counterpart and opposite, irrationality. Where does Mishnah-exposition break down? There we find the points of irrationality. Then the answer is simple: at the listed passages, III.A, B, IX D, XVI B, C, XVI F, G, H, XXII D, XXX C, where Mishnah-exegesis does not define the focus of a composite, but where some other principle does. The point of irrationality on the surface is structural. But in that aspect, it also conflicts with both the scriptural and the topical principles of coherent discourse; neither Scripture's relevant passages nor the Mishnah's topical program governs, and at some interesting points in this tractate, a completely different theory of the

composition of an exposition of the law, and not the Talmud's theory, takes over. Had this other theory prevailed, we should have law, but not the Talmud; and we should have exegesis, but not the Midrash-compilations as we know them.*

*I shall not expand upon that point in this project; it is something to be investigated in the context of Midrash-compilation: what other of the collection and arrangement of Midrash-compositions functions alongside the ones that the documents themselves take for granted? Just as we can contemplate the Bavli that might have been, and here begin the examination of the alternative to the Talmud as we know it that can have been produced, so in due course we must consider the Midrash-compilations that we might have had but do not have. In my *Making the Classics in Judaism: The Three Stages of Literary Formation*. Atlanta, 1990: Scholars Press for Brown Judaic Studies, I begin the work to which reference is made here. The classification of materials there called "compositions for no document we now can imagine" corresponds to what I have in mind here as the Midrash-counterpart to "points of irrationality" in the Talmud. These observations suffice for the moment.

Points of System

1. DOES THE BABYLONIAN TALMUD-TRACTATE MAKKOT SERVE ONLY AS A REPRESENTATION OF THE MISHNAH-TRACTATE OF THE SAME NAME?

This Bavli-tractate serves mainly as a re-presentation of the Talmud-tractate of the same name, in that the structure of the document finds its definition therein. But, as we recognize, large tracts of Mishnah-tractate Makkot are ignored or given the most routine exposition. When we realize that a fair measure of the Mishnah-exposition follows a repeated formula over the discussion of several Mishnah-paragraphs, the routine character of the re-presentation becomes striking. But since the framers obviously picked and chose, we must say that their system rests only asymmetrically upon that of the Mishnah. But, I hasten to add, in this tractate as in most others, where the authors of a composition do expound the meaning of a sentence or paragraph of the Mishnah, I cannot point to a single passage in which, it seems to me, they have brought a program of their own such that they have recast the Mishnah-sentence or paragraph into a different framework of meaning from that defined by the Mishnah's authors or framers. That seems to me a consistent, and very important, result of our examination of this tractate.

2. HOW DO THE TOPICAL COMPOSITES FIT INTO THE TALMUD-TRACTATE MAKKOT AND WHAT DO THEY CONTRIBUTE THAT THE MISHNAH-TRACTATE OF THE SAME NAME WOULD LACK WITHOUT THEM?

An answer composed of generalizations contributes nothing. We turn directly to each specific item.

III.A and B: The entire composition goes its own way, and if this kind of composition predominated, we should have nothing resembling a talmud, such as the Talmuds that we know. The law of Judaism would have reached us in a completely different form from the form — the applied reason and practical logic given dynamism by dialectics — that we know. And the history of Judaism, so far as the intellectual life of the faith defines that history, would have taken a different course from the one that it took.

The composite at 1:1L-N, from beginning to end, shows a different theory of composite-making from the one that predominates in the Talmud overall. In this theory we collect statements attributed by a principal authority to a founder of the tradition in Babylonia, Rab or Samuel; these statements cover a variety of topics and express no single cogent principle; nor do they take up one problem in a variety of forms. And since the composite does not take shape around a problem of Mishnah-exegesis or of the analysis of a problem of law, exegesis of Scripture, or theology, it follows that the theory of composite-making is different from the theory that produced the Talmud's composites as we know them. Had the present theory prevailed, we should have no Talmud — systematic exposition of the Mishnah, with additions — but rather collections of sayings joined by the formality of common source in a given authority's school. These collections then will have yielded something other than a coherent statement of the law of the Mishnah,

properly expanded. They will have given us the same law, but in very different form.

And yet, we notice, the character of the discussion of the components of the composite that sets forth the formulation of Judah in Samuel's or in Rab's name in no way differs from the character of the discussion of our conventional Talmud. I take that fact to mean people subjected to the same sort of sustained analytical discussion diverse types of composites, not only the types that yielded the Talmud as we know it. So in circulation were composites built on various principles, analyzed in a uniform manner. Then, it must follow, those who made the Talmud as we know it picked the kinds of materials they wanted for their Talmud and, in general, omitted such other kinds as did not serve their purpose. And one of the important other kinds is the one before us: compilations of masters' sayings, organized around other than topical-programmatic lines.

This composite does not change the face of our tractate, because it has no bearing upon the re-presentation of the tractate's topical program. The composite rather shows us a different face of the law, one that, had it predominated, would have ignored the structure of the Mishnah altogether and re-formed the law into a set of rulings assigned to this authority or that one, to this set of verses of Scripture or that one, to this formulary pattern or that one. Then the topical organization of the law would have given way to a mode of presentation bearing a different rationality altogether. The figure of the authority, the tradition of his school, would have predominated; the law would then have consisted of what the authority taught, and search for the rule in a given case or concerning a given problem would have involved finding which authority dealt with the topic. Along with the orderly presentation of topics, the analytical and dialectical discussion of them would never have gotten under way, since dialectics as we know them depend upon not personality or authority but reason and the governing, objective logic that inheres in a given topic. From our perspective, the one contribution this composite makes to our tractate is to show us how things might have been, and to underscore the reasons for admiring the way in which the framers of the Talmud laid matters out.

IX D: This item introduces the complication of the suitability of testimony of witnesses. It may be that the intent is to carry forward the introduction of the rules of testimony into the matter at hand, but that is not a compelling consideration.

XVI B: The introduction of the matter of relationships of disciples and masters — a general point, of enormous interest — into the rules governing going into exile reshapes the topic by adding a profound observation. It is that while someone may go into exile from his home town and family, the Torah never leaves him; if his master goes into exile, he goes along; if he goes into exile, his master goes along. The point then is that exile affects the natural relationships, but not supernatural ones. In a case of manslaughter, God knows that there has been no murder and does not inflict the penalty of separation from the Torah upon the surviving party to a tragic accident. The Torah legislates for this world, allowing for a penalty to manslaughter, since, after all, the victim has died; but the Torah also distinguishes this world's penalties, which are painful but can be endured, from those of Heaven. Exile from the Torah would be a penalty that cannot be endured and may not be inflicted. So XVI.B recasts the rules at hand into a very original point.

XVI C: In light of the foregoing, we cannot find surprising the explicit statement of what is implicit, which is, the Torah is the sole source of authentic, enduring wealth. This world's rewards are transient; Torah-study with a multitude of disciples forms the reward of eternity. So XVI.C forms an essential step in a carefully-wrought statement. Then the topic, exile, provides the occasion for making a statement that the framers of the Talmud wish to make, not only in its own terms, therefore abstractly, but also in terms of one topic after another, and so in a very concrete way.

XVI F: Since an "elder" is a sage, the addition here makes the same point once more: a city that lacks elders, or sages, is not a suitable city of refuge. This addition is now predictable: the dimension of Torah-learning, which is supernatural, completely recasts our perception of the topic, its issues, and its messages.

XVI G: While this composition does not expound a clause of the Mishnah, it fits into the context of those that do.

XVI H: This passage is built on the following structure:

On the verse, "And Joshua wrote these words in the book of the Torah of God" (Jos. 24:26), *there was a difference of opinion between R. Judah and R. Nehemiah.*

As to the suitability of a scroll of the Torah, the parchment skins of which are sewn together with thread of flax, *there was a difference of opinion between R. Judah and R. Meir.*

The principle of composition then is obvious: disputes between Judah and someone else; and the principle of inclusion is beyond comprehension within the rationality of our Talmud — and of the Mishnah.

XXII D: The curse of a sage takes effect even when it is not justified. The passage to which this propositional composite is attached concerns the curse of the mother of the manslayer. Once more, therefore, we know why the passage has been included: it is to recast the topic in a new dimension, one in which the supernatural enters in. The mother's curse may not take effect; the sage's curse will.

XXX C: Here we find a systematic set of reflections on Israel's history, which make a striking point. A quick review of the reflections shows us what that point is. To restate the main propositions laid out in sequence: The statement maintains that [1] the sage succeeds to prophecy, because now the sage, through master of the Torah, can convey Heaven's statement to Israel; [2] the Holy Spirit appears to Israel, but the upshot is the same as that of Torah-learning; and Moses our rabbi made decrees, but sages annulled them. This last point yields the proposition that the sage is the master of prophecy, because the sages know how to read prophecy in the correct way.

3. CAN WE STATE WHAT THE COMPILERS OF THIS DOCUMENT PROPOSE TO ACCOMPLISH IN PRODUCING THIS COMPLETE, ORGANIZED PIECE OF WRITING?

With the sole exception of IX.D, we can account for the intruded compositions and composites in one of two ways. One set of materials portrays legal topics by organizing teachings of named masters. Then the named master, not the topic, forms the source of coherence. The other set of materials portrays the topic of our tractate in a quite fresh

way, by introducing a dimension of all law that the Mishnah ordinarily does not portray, namely, how the intrusion of the sage imparts a supernatural character to the affairs of this world. [1] The Torah does not abandon a person, but accompanies the disciple into exile; that means the supernatural family of master and disciples forms a unit subject to the judgment of the law; the Torah is the sole enduring and reliable form of wealth; a city without “elders,” that is, sages, cannot afford the refuge that the Torah has provided for the manslayer; the sage is the heir to prophecy, has direct access through his powers of analytical learning, to Heaven’s wishes, and disposes of prophecy much as the prophets were able to dispose of even the teachings of Moses. The Mishnah-tractate that concerns flogging and exile has been transformed into a statement about the glory of the Torah as represented by the sage, who may be subject to flogging and exile, but who always represents that transcendent reality that the Torah conveys in this world. The topic is now seen from a different perspective altogether, and though the Mishnah has been faithfully set forth, through the introduction of topics not required for Mishnah-exegesis, and through the juxtaposition of those topical presentations with the exposition of the Mishnah, all things have changed. It is probably extending matters beyond the limits to observe that in a tractate bearing such a message, the presentation of composites formed around the names of sages delivers the message of the priority of the sage over prophecy, as much as the power of the sage to transcend exile and the power of the Torah to secure a permanent endowment, that other intruded compositions and composites deliver as well. That observation about the appropriateness even of what is least coherent in the most definitive and formal traits must, for the moment, form a mere footnote. But the text and its message leave no grounds for doubt on how the Talmud-tractate has recast the Mishnah-tractate and made the Mishnah-tractate into a medium for the message that the Talmud’s system, and not the Mishnah’s, wishes to set forth.